

EDPS Formal comments on the draft Commission Implementing Regulation on interoperability requirements and non-discriminatory and transparent procedures for access to metering and consumption data

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

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 29 July 2022, the European Commission consulted the EDPS on a draft Commission Implementing Regulation on interoperability requirements and non-discriminatory and transparent procedures for access to metering and consumption data ('the draft Implementing Act').
2. The objective of the draft Implementing Act is to facilitate the interoperability and increase the effectiveness of transactions that involve data access and exchange by market participants, and ultimately of energy services, promote competition in the retail market and help avoid excessive administrative costs for the eligible parties. To that end, it:
 - lays down interoperability requirements and rules for non-discriminatory and transparent procedures for access to metering and consumption data by final customers and eligible parties;
 - establishes, in order to ensure the application of interoperability requirements, a reference model for metering and consumption data that sets out the rules and procedures that Member States must apply to enable interoperability, and lists the electricity market participants that are concerned by this act and the roles and responsibilities they can assume separately or cumulatively as described in Articles 5, 6, 7 and 8 and in the Annex to the draft Implementing Act; and

¹ OJ L 295, 21.11.2018, p. 39.

- sets out non-discriminatory and transparent procedures for access to data that require reporting and publication of national practices applying the reference model².
3. The draft Implementing Act would be adopted pursuant to Article 24(2) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU³ ('the Directive'). The draft Implementing Act would also be the first from a series of implementing acts that should be developed setting out interoperability requirements and non-discriminatory and transparent procedures for access to data in order to fully implement Article 24 of the Directive⁴.
 4. The present formal comments of the EDPS are issued in response to the consultation by the European Commission, pursuant to Article 42(1) EUDPR. In this regard, the EDPS welcomes the reference to this consultation in recital 17 of the draft Implementing Act.
 5. These formal comments do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts⁵. 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 and are limited to the provisions of the draft Implementing Act that are relevant from a data protection perspective.

2. Comments

2.1. General comments

6. Smart metering systems entail certain risks to the rights and freedom of individuals, as already identified in previous guidance⁶. More recently, the EDPS summarised the

² Article 1 of the draft Implementing Act.

³ OJ L 158, 14.6.2019, p. 125.

⁴ Recital 2 of the draft Implementing Act.

⁵ In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

⁶ See [EDPS Opinion on the Commission Recommendation on preparations for the roll-out of smart metering systems](#), issued on 8 June 2012, [Article 29 Data Protection Working Party, Opinion 12/2011 on smart metering](#), issued on 4 April 2011, WP 183. Data gathered from smart meters can be considered as personal data since they are associated with an identified or identifiable user and can disclose information about his or her energy usage, thereby providing insight on the daily life of the data subject.

data protection concerns in his TechDispatch on smart meters⁷. While the monitoring of the energy consumed in short intervals can help to increase the efficiency and safety of electricity distribution, it also allows those who have access to the data to draw conclusions about the behaviour of energy consumers, including natural persons. Unless adequate safeguards are established to ensure that only authorised third parties may access and process data for clearly specified purposes and in compliance with applicable data protection law, the use of smart metering may lead to tracking the everyday lives of people in their own homes and thus allow detailed profiles of individuals based on their domestic activities⁸.

7. The Directive introduced a number of rules empowering consumers and providing them with the tools to access data on consumption and costs. Notably, smart metering systems that enable consumers to access objective and transparent consumption data should be interoperable and able to provide data required for consumer energy management systems. To that end, the Directive requires Member States to have due regard to the use of relevant available standards, including standards that enable interoperability on the level of the data model and the application layer, to best practices and to the importance of the development of smart grids and of the internal market for electricity⁹.
8. The Directive obliges Member States to strongly recommend to electricity market participants to introduce smart metering systems that are interoperable (Article 19) and lays down the general rules regarding the management, exchange and access to data. It also confers implementing powers to the Commission to determine interoperability requirements and non-discriminatory and transparent procedures for access to data of the final customers by eligible parties. These data include metering and consumption data, as well as data required for customer switching demand response and other services (Articles 23 and 24).
9. According to its recital 3, the draft Implementing Act applies to metering and consumption data. It lays down rules enabling final customers and eligible parties to access this data, in a timely, simple and secure manner and suppliers and service providers to access customers data, in a manner that the data is easy for them to understand and use, provided that customers have given their 'permission' for that access to data.
10. As the draft Implementing Act would regulate processing of personal data in the context of access to metering and consumption data by final customers and eligible

⁷ [EDPS TechDispatch 02/2019 on Smart Meters in Smart Homes](#), issued on 16 October 2019.

⁸ [EDPS TechDispatch 02/2019 on 'Smart Meters in Smart Homes](#), issued on 16 October 2019.

⁹ Article 19(3) of the Directive and recital 1 of the draft Implementing Act.

parties, the EDPS welcomes the references, in recital 16 of the draft Implementing Act, to the need to comply with Regulation (EU) 2016/679 ('GDPR') as well as with the Directive 2002/58/EC¹⁰ ('ePrivacy Directive').

2.2. Access to consumption and metering data

11. The EDPS welcomes the overall aim of the draft Implementing Act, which essentially aims at laying down provisions ensuring that final customers enjoy enhanced transparency and portability of their metering and consumption data. The draft Implementing Act, in accordance with Article 20 of the Directive, would indeed make it possible for final customers to retrieve their metering data and transmit them to the 'eligible parties' at their request.
12. Article 2(6) of the draft Implementing Act defines an 'eligible party' as an 'an entity offering energy-related services to final customers, such as suppliers, transmission and distribution system operators, aggregators, energy service companies, and balancing service providers'. In accordance with Article 23 of the Directive, the party responsible for data management must provide the eligible parties access to the data of the customer, in accordance with the applicable Union legal framework.
13. While Article 5 of the draft Implementing Act imposes on the metered data administrator the obligation to ensure seamless access to data for final customers and eligible parties, the EDPS considers that there is a need to revise Article 5(1)(d) of the draft Implementing Act. In particular, the EDPS considers that Article 5(1)(d) should be modified to specify that access to consumption and metering data by eligible parties may only be provided following a permission by the final customer as defined by Article 2(8) of the draft Implementing Act (i.e., an authorisation given by a final customer to an eligible party on the basis of a contractual agreement they have with this party) and in accordance with Article 6 GDPR and Article 5(3) of the ePrivacy Directive.
14. The current wording of Article 5(1)(d) of the draft Implementing Act refers not only to an "active permission", but also to "other legal or contractual basis for the data to be transferred". This wording would suggest that any of the legal bases under Article 6 GDPR could be applicable and, in particular, that sharing of data with eligible parties would not necessarily require a permission by the final customer. In contrast, the wording of recital 3 of the draft Implementing Act appears to refer to the permission of the customer as a pre-condition for such access. Moreover, recital 16 of the draft

¹⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p.37.

Implementing Act confirms that the ePrivacy Directive applies to the processing of personal data in the context of smart meters as they qualify as terminal equipment.

15. The EDPS recalls that Article 5(3) of the ePrivacy Directive requires consent of the subscriber or user prior to the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or end-user, unless such storage or access is strictly necessary in order for the provider of an information society service to provide the service explicitly requested by the subscriber or user. Moreover, any processing operations of personal data following these processing operations, including processing personal data obtained by accessing information in the terminal equipment, must also have a legal basis under Article 6 GDPR in order to be lawful¹¹. As a result, the transfer of metering and consumption data to an eligible party would require in principle the consent of the end-user, unless access to such information is strictly necessary in order for the provider of an information society service to provide the service explicitly requested by the subscriber or user.
16. In order to further clarify its relationship with EU data protection law, Article 5(1)(d) of the draft Implementing Act should be amended to clarify that the responsibilities of the metered data administrator include ensuring that personal data are only made available to eligible parties in compliance with Article 6 GDPR and Article 5(3) of the ePrivacy Directive.
17. In addition, the EDPS would welcome a recital stating that, in accordance with the GDPR, the performance of a contract can only be a legal ground for processing of personal data if the data subject is a party or if steps are being taken at the request of the data subject prior to entering into a contract. Furthermore, this recital should mention that the requirement of ‘necessity’ is not satisfied by the mere inclusion of a contractual clause providing for the processing. The controller should be able to demonstrate how the main subject matter of the specific contract with the data subject cannot, as a matter of fact, be performed if the specific processing of the personal data in question does not occur¹².

¹¹ The EDPS recalls that where consent is required pursuant to Article 5(3) ePrivacy Directive, consent under Article 6 GDPR would be most probably the adequate legal basis in relation to any processing of personal data following the storing of information, or gaining access to, information already stored in the terminal equipment of a subscriber or user. See also [EDPB-EDPS Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data \(Data Act\)](#), 4 May 2022, in particular at paragraphs 41-46.

¹² See also [EDPB-EDPS Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data \(Data Act\)](#), 4 May 2022, in particular at paragraph 28.

