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from:	European Data Protection Supervisor
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to:	The President of the Council
Subject:	Proposal for a Council Regulation on Administrative Cooperation in the field of Excise Duties [doc. 16975/11 FISC 142 - COM(2011) 730 final] <i>- Opinion of the European Data Protection Supervisor</i>

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Delegations will find attached the related opinion of the European Data Protection Supervisor.



## **Opinion of the European Data Protection Supervisor**

### **on the Proposal for a Council Regulation on Administrative Cooperation in the field of Excise Duties**

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 data<sup>1</sup>,

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 data<sup>2</sup>, and in particular its Article 28(2),

HAS ADOPTED THE FOLLOWING OPINION:

#### **1. INTRODUCTION**

##### ***1.1. Consultation of the EDPS***

1. On 14 November 2011, the Commission adopted a proposal for a Regulation of the Council concerning administrative cooperation in the field of excise duties<sup>3</sup> (hereinafter 'the Proposal').
2. On the same date, the Proposal was sent by the Commission to the EDPS. The EDPS understands this communication as a request to advise Union institutions and bodies, as foreseen in Article 28(2) of Regulation (EC) No 45/2001.
3. Before the adoption of the Proposal, the EDPS was given the opportunity by the Commission to provide informal comments. The EDPS is pleased with the

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

<sup>2</sup> OJ L 8, 12.1.2001, p. 1.

<sup>3</sup> COM(2011)730 final.

process, which has helped to improve the text from a data protection point of view at an early stage. Some of those comments have been taken into account in the Proposal. The EDPS welcomes the reference to the present consultation in the preamble of the Proposal.

4. The EDPS would nevertheless like to highlight some elements which could still be ameliorated in the text from a data protection perspective.

## *1.2. General background*

5. The Proposal aims to update the provisions of Regulation (EC) No 2073/2004, which laid down a legal framework for administrative cooperation between national tax authorities in the field of excise duties (on alcohol, tobacco and energy products) in order to combat excise fraud. The Regulation established binding rules on cooperation between Member States, introduced automatic and spontaneous information exchanges (in addition to information exchange on request) and enabled national competent authorities to exchange information with each other, notably by electronic means. The Regulation also laid down the conditions for cooperation with the Commission.
6. These provisions need to be revised to take into account the modifications to the computerised Excise Movement and Control System (hereafter referred to as 'EMCS'), aimed at computerising the movement and surveillance of excisable products. The Proposal also aims to (i) update the language in the Regulation; (ii) take out provisions which are no longer relevant and making the structure of the text more logical and (iii) simplify the regulatory framework, making it more efficient.
7. In this context, processing of personal data takes place in various ways. Member States exchange information between themselves, with the Commission and also with third countries<sup>4</sup> about traders in excise goods, which can be natural or legal persons, as well as other commercial information, alongside information on suspected or verified offences related to violations of excise duties legislation.
8. This Opinion focuses on the aspects of the Proposal which have an effect on data protection.

## **2. ANALYSIS OF THE PROPOSAL**

### *2.1. Reference to Directive 95/46/EC*

9. The EDPS welcomes the fact that recital 18 of the Proposal explicitly mentions that processing of personal data by the Commission is governed by Regulation (EC) No 45/2001 and that processing by the competent authorities of the Member States is governed by Directive 95/46/EC.

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<sup>4</sup> Where allowed by Directive 95/46(EC), as stated in Article 32(1) of the Proposal.

10. The EDPS also welcomes the reference to the applicability of national data protection laws in Article 28(4) of the Proposal. However, the provision should more precisely refer to the "processing of personal data" rather than to "all storage or exchange of information". Such reference is preferred because the term "processing" refers to any operation related to the information, thereby also including all steps in the use of the information, from collection to any further use, pursuant to paragraphs 2 and 3. This is important because the use of personal data for purposes other than those for which it was originally collected, is subject to strict conditions under Articles 6 and 7 of Directive 95/46/EC.

## *2.2 Definition of the categories of data to be exchanged*

11. The Proposal distinguishes between two types of exchange of information: "Cooperation on request" (Chapter II) and "Exchange of information without prior request" (Chapter III). However, the EDPS notes that the text of the Regulation does not specify the categories of data to be exchanged. In both cases (on request and without previous request), it is stated that the content of the mutual administrative assistance documents is to be adopted by the Commission through implementing acts (Articles 9(2) and 16(3)).
12. The EDPS recommends that a general description of the categories of data that can be exchanged by the competent authorities should be inserted in the Proposal itself since it determines the scope of application of the essential elements of the Regulation. This can not be dealt with in an implementing act.
13. Additionally, the EDPS should be consulted before the adoption of implementing measures which might have an impact on the protection of personal data. This obligation should be specified in the text of the Proposal.

## *2.3 Processing of sensitive data*

14. Taking into account the objective of the Proposal, it is likely that data related to suspected cases of fraud will be processed. The EDPS highlights that data on suspected offences can only be processed under the control of an official authority<sup>5</sup> or subject to specific safeguards provided by law<sup>6</sup> since they are considered sensitive data which require special protection. Safeguards about the permitted use of this information (such as stricter access rights, stronger security measures, including a privacy impact assessment, a security plan and regular audits) should be inserted in the text of the Regulation.
15. Furthermore, the EDPS would like to draw attention to the fact that the processing of these sensitive data may be subject to prior checking by the EDPS or by national data protection authorities.

<sup>5</sup> See Article 8(5) of Directive 95/46/EC.

<sup>6</sup> See Article 8(5) of Directive 95/46/EC and Article 10(5) of Regulation (EC) No 45/2001.

