

Opinion of the Board (Art. 64)



EDPB Plenary meeting, 04/05.12.2018

Opinion 27/2018 on the draft list of the competent supervisory authority of Slovenia regarding the processing operations subject to the requirement of a data protection impact assessment (Article 35.4 GDPR)

Adopted on 4 December 2018

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The European Data Protection Board

Having regard to Article 63, Article 64 (1a), (3) - (8) and Article 35 (1), (3), (4), (6) of the Regulation 2016/679/EU 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 (hereafter “GDPR”),

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018,

Having regard to Article 10 and 22 of its Rules of Procedure of 25 May 2018,

Whereas:

(1) The main role of the Board is to ensure the consistent application of the Regulation 2016/679 (hereafter GDPR) throughout the European Economic Area. In compliance with article 64.1 GDPR, the Board shall issue an opinion where a supervisory authority (SA) intends to adopt a list of processing operations subject to the requirement for a data protection impact assessment pursuant to article 35.4 GDPR. The aim of this opinion is therefore to create a harmonised approach with regard to processing that is cross border or that can affect the free flow of personal data or natural person across the European Union. Even though the GDPR doesn't impose a single list, it does promote consistency. The Board seeks to achieve this objective in its opinions firstly by requesting SAs to include some types of processing in their lists, secondly by requesting them to remove some criteria which the Board doesn't consider as necessarily creating high risks for data subjects, and finally by requesting them to use some criteria in a harmonized manner.

(2) With reference to Article 35 (4) and (6) GDPR, the competent supervisory authorities shall establish lists of the kind of processing operations which are subject to the requirement for a data protection impact assessment (hereinafter “DPIA”). They shall, however, apply the consistency mechanism where such lists involve processing operations, which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

(3) While the draft lists of the competent supervisory authorities are subject to the consistency mechanism, this does not mean that the lists should be identical. The competent supervisory authorities have a margin of discretion with regard to the national or regional context and should take into account their local legislation. The aim of the EDPB assessment/opinion is not to reach a single EU list but rather to avoid significant inconsistencies that may affect the equivalent protection of the data subjects.

(4) The carrying out of a DPIA is only mandatory for the controller pursuant to Article 35 (1) GDPR where processing is “likely to result in a high risk to the rights and freedoms of natural persons”. Article 35 (3) GDPR illustrates what is likely to result in a high risk. This is a non-exhaustive list. The

Working Party 29 in the Guidelines on data protection impact assessment¹, as endorsed by the EDPB², has clarified criteria that can help to identify when processing operations are subject to the requirement for a DPIA. The Working Party 29 Guidelines WP248 state that in most cases, a data controller can consider that a processing meeting two criteria would require a DPIA to be carried out, however, in some cases a data controller can consider that a processing meeting only one of these criteria requires a DPIA.

(5) The lists produced by the competent supervisory authorities support the same objective to identify processing operations likely to result in a high risk and processing operations, which therefore require a DPIA. As such, the criteria developed in the Working Party 29 Guidelines should be applied when assessing whether the draft lists of the competent supervisory authorities does not affect the consistent application of the GDPR.

(6) Twenty-two competent supervisory authorities received an opinion on their draft lists from the EDPB on 5 September 2018. A further 4 SAs submitted their draft list by early October. A global assessment of these draft lists supports the objective of a consistent application of the GDPR even though the complexity of the subject matter increases.

(7) The opinion of the EDPB shall be adopted pursuant to Article 64 (3) GDPR in conjunction with Article 10 (2) of the EDPB Rules of Procedure within eight weeks from the first working day after the Chair and the competent supervisory authority have decided that the file is complete. Upon decision of the Chair, this period may be extended by a further six weeks taking into account the complexity of the subject matter.

HAS ADOPTED THE OPINION:

1 SUMMARY OF THE FACTS

1. The competent supervisory authority of Slovenia has submitted its draft list to the EDPB. The decision on the completeness of the file was taken on the 9th of October 2018. The period until which the opinion has to be adopted has been extended until the 16th of January 2019 taking into account the complexity of the subject matter considering also the need to factor in the outcome of the review of the twenty-two draft lists previously submitted by competent supervisory authorities and the need for a global assessment of all of them.

¹ WP29, Guidelines on Data Protection Impact Assessment and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679 (WP 248 rev. 01).

² EDPB, Endorsement 1/2018.

