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COVER NOTE

from: Mr Giovanni Buttarelli, European Data Protection Assistant Supervisor
date of receipt: 18 June 2012
to: President of the Council of the European Union

Subject: Opinion on the Commission proposals for a Regulation on European Venture capital funds and for a Regulation on European Social entrepreneurship funds

Delegations will find attached the opinion of the European Data Protection Supervisor on the above mentioned proposals .

Encl.



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

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Brussels, 14 June 2012
GB/PI/mch/D(2012) 1267 C 2011-1140;
2011-1142

Subject: Opinion on the Commission proposals for a Regulation on European Venture capital funds and for a Regulation on European Social entrepreneurship funds

Dear Mr President,

With regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of data by the Community institutions and bodies and on the free movement of such data, and in particular its Article 41, I send you an Opinion on the Commission proposals for a Regulation on European Venture capital funds and for a Regulation on European Social entrepreneurship funds.

I would like to draw your attention to the data protection implications and our recommendations concerning the following thematic areas:

- applicability of data protection legislation;
- exchanges of information;
- investigatory powers of the competent authorities;
- ESMA databases.

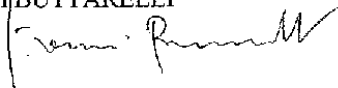
Although I realise it is late in the legislative procedure, I feel that these recommendations are worth making.

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I have sent these opinions to the President of the European Commission and the President of the European Parliament and I have sent a copy to the Chairperson of the European Securities and Markets Authority (ESMA).

Yours sincerely,

Giovanni BUTTARELLI



Annex: Opinion

Cc: Mr Uwe CORSEPIUS, Secretary-General
Mr Jeppe TRANHOLM-MIKKELSEN, Permanent Representative of Denmark



Opinion of the European Data Protection Supervisor

on the proposals for a Regulation on European Venture capital funds and for a Regulation on European Social entrepreneurship funds

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data², and in particular Article 28(2) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

1.1. Consultation of the EDPS

1. On 7 December 2011, the Commission adopted a proposal for a Regulation on European Venture capital funds³ (hereinafter 'the proposed VCF Regulation'). On the same date, the Commission adopted a proposal for a Regulation on Social entrepreneurship funds⁴ (hereinafter 'the proposed SEF Regulation'). These proposals were sent to the EDPS for consultation on 12 December 2011.
2. The EDPS welcomes the fact that he is consulted by the Commission and recommends that references to this Opinion are included in the preambles of the proposed Regulations.
3. The implementation and application of the legal framework for Venture capital funds and Social entrepreneurship funds may in certain cases affect the rights of individuals relating to the processing of their personal data. The proposed

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 8, 12.1.2001, p. 1.

³ COM(2011)860.

⁴ COM(2011)862.

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Regulations contain provisions which may have data protection implications for the individuals concerned, such as the applicability of data protection legislation, cross border exchanges of information, investigatory powers of the competent authorities and databases of fund managers.

4. There are comparable provisions to the ones referred to in this Opinion in several pending and possible future proposals, such as those discussed in the EDPS Opinions on the legislative package on the revision of the banking legislation, credit rating agencies, markets in financial instruments (MIFID/MIFIR) and market abuse⁵. Therefore, the EDPS recommends reading this Opinion in close conjunction with his Opinions of 10 February 2012 on the above mentioned initiatives.

1.2. Objectives and scope of the proposal

5. The proposed Regulations aim to solve different problems with both types of funds.
6. Although Venture capital funds focus on providing equity finance for SME's, the European venture capital industry is fragmented and dispersed. This fragmentation and dispersion leads to a statistically significant investor's reluctance to invest in Venture capital funds. Regulatory fragmentation also impedes specialised Venture capital funds from raising significant amount of capital from abroad. Potential investor's current preference is to prefer private equity over venture capital investments. This is negative for Europe's global competitiveness. The proposed Regulation on Venture capital funds aims at addressing these problems.
7. The range of eligible financing tools proposed in the Regulation on European Social entrepreneurship funds goes beyond equity finance. Social undertakings also have recourse to other forms of finance, combining public and private sector financing, debt instruments or small loans. The proposed rules on social entrepreneurship funds therefore provide for a larger range of qualifying investment tools that are available for Venture capital funds.
8. In addition, the transparency issues raised by investments into social businesses are distinct from the general reporting obligations that are provided in the area of venture capital: investments into social entrepreneurship target a form of 'social return' or positive social impact. The proposed rules contain special sections that focus on information pertaining to social impacts, their measurement and the strategies employed to foster their achievement.
9. The proposed Regulations on European Venture capital funds and on European Social entrepreneurship funds are envisaged to complement each other. Both proposals, if adopted, will coexist as autonomous legal acts in mutual independence.

⁵ EDPS Opinions of 10 February 2012, available at www.edps.europa.eu.

1.3. Main EDPS Comment

10. The EDPS considers that -with regard to data protection issues- the proposed Regulations are too general. It is unclear in some cases whether processing of personal data will take place under certain provisions of the proposed Regulations for example regarding exchanges of information, investigatory powers of the competent authorities and establishment of ESMA data bases.

2. ANALYSIS OF THE PROPOSAL

2.1. Applicability of data protection legislation

11. Recitals of the proposed Regulations mention the Charter of Fundamental Rights, Directive 95/46/EC and Regulation (EC) No 45/2001⁶. In particular, Recital 34 of the proposed VCF Regulation and Recital 33 of the proposed SEF regulation state that Directive 95/46/EC shall govern the processing of personal data carried out in the Member States in the context of the proposed Regulations and under the supervision of the Member States competent authorities, in particular the public independent authorities designated by the Member States and that Regulation (EC) No 45/2001 shall govern the processing of personal data carried out by the European Securities and Markets Authority (ESMA) within the framework of the proposed Regulations and under the supervision of the European Data Protection Supervisor.
12. The EDPS suggests rephrasing the provisions emphasising the full applicability of existing data protection legislation in one general provision referring to Directive 95/46/EC as well as Regulation (EC) No 45/2001 and that the reference to Directive 95/46/EC is clarified by specifying that the provisions will apply in accordance with the national rules which implement Directive 95/46/EC. The EDPS furthermore recommends including this type of overarching provision in a substantive provision of both proposed Regulations⁷.

2.2. Exchanges of information

13. The proposed Regulations contain provisions requiring competent authorities to exchange information between them and with ESMA. In particular, Article 21 of the proposed VCF Regulation and Article 23 of the proposed SEF Regulation state that competent authorities shall exchange all information and documentation necessary to identify and remedy breaches to the Regulations.
14. In some cases these exchanges of information will undoubtedly relate to identified or identifiable individuals, for example the persons who effectively conduct the

⁶ i.e. recitals 33 and 34 of the proposed VCF Regulation and recitals 34 and 35 of the proposed SEF Regulation.

⁷ See EDPS Opinions of 10 February 2012 on the revision of the banking legislation (paragraphs 11-13), credit rating agencies (paragraphs 12-15), markets in financial instruments (MIFID/MIFIR) (paragraphs 9-12) and market abuse (paragraphs 13-15), available at www.edps.europa.eu.

business of managing funds⁸, i.e. employees of the fund manager, which is a legal entity, and therefore constitute the processing of personal data under Article 2(b) of Directive 95/46/EC and Article 2(b) of Regulation (EC) No 45/2001.

15. The EDPS recognises the importance of ensuring a swift exchange of information between national competent authorities with a view to effectively supervising fund managers. However, these provisions are too vague and do not fulfil the basic legal requirements for the processing of personal data.
16. A basic requirement of data protection law is that information must be processed for specified, explicit and legitimate purposes and that it may not be further processed in a way incompatible with those purposes. The data used to achieve the purposes should furthermore be adequate, relevant and not excessive in relation to these purposes⁹. To be avoided is in particular that the provisions requiring the exchange of information could be construed as a blanket authorisation to exchange all kinds of personal data.
17. As regards purpose limitation, it must be stressed that the proposed Regulations fail to specify the purposes of the system for exchange of information and, most importantly, the purposes for which the information held by competent authorities can be accessed by other competent authorities using their investigatory powers under of the proposed Regulations.
18. Furthermore, the proposed Regulations fail to specify the kind of data that will be recorded, reported and accessed, including any personal data of identified or identifiable persons¹⁰.
19. Finally, Article 6 of Directive 95/46/EC and Article 4 of Regulation (EC) No 45/2001 require that personal data must be kept in a form which permits the identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The EDPS notes that the proposals do not lay down any concrete limitation of the period for the retention of the personal data potentially processed under the proposed Regulations. This may at least result in uncertainty and undue diversity in national implementation or practice.
20. On the basis of the foregoing, the EDPS urges the legislator to specify the purposes for which personal data can be processed by national competent authorities and ESMA, to specify the kind of personal information that can be processed under the proposed Regulations and fix a proportionate data retention period for the above processing or at least introduce precise criteria for its establishment.

⁸ See Article 13.1(a) of the proposed VCF Regulation and Article 14.1(a) of the proposed SEF Regulation.

⁹ See Article 6 of Directive 95/46/EC and Article 4 of Regulation (EC) No 45/2001.

¹⁰ See for example Article 12.1(a) of the proposed VCF Regulation and Article 13.1(a) of the proposed SEF Regulation regarding the identity of the persons who effectively conduct the business of managing funds.

2.3. Investigatory powers of the competent authorities

21. Article 18 of the proposed VCF Regulation and Article 19 of the SFF Regulation state that the competent authorities shall have all the supervisory and investigatory powers that are necessary for the exercise of their functions. The provision clearly implies that exchanges of personal data will take place under the proposed Regulation. It seems likely -or at least it cannot be excluded- that documents requested and information on fund managers and their employees concerned include personal data within the meaning of Directive 95/46/EC and Regulation (EC) No 45/2001. In this case, it should be assured that the conditions for fair and lawful processing of personal data, as laid down in the Directive and the Regulation, are fully respected¹¹.
22. The EDPS acknowledges that the aims pursued by the Commission in the proposed Regulation are legitimate. He understands the need for initiatives aiming at strengthening supervision of financial markets in order to preserve their soundness and better protect investors and the economy at large. However, investigatory powers relating to fund managers (legal persons) and the persons who effectively conduct the business of managing funds, given their potentially intrusive nature, have to comply with the requirements of necessity and proportionality, i.e. they have to be limited to what is appropriate to achieve the objective pursued and not go beyond what is necessary to achieve it. It is therefore essential in this perspective that the provisions are clear on the circumstances in which and the conditions on which they can be used. Furthermore, adequate safeguards should be provided against the risk of abuse.
23. According to the EDPS, the circumstances and the conditions for using the investigatory powers of the competent authorities should be more clearly defined in the basic act. Article 18 of the proposed VCF Regulation and Article 19 of the proposed SFF Regulation do not indicate the circumstances and the conditions under which documents and information can be requested. Nor does it provide for important procedural guarantees or safeguards against the risk of abuses. The EDPS therefore recommends limiting access to documents and information to specifically identified and serious violations of the proposed Regulations and in cases where a reasonable suspicion (which should be supported by concrete initial evidence) exists that a breach has been committed¹².
24. The EDPS recommends introducing the requirement for competent authorities to request documents and information by formal decision, specifying the legal basis and the purpose of the request and what information is required, the time-limit within which the information is to be provided as well as the right of the addressee to have the decision reviewed by a court.

¹¹ See EDPS Opinions of 10 February 2012 on credit rating agencies (paragraph 23), markets in financial instruments (MIFID/MIFIR) (paragraph 46) and market abuse (paragraph 26), available at www.edps.europa.eu.

¹² See EDPS Opinions of 10 February 2012 on credit rating agencies (paragraph 35) and market abuse (paragraph 33), available at www.edps.europa.eu.

