Formal comments of the EDPS on a proposal for a Directive of the European Parliament and of the Council on the issue of covered bonds and covered bonds public supervision and amending Directive 2009/65/EC and Directive 2014/59/EU

1. Introduction

- On 13 September 2018, the European Commission consulted the European Data Protection Supervisor (EDPS) on the proposal for a Directive of the European Parliament and of the Council on the issue of covered bonds and covered bonds public supervision and amending Directive 2009/65/EC and Directive 2014/59/EU (hereinafter, "the Proposal")[1].

- We welcome the fact that the EDPS had the opportunity to discuss the data protection aspects of the proposal with the Commission services at staff level.

- We have limited the comments below to the provisions of the Proposal that are particularly relevant from a data protection perspective, namely Article 24, "Publication of administrative sanctions and remedial measures".

2. Comments

2.1. Preliminary remarks

- The Proposal sets out **minimum harmonization** requirements aiming at ensuring that the "covered bond" financial instrument (debt obligations issued by credit institutions) represents a "stable funding tool for European banks". A core feature of the regulatory framework is public supervision, and the possibility for the competent authorities to issue administrative penalties and other administrative measures following a breach of the Proposal. In short, the administrative penalties and remedial measures are applicable at least in the situations listed under Article 23(1) of the Proposal. Article 24 states that "Member States shall ensure that the provisions transposing this Directive include rules requiring that administrative sanctions and remedial measures be published without undue delay on the official website of the competent authorities [...]".

- As preliminary remark, we observe that the publication at stake would imply the processing of personal data, since the publication may include personal data relating to *the natural* person[2] to whom the penalty has been imposed (notably in case of criminal penalty), as well as information relating to a *legal person* that nonetheless may indirectly identify a natural person (for instance, the owner or the administrator of the legal person)[3]. Hence, it is undisputed that **Regulation (EU) 2016/679 (hereinafter, "the GDPR")**[4] **would be applicable** to the publication at stake.

[1] COM(2018) 94 final, 12.3.2018.
[2] See Article 24(3) of the Proposal.
[3] See Judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR* (C-92/09) *and Hartmut Eifert* (C-93/09) *v Land Hessen*.
[4] 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.

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- We also note that pursuant to Article 24(10) of the Proposal, the European Banking Authority ("EBA") would maintain a central database of administrative sanctions and remedial measures communicated to it by the national authorities in accordance with paragraph 9. We recall that the data protection law applicable to the data processing performed by EBA would be Regulation (EC) No. 45/2001 (hereinafter, "the Regulation")[5], soon to be replaced by a new regulation, currently in the final stages of the legislative process[6]. **Therefore, and for the sake of clarity, we recommend adding to the Proposal a specific recital on the applicability of the GDPR and of the Regulation.**

- We recall that the issue of the publication of sanctions has been dealt with in a number of cases in the past[7], in which we pointed out to the following **overarching data protection rules and principles** that can be considered generally applicable notwithstanding the need for a **case-by-case** assessment for each type of publication of personal data:

  - the principle of *lawfulness* of the publication [Article 5(1)(a) of the GDPR];
  - the principle of *data minimisation* [Article 5(1)(c) of the GDPR];
  - the principle of *accuracy* [Article 5(1)(d) of the GDPR];
  - the requirement *to inform the data subject* concerned [Article 13 and 14 of the GDPR];
  - the principle of *storage limitation* [Article 5(1)(e) of the GDPR].

- In the paragraphs that follow, we provide specific comments on the legal text of the Proposal having regard to these rules and principles.

2.2. Specific comments

- The **legal basis** of the processing (i.e. the publication) would be the Proposal itself, as implemented by Member States law. It is expected that the national transposition measures specifically refer to the situations triggering the obligation for the competent authority to publish the penalties, thus ensuring a sound legal basis for the publication.

- Concerning **the content** of the publication, Article 24(3) specifies that it should include: (i) information on the type and nature of the breach; (ii) information on the identity of the natural or legal person on whom the fine is imposed; (iii) in case of decision imposing the penalty has been appealed, information on the status of the appeal and the outcome thereof, including the court ruling annulling the decision. We consider that, in the context of the Proposal, information so defined appears to be adequate, relevant and limited to what is necessary and proportionate in relation to the

[5] Regulation (EC) No 45/2001 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, OJ L8, 12.1.2001, p. 1.
[6] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals 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/E, COM(2017) 8 final. The entry into force of this Regulation is expected on 11/12/2018.
[7] See the EDPS Guidelines on data protection in EU financial services regulation, of 26.11.2014, p.23 ("Transparency measures and publication of sanctions"), available at: https://edps.europa.eu/sites/edp/files/publication/14-11-25_financial_guidelines_en.pdf

purpose of the publication. In particular, information on the status of the appeal contributes to keeping the information up to date and accurate.

- We note that pursuant to Article 24(3) of the Proposal, Member States law would establish that the aforesaid publication would occur without undue delay, and that the person concerned would be informed about the penalties before the publication.
  In this regard, we recommend inserting after "that person is informed of those penalties", the wording **"and of the publication of the decision imposing the penalty on the official website of the competent authority"**, to ensure compliance with the requirement for the competent authority **to inform** the data subject of the processing of personal data.

- Article 24(5) would provide for the possibility for Member State law to proceed to the publication "**on an anonymous basis**" under the circumstances listed under letters (a)-(c). According to Article 24(6), in these cases the 'full' publication may be postponed.
  With reference to these provisions, we draw attention to the fact that the GDPR defines "anonymous information" as "information which does not relate to an identified or identifiable natural person or to data rendered anonymous in such a manner that the data subject is no longer identifiable"[8]. In this regard, we remark that, also in case of publication of a decision imposing a penalty whereby the name of the natural person is blanked out, it cannot be excluded that the natural person would still remain identifiable via the context and the other elements contained in the publication. However, we can accept the reference to "anonymisation" in the Proposal (as also used in other EU legal texts) even though it is not entirely correct from a technical, data protection viewpoint.

- Finally, we note that the Proposal provides that Member States would ensure that the publication remains on the institutional website of the competent authority "**for at least five years"** after its entry and **"for the period which is necessary** and in accordance with the applicable personal data protection rules". Hence, the Proposal does not provide a *maximum* data retention period. In this regard, we would recommend setting a *maximum* retention period for the publication. While it may not be feasible to set such a maximum limit at EU level, i.e. directly in the Proposal, this could be done in the national transposition measures, in accordance with the applicable national law requirements (taking into account, for instance, the limitation time for the offences and for the related judicial proceedings, as well as the 'timing' of the financial product/investment and the need to protect the investors 'naming and shaming' the financial institutions in breach of the Proposal).

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[8] Recital 26 of the GDPR. For more details on 'anonymisation', see the Working Party 29 Opinion 05/2014 on Anonymisation Techniques, WP216 of 10.4.2014.