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COVER NOTE

From:	The European Data Protection Supervisor
date of receipt:	3 February 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

Subject:	Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC; and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU - Opinion of the European Data Protection Supervisor
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Delegations will find attached the opinion of the European Data Protection Supervisor on the above subjects.



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

2 February 2023

Opinion 2/2023

on the Proposals for Directives
on standards for equality
bodies in the field of equal
treatment

edps.europa.eu

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 'With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3) '...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

Under Article 42(1) of Regulation 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data'.

This Opinion relates to the Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (COM(2022)689 final) and the Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation (COM(2022)688 final). This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposals that are relevant from a data protection perspective.

Executive Summary

On 7 December 2022, the European Commission issued a Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and a Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU.

The objective of the proposals is to lay down minimum requirements for the functioning of equality bodies to improve their effectiveness and guarantee their independence in order to strengthen the application of the principle of equal treatment.

The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 8 December 2022, pursuant to Article 42(1) of EUDPR.

The EDPS welcomes such objectives. He notes that the reports, which the equality bodies would provide under Article 15, should not contain personal data and that the cooperation set out under Article 12, as well as the monitoring under Article 16 should not involve the processing of personal data.

He focuses therefore his recommendations on Article 18 concerning the processing of personal data. In particular, he recommends enhancing legal certainty for the equality bodies by considering Article 18 of the Proposals as the legal basis for the data processing and to make an explicit link to Article 9 GDPR with regard to special categories of personal data. He recommends clarifying the scope of Article 18(1) of the Proposals to cover not only the collection but also the subsequent processing of personal data by equality bodies, as necessary, exhaustively listing all special categories of personal data within the meaning of the GDPR that may be processed on the basis of the Proposals as well as clarifying the suitable and specific measures to safeguard the fundamental rights and the interests of the data subject required in Article 9(2)(g) GDPR.

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

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 7 December 2022, the European Commission issued a Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC² and Article 12 of Directive 2004/113/EC³ ('the Equal Treatment Proposal')⁴ and a Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation and deleting Article 20 of Directive 2006/54/EC⁵ and Article 11 of Directive 2010/41/EU⁶ ('the Equal Opportunities Proposal')⁷.
2. The objective of the Equal Treatment Proposal⁸ is to lay down minimum requirements for the functioning of equality bodies to improve their effectiveness and guarantee their independence in order to strengthen the application of the principle of equal treatment as derived from Council Directives 79/7/EEC⁹ (which prohibits discrimination based on sex, in matters of social security), 2000/43/EC (which prohibits discrimination based on racial or ethnic origin), 2000/78/EC¹⁰ (which prohibits discrimination on the grounds of religion or

¹ OJ L 295, 21.11.2018, p. 39.

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22).

³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37).

⁴ COM(2022)689 final.

⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, p. 23).

⁶ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.7.2010, p. 1).

⁷ COM(2022)688 final.

⁸ Article 1(1) and recitals 3 to 7 of the Equal Treatment Proposal.

⁹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.1.1979, p. 24).

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

belief, disability, age or sexual orientation as regards employment, occupation and vocational training) and 2004/113/EC (which prohibits discrimination based on sex in access to and supply of goods and services).

3. The Equal Treatment Proposal is part of several strategies and action plans adopted to achieve a Union of Equality: the gender equality strategy¹¹, the anti-racism action plan¹², the Roma strategic framework for equality, inclusion and participation¹³, the LGBTIQ equality strategy¹⁴, and the strategy for the rights of persons with disabilities¹⁵. It was also referred to in the strategy on combating antisemitism and fostering Jewish life¹⁶.
4. The objective of the Equal Opportunities Proposal¹⁷ is to lay down minimum requirements for the functioning of equality bodies to improve their effectiveness and guarantee their independence in order to strengthen the application of the principle of equal treatment as derived from Directives 2006/54/EC and 2010/41/EU. This Proposal is complementary to EU legislation adopted in the field of victims' rights¹⁸, access to justice¹⁹ and to combat strategic lawsuits against public participation²⁰. The 2022 Rule of Law Report highlights that equality bodies need structural guarantees of independence and sufficient resources to work effectively, and several of these bodies in the Member States continue to face challenges^{21,22}.
5. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 8 December 2022, pursuant to Article 42(1) EUDPR. The EDPS welcomes the reference to this consultation in recital 50 of the Equal Treatment Proposal and recital 49 of the Equal Opportunities Proposal. In this regard, the EDPS also positively notes that he was already previously informally consulted pursuant to recital 60 EUDPR on the Equal Treatment draft Proposal.

