



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

13 January 2023

Opinion 1/2023 on the Proposal for an Interoperable Europe Act

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’.*

This Opinion relates to the Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act). This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposal that are relevant from a data protection perspective.

Executive Summary

On 18 November 2022 the European Commission issued the Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act) ('the Proposal'). The objective of the Proposal is to promote the cross-border interoperability of network and information systems which are used to provide or manage public services in the Union by establishing common rules and a framework for coordination on public sector interoperability, with the aim of fostering the development of interoperable trans-European digital public services infrastructure.

The EDPS acknowledges the benefits that can be derived from increased interoperability in the public sector and welcomes the efforts undertaken by the Commission to organize and institutionalise the process towards this goal. However, the EDPS also recalls that interoperability of network and information systems across sectors of public administration and across all levels of administration affects one of the most fundamental principles of data protection, the principle of purpose limitation. It is therefore crucial that the risks that are being created by removing technical barriers to information exchange, are considered further in the process. For this reason, the EDPS welcomes the provision requiring the Commission to consult the EDPS prior to authorising the establishment of regulatory sandboxes in cases where no EU institution, body or agency participates in the sandbox, and proposes a change in the wording.

The Proposal would create a legal basis for the processing of personal data in regulatory sandboxes provided for in Article 11 and 12 of the Proposal. The comments of the EDPS therefore concentrate on these provisions.

The EDPS recommends to consider whether possible use cases for the regulatory sandboxes exist that meet the standard of necessity, and if no such uses cases can be identified, to remove the legal basis for personal data processing from the Proposal. He further identifies provisions seemingly without regulatory content, and proposes to amend them so that they would bear added value. In addition, the EDPS suggests to introduce an additional safeguard to ensure that test data does not become data in the production environment again, especially not after enriching it with data from other participants. He further suggests to require participants in regulatory sandboxes to provide the necessary essential information for a data protection evaluation by the supervisory authority to be carried out, with their request to the Commission to establish a sandbox, and proposes amendments to better address situations in which several supervisory authorities are competent to assess a proposed processing in a regulatory sandbox.

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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 Community institutions and bodies and on the free movement of such data ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 18 November 2022 the European Commission issued the Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act) ('the Proposal').
2. The objective of the Proposal is to promote the cross-border interoperability of network and information systems which are used to provide or manage public services in the Union by establishing common rules and a framework for coordination on public sector interoperability, with the aim of fostering the development of interoperable trans-European digital public services infrastructure. In particular, it aims at:
 - ensuring a consistent, human-centric EU approach to interoperability from policymaking to policy implementation;
 - establishing an interoperability governance structure designed to enable public administrations from all levels and sectors, as well as private stakeholders, to work together – with a clear mandate to agree on shared interoperability solutions (e.g. frameworks, open specifications, open standards, applications, or guidelines);
 - co-creating an ecosystem of interoperability solutions for the EU's public sector, so that public administrations at all levels in the EU and other stakeholders can contribute to and re-use such solutions, innovate together and create public value.
3. The need for stronger action in the field was recognised and concrete action was announced in several Commission communications, among them the Communication 'Shaping

¹ OJ L 295, 21.11.2018, p. 39.

Europe's Digital Future'², 'A European Strategy for Data'³, 'Identifying and addressing barriers to the Single Market'⁴ and 'Digitalisation of justice in the European Union A toolbox of opportunities'⁵. In addition, the European Council called for an empowering interoperability framework in its Communication to the Delegations on the Conclusions of the Special meeting on 1 and 2 October 2020⁶. This initiative was included in the Commission work programme for 2022 (REFIT annex)⁷.

4. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 18 November 2022, pursuant to Article 42(1) of the EUDPR. The EDPS welcomes the reference to this consultation in recital 40 of the Proposal. In this regard, the EDPS also positively notes that he was already previously informally consulted pursuant to recital 60 of the EUDPR.

2. General remarks

5. The explanatory memorandum to the Proposal emphasizes on page 2 that interoperability is not only a technical issue but requires action in several fields, summarized by the terms legal, organisational, and semantic interoperability. Differently from other, previous legislative measures in the field of interoperability⁸, this Proposal does not contain a legal basis for the interconnection of information systems and an extension of the purposes of personal data processing, other than in the form of a regulatory sandbox. Instead, the Proposal for the most part aims at organizing and further institutionalizing the cooperation among Member States and with the EU institutions, bodies and agencies in the area of cross-border interoperability of network and information systems which are used to provide or manage public services to be delivered or managed electronically in the Union.
6. The underlying explicit assumption of the Proposal is that increased interoperability of all areas and levels of public administration furthers the common good by, among others,

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Shaping Europe's digital future (COM(2020) 67 final).

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European strategy for data, 19.02.2020 (COM(2020) 66 final).

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Identifying and addressing barriers to the Single Market (COM(2020) 93 final).

⁵ Commission Communication on the Digitalisation of justice in the European Union - A toolbox of opportunities (COM (2020) 710 final).

⁶ Communication from the General Secretariat of the Council to the Delegations on the Conclusions of the Special meeting of the European Council (1 and 2 October 2020) (EUCO 13/20).

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission work programme 2022 Making Europe stronger together (COM(2021) 645 final).

⁸ Cf. EDPS Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, issued on 16 April 2018, for download at: https://edps.europa.eu/data-protection/our-work/publications/opinions/interoperability-between-eu-large-scale-informations_en.

- reducing administrative burden on the private sector as well as individuals and the administration,
- increasing trust in the documents exchanged, and
- providing solutions for multilingual settings.

The EDPS welcomes the legislative purpose of the Proposal and invites the Commission and the co-legislators, whenever enacting legislation to increase interoperability in a specific sector of public administration, to consider additional benefits for data protection that can be realised as a consequence of interoperability, for example by avoiding then unnecessary double storage of the same data by different public authorities.

7. However, the EDPS recalls that a technological environment with information systems that are not inter-operable with each other has provided a very strong safeguard against the violation of the fundamental data protection principle of purpose limitation. Although lack of interoperability is not a purposeful technical measure to ensure lawful processing, it has worked like one for decades. Technical non-feasibility has made it harder to use large amounts of data for purposes for which they were not collected. Removing that technical barrier requires greater consciousness for the legal limitations and might also warrant new safeguards to ensure lawfulness of the processing and accountability.
8. The EDPS also recalls that when personal data need to be exchanged between public bodies of two Member States, then these bodies must comply with all applicable legislation including data protection and deploy adequate processes to ensure data quality, access rights and transparency, so that citizens are fully informed about which data has been exchanged with whom and for which purpose. Without such measures, interoperability alone will not deliver on the promise of increased trustworthiness compared to documents provided by citizens, and will only increase risks.
9. The EDPS encourages the development of interoperability solutions which do not go over the head of the person concerned, but actively involve him or her, e.g. in a process of authorizing the exchange between administrations and electronically checking the data to be exchanged. In this context, the EDPS emphasizes the general preference for solutions that give the user better control over what data to share for which purposes, which he has already expressed in the context of the eID wallet⁹. Such self-sovereign IT solutions should be favoured.
10. The EDPS further welcomes the preference expressed in the proposal for open standards over proprietary solutions.
11. Finally, having concurred with the potential benefits that the explanatory memorandum promises, the EDPS reminds that there will be subject areas of public administration where there are few benefits from increased interoperability and areas where such benefits are outweighed by the risks. For example, the (physical and semantical) connection between law enforcement and civil authorities that would enable mass data transfers or automated

⁹ Cf. EDPS Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, p 3.

data exchanges would probably violate the principle of purpose limitation and also not correspond with different data security requirements of the two sectors. Moreover, in order to preserve well-established confidentiality principles (such as tax secrecy and social security data secrecy), certain civil administrations are also unlikely to benefit from interoperability with other areas. The EDPS takes note that stakeholders will have the instrument of interoperability assessments to balance the advantages and risks. The EDPS wishes nevertheless to stress that an increase of interoperability should not be seen in itself as a benefit.

12. Against this background, the following specific comments address certain aspects of the legal basis for the processing of personal data in the regulatory sandbox introduced by the Proposal.

3. Legal basis for processing personal data in regulatory sandboxes

13. The Proposal provides in Article 12(6) for a legal basis for the processing of personal data in regulatory sandboxes established pursuant to Article 11 of the Proposal. According to recital 26, regulatory sandboxes would consist in controlled test environments that facilitate the development and testing of innovative solutions before such systems are integrated in the network and information systems of the public sector. The objectives of the regulatory sandboxes should be to foster interoperability through innovative solutions by establishing a controlled experimentation and testing environment with a view to ensure alignment of the solutions with this Regulation and other relevant Union law and Member States' legislation, to enhance legal certainty for innovators and the competent authorities and to increase the understanding of the opportunities, emerging risks and the impacts of the new solutions.
14. The EDPS takes note that recital 27 refers to Article 6(4) of the GDPR¹⁰ and Article 6 of the EUDPR¹¹. It is the understanding of the EDPS that the processing in regulatory sandboxes would then be based on Union law (i.e. the Proposal) as referred to in the first paragraph of Article 6(4) GDPR (and Article 6 EUDPR). In this regard, the EDPS considers that the Proposal lacks specificity concerning the objectives of public interest that may be pursued. The EDPS recommends further delineating the relevant objectives of public interest in the future Regulation. The EDPS recommends therefore being more specific on which

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); OJ L 119, 4.5.2016, p. 1–88.

