

EDPS Formal comments on the draft Implementing Regulation on the practical and operational arrangements for the functioning of the information sharing system pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council ('Digital Services Act')

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 13 December 2023, the European Commission consulted the EDPS on the draft Implementing Regulation on the practical and operational arrangements for the functioning of the information sharing system pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council² ('the draft Implementing Regulation').
2. The objective of the draft Implementing Regulation is to lay down practical and operational arrangements for the functioning of a reliable and secure information sharing system ('AGORA') for the supervision, investigation, enforcement and monitoring under the Digital Services Act³.
3. The draft Implementing Regulation is adopted pursuant to Article 85 of the DSA and is accompanied by two Annexes: one setting out a joint controllership arrangement for DSCs in relation to the processing activities conducted in the context of AGORA for joint investigations and for the activities of the Board (Annex I); and another one setting out the responsibilities of the European Commission as processor for

¹ OJ L 295, 21.11.2018, p. 39.

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022, p. 1 ('Digital Services Act', 'DSA', or 'the basic act').

³ Article 1 of the draft Implementing Regulation.

processing activities conducted in the context of AGORA by DSCs, other national authorities and the Board (Annex II).

4. The EDPS previously issued Opinion 1/2021 on the Proposal for a Digital Services Act⁴.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 22 of the draft Implementing Regulation.
6. These formal comments do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts⁵.
7. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR and are limited to the provisions of the draft Implementing Regulation that are relevant from a data protection perspective.

2. Comments

8. The EDPS positively notes that the draft Implementing Regulation clarifies the legal grounds that DSCs, national authorities and the European Commission shall rely on to process personal data in AGORA (performance of a task carried out in the public interest or in the exercise of official authority)⁶.
9. While more details about the AGORA system should have been provided at the level of the basic act, the EDPS welcomes that Recital 11 and Article 11(2) to (4) of the draft Implementing Regulation define the data subjects, categories and types of personal data that DSCs, other national competent authorities and the European Commission may share and access in AGORA.
10. The EDPS notes that Article 11(5) of the draft Implementing Regulation would require the storage of personal data in AGORA to be performed using information technology infrastructure located in the European Economic Area ('EEA'). As this requirement

⁴ [EDPS Opinion 1/2021 on the Proposal for a Digital Services Act](#), issued on 10 February 2021.

⁵ In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

⁶ Recital 7 of the draft Implementing Regulation.

constitutes an exception to the general framework for international personal data transfers under Chapter V of the EUDPR and Chapter V of the GDPR, the EDPS recommends including a justification for this requirement in a recital. In addition, the EDPS recommends clarifying that the requirement to store personal data in the EEA should be without prejudice to the possibility for specific transfers of personal data in compliance with Chapter V GDPR and Chapter V EUDPR⁷. Furthermore, for the sake of clarity, the EDPS recommends amending Article 11(5) of the draft Implementing Regulation as follows: “*The **processing of personal data** referred to in **paragraphs 2, 3 and 4** shall be performed using information technology infrastructure located in the European Economic Area.*”

11. The EDPS notes that DSCs are qualified in Article 12(1) and (2) of the draft Implementing Regulation as joint controllers when processing data in joint investigations and for activities of the Board, with the joint controllership arrangement between them being established in Annex I. The EDPS welcomes that Annex I of the draft Implementing Regulation provides for a joint controllership arrangement under Article 26 GDPR. The EDPS recommends additionally specifying that the joint controllers shall assist each other to enable each joint controller to comply with its obligations towards its respective supervisory authority⁸, including (but without being limited to) the notification of data breaches.
12. The EDPS takes note that DSCs would be allowed to use AGORA for their own case handling activities⁹. In those cases, DSCs would be qualified as sole controllers under the GDPR¹⁰, and any DSC or other competent authorities receiving personal data would also be qualified as sole controller¹¹.
13. The EDPS also notes that the European Commission would be qualified as the DSCs’ processor in the cases laid down in Article 5(1) and (4) and 12(4) of the draft Implementing Regulation, with its responsibilities as a processor being defined in Annex II. On the other hand, Articles 5(2) and (3) of the draft Implementing Regulation would establish that the European Commission shall as controller in other cases. For the sake of consistency, the EDPS recommends defining the European Commission’s roles and responsibilities under the EUDPR by reference to each of tasks mentioned in Article 4(1) of the draft Implementing Regulation that entail processing of personal data.
14. On a more general note, the EDPS notes that AGORA would appear to offer functionalities which are similar in nature to the Internal Market Information System

⁷ See also [EDPB-EDPS Joint Opinion 03/2022 on the Proposal for a Regulation on the European Health Data Space](#), 12 July 2022, paragraph 108 and 111.

⁸ [EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR](#), issued on 7 July 2021, paragraphs 190 and 191.

⁹ Recital 9 of the draft Implementing Regulation.

¹⁰ Subsection 2(2) of Annex I of the draft Implementing Regulation.

¹¹ Article 6(6) and (7) of the draft Implementing Regulation.

(‘IMI’)¹², in particular as regards its role to support the exchange of information between competent supervisory authorities. Against this background, the EDPS recommends reconsidering the allocation of certain roles and responsibilities under EU data protection law in the draft Implementing Regulation with a view to ensure consistency with the allocation of roles defined for IMI. As an example, whereas the European Commission acts as controller when processing personal data for registering any users in IMI¹³, the draft Implementing Regulation qualifies the European Commission as processor “*when registering AGORA administrators*”¹⁴.

15. On a related note, the EDPS welcomes that Article 11(7) of the draft Implementing Regulation - in line with the rules set for IMI¹⁵ -, provides for coordinated supervision, i.e., the sharing of supervision of data processing activities carried out in AGORA between national data protection supervisory authorities and the EDPS, under Article 62 of the EUDPR.
16. Lastly, the EDPS welcomes that Article 15(2) of the draft Implementing Regulation would require the European Commission to periodically report to (among others) the EDPS on aspects relating to the implementation of the draft Implementing Regulation, and that Article 15(2) specifies that the report shall address aspects of implementation relating to the protection of personal data in AGORA, including data security.

Brussels, 4 January 2024

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹² Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation), (OJ L 316, 14.11.2012, p. 1).

¹³ See https://ec.europa.eu/internal_market/imi-net/docs/data_protection/privacy_statement_en.pdf, p. 2: “*This privacy statement covers the part of IMI for which the Commission (Data Controller) is responsible, i.e.: a) Ensuring the security, availability, maintenance and development of the software and IT infrastructure for IMI; b) The collection of personal data and registration of users of the Commission, Union bodies, offices and agencies and national IMI Coordinators, as well as the storage and deletion of personal data of all IMI users; c) The storage, blocking, deletion, and (in some specific cases, upon request from competent authorities) retrieval, of personal data of persons who are the subject of an information exchange, but not the collection or viewing of such personal data.*”

¹⁴ Article 5(1) of the draft Implementing Regulation.

¹⁵ See Article 21(3) of Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation), OJ L 316, 14.11.2012, p. 1.