2 ASSESSMENT

2.1 General reasoning of the EDPB regarding the submitted list

2. Any list submitted to the EDPB has been interpreted as further specifying Art 35.1, which will prevail in any case. Thus, no list can be exhaustive.
3. In compliance with article 35.10 GDPR, the Board is of the opinion that if a DPIA has already been carried out as part of a general impact assessment in the context of the adoption of the legal basis the obligation to carry out a DPIA in accordance with paragraphs 1 to 7 of article 35 GDPR does not apply, unless the Member State deems it necessary.
4. Further, if the Board requests a DPIA for a certain category of processing and an equivalent measure is already required by national law, the Informacijski pooblaščenec (hereafter Slovenian Supervisory Authority) shall add a reference to this measure.
5. This opinion does not reflect upon items submitted by the Slovenian Supervisory Authority, which were deemed outside the scope of Article 35.6 GDPR. This refers to items that neither relate “to the offering of goods or services to data subjects” in several Member States nor to the monitoring of the behaviour of data subjects in several Member States. Additionally, they are not likely to “substantially affect the free movement of personal data within the Union”. This is especially the case for items relating to national legislation and in particular where the obligation to carry out a DPIA is stipulated in national legislation. Further, any processing operations that relate to law enforcement were deemed out of scope, as they are not in scope of the GDPR.
6. The Board has noted that several supervisory authorities have included in their lists some types of processing which are necessarily local processing. Given that only cross border processing and processing that may affect the free flow of personal data and data subjects are concerned by Article 35.6, the Board will not comment on those local processing.
7. The opinion aims at defining a consistent core of processing operations that are recurrent in the lists provided by the SAs.
8. This means that, for a limited number of types of processing operations that will be defined in a harmonized way, all the Supervisory Authorities will require a DPIA to be carried out and the Board will recommend the SAs to amend their lists accordingly in order to ensure consistency.
9. When this opinion remains silent on DPIA list entries submitted, it means that the Board is not asking the Slovenian Supervisory Authority to take further action.
10. Finally, the Board recalls that transparency is key for data controllers and data processors. In order to clarify the entries in the list, the Board is of the opinion that making an explicit reference in the lists, for each type of processing, to the criteria set out in the guidelines could improve this transparency. Therefore, the Board considers that an explanation on which criteria have been taken into account by the Slovenian Supervisory Authority to create its list could be added.

2.2 Application of the consistency mechanism to the draft list

11. The draft list submitted by the Slovenian Supervisory Authority relates to the offering of goods or services to data subjects, relates to the monitoring of their behavior in several Member States and/or

may substantially affect the free movement of personal data within the Union mainly because the processing operations in the submitted draft list are not limited to data subjects in this country.

2.3 Analysis of the draft list

12. Taking into account that:

- a. Article 35 (1) GDPR requires a DPIA when the processing activity is likely to result in a high risk to the rights and freedoms of natural persons; and
- b. Article 35 (3) GDPR provides a non-exhaustive list of types of processing that require a DPIA,

the Board is of the opinion that:

2.3.1 Biometric data

13. The Board is of the opinion that the processing of biometric data for the purpose of uniquely identifying a natural person in conjunction with at least one other criterion requires a DPIA to be carried out. The list submitted by the Slovenian Supervisory Authority incorporates this requirement implicitly, given that the list deems a DPIA necessary when the processing of sensitive data occurs in conjunction with another criterion from the list.
14. The Board recommends mentioning explicitly biometric data which is processed for the purpose of uniquely identifying a natural person in the DPIA list as a criterion which, as indicated in the introduction of the submitted DPIA list, when occurring together with another criterion from the list leads to a DPIA being compulsory.

2.3.2 Genetic data

15. The Board is of the opinion that the processing of genetic data in conjunction with at least one other criterion requires a DPIA to be carried out. The list submitted by the Slovenian Supervisory Authority incorporates this requirement implicitly, given that the list deems a DPIA necessary when the processing of sensitive data occurs in conjunction with another criterion from the list.
16. The Board recommends mentioning explicitly genetic data in the DPIA list as a criterion which, as indicated in the introduction of the submitted DPIA list, when occurring together with another criterion from the list leads to a DPIA being compulsory.

2.3.3 Processing posing a significant risk

17. The Board is of the opinion that the notion “may pose a significant risk”, as used under item 4 ‘Processing of special categories of personal data’ of the list submitted by the Slovenian Supervisory Authority, may lead to confusion as to whether the level of risk is equivalent to the term “likely to result in a high risk” as stated by article 35.1 GDPR. Therefore, the Board requests the Slovenian Supervisory Authority to remove the reference to significant risk.

2.3.4 Processing posing a high risk

18. The list submitted by the Slovenian Supervisory Authority mentions, under item 4 ‘Processing of special categories of personal data’, that a DPIA is required “when processing of special categories of personal data, data on criminal or minor offences represent a high-risk for the rights of the individual”. The mention of “high risk” here should be taken as a reference to the term “likely to result in a high

risk” as stated by article 35.1 GDPR and not as a separate condition. The Board requests the Slovenian Supervisory Authority to remove the repetition of “high risk” from this item of its list.

3 CONCLUSIONS / RECOMMENDATIONS

19. The draft list of the Slovenian Supervisory Authority may lead to an inconsistent application of the requirement for a DPIA and the following changes need to be made:
 - Regarding biometric data: the Board requests the Slovenian Supervisory Authority to amend its list by mentioning explicitly the processing of biometric data which is processed for the purpose of uniquely identifying a natural person in conjunction with at least one other criterion;
 - Regarding genetic data: the Board requests the Slovenian Supervisory Authority to amend its list by mentioning explicitly the processing of genetic data in conjunction with at least one other criterion in the DPIA list;
 - Regarding processing posing a significant risk: the Board requests the Slovenian Supervisory Authority to amend its list by removing the reference to “significant risk”
 - Regarding processing posing a high risk: the Board requests the Slovenian Supervisory Authority to amend its list by removing the reference to “high risk”

4 FINAL REMARKS

20. This opinion is addressed to the Informacijski pooblaščenec (Slovenian Supervisory Authority) and will be made public pursuant to Article 64 (5b) GDPR.
21. According to Article 64 (7) and (8) GDPR, the supervisory authority shall communicate to the Chair by electronic means within two weeks after receiving the opinion, whether it will amend or maintain its draft list. Within the same period, it shall provide the amended draft list or where it does not intend to follow the opinion of the Board, it shall provide the relevant grounds for which it does not intend to follow this opinion, in whole or in part.

For the European Data Protection Board

The Chair

(Andrea Jelinek)