¹¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons 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; OJ L 295, 21.11.2018, p. 39–98.

particular objective referred to in Article 23(1) GDPR and Article 25(1) EUDPR is being pursued.

15. The EDPS recalls that the regulatory sandbox provided for by the Proposal resembles the ‘projects’ that have been used by controllers in the past to justify in their view a processing of personal data the purpose of which would be incompatible with the original purpose for which the data had been collected. A prominent example is the use of personal data from the production environment for testing purposes. The EDPS considers that if there is no compelling need to use original data, then its use for testing purposes is not justifiable. A compelling need to use real data has been assumed in the context of artificial intelligence, for example, when it is a matter of training algorithms. Why a regulatory sandbox should be necessary in the case of interoperability, however, is not clear. The EDPS cautions against a wide interpretation of Article 12(6) of the Proposal. In no way should the example of regulatory sandboxes from the Artificial Intelligence Act be misrepresented as a general principle that the use of personal data for testing and developing purposes can easily be justified and permissible.
16. The EDPS acknowledges that the Proposal requires that the data processed is limited to what is necessary for the functioning of the interoperability solution to be developed or tested in the sandbox, and the functioning cannot be effectively achieved by processing anonymised, synthetic or other non-personal data. The EDPS welcomes this clarification. The EDPS nevertheless recommends that the co-legislators verify that there are relevant possible use cases that would actually meet this standard, prior to enacting this provision.

4. Implementing procedures of regulatory sandboxes for the processing of personal data

17. The EDPS welcomes the specific safeguards for processing personal data in regulatory sandboxes contained in Article 12(6)(d) and (e) and (h) of the Proposal, that is: using a functionally separate, isolated and protected data processing environment; a prohibition of transfers; and logging beyond the data lifecycle for the sole purpose of auditing. With regard to letter (f) of that provision, which is a clarification that processing in a sandbox environment does not affect the application of data subjects’ rights under the GDPR and EUDPR, the EDPS notes that the normative content of this clarification is low. The EDPS proposes instead to assume the applicability of the rules on data subjects’ rights and, in point (f), to rather mandate the sandbox stakeholders to fulfil an effective implementation of these data subjects’ rights through appropriate technical and organizational arrangements.
18. However, the EDPS takes note that Article 12(6)(f) of the Proposal emphasizes in particular the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. It is the understanding of the EDPS that the processing in the regulatory sandbox is limited to the purpose of developing or testing an innovative interoperability solution which can otherwise not be tested nor developed. Therefore it is unclear to the EDPS why of all data subjects’ rights, the right in Article 22 GDPR (and Article 24 EUDPR)

is deemed of particular importance. As both Articles contain a number of exceptions to the rule, the EDPS recommends to amend the text by a clause prohibiting another, subsequent purpose change, to ensure that test data, enriched in the sandbox, does not become data in a production environment again.

19. The EDPS notes that a number of elements which are highly relevant from a data protection perspective, such as the purpose of the processing, the actors involved and their roles, are left to be specified in the plan mentioned in Article 12(3) of the Proposal. In this regard, the EDPS recommends adding a provision requiring that these elements are already included in the requests for authorisation to the Commission pursuant to Article 11(5) of the Proposal.
20. In addition to the purpose of the processing, the actors involved and their roles, the categories of data concerned and their source(s) and the envisaged retention period should be specified¹². In other words, only the details for practical implementation should be left to the plan mentioned in Article 12(3).

5. Role of the supervisory authorities

21. The EDPS welcomes that the Proposal takes into account in Article 11(5) the rules on prior consultation of supervisory authorities in Article 36 of the GDPR and Article 40 of the EUDPR, and makes explicitly reference to them. The EDPS further welcomes the reference to the advisory role of the supervisory authorities in Article 12(3) of the Proposal, which can be read into the term ‘other national competent authorities’ and which would be fully adequate given their role at national level. However, in Article 12(1) the Proposal distinguishes between ‘national data protection authorities’ and ‘other national authorities’, making it unclear to the reader whether the term used in Article 12(3) is intended to include the supervisory authorities under the GDPR. For the sake of legal certainty, the EDPS recommends to amend the wording and also use the term supervisory authorities in Article 13(1) to align it with the wording of the GDPR.
22. Furthermore, the EDPS welcomes the clarification in Article 12(4) of the Proposal that any advice provided to the participants in the sandbox does not prevent supervisory authorities from exercising supervisory and corrective powers in the future. In the same vein, the EDPS also welcomes the declaratory statement in Article 12(5) of the Proposal that participation in the sandbox does not liberate from liability.
23. If the establishment of a regulatory sandbox is requested by at least three public sector bodies from Member States and the interoperability solution is not intended to support the cross-border interoperability of network and information systems used to provide public

¹² In this regard, see judgment of the Court of Justice of the EU of 20 October 2022, *Digi Távközlési és Szolgáltató Kft.* C-77/21, point 2 of the ruling, no official English version available at the date of the Opinion. The principle of storage limitation provided for under Article 5 (1)(e) GDPR, precludes the storage by the controller, in a database created for the purpose of testing and correcting errors, of personal data previously collected for other purposes, for a period exceeding that which is necessary for the carrying out of those tests and for the correction of such errors.

services by one or more EU institutions, bodies and agencies, Article 11(5) of the Proposal provides that the Commission needs to authorise the establishment of the regulatory sandbox. The Commission is obliged by the same provision to consult the EDPS on the matter where the sandbox would include the processing of personal data. The EDPS welcomes the advisory role to the Commission that is attributed to him by the Proposal. In order to make the proposed consultation more meaningful, the EDPS considers that the Commission should be obliged to ‘take utmost account of’ such an EDPS Opinion. Article 11(5) of the Proposal should be amended accordingly.

24. For the EDPS and the Commission to make the most of this consultation, it should be noted that the best processes and consultations fail to protect the fundamental rights and freedoms if the law does not explicitly state the standard of review to be observed in the procedure. According to the Proposal, when the Commission authorises the regulatory sandbox, it does so on the basis of a joint request as described in Article 11(5). It is the understanding of the EDPS that the specific plan mentioned in Article 12(3) of the Proposal that would also contain some essential elements regarding the envisaged data processing would be produced thereafter and would not form the basis for the Commission’s decision under Article 11(5). In that case it is unclear, on which basis the Commission would make its decision to authorize or not, and on which factual basis the EDPS could support the Commission in this process.
25. The EDPS reiterates his view that the decision provided for by Article 11(5) of the Proposal should be based on full appreciation of the essential elements of the envisaged processing. If the plan cannot be provided at the time of the request, then at least the essential elements of the envisaged data processing (including e.g. the purpose of the processing, the actors involved, their roles, the categories of data concerned, their source(s) and the envisaged retention period) should form part of the request.
26. The Proposal acknowledges in Article 11(5) that there may be a need for a prior consultation under the GDPR, for which the national supervisory authorities would be competent. It would also be necessary to ensure that the requesting public sector bodies have, by the time of the request, prepared their data protection impact assessments and entered into the consultation of their supervisory authorities under Article 36 GDPR, so that effective coordination between the EDPS and the national supervisory authorities will be possible. This timing can best be achieved if the future Regulation provides a definition of the exact content of the request.

6. Conclusions

27. In light of the above, the EDPS makes the following recommendations:

- (1) to consider whether possible use cases for the regulatory sandboxes exist that meet the standard, and if no such use cases can be identified, to remove the legal basis for personal data processing from the Proposal;

- (2) to further define the relevant objectives of public interest in the context of the future Regulation and to be more specific on which particular objective referred to in Article 23(1) GDPR and Article 25(1) EUDPR is being pursued;
- (3) to amend Article 12(6)(f) of the Proposal so that it requires the sandbox participants to provide for effective technical and organizational arrangements for the fulfilment of data subjects' rights;
- (4) to modify Article 12(6) as to prohibit any subsequent change of purpose, to ensure that test data does not become data in a production environment again, especially not after enriching it with data from other participants;
- (5) to amend Article 11(5) in a way that the purpose of the processing, the actors involved, their roles, the categories of data concerned, their source(s) and the envisaged retention period must be specified in the request within the meaning of Article 11(5) of the Proposal, and that a data protection impact assessment should be underway or completed.

Brussels, 13 January 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI