

EDPS Formal comments on the draft Commission Implementing Regulation laying down implementing technical standards for the application of Directive 2011/61/EU of the European Parliament and of the Council with regard to the form and content of the information to be notified in respect of the cross-border activities alternative investment fund managers and the exchange of information between competent authorities on cross-border notification letters; the draft Commission Delegated Regulation supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of managers of alternative investment funds (AIFMs); the draft Commission Delegated Regulation supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of management companies and undertakings for collective investment in transferable securities (UCITS); and the draft Commission Implementing Regulation laying down implementing technical standards for the application of Directive 2009/65/EC of the European Parliament and of the Council with regard to the form and content of the information to be notified in respect of the cross-border activities of UCITS management companies, undertakings for collective investment in transferable securities (UCITS), the exchange of information between competent authorities on cross-border notification letters, and amending Regulation (EU) No 584/20

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 4 October 2023, the European Commission consulted the EDPS on the draft Commission Implementing Regulation laying down implementing technical standards for the application of Directive 2011/61/EU of the European Parliament and of the Council with regard to the form and content of the information to be notified in respect of the cross-border activities alternative investment fund managers and the exchange of information between competent authorities on cross-border notification letters ('the draft AIFM Implementing Regulation'); the draft Commission Delegated Regulation supplementing Directive 2011/61/EU of the European Parliament and of

¹ OJ L 295, 21.11.2018, p. 39.

the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of managers of alternative investment funds ('the draft AIFM Delegated Regulation'); the draft Commission Delegated Regulation supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of management companies and undertakings for collective investment in transferable securities ('the draft UCITS Delegated Regulation'); and the draft Commission Implementing Regulation laying down implementing technical standards for the application of Directive 2009/65/EC of the European Parliament and of the Council with regard to the form and content of the information to be notified in respect of the cross-border activities of UCITS management companies, undertakings for collective investment in transferable securities (UCITS), the exchange of information between competent authorities on cross-border notification letters, and amending Regulation (EU) No 584/20 ('the draft UCITS Implementing Regulation'), the four together hereinafter 'the draft Regulations'. The draft AIFM Implementing Regulation and the draft AIFM Delegated Regulation are accompanied by 5 Annexes specifying Implementing Technical Standards ('ITS'); the draft UCITS Delegated Regulation and the draft UCITS Implementing Regulation are accompanied by 7 Annexes specifying ITS.

2. The draft AIFM Implementing Regulation aims at specifying Article 31(5), second subparagraph, Article 32(8), second subparagraph and Article 33(8), second subparagraph of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Funds Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EU) No 1060/2009 and (EU) No 1095/2010 ('Directive 2011/61')²; the draft AIFM Delegated Regulation aims at specifying Article 33(7), second subparagraph of Directive 2011/61/EU; the draft UCITS Delegated Regulation aims at specifying Article 17(10), second subparagraph, Article 18(5), second subparagraph, and Article 20(5), second subparagraph of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ('Directive 2009/65')³; the draft UCITS Implementing Regulation aims at specifying Article 17(10), fourth subparagraph, Article 18(5), fourth subparagraph, Article 20(5), fourth subparagraph, and Article 95(2), second subparagraph of Directive 2009/65.
3. 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 8 of the draft UCITS Delegated Regulation and recital 9 of the AIFM Delegated Regulation.

² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1.

³ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), OJ L 302, 17.11.2009, p. 32.

4. 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.
5. 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 Regulations that are relevant from a data protection perspective.

2. Comments

6. The EDPS recommends introducing in the draft AIFM Implementing Regulation and in the draft UCITS Implementing Regulation a recital that refers to the consultation of the EDPS in accordance with Article 42(1) of the EUDPR. The EDPS also recommends introducing in the draft AIFM Implementing Regulation and in the draft UCITS Implementing Regulation a recital that refers to the applicability of Regulation (EU) 2016/679⁵ ('the GDPR'). The EDPS welcomes that both references are already included in recitals 8 and 9 of the draft AIFM Delegated Regulation and in recitals 7 and 8 of the draft UCITS Delegated Regulation.
7. The EDPS observes that the processing under the draft Regulations mainly concerns non-personal data and data related to legal persons (e.g., management companies). However, the processing of personal data may also concern personal data (e.g., in case of names, addresses, email address or other contact details related to an identified or identifiable natural person, notably the persons responsible for the management or termination of a branch). The EDPS notes that personal data processing in the context of the draft Regulations should remain adequate, relevant and limited to what is necessary in relation to the purposes of the processing, in line with the data protection principle of data minimisation⁶. Nonetheless, the EDPS has no comments to be made having regard to the types of personal data to be provided to competent authorities as specified in the Annexes to the draft Regulations.

Brussels, 10 October 2023

(e-signed)
Wojciech Rafał WIEWIÓROWSKI

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 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.

⁶ Article 5(1)(c) GDPR.