2.4. ESMA databases

25. Article 16 of the proposed VCF Regulation and Article 17 of the proposed SEF Regulation state that ESMA shall maintain a central database listing all fund managers registered in the Union. These databases shall be publicly available on the Internet. It is unclear whether these databases will include the personal data of natural persons. The wording of the Articles only speaks about fund managers (legal persons), but (as stated above¹³) information regarding natural persons is to be collected by competent authorities and may be exchanged between them and ESMA. This implies that also such information could be included in the databases.
26. The creation of central databases which are publicly available on the Internet (and which include personal data) constitutes processing. The legal basis for instruments which restrict the fundamental right to the protection of personal data is recognized by Article 16 of the TFEU and must be laid down in a legal instrument based on the Treaties, which can be invoked before a judge. This is necessary in order to guarantee legal certainty for the data subject. This means that, regarding these databases, it should be assured that the conditions for fair and lawful processing of personal data, as laid down in the Directive and the Regulation, are fully respected¹⁴.
27. There are currently no provisions in the proposed Regulations on the basis of which an individual could verify the lawfulness of such processing. Furthermore, the specific access rights and management rights in relation to the processing operations are not explicitly clarified in the proposed Regulations.
28. The EDPS recommends the Commission to clarify the legal basis of the databases by introducing more detailed provisions in the proposed Regulations. Such provisions must comply with the requirements of Regulation (EC) No 45/2001. In particular, the provision establishing the database must (i) identify the purpose of the processing operations and establish which are the compatible uses; (ii) identify which entities (ESMA, competent authorities and potentially others) will have access to which data stored in the database and will have the possibility to modify the data; (iii) ensure the right of access and appropriate information for all the data subjects whose personal data may be stored and exchanged (iv) define and limit the retention period for the personal data to the minimum necessary for the performance of such purpose.
29. In any case, the implementing measures to be adopted should specify in detail the functional and technical characteristics of the database and should be notified to the EDPS for consultation.

¹³ See above under section 2.2.

¹⁴ See EDPS Opinions of 10 February 2012 on credit rating agencies (paragraph 23), markets in financial instruments (MIFID/MIFIR) (paragraph 46) and market abuse (paragraph 26), available at www.edps.europa.eu.

2.5. Delegated acts

30. Article 23 of the proposed VCF Regulation and Article 24 of the proposed SEF Regulation lay down the conditions under which the power to adopt delegated acts is given to the Commission. Delegated acts are meant to amend and specify certain non-essential aspects of legal acts (Article 290 TFEU). While details can of course be regulated in delegated acts, and such additional provisions are certainly of great benefit, the EDPS recommends that the proposed Regulations themselves also provide more guidance in situations that have been analysed before such as cross-border exchanges of information, investigatory powers of the competent authorities and the establishment of ESMA databases.
31. The EDPS also recommends including references in the proposed Regulations to the need to consult the EDPS in so far as the delegated and implementing acts concern the processing of personal data.

3. CONCLUSIONS

32. The EDPS recommends:

- that references to this Opinion are included in the preambles of the proposed Regulations;
- inserting provisions in the proposed Regulations emphasising the full applicability of existing data protection legislation. The EDPS also suggests that the reference to Directive 95/46/EC be clarified by specifying that the provisions will apply in accordance with the national rules which implement Directive 95/46/EC;
- specifying the kind of personal information that can be processed and transferred under the proposed Regulations, defining the purposes for which personal data can be processed and transferred by the competent authorities concerned and ESMA and fix a proportionate data retention period for the above processing or at least introduce precise criteria for its establishment;
- limiting competent authorities' access to documents and information to specifically identified and serious violations of the proposed Regulations and in cases where a reasonable suspicion (which should be supported by concrete initial evidence) exists that a breach has been committed;
- introducing a requirement for competent authorities to request documents and information by formal decision, specifying the legal basis and the purpose of the request and what information is required, the time-limit within which the information is to be provided as well as the right of the addressee to have the decision reviewed by a court of law;
- clarifying the legal basis of the Fund Manager databases by introducing more detailed provisions in the proposed Regulations. Such provisions must comply with the requirements of Regulation (EC) No 45/2001. In particular, the

provision establishing the database must (i) identify the purpose of the processing operations and establish which are the compatible uses; (ii) identify which entities (ESMA, competent authorities, Commission) will have access to which data stored in the database and will have the possibility to modify the data; (iii) ensure the right of access and appropriate information for all the data subjects whose personal data may be stored and exchanged (iv) define and limit the retention period for the personal data to the minimum necessary for the performance of such purpose;

- that, as the proposed Regulations are too general in cases of cross border exchanges of information, investigatory powers of the competent authorities and the establishment of ESMA databases of fund managers, essential elements of the processing of personal data should not be left to be decided by delegated acts, but included in the relevant substantive Articles of the proposed Regulations;
- including references in the proposed Regulations to the need to consult the EDPS in so far as the delegated and implementing acts concern the processing of personal data.

Done in Brussels, 14 June 2012

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

