



EDPS formal comments on the draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to product intervention and on the draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to additional information for the purposes of the convergence of supervisory reporting

1. Introduction and background

- These formal comments on the draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to product intervention and on the draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to additional information for the purposes of the convergence of supervisory reporting ('the draft Delegated Regulations') are issued by the EDPS pursuant to Article 42(1) of Regulation (EU) 2018/1725¹, following a request for consultation from the European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) of 27 October 2020.
- The draft Delegated Regulation concerning product intervention specifies supplementary elements of the regime of pan-European Pension Product (PEPP). The draft Delegated Regulation concerning convergence of supervisory reporting by providers of PEPP specifies additional information which shall be collected from these providers by the competent supervisory authorities.

2. The EDPS Comments

- The EDPS notes that the draft Delegated Regulations are enacted pursuant to Regulation (EU) No 2019/1238 of the European Parliament and of the Council on a pan-European Personal Pension Product ('the PEPP Regulation')², which recitals 84, 85³ and 89⁴ refer to the right to the protection of personal data.

¹ 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, L295, 21.11.2018.

² Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP), L198, 25.7.2019.

³ "Given the sensitivity of personal financial data, strong data protection is of the utmost importance. Therefore it is recommended that data protection authorities are closely involved in the implementation and supervision of this Regulation."

⁴ "This Regulation should ensure respect for fundamental rights and observe the principles recognised in particular by the Charter of the Fundamental Rights of the European Union, in particular the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life, the right to the protection of personal data, the right to property, the freedom to conduct a business, the principle of equality between men and women and the principle of a high level of consumer protection."

In particular, recital 84 refers to the applicability of the Regulation (EU) 2016/679 ('GDPR')⁵ and of Regulation (EU) 2018/1725: “Any processing of personal data carried out within the framework of this Regulation, such as the exchange or transmission of personal data by the competent authorities or the processing of personal data by PEPP providers or PEPP distributors, should be undertaken in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council and Directive 2002/58/EC of the European Parliament and of the Council. Any exchange or transmission of information by the ESAs should be undertaken in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council.”

- Having regard to the **draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to additional information for the purposes of the convergence of supervisory reporting**, the EDPS notes that the additional information specified under Article 1⁶ does not raise data protection concerns. This is due to the fact that said information is in line with the reporting requirements under Article 40(1) to (5) of the PEPP Regulation, which this delegated regulation aims at specifying, as well as to the fact that the information in most cases is not relating to identified or identifiable individuals.
- Having regard to the **draft Commission Delegated Regulation supplementing Regulation (EU) No 2019/1238 of the European Parliament and of the Council with regard to product intervention**, the EDPS notes that this legal act specifies criteria and factors listed in points (a), (b) and (c) of the second subparagraph of Article 65(9) of the PEPP Regulation, relating, respectively, to the following features of the PEPP: the degree of complexity (letter a), the degree of innovation (letter b), and the leverage (letter c).

⁵ 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.

⁶ Article 1: “The additional information referred to in Article 40(1) to (5) of Regulation (EU) 2019/1238 shall include the following information:

(a) a description of the risk management system of the PEPP provider, including its governance, for managing the risks deriving from PEPP products;

(b) a description of the business pursued by the PEPP provider relative to the sector in which the PEPP provider operates, including the type of investments made and their management, whether the investments are active or passive, whether guarantees are offered or not, the implementation of risk-mitigation techniques, the size in terms of contributions and asset values, and a list comprising the home Member State of the PEPP provider and any host Member States of the PEPP provider;

(c) the information on which written policies PEPP providers are to have in place addressing relevant risks;

(d) information on the valuation principles applied for solvency purposes, where applicable;

(e) an overview of the relevant risks pertaining or linked to the provision of PEPP and how the PEPP provider intends to manage those risks, including but not limited to financial and liquidity risks, market risks, credit risks, reputational risks and risks related to environmental, social and governance factors;

(f) the information with regard to the capital structure of the PEPP provider, including capital ratios and levels of leverage;

(g) information on contracts held by a PEPP provider, or regarding contracts entered into with third parties, including the obligations towards PEPP savers during the decumulation phase, or for the provision of PEPP sub-accounts.”

- Article 2 of this draft Delegated Regulation specifies features relating to the **degree of complexity** of the PEPP in relation to the investor's profile, that is the 'PEPP saver'. In this regard, the legal text specifies that EIOPA, in order to determine whether the PEPP raises a significant investor protection concern, shall take into account:
 - “(i) features characterising the PEPP saver’s skills and abilities, including the level of education, knowledge of and experience with other pension products, long-term investment products or selling practices and the PEPP saver’s vulnerability;
 - (ii) features characterising the PEPP saver’s economic situation, including income, wealth and the degree of dependence on the PEPP for an adequate retirement income;
 - (iii) the PEPP saver’s core financial objectives, including pension savings and need for risk coverage, including biometric risks;
 - (iv) whether the PEPP is being sold to a PEPP saver outside the intended target market, or whether the target market has not been adequately identified;
 - (v) the eligibility for coverage by a national guarantee scheme, where such schemes exist.”

We also note that the definition (29) under Article 2 of the PEPP Regulation specifies that: “*biometric risks*’ means risks linked to death, disability and/or longevity.”

- The EDPS considers the draft Delegated Regulation to be in line with the data protection framework, and thus, he does **not** have specific recommendations. He would like however to recall the importance of respecting the data protection principle of **purpose limitation**⁷ in the context of the collection and use by the PEPP provider of personal data relating to the PEPP saver.

It is essential in this regard, as specified under recital 37⁸ of the PEPP Regulation, that the information, including on the saver’s biometric risks -collected as pre-contractual information by the PEPP provider pursuant to Section II of the PEPP Regulation- will be used by the latter “*in the best interest of the PEPP saver*”⁹ to allow her or him “*to make an informed choice*” in line with the overall investor protection’s aim of the PEPP Regulation.

Brussels, 07 November 2020

Wojciech Rafał WIEWIÓROWSKI
(*e-signed*)

⁷ According to Article 5(1), letter (b) of the GDPR: personal data shall be “*collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’)*”.

⁸ “*Before concluding a PEPP contract, prospective PEPP savers should be given all the necessary information to make an informed choice. Prior to the conclusion of the PEPP contract, retirement-related demands and needs should be specified and advice should be provided.*”

⁹ See Article 22 of the PEPP Regulation.