¹¹ COM(2020)152 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en.

¹² COM(2020)565 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en.

¹³ https://ec.europa.eu/info/publications/new-eu-roma-strategic-framework-equality-inclusion-and-participation-full-package_en.

¹⁴ COM(2020)698 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality-lgbtq-equality-strategy-2020-2025_en.

¹⁵ COM(2021)101 <https://ec.europa.eu/social/main.jsp?catId=1484>.

¹⁶ COM(2021) 615 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4990. See Explanatory memorandum, page 4.

¹⁷ Article (1)(1) of the Proposal.

¹⁸ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57).

¹⁹ Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26, 31.1.2003, p. 41).

²⁰ Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation').

²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report (COM(2022) 500 final) https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

²² Explanatory memorandum, page 6.

2. General remarks

6. The EDPS welcomes recital 48 of the Equal Treatment Proposal and recital 47 of the Equal Opportunities Proposal recalling that the processing of personal data by equality bodies is to be carried out in full compliance of the Regulation (EU) 2016/679²³ ('GDPR').
7. It is clear from the text of the Proposals that, in order to fulfil their tasks, equality bodies would inevitably need to process personal data, including special categories of personal data²⁴.
8. Article 6(1) of the GDPR sets out an exhaustive and restrictive list of the cases in which processing of personal data can be regarded as lawful. To be lawful, processing must fall within one of the cases provided for in those provisions²⁵. In addition, Article 9(1) of the GDPR provides for the prohibition, inter alia, of processing of personal data revealing racial or ethnic origin, religious or philosophical beliefs and the processing of data concerning a natural person's sex life or sexual orientation.
9. The purpose of Article 9(1) GDPR is to ensure enhanced protection as regards processing which, because of the particular sensitivity of the data processed, is liable to constitute a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter²⁶.
10. The EDPS recalls that, with regard to the processing of special categories of personal data, the controller must be able to identify both a legal basis under Article 6 GDPR and an exception for processing special categories of data under Article 9 (i.e. an exemption from the general rule that one should not process special categories of data), where applicable²⁷. In other words: both provisions should be applied cumulatively.
11. The EDPS understands, in particular from recitals 48 and 49 of the Equal Treatment Proposal and recitals 47 and 48 of the Equal Opportunities Proposal, that the Commission's plan is to leave the choice of the legal basis for the processing of personal data by equality bodies to the national transposition of the future Directives. However, the EDPS would nonetheless like to offer an alternative path and include the relevant elements in the Proposals directly, in order to enhance legal certainty (in this regard, see the recommendations in the next section below).

²³ 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).

²⁴ For example, when receiving and handling complaints of discrimination (see Article 6(2) of the Proposals).

²⁵ Judgment of the Court of Justice of 1 August 2022, OT a.o., C 184/20, ECLI:EU:C:2022:601, paragraph 67.

²⁶ Judgment of the Court of Justice of 1 August 2022, OT a.o., C 184/20, ECLI:EU:C:2022:601, paragraph 126.

²⁷ See also European Data Protection Board, Guidelines 3/2019 on processing of personal data through video devices, Version 2.0, 29 January 2020, paragraph 68.

3. On the processing of special categories of personal data and access to personal data

12. The EDPS welcomes Article 18 of the Proposals according to which equality bodies may collect personal data only where necessary for the fulfilment of a task under the Proposals. However, given the processing of special categories of personal data and against the background of the considerations set out above, the EDPS invites the legislator to consider Article 18 of the Proposals as the legal basis under Union law for the processing of special categories of personal data, and to make an explicit link to Article 9 GDPR.
13. More specifically, the EDPS therefore recommends clarifying the scope of Article 18(1) of the Proposals, which currently covers only the “collection” of personal data, to include also subsequent processing of personal data as may be necessary, in line with recital 47 of the Equal Opportunities Proposal and recital 48 of the Equal Treatment Proposal.
14. Secondly, the EDPS notes that the list of special categories of personal data contained in Article 18(2) of the Proposals (data on racial or ethnic origin, religion or belief, disability or sexual orientation) does not include all the categories of sensitive data listed in Article 9(1) GDPR. Consequently, he invites the legislator to consider whether equality bodies process additional categories of sensitive data linked to protected characteristics, such as data concerning health, political opinions, trade union memberships, biometric or genetic data or sex life. The EDPS recommends exhaustively listing all special categories of personal data within the meaning of the GDPR that may be processed on the basis of the Proposals as well as clarifying the suitable and specific measures to safeguard the fundamental rights and the interests of the data subject required in Article 9(2)(g) GDPR.
15. As a minimum, the EDPS recommends redrafting Article 18(2) of the Proposals to clearly require that Member States ensure that their national law transposing the future Directives fulfil the conditions of Article 9(2)(g) GDPR. In particular, national transposition law must exhaustively list the special categories of personal data that may be processed, and provide suitable and specific measures as required in that provision.

4. Other comments

16. The EDPS welcomes Article 6(3) subparagraph 2 of the Proposals specifying the obligation for equality bodies to inform victims of discrimination on the processing of personal data. In addition, he positively notes that Article 14 of the Proposals on data collection and access to equality data clarifies that the disaggregated data would be anonymised or, where not possible, pseudonymised. The EDPS underscores that pseudonymisation should indeed not be seen as a synonym of anonymisation and that, as a result, pseudonymised data would still constitute personal data in the meaning of EU data protection law.
17. The EDPS notes that Article 12 of the Proposals would set out an obligation on Member States to ensure that equality bodies have appropriate mechanisms in place to cooperate not only with other equality bodies in the same Member State but also with relevant public or private entities in other member states or at Union or international level. In this regard, the EDPS welcomes recital 39 of the Equal Treatment Proposal and recital 38 of the Equal

Opportunities Proposal clarifying that such cooperation should not imply the processing of personal data.

18. Lastly, the EDPS welcomes recitals 42 and 44 of the Equal Treatment Proposal and recitals 41 and 43 of the Equal Opportunities Proposals clarifying that the reports which the equality bodies must provide under Article 15 of the Proposals should not contain any personal data and that the monitoring of the application of the future Directives under Article 16 of the Proposals should not entail the processing of personal data.

5. Conclusions

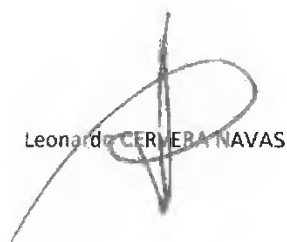
19. In light of the above, the EDPS makes the following recommendations:

- (1) to enhance legal certainty for the equality bodies by considering Article 18 of the Proposals as the legal basis for the data processing and to make an explicit link to Article 9 GDPR with regard to the processing of special categories of personal data;*
- (2) to clarify the scope of Article 18(1) of the Proposals to cover not only the collection but also the subsequent processing of personal data by equality bodies, as necessary;*
- (3) to exhaustively list all special categories of personal data within the meaning of the GDPR that may be processed on the basis of the Proposals as well as clarify the suitable and specific measures to safeguard the fundamental rights and the interests of the data subject required in Article 9(2)(g) GDPR.*

Brussels, 2 February 2023

P.O.

Leonardo CERMEBA NAVAS



(e-signed)

Wojciech Rafał WIEWIÓROWSKI