2.3. Purposes of the processing

18. The EDPS considers that the enacting terms of the draft Implementing Act should explicitly delineate the purposes for which data may be transferred to eligible parties. Data gathered from smart meters can allow customers' segmentation according to the customer's energy footprint in his or her private environment, his or her behavioural habits and preferences. To avoid unauthorised use and ensure purpose limitation, the purposes for which metering and consumption data may be transferred to eligible parties should be clearly delineated in the enacting terms of the draft Implementing Act, having regard also to the objectives of the Directive.

2.4. Categories of data

19. The draft Implementing Act specifies the categories of data that are to be made accessible to final customers and eligible parties, with Article 2 providing definitions of "metering and consumption data", "validated historical data" and "non-validated near-real time data". The EDPS welcomes that the draft Implementing Act clearly defines the categories of data concerned.

2.5. Roles and responsibilities

20. As stated in Article 1(2) of the draft Implementing Act, the draft Implementing Act, and its Annex, list the electricity market participants that are concerned by the draft Implementing Act and sets out the roles and responsibilities they can assume¹³. The draft Implementing Act does not, however, clarify roles and responsibilities of the various actors involved (metered data administrators; metering point administrators, data access providers, permission administrators, eligible parties)¹⁴ from a data protection perspective.
21. In this context, the EDPS recalls that the concepts of controller, joint controller and processor play a crucial role in the application of data protection law, since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice.
22. The EDPS recalls that in line with Article 26 of the GDPR '*where two or more controllers determine the purposes and means of the processing, they shall be joint controllers*'. This specification makes it clear that the concept of controllership does not necessarily

¹³ See recital 7 of the draft Implementing Act: "By establishing a reference model, this Regulation aims at ensuring that market participants have a mutual and clear understanding of the roles, responsibilities and procedures for access to data."

¹⁴ See recital 10 of the draft Implementing Act.

refer to one single entity, but can also involve multiple parties playing a role in a processing operation. As a result, and as confirmed by the CJEU, each of the actors involved have obligations under data protection law¹⁵. Insofar as the various actors act as joint controllers, they *'shall in transparent manner determine 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 (...)'*. In that case, the distribution of tasks between them should be laid down, preferably by law, or by an arrangement between the joint controllers.

23. In any event, the allocation of the responsibilities between the various actors should be clear and accessible in particular to ensure that the data subjects can fully exercise their rights under the GDPR. Therefore, the EDPS considers that the roles and responsibilities of the various actors involved as controller, joint controller or processor should be clearly assigned in the draft Implementing Act.

2.5. Retention period

24. Pursuant to Article 5(2) of the draft Implementing Act, metered data administrators shall keep complementary information on historical metering and consumption data in accordance with Annex I.4 points (a) and (b) to the Directive. For the duration of the retention period, the historical metering and consumption data must be kept available, along with the corresponding data access log information, for access by final customers and eligible parties on final customers' request.
25. In line with Annex I.4 points (a) and (b) to the Directive regarding access to complementary information on historical consumption, Member States must require that such information is made available, at the request of the final customer, to the supplier or service provider designated by the final customer. Complementary information on historical consumption shall include:
 - a) cumulative data for at least the three previous years or the period since the start of the electricity supply contract, if that period is shorter. The data shall correspond to the intervals for which frequent billing information has been produced; and
 - b) detailed data according to the time of use for any day, week, month and year, which is made available to the final customer without undue delay via the internet or the meter interface, covering the period of at least the previous 24 months or

¹⁵ Judgment of the Court (Grand Chamber) of 5 June 2018, *Wirtschaftsakademie v Schleswig-Holstein*, case C-210/16, ECLI:EU:C:2018:388, paragraph 29.

the period since the start of the electricity supply contract, if that period is shorter¹⁶.

26. In this context, the EDPS recalls that pursuant to the principle of storage limitation, personal data can be kept *'for no longer than is necessary for the purposes for which the personal data are processed'*¹⁷. While Annex I.4 points (a) and (b) to the Directive establishes a minimum retention period, it does not specify a maximum retention period. To ensure compliance with the principle of storage limitation, the EDPS recommends establishing a maximum retention period for the relevant categories of personal data concerned, or at least laying down criteria to determine such periods, taking into account purposes of the processing.

Brussels, 24 August 2022

(e-signed)

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¹⁶ Annex I.4 points (a) and (b) of Directive (EU) 2019/944 (emphasis added).

¹⁷ Article 5(1)(e) of the GDPR.