## *2.4 Data quality and data subjects' rights*

16. The Proposal introduces an obligation for Member States to keep a register in an electronic database of all economic operators which are authorised warehouse keepers or registered consignees or consignors. The information contained in the registries would be automatically exchanged between Member States through the central register managed by the Commission (see Article 19(4)).
17. Article 19(3) requires the central excise liaison office or department of each Member State to ensure that the information contained in the national registers is complete, accurate and up to date. The EDPS welcomes this provision which is compliant with the principle of data quality enshrined both in Directive 95/46/EC<sup>7</sup> and in Regulation (EC) No 45/2001<sup>8</sup>.
18. Article 20 of the Proposal explains that economic operators have the right to check the publicly available information on the central database managed by the Commission (SEED-on-Europa) in relation to the details of their authorisation, by entering their excise authorisation number. They are also explicitly granted the right to have any errors in the public information corrected by the Member State that issued the authorisation. The Commission undertakes to forward such requests for correction to the appropriate competent authority. As regards access and corrections to the non-public information on economic operators, to which the Commission has no access, an economic operator must continue to refer to the relevant competent authority. The EDPS welcomes the fact that the Proposal explicitly grants and regulates data subjects' rights of access and correction of personal data relating to them.
19. However, Article 28(4), second subparagraph, states that Member States shall restrict the rights of information and access and the publication of processing operations<sup>9</sup> to the extent necessary to safeguard the "important or economic financial interests" of Member States and of the European Union, including monetary, budgetary and taxation matters<sup>10</sup>. These represent a restriction of some important elements of the right to data protection as specified in Article 8 of the Charter of the Fundamental Rights of the Union. The necessity and the proportionality of these restrictions have to be clearly demonstrated by the legislator. In addition, specific situations where such restrictions are needed must be specified in the text of the Proposal – or in a recital.

## *2.5 Data retention*

20. Article 21(1) of the Proposal introduces the obligation to keep the information concerning intra-community movements for at least three years, depending on the retention policy of the competent authority, in order to permit usage of the information for the procedures established in the Regulation.

<sup>7</sup> See Article 6(1)(d).

<sup>8</sup> See Article 4(1)(d).

<sup>9</sup> See Articles 10, 11(1), 12 and 21 of Directive 95/46/EC.

<sup>10</sup> See Article 13(1)(e) of Directive 95/46/EC.

21. The EDPS welcomes the obligation to delete or anonymise any personal data after this period (see Article 21(2)). However, the Proposal should not only specify the minimum retention period but also the maximum period of time that these data can be stored. In addition, the necessity of retaining personal data for this period should be justified and demonstrated, at least in the recitals of the Proposal.

## 2.6 International transfers

22. Article 32(1) of the Proposal states that in cases of transactions that appear to contravene excise legislation, information obtained under the Proposal may be communicated to a third country if all the following conditions apply:
- if the third country is legally committed to provide the assistance required to gather evidence of the irregular nature of the transaction;
  - if the competent authorities which supplied the information have provided consent in accordance with their national law;
  - if this is in accordance with the Directive 95/46/EC and national legislation implementing it;
  - if the data are transferred for the same purposes for which they were collected.
23. The EDPS welcomes the reference to the applicability of data protection legislation and the limitation of the scope of the transfers to data on specific transactions suspected of contravening excise legislation. However, as this will imply the processing of sensitive data, the transfer will also need to comply with national legislation implementing Article 8 of Directive 95/46/EC (see paragraph 2.3).
24. The EDPS also welcomes the fact that data can only be transferred for the same purposes for which they were collected. However, the specific purposes for which data could be transferred to third countries and the categories of data that may be transferred should be made explicit in the Proposal and in principle, be limited to fighting infringements to excise legislation. It should also be specified that transfers of personal data to third countries can only be made by national tax authorities.
25. The EDPS also reminds that, according to Directive 95/46/EC, transfers to third countries are, in principle, only allowed if an adequate level of protection is ensured in the recipient country. The transfer to countries which do not provide for adequate protection can only be justified if any of the exceptions of Article 26 of Directive 95/46/EC apply, for example, if the transfer is necessary or legally required on important public interest grounds<sup>11</sup>. However, this exception can only be used if the transfer is of interest to the authorities of an EU Member State and not only to the authorities of the recipient country<sup>12</sup>.

<sup>11</sup> According to Recital 58 of Directive 95/46/EC, this exception covers transfers between tax or customs authorities.

<sup>12</sup> See also Article 29 Working Party Working Document of 25 November 2005 on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (WP114), available on [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf).

In any case, exceptions should only be used on a case by case basis, which means that no massive or systematic transfers of data should be based on the public interest grounds exemption.

26. In addition, the relevant legal undertaking by the third country should include specific safeguards as regards the protection of privacy and personal data and the exercise of these rights by data subjects.

### 3. CONCLUSION

27. The EDPS welcomes the specific reference in the Proposal to the applicability of Directive 95/46/EC and Regulation (EC) No 45/2001 to the personal data processing activities covered by the Regulation. He proposes a precision of this reference.

28. The EDPS recommends the following points with a view to ameliorate the text from a data protection perspective:

- the categories of data to be exchanged between competent authorities should be laid down in the Proposal;
- the EDPS expects to be consulted on implementing measures related to the protection of personal data;
- safeguards about the permitted use of information related to suspected cases of fraud should be inserted in the text of the Regulation;
- the necessity and the proportionality of the restrictions to the rights of information and access have to be clearly demonstrated by the legislator. In addition, specific situations where such restrictions are needed must be specified in the text of the Proposal - or in a recital.
- the maximum retention period for information concerning intra-community movements should be specified in the Regulation;
- the retention period should be justified in its preamble ;
- international transfers of data on suspicious transactions should comply with Articles 8 and 26 of Directive 95/46/EC and their scope, the identity of the sender and the purpose should be specified.

Done in Brussels, 27 January 2012

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor

