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From:	Mr Wojciech Rafal WIEWIOROWSKI, European Data Protection Supervisor
date of receipt:	19 August 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Formal comments of the European Data Protection Supervisor on the Proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the EP and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the EP and of the Council.

Delegations will find attached the above document.

Encl.: Formal comments

E-MAIL

WOJCIECH RAFAŁ WIEWIÓROWSKI
SUPERVISOR

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H.E. Ambassador Iztok JARC
Permanent Representative of
Slovenia to the European Union
Presidency of the Council of the
European Union

Mr Jeppe TRANHOLM-MIKKELSEN
Secretary General
Council of the European Union
1048 Brussels

Brussels, 18 August 2021
WRW/AZ/mt/D(2021)1688 **C2021-0680**
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Subject: Formal Comments[1] of the European Data Protection Supervisor on the Proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council

Your Excellency,
Mr Secretary-General,

Having regard to Article 42(1) of 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, please find enclosed Formal Comments on the Proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council.

[1] Article 20(1) of the EDPS Rules of Procedure provide that "*In response to requests from the Commission pursuant to Article 42(1) of the Regulation, the EDPS shall issue opinions or formal comments.*"

We have sent a copy of these Formal Comments to the President of the European Commission and the President of the European Parliament.

Yours sincerely,

p.o.



Wojciech Rafał WIEWIÓROWSKI
(e-signed)

Encl.: Formal Comments

Cc: Mr Serge DE BIOLLEY, Director for Justice, Secretariat General of the Council

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Formal comments of the EDPS on the Proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council

1. Introduction and background

- The following comments concern the Commission proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council ('the Proposal')[1], which lays down essential rules on the safety of consumer products placed or made available on the market.

- These comments are provided in reply to the formal request by the Commission on 1 July 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')[2]. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.

- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. 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.

2. EDPS Comments

- The EDPS welcomes the references to the data protection rules in Recital 80[3] and in Article 36(5) and (6)[4] of the Proposal.

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[1] The Commission proposal on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council, 2021/0170 (COD).

[2] 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, OJ L 295, 21.11.2018.

[3] Recital 80 states that *"[a]ny processing of personal data for the purpose of this Regulation should be in compliance with Regulations (EU) 2016/679 and (EU) 2018/1725. When consumers report a product in the Safety Gate, only those personal data will be stored that are necessary to report the dangerous product and for a period not exceeding five years after such data have been encoded. Manufacturers and importers should hold the register of consumer complaints only as long as it is necessary for the purpose of this Regulation. Manufacturers and importers, when they are natural persons should disclose their names to ensure that the consumer is able to identify the product for purpose of traceability"*.

[4] Article 36(5) states that *"[a]ny information exchange under this Article, to the extent it involves personal data, shall be carried out in accordance with Union data protection rules. Personal data shall only be transferred*

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- The EDPS notes that the Proposal does not impose on online marketplaces a general monitoring obligation nor the obligation to actively seek facts or circumstances indicating illegal activity, such as the sale of dangerous products online. Recital 32[5] in fact prohibits the imposition of such obligations, without prejudice to the obligation on online marketplaces to expeditiously remove content upon actual knowledge of the illegality of the content, for instance in case of order to act against specific items of illegal content[6]. In particular, under Article 20(4) of the Proposal, "*[o]nline marketplaces shall give an appropriate answer without undue delay, and in any event within five working days, in the Member State where the online marketplace operates, to notices related to product safety issues and dangerous products received in accordance with [Article 14] of Regulation (EU) [.../...] on a Single Market for Digital Services (Digital Service Act) and amending Directive 2000/31/EC.*"[7]

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to the extent that such exchange is necessary for the sole purpose of the protection of consumers' health or safety." and Article 36(6) states that *"[t]he information exchanged pursuant to this Article shall be used for the sole purpose of the protection of consumers' health or safety and respect confidentiality rules."*

[5] Recital 32 states that "*The obligations imposed by this Regulation on online marketplaces should* ***neither amount to a general obligation to monitor the information which they transmit or store, nor to actively seek*** *facts or circumstances indicating illegal activity, such as the sale of dangerous products online. Online marketplaces should, nonetheless,* ***expeditiously remove content referring to dangerous products from their online interfaces, upon obtaining actual knowledge or, in the case of claims for damages, awareness*** *of the illegal content, in particular in cases where the online marketplace has been made aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question, in order to benefit from the exemption from liability for hosting services under the 'Directive on electronic commerce' and the [Digital Services Act]. Online marketplaces should* ***process notices concerning content referring to unsafe products, received in accordance with [Article 14] of Regulation (EU) .../...[the Digital Services Act]****, within the additional timeframes established by this Regulation."* (emphasis added)

[6] Proposal for a Regulation of the European Parliaments and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

[7] Article 14 of the Proposal for a Digital Services Act provides: *Notice and action mechanisms*

1. Providers of hosting services shall put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Those mechanisms shall be easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means.

2. The mechanisms referred to in paragraph 1 shall be such as to facilitate the submission of sufficiently precise and adequately substantiated notices, on the basis of which a diligent economic operator can identify the illegality of the content in question. To that end, the providers shall take the necessary measures to enable and facilitate the submission of notices containing all of the following elements:

(a) an explanation of the reasons why the individual or entity considers the information in question to be illegal content;

(b) a clear indication of the electronic location of that information, in particular the exact URL or URLs, and, where necessary, additional information enabling the identification of the illegal content;

(c) the name and an electronic mail address of the individual or entity submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU;

(d) a statement confirming the good faith belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete.

3. Notices that include the elements referred to in paragraph 2 shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned.

In this regard, the EDPS points out that the considerations made in the EDPS Opinion 1/2021 on the Proposal for a Digital Services Act[8], regarding online content/speech (finding and taking down illegal content) moderation, also apply *mutatis mutandis* to the activity consisting in finding and taking down dangerous products offered online[9].

Also in this case, the EDPS notes that in practice **efforts to identify, detect or remove illegal content can involve processing of personal data**, in particular where they make use of automated means.

The EDPS stresses that **not all forms of monitoring of sales of dangerous products require attribution to a specific data subject**. In accordance with the requirements of data minimisation and data protection by design and by default, **such online monitoring should, insofar as possible, not involve any processing of personal data**. The EDPS encourages the co-legislature to include a recital to this effect. Where processing of personal data is necessary, such data should

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4. Where the notice contains the name and an electronic mail address of the individual or entity that submitted it, the provider of hosting services shall promptly send a confirmation of receipt of the notice to that individual or entity.
5. The provider shall also, without undue delay, notify that individual or entity of its decision in respect of the information to which the notice relates, providing information on the redress possibilities in respect of that decision.
6. Providers of hosting services shall process any notices that they receive under the mechanisms referred to in paragraph 1, and take their decisions in respect of the information to which the notices relate, in a timely, diligent and objective manner. Where they use automated means for that processing or decision-making, they shall include information on such use in the notification referred to in paragraph 4."
We also recall that according to Article 20(5) of the Proposal:
"*For the purpose of the requirements of Article 22(7) of Regulation (EU) [.../...] on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, online marketplaces shall design and organise their online interface in a way that enables traders to provide the following information for each product offered and ensures that it is displayed or otherwise made easily accessible by consumers on the product listing:*
(a) name, registered trade name or registered trade mark of the manufacturer, as well as the postal or electronic address at which they can be contacted;
(b) where the manufacturer is not established in the Union, the name, address, telephone number and electronic address of the responsible person within the meaning of Article 15 (1);
(c) information to identify the product, including its type and, when available, batch or serial number and any other product identifier;
(d) any warning or safety information that is to be affixed on the product or to accompany it in accordance with this Regulation or the applicable Union harmonisation legislation in a language which can be easily understood by consumers."

[8] EDPS Opinion 1/2021 on the Proposal for a Digital Services Act published on 10 February 2021, available at https://edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_services_act_en.pdf, p.8-9.

[9] On the interface between the Proposal and the Digital Services Act, see recital (27) of the Proposal: (emphasis added) "*Given the important role played by online marketplaces when intermediating the sale of products between traders and consumers, such actors should have more responsibilities in tackling the* ***sale of dangerous products online****. Directive 2000/31/EC of the European Parliament and of the Council provides the general framework for e-commerce and lays down certain obligations for online platforms. Regulation [.../...] on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC30 regulates* ***the responsibility and accountability of providers of intermediary services online with regard to illegal contents, including unsafe products****. That Regulation applies without prejudice to the rules laid down by Union law on consumer protection and product safety. Accordingly, building on the horizontal legal framework provided by that Regulation, specific requirements essential to effectively tackle the sale of dangerous products online should be introduced, in line with Article [1(5), point (h)] of that Regulation.*"

only concern data necessary for this specific purpose, while applying all the other principles of the Regulation (EU) 2016/679.[10] In the interest of legal certainty for all parties involved, the EDPS recommends further specifying in which circumstances efforts to combat "the sale of dangerous products online" legitimise processing of personal data.[11]

- Concerning Article 7 of the Proposal that enumerates *"aspects that shall be taken into account in particular when assessing whether a product is safe"*, the EDPS recommends considering data protection aspects in case the products involve personal data processing operations. In this context, the EDPS recalls the need to conduct a data protection impact assessment before processing data using innovative technologies if the processing is likely to result in a high risk to the rights and freedoms of the individuals, in accordance with Article 35 GDPR[12].

- The EDPS welcomes Article 8(2) on the obligations of manufacturers that clearly specifies both the purpose and retention time for the personal data stored in the register of complaints. As regards Article 8(8), the EDPS recommends that, when products involve personal data processing operations, an information notice is added to the necessary accompanying documentation in order to reinforce transparency principle (i.e. clarifying who is the controller, which might be different from the manufacturer). This information notice could be also displayed in electronic version whenever possible.

- Article 24 of the Proposal contains the notification system through the Safety Gate of products presenting a risk. In this context, the EDPS recalls that in case of a data breach involving personal data, the notification obligation under Article 33 GDPR[13]

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[10] See paragraph 25 of EDPS Opinion 1/2021.
[11] See paragraph 26 of EDPS Opinion 1/2021.
[12] Article 35 (1) GDPR states that : *"[w]here a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks."*
Article 35 (3) GDPR states that *"[a] data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:*
a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;
b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or
c) a systematic monitoring of a publicly accessible area on a large scale."
[13] Article 33(1) GDPR states that : *"[i]n the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay."*

has to be observed and, in case of need, controllers have to notify the breach to the competent supervisory authority.

- Finally, the EDPS welcomes the establishment of the Consumer Safety Network in Article 28 of the Proposal. Building, among others, on the experience of the Digital Clearinghouse and given the importance of cooperation with competent authorities in the area of consumer law, the EDPS recommends adding in Article 28(1) of the Proposal an explicit reference to data protection authorities, in addition to those already mentioned. This should ensure in particular that all relevant information (e.g., information concerning risk assessments and dangerous products) can be exchanged with the relevant oversight authorities, including data protection authorities.

Brussels, 18 August 2021

p.o.

Leonardo CERVERA NAVAS

Wojciech Rafał WIEWIÓROWSKI
(e-signed)