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NOTE

From: Mr Wojciech Rafał WIEWIÓROWSKI, European Data Protection Supervisor

On: 11 February 2022

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: 15296/21 - COM (2021) 565 final

Subject: Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU
- Opinion of the European Data Protection Supervisor

Delegations will find attached the opinion of the European Data Protection Supervisor concerning the abovementioned legislative proposal.

E-MAIL

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EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
SUPERVISOR

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Permanent Representative of France
to the European Union
Presidency of the Council of the
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Mr Jeppe TRANHOLM-MIKKELSEN
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1048 Brussels

Brussels, 11 February 2022
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Subject: Formal Comments¹ of the European Data Protection Supervisor on the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU

Your Excellency,
Mr Secretary-General,

Having regard to Article 42(1) of 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, please find enclosed Formal Comments on the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.

¹Article 20(1) of the EDPS Rules of Procedure provide that "In response to requests from the Commission pursuant to Article 42(1) of the Regulation, the EDPS shall issue opinions or formal comments."



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We have sent a copy of these Formal Comments to the President of the European Commission and the President of the European Parliament.

Yours sincerely,

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

Encl.: Formal Comments

Cc: Mr Serge DE BIOLLEY, Director for Justice, General Secretariat of the Council

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EUROPEAN DATA PROTECTION SUPERVISOR

EDPS formal comments on the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU

1. Introduction

- On 22 December 2021, the European Commission adopted a Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU ('the Proposal')¹.
- The objective of the Proposal is to reduce tax revenue loss related to tax avoidance and tax evasion due to the use of shell entities in the EU². It lays down indicators of minimum substance for undertakings in Member States and rules regarding the treatment for tax purposes of those undertakings that do not meet the indicators³. The Proposal also introduces mandatory automatic exchange of information on undertakings required to report on indicators of minimum substance⁴.
- On 29 October 2020, the EDPS issued an Opinion⁵ related to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation adopted on 15 July 2020⁶.
- These comments are provided in reply to the formal request by the Commission of 22 December 2021, pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')⁷. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.

¹ COM(2021) 565 final.

² COM(2021) 565 final, p. 39.

³ Article 1 of the Proposal.

⁴ Article 8ad of the Proposal.

⁵ EDPS Opinion 6/2020 on a proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation, 28 October 2020.

⁶ COM(2020) 314 final. The final act, the Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, was published in the Official Journal on 25 March 2021 (OJ L 104/1, 25.3.2021).

⁷ 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. 1).

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- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. 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.

2. Comments

- The EDPS welcomes recital (21) of the Proposal, specifying that any processing of personal data carried out within the framework of Council Directive 2011/16/EU should comply with Regulation 2016/679 ('the GDPR')⁸ and with the EUDPR.
- The EDPS also welcomes the confirmation that data processing is set out in Directive 2011/16/EU⁹ solely with the objective of serving matters of taxation and the purposes of combating tax fraud, tax evasion and tax avoidance, safeguarding tax revenues and promoting fair taxation.
- The EDPS notes that main elements of the Proposal concern: a determination of the relevant income of undertakings; identification of undertakings that do not meet minimum substance for tax purpose; the presumption of minimum substance and the rebuttal of such presumption; tax treatment for undertakings that do not have minimum substance for tax purposes. Chapter IV of the Proposal, under Article 13, amends Directive 2011/16/EU by providing the obligation for competent authorities of Member States to exchange the information listed under new Article 8ad(4), (5) and (6).
- To facilitate the exchange of information referred to in paragraphs 4, 5 and 6, the Commission shall, by means of implementing acts, adopt the practical arrangements necessary for the implementation of paragraphs 1 to 6 of Article 8ad¹⁰. Such practical arrangements shall include measures to standardise the communication of the information set out in paragraphs 4, 5 and 6. Article 8ad(9) specifies the applicable maximum data retention period. Article 8ad(10) specifies that the competent authorities of each Member State shall be considered to be data controllers and the Commission shall be considered to be data processor. Finally, Article 8ad(1) specifies that in the event of an unauthorised disclosure of information referred to in points (a) – (f) of paragraph 4, Member States may decide to suspend, as a mitigating measure,

⁸ 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).

⁹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1).

¹⁰ Article 8ad(7) of the Proposal.

the exchanges of information under this Directive with the Member State where the unauthorised disclosure occurred.

- In this regard, the EDPS observes that the automatic exchange of information between competent tax authorities to reduce tax revenue loss referred to in the Proposal builds on the already existing framework and system for the automated exchange of information provided by Article 21 of Directive 2011/16/EU.
- The EDPS also welcomes the fact that Article 8ad(10) aims to specify the respective roles of the competent authorities of each Member State, as controllers, and of the Commission, as processor. The EDPS also considers that the role of the Commission as **processor** appears compatible with the (limited) responsibilities of the Commission as regulated under Article 8ad of the Proposal. Indeed, in order to qualify as controller the entity shall actually exert a decisive influence on the purposes and means of the processing¹¹.
- As regards the competent authorities of the Member States, the EDPS recommends explicitly clarifying whether these authorities are to be considered as joint controllers or not. The EDPS recalls that in case of joint controllership the competent authorities of the Member States shall enter into an agreement pursuant to Article 26 GDPR, specifying in transparent manner their respective responsibilities for compliance with their data protection obligations, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information.
- The EDPS recalls that there is a need for a legal act binding the Commission (as processor) to the competent authorities of the Member States (as controllers) pursuant to Article 28(3) GDPR and Article 29(3) EUDPR. In this regard, the EDPS notes that Article 25(7) of Directive 2011/16/EU provides that Member States, assisted by the Commission, shall agree where appropriate a joint data controller agreement, a data processor – data controller agreement, or models thereof¹².

¹¹ In this regard, see the EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR, version 2.0 adopted on 7 July 2021, paragraph 30. In the Opinion 6/2020 on the proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation, dated 28 October 2020, the EDPS invited the Commission to make an assessment as to its decision-making power over the means used for the processing of the personal data in the central secure interface, in order to exclude a potential implicit competence as controller or joint controller. See also EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725, of 7 November 2019, at page 7, referring to “the factual influence that the controller has over the processing operation”.

¹² See also recital (32) of Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (OJ L 104/1, 25.3.2021).

- Finally, the EDPS observes that according to Article 8ad(7) of the Proposal the Commission shall adopt by means of implementing acts the practical arrangements for the exchange of information referred to under Article 8ad(4)-(6). In this regard, the EDPS recalls that the Commission must ensure compliance with the provisions on **security** of processing under the EUDPR, in particular following the EDPS "Guidelines on the protection of personal data in IT governance and management of EU institutions"¹³.

Brussels, 11 February 2022

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹³ EDPS Guidelines on the protection of personal data in IT governance and IT management of EU institutions, 23 March 2018.