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Subject: Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
and
Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services
- Opinion of the European Data Protection Supervisor

Delegations will find attached the Opinion of the European Data Protection Supervisor.



Opinion of the European Data Protection Supervisor

on the Commission Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and on the Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services

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,

Having regard to the request for an opinion in accordance with Article 28(2) of Regulation (EC) No 45/2001,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

1.1. Consultation of the EDPS

1. On 21 March 2012, the Commission adopted:
 - a Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the 'Posting of Workers Proposal')³ and

¹ OJL 281, 23.11.1995, p. 31.

² OJL 8, 12.1.2001, p. 1.

³ COM(2012) 131 final.

- a Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services ('the Collective Action Proposal')⁴.
2. The two related Proposals were sent to the EDPS for consultation on 26 March 2012.
 3. The EDPS welcomes the fact that the Commission consulted him formally after the Proposals were adopted and that this Opinion is referred to in the preamble of the Posting of Workers Proposal. However, he regrets that he was not given the opportunity to provide informal comments before the draft Proposals were adopted.

1.2. Objectives and background of the Proposals

4. The objective of the Posting of Workers Proposal is to improve, enhance and reinforce the way in which Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ('Posting of Workers Directive'⁵) is implemented, applied and enforced in practice across the European Union. The Proposal aims to achieve this by establishing a general common framework for better and more uniform implementation, application and enforcement of the Directive, including measures to prevent any circumvention or abuse of the rules.⁶
5. The objective of the Collective Action Proposal is to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment.⁷

1.3. Relevant provisions; objectives of the EDPS Opinion

6. While it is not the main objective of either of the two Proposals to process personal data, at least one of the Proposals - the Posting of Workers Proposal - requires the processing of a significant amount of personal data. As will be shown below, these personal data may relate to the posted workers as well as to individuals acting on behalf of the posting undertakings such as their corporate officers, management, company representatives, or employees. In addition, the posting undertakings themselves may also be natural persons. If so, their personal data may also be processed. Some of the data processed may be sensitive⁸: in particular, data on suspected circumvention or abuse of the rules may be exchanged among competent authorities.
7. From the data protection perspective, the three most relevant provisions of the Posting of Workers Proposal are
 - Article 6(2) which allows bilateral information exchanges (consisting of '[replies] to reasoned requests for information');
 - Article 6(6), which requires Member States to ensure that registers of service providers may be consulted by competent authorities of the other Member States 'in accordance with the same conditions'; and

⁴ COM(2012) 130 final.

⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21/01/1997, p.1-6.

⁶ See Explanatory Memorandum, page 11, Section 3.1, para 1.

⁷ See Explanatory Memorandum, page 10, Section 3.1, para 4.

⁸ Falling within the definition of 'special categories of data' in the meaning of Article 8(5) of Directive 95/46/EC.

- Article 7(2), which requires the Member State of establishment, on its own initiative, to communicate to the Member State to which the posting takes place relevant information regarding possible irregularities.
8. The processing of personal data in all three cases is foreseen to take place via the Internal Market Information System ('IMI').⁹
 9. As to the Collective Action Proposal, the alert mechanism foreseen in Article 4 appears to allow the exchange of personal data, possibly including sensitive data (information about participation in strikes or similar collective action¹⁰). However, as will be noted in Section 4 below, the exchange of personal data appears not to be the legislative intention, and therefore, any concerns can presumably be addressed by a simple clarification that no sensitive personal data shall be contained in these alerts.

2. GENERAL COMMENTS

10. The EDPS welcomes the efforts made in the Posting of Workers Proposal to address data protection concerns. The EDPS also welcomes the fact that the use of an existing information system, IMI, is proposed for the administrative cooperation, which already offers, at the practical level, a number of data protection safeguards. Specific safeguards are also expected to be adopted soon under the IMI Regulation (see footnote 9).
11. The EDPS also welcomes the references to the IMI Regulation, Directive 95/46/EC and Regulation 45/2001 in recital 13, and the references to fundamental rights including the protection of personal data in recital 33.
12. As a general comment on legal drafting, the EDPS recommends 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. The EDPS also recommends that the applicability of Directive 95/46/EC, Regulation 45/2001 and the IMI Regulation be set forth in a substantive provision of the Posting of Workers Proposal rather than in a recital.
13. On more substantive safeguards, the EDPS further welcomes that Article 6(7) requires the confidentiality of information exchanged and strict observance of the purpose limitation principle ('information exchanged shall be used only in respect of the matter(s) for which it was requested').
14. Nevertheless, some concerns remain, mainly relating to the bilateral exchanges under Article 6(2), the access to the registries under Article 6(6), and the 'alert system' under Article 7(2) of the Posting of Workers Proposal.

3. COMMENTS ON THE POSTING OF WORKERS PROPOSAL

⁹See Article 19 of the Posting of Workers Proposal, which amends Annex I of the IMI Regulation. See also Commission Proposal for a Regulation on administrative cooperation through the Internal Market Information System ('the IMI Regulation') available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0522:FIN:EN:PDF>. The Regulation on IMI is expected to be adopted later this year. In November 2011 the EDPS issued an Opinion on the Commission Proposal (OJ C 48, 18.2.2012, p. 2–12).

¹⁰ That is, 'special categories of data' in the meaning of Article 8(1) of Directive 95/46/EC.

3.1. Article 6(2): bilateral information exchanges

15. Article 6(2) of the Posting of Workers Proposal provides that 'the cooperation of the Member States shall in particular consist in replying to reasoned requests for information and to carry out checks, inspections and investigations from competent authorities with respect to the situations of posting referred to in Article 1(3) of [the Posting of Workers Directive], including investigation of any abuses of applicable rules on the posting of workers or possible cases of unlawful transnational activities'.
16. The EDPS notes that a pilot project has been launched in IMI in 2011 with regard to bilateral information exchanges in the field of the posting of workers.¹¹ The question sets used in the pilot are publicly available on the IMI website¹². These question sets follow similar information flows and logic as question sets used in the areas of services and professional qualifications. The questions listed appear relevant and proportionate. If further questions will be added to the question sets, the relevance, necessity and proportionality of the questions should be carefully assessed. For purposes of transparency, all questions should be publicly available at the IMI website.
17. The IMI Regulation, once adopted, will be fully applicable to the information exchanges under Article 6(2) of the Posting of Workers Proposal. The IMI Regulation, thus, will provide a number of safeguards, which need not be repeated in the text of the Posting of Workers Proposal. However, this does not exclude that further specific provision relevant to data protection be adopted in the text of the Proposal when such is necessary or useful.
18. The EDPS recommends in any event that the permissible purposes of information exchange should be more clearly specified in the Proposal. The current wording - 'possible cases of unlawful transnational activities'- is not sufficiently specific, and thus, does not offer the required degree of legal certainty. The rest of the provision, which refers to 'investigation of any abuses of applicable rules on the posting of workers', appears to be more specific, and thus, better ensure legal certainty. The EDPS recommends that the phrase 'possible cases of unlawful transnational activities' be deleted and the provision redrafted to ensure that any exchange of personal data is only possible for the purposes of 'investigation of any abuses of applicable rules on the posting of workers'. Other purposes may also be specified in the Proposal if this is strictly necessary.

3.2. Article 6(6): access to registers of service providers by competent authorities in other Member States

19. Article 6(6) of the Posting of Workers Proposal provides that 'Member States shall ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States'.

¹¹ See Section 2.6, Commission Staff Working Document the Internal Market Information System (IMI) Operation and Development in 2011, available at http://ec.europa.eu/internal_market/imi-net/docs/ar2011.pdf.

¹² See http://ec.europa.eu/internal_market/imi-net/data_protection_en.html#data_fields.

20. This provision is modelled after Article 28 of the Services Directive¹³, which is nearly identical but allows access to a largely overlapping but not entirely identical set of registries compared to the Posting of Workers Proposal¹⁴, taking into account the scope of the two different legal instruments.
21. IMI itself does not offer a facility to interconnect these registries or provide direct access to competent authorities across borders. However, it includes a directory of the various registries available.¹⁵
22. The EDPS supports the availability of the directory of registers via IMI. He also agrees that direct access on equivalent conditions (e.g. without having to pay a fee for access) be given to data on a case-by-case basis to help enforce the Posting of Workers Directive. However, he recommends that Article 6(6) be clarified to ensure that there is no misunderstanding regarding its scope and effect.
23. One concern is to ensure that this Article is not used as a legal basis to allow access to registers established in some Member States where posting undertakings need to declare, among others, certain personal data relating to their posted employees¹⁶. The EDPS recommends that Article 6(6) be clarified accordingly. In principle, the EDPS has no objection against allowing access to business registers; however, to ensure legal certainty, it should be better specified in the Proposal what registers are actually concerned.
24. Another concern relates to the modalities of providing access to competent authorities in other Member States. So long as there is no EU coordination on the inter-connection of registries, each national register, subject to its own data protection law, may decide on its own how to comply with Article 6(6) and how to provide access to competent authorities in other countries. If and when interconnection of registers is planned as a common EU project in this area as well¹⁷, data protection safeguards must be carefully considered at the European level.

3.3. Article 7(2): 'alert system' regarding possible irregularities

25. Article 7(2) of the Posting of Workers Proposal establishes what appears to be an alert system. In particular, it provides that 'the Member State of establishment of the service provider shall, on its own initiative, communicate to the Member State to which the posting takes place any relevant information as specified in Articles 3 (1) and (2) and 9(1), where the Member State of establishment of the service provider is aware of specific facts which indicate possible irregularities'.

¹³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

¹⁴ As explained to the EDPS by the relevant Commission services.

¹⁵ See Section 3.1, of the Commission Staff Working Document referred to in footnote 11 above.

¹⁶ Such as LIMOSA in Belgium; see Section 3.1.1 of the Impact Assessment accompanying the Posting of Workers Proposal. SWD(2012) 63 final.

¹⁷ For example, as has been the case recently with the interconnection of business registers. See Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p. 1–9. See also EDPS Opinion on the Proposal for this Directive (OJ C 220, 26.7.2011, p. 1–11).

26. The EDPS welcomes that alerts are not sent to all Member States, but only to those where the posting takes place. As with the more traditional general bilateral exchanges, the IMI Regulation should provide a number of safeguards. Some specific elements, however, remain to be addressed in the Posting of Workers Proposal itself.
27. In addition, the Proposal leaves some uncertainty as to whether the messages sent under Article 7(2) will follow the 'bilateral exchange' (Article 6(2)) workflow in IMI or whether these 'alerts' will be separate, one-way messages in all cases. Indeed,¹⁸ it appears that Article 7(2) may be intended to cover both situations. Clarity on this is important in order to ensure that adequate safeguards are in place -in particular, regarding retention periods-, as will be shown below.
28. To address these concerns, the EDPS recommends that the Proposal:
- unambiguously specify that alerts can only be sent in case of a 'reasonable suspicion' of possible irregularities (rather than, as currently stated, 'when the Member State is 'aware of specific facts which indicate possible irregularities');
 - clarify and limit to the minimum strictly necessary, the period for which alerts are retained. Considering that the IMI Regulation already provides for specific and sufficiently long retention periods after closure of cases -including 6 months providing still full access to the information to the competent authority concerned, and several years of retention in 'archived' form with limited access- the Proposal should require closure of cases automatically upon receipt of an alert (if necessary, an exception may be provided for the case if the alert triggers a continued information exchange between the two competent authorities concerned); this should help ensure that the alert system will function, as intended, as a warning mechanism, rather than a long-term black-list¹⁹; and
 - ensure that alerts are only sent to competent authorities in Member States and that these authorities shall keep the alert information received confidential and not further distribute or publish it.²⁰

4. COMMENTS ON THE COLLECTIVE ACTION PROPOSAL

29. Article 4 of the Collective Action Proposal calls for an alert mechanism. Article 4(1) provides that '[w]henver serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States, arise, the Member State concerned shall immediately inform and notify the Member State of establishment or origin of the service provider and/or other relevant Member States concerned as well as the Commission.'
30. Article 4(2) adds that '[the] Member State(s) concerned shall respond as soon as possible to requests for information from the Commission and from other Member

¹⁸ As described by the relevant Commission services to the EDPS.

¹⁹ See previous EDPS recommendations on this distinction, in particular, paras 17 and 18 of the EDPS Opinion on the Professional Qualifications Proposal (OJ C 137, 12.5.2012, p. 1-6) and paras 57-59 on the EDPS Opinion on the IMI Proposal referenced in footnote 9.

²⁰ We note that a general confidentiality obligation is already set forth in Article 6(2). It should be made sure that it will also cover information exchanges under Article 7.

States concerning the nature of the obstacle or threat. Any information exchange between Member States shall also be transmitted to the Commission'.

31. The exchange of personal data appears not to be the legislative intention. Assuming this is correct, any concerns regarding data protection can presumably be addressed by a simple clarification of the fact that no sensitive personal data shall be contained in these alerts. This clarification would increase legal certainty, especially considering the sensitivity of personal data that may relate to the participation of individuals (whether posted workers or locals) in strike action or similar collective action, and the specific protection such sensitive data are afforded under Article 8(1) of Directive 95/46/EC.

5. CONCLUSIONS

32. The EDPS welcomes that the Posting of Workers Proposal addresses data protection concerns. The EDPS also welcomes the fact that the use of an existing information system, IMI, is proposed for the administrative cooperation, which already offers, at the practical level, a number of data protection safeguards, and for which specific safeguards are expected to be adopted soon under the IMI Regulation.
33. To address any remaining data protection concerns, the EDPS provides the following recommendations.
34. As a general comment, the EDPS recommends that the reference to the applicable data protection framework should be set forth in a substantive provision rather than in a recital and should be further nuanced by reference to 'national rules which implement' Directive 95/46/EC.
35. On bilateral information exchanges under the Posting of Workers Proposal (Article 6(2)), the EDPS recommends that the permissible purposes of information exchange should be more clearly specified in the Proposal. In particular, the phrase 'possible cases of unlawful transnational activities' should be deleted and the provision should be redrafted to ensure that any exchange of personal data is only possible for the purposes of 'investigation of any abuses of applicable rules on the posting of workers' (or other necessary purposes clearly specified in the Proposal).
36. On access to registers of service providers by competent authorities of other Member States (Article 6(6)), the EDPS recommends that the Proposal should more clearly specify what registers are actually concerned. This Article should not, in particular, be used as a legal basis to allow access to registers established in some Member States where posting undertakings need to declare, among others, certain personal data relating to their posted employees.
37. In addition, if and when interconnection of registers is planned as a common European project in this area as well, data protection safeguards must be carefully considered at the European level.
38. With regard to the alert system on possible irregularities (Article 7(2)), the EDPS recommends that the Proposal:
 - unambiguously specify that alerts can only be sent in case of a 'reasonable suspicion' of possible irregularities;

- should require closure of cases automatically upon receipt of an alert, to help ensure that the alert system will function as a warning mechanism, rather than as a long-term black-list; and
- ensure that alerts are only sent to competent authorities in Member States and that these authorities shall keep the alert information received confidential and not further distribute or publish it.

39. On the Collective Action Proposal, Article 4 should clarify that no sensitive personal data shall be contained in these alerts.

Done in Brussels, 19 July 2012

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