



EDPS Formal comments on the draft Commission Implementing Regulation laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the carbon border adjustment mechanism during the transitional period

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 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 ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 10 July 2023, the European Commission consulted the EDPS on the draft Commission Implementing Regulation laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the carbon border adjustment mechanism during the transitional period ('the draft Implementing Regulation').
2. The objective of the draft Implementing Regulation is to lay down rules for reporting obligations laid down in Article 35 of Regulation (EU) 2023/956² in respect of goods listed in Annex I to that Regulation imported into the customs territory of the Union during the transitional period from 1 October 2023 to 31 December 2025³.
3. The draft Implementing Regulation is adopted pursuant to Article 35(7) of Regulation (EU) 2023/956.
4. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 23 of the Proposal.

¹ OJ L 295, 21.11.2018, p. 39.

² Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (OJ L 130, 16.5.2023, p. 52).

³ See Article 1 of the draft Implementing Regulation.

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 acts⁴.
6. 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 Regulation that are relevant from a data protection perspective.

2. Comments

2.1. General comments

7. Regulation (EU) 2023/956 lays down reporting obligations for the purposes of carbon border adjustment mechanism during the transitional period from 1 October 2023 until 31 December 2025. During the transitional period, importers or indirect customs representatives are to report on the quantity of imported goods, direct and indirect emissions embedded in them, and any carbon price due for those emissions, including carbon prices due for emissions embedded in relevant precursor materials.
8. Article 32 of the Regulation (EU) 2023/956 provides that during the transitional period from 1 October 2023 until 31 December 2025, the obligations of the importer under the Regulation shall be limited to the reporting obligations set out in Articles 33, 34 and 35 of that Regulation. Article 35(7) empowers the Commission to adopt implementing rules of those reporting requirements. In order to ensure the efficient implementation of reporting obligations, an electronic database, the CBAM Transitional Registry, should be established to collect the information reported during the transitional period. The CBAM Transitional Registry should be interoperable with the Uniform User Management and Digital Signature (UUM&DS), Economic Operator Registration and Identification (EORI), Surveillance system for the purpose of retrieving information on Customs Imports Declarations for goods listed in Annex I of Regulation (EU) 2023/956 for checks of the CBAM reports and compliance, developed through the UCC Surveillance 3 (SURV3) and the TARIC System⁵. The CBAM Transitional Registry should be the basis for the establishment of the CBAM Registry pursuant to Article 14 of Regulation (EU) 2023/956.

⁴ 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.

⁵ See Article 17(1) and Recitals 15, 18 and 19 of the draft Implementing Regulation.

9. As already mentioned, the EDPS welcomes this consultation regarding the draft Implementing Regulation. Nevertheless, he regrets that he had not been consulted during the legislative procedure on the basic act, given that Regulation (EU) 2023/956 introduced provisions that could have an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data⁶.

2.2. Applicable data protection rules

10. The EDPS positively notes recital 22 of the Draft Implementing Regulation, which states that the draft Implementing Regulation “respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and notably the right to protection of personal data”. In addition, the recital explains that the personal data of economic operators and other persons processed by the electronic systems should be restricted to the dataset set out in Annex I of the Regulation⁷. At the same time, in the interest of completeness and legal certainty, the EDPS recommends indicating in this recital as well that where it is necessary for the purposes of the Implementing Regulation to process personal data, this should be carried out in accordance with Union law on the protection of personal data. In that regard, any processing of personal data by Member States' authorities would be subject to the Regulation (EU) 2016/679 ('GDPR')⁸ and national requirements on the protection of natural persons with regard to the processing of personal data, and any processing of personal data by the Commission would be subject to the EUDPR.
11. Having this in mind, the EDPS welcomes Articles 33(2) and 37 of the draft Implementing Regulation which clearly designate the roles and responsibilities of the Commission and Member States with regard to the processing of personal data in the CBAM Transitional Registry, and introduce coordinated supervision in line with Article 62 EUDPR. However, the EDPS also notes the limitations of the possibility to modify and correct the CBAM reports, provided for in Article 9 of the draft Implementing Regulation, both in time (within one year after the end of the relevant reporting quarter being the maximum) and in persons authorised to request the modifications and corrections (only reporting declarant). Given that the CBAM report contains personal data (not limited to those of the reporting declarant), the EDPS draws attention to the fact that, in relation to personal data, Article 16 of the GDPR gives the right to rectification to all data subjects and this right is not limited in time.

⁶ See to that effect Recital 75 in relation to Articles 5,9,10,14 and 17 of the Regulation.

⁷ From what can be seen from Annex I, processing of personal data would be limited to identification numbers, names, addresses, phone numbers and e-mail addresses of data subjects.

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) (Text with EEA relevance) (OJ L 119, 4.5.2016, p. 1).

The EDPS therefore considers it necessary to clarify this in the draft Implementing Regulation as well.

12. The EDPS also welcomes Articles 36 and 39 of the draft Implementing Regulation addressing system security and the assessments of the electronic systems in view of ensuring the security and integrity of the CBAM Transitional Registry and its components, as well as the confidentiality of the data processed within. However, in the interest of completeness and legal certainty, the EDPS recommends including in Recital 16 a reference to the principle of data protection by design and by default under Article 27 EUDPR and Article 25 GDPR, as well as to security of processing under Article 33 EUDPR and Article 32 GDPR.

2.3. Purpose limitation

13. The EDPS would like to underline that, pursuant to Article 5(1)(b) of the GDPR, personal data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.
14. Having this in mind, the EDPS appreciates the attempt of the Commission to reflect the principle of purpose limitation in Article 33(1) of the draft Implementing Regulation which reads: *“The personal data registered in the CBAM Transitional Registry, and the components of electronic systems developed at national level shall be processed for the purposes of implementing the Regulation (EU) 2023/956 having regard to the specific objectives of those databases as set out in in this Regulation.”*
15. However, for the sake of legal clarity, the EDPS considers that the sole reference to the basic act (Regulation (EU) 2023/956) does not suffice and that specific categories of purposes for which the personal data could be processed must be listed in the draft Implementing Regulation in an exhaustive manner. In addition, the EDPS reminds that these purposes must be limited to what is necessary and proportionate to safeguard the objectives referred to in Article 23(1) GDPR.

2.4. Storage period

16. The EDPS welcomes the introduction, in Article 38 of the draft Implementing Regulation of a maximum retention period for the storage of personal data in the CBAM Transitional Registry. The EDPS underlines however that, in line with the storage limitation principle, personal data should be kept in a form which permits the identification of data subjects for no longer than necessary for the purposes for which personal data are processed. The EDPS recalls that the period of time should be as short as possible in relation to the purpose pursued and must be justified in order to

ensure that the storage is limited to what is necessary for the purpose(s) pursued. In this regard, the EDPS notes that the draft Implementing Regulation does not provide any information to justify the proposed retention period of 5 years. As limiting the retention of personal data constitutes an important safeguard to protect individuals against misuse of their personal data, the EDPS recommends to carefully assess and justify the necessity and proportionality of the proposed retention period.

17. In addition, the EDPS notes that, according to Article 38(2), where an appeal has been lodged or where court proceedings have begun involving data stored in the CBAM Transitional Registry, those data can be retained until the appeal procedure or court proceedings are terminated. In these cases, in line with the purpose limitation principle, the EDPS suggests to limit the possible use of the personal data kept for this extended period to this specific appeal procedure or court proceeding only.

Brussels, 28 July 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI