

EVALUATION OF THE GDPR UNDER ARTICLE 97 – QUESTIONS TO DATA PROTECTION AUTHORITIES / EUROPEAN DATA PROTECTION BOARD

ANSWERS FROM THE HUNGARIAN SUPERVISORY AUTHORITY

The General Data Protection Regulation ('GDPR') entered into application on 25 May 2018, repealing and replacing Directive 95/46/EC. The GDPR aims to create a strong and more coherent data protection framework in the EU, backed by strong enforcement. The GDPR has a two-fold objective. The first one is to protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The second one is to allow the free flow of personal data and the development of the digital economy across the internal market.

According to Article 97 of the GDPR, the Commission shall submit a first report on the evaluation and review of the Regulation to the European Parliament and the Council. That report is due by 25 May 2020, followed by reports every four years thereafter.

In this context, the Commission shall examine, in particular, the application and functioning of:

- Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 45(3) of this Regulation and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC; and
- Chapter VII on cooperation and consistency.

The GDPR requires that Commission takes into account the positions and findings of the European Parliament and the Council, and of other relevant bodies and sources. The Commission may also request information from Member States and supervisory authorities. As questions related to Chapter VII concern more directly the activities of the DPAs, the present document focuses primarily on that aspect of the evaluation, while also seeking their feedback on Chapter V related issues.

We would be grateful to get the replies to the questions (in English) by 15 January 2019, at the following e-mail address: JUST-EDPB@ec.europa.eu.

Please note that your replies might be made public.

When there are several DPAs in a given Member State, please provide a consolidated reply at national level. In the context of the preparation of the evaluation report, and following the input from other stakeholders, it is not excluded that we might have additional questions at a later stage.

I. CHAPTER V

The GDPR provides that the adequacy decisions adopted by the Commission under Directive 95/46 remain in force under the GDPR until amended, replaced or repealed. In that context, the Commission is tasked to continuously monitor and regularly evaluate the level of protection guaranteed by such decisions. The 2020 evaluation provides a first opportunity to evaluate the 11 adequacy decisions adopted under the 1995 Directive. This does not include the decision on the Privacy Shield that is subject to an ad hoc annual review

process and the Japanese adequacy decision that was adopted last year under the GDPR and is also subject to a specific evaluation exercise (the first one will be in 2021).

1. Has any stakeholder raised with your authority any particular question or concern regarding any of the adequacy decisions adopted under the 1995 Directive (with the exception of the EU-US adequacy decision which is not covered by this evaluation process)?

The Authority has never received complaint from stakeholders regarding any of the adequacy decisions.

2. Does your authority have any information on the developments of the data protection system of any of the countries/territories subject to a Commission adequacy decision under the 1995 Directive that you would consider relevant for the Commission's evaluation?

The authority has no information on such developments.

3. In your view, should any third country or international organisation be considered by the Commission in view of a possible adequacy decision?

Our Authority does not have a specific list of possible candidate countries, however we believe that the network of the Global Privacy Assembly may provide a suitable pool for candidate countries.

II. CHAPTER VII

The GDPR provided for one single set of data protection rules for the EU (by a Regulation) and one interlocutor for businesses and one interpretation of those rules. This “one law one interpretation” approach is embodied in the new cooperation mechanism and consistency mechanisms. In order to cooperate effectively and efficiently the GDPR equips the Data Protection Authorities (thereafter the DPA/DPAs) with certain powers and tools (like mutual assistance, joint operations). Where a DPA intends to adopt a measure producing effects in more than Member State, the GDPR provides for consistency mechanism with the power to ask for opinions of the European Data Protection Board (EDPB) on the basis of Article 64(1) and (2) GDPR. In addition, in situations where the endeavour to reach consensus in the cases of one-stop shop (OSS) does not work (i.e. there is a dispute between the DPAs in specific cases), the EDPB is empowered to solve the dispute through the adoption of binding decisions.

In this context, the Commission finds it appropriate to request the views of the DPAs / EDPB on their first experiences on the application of the cooperation and consistency mechanisms. To this aim, the Commission established the list of questions below, in order to help the DPAs framing their input. It is understood, that the Commission is also interested in any comments the DPAs may have which goes beyond the answer to the questions and which concerns the application of the two above-mentioned mechanisms.

1. Cooperation Mechanism

1.1. OSS – Article 60

a. Has your DPA been involved in any OSS cases? If so, in how many cases since May 2018?

The Authority has been involved in 227 OSS cases (239 Cases received and 8 Cases initiated, including Informal Consultations) since May 2018.

b. Did you encounter any problems/obstacles in your cooperation with the lead/concerned DPA? If yes, please describe them

Our authority did not encounter any problems/ obstacles during cooperation neither as lead, nor as a concerned supervisory authority.

c. How would you remedy these problems?

In the light of our answer given to question b. we have no comment.

d. Is your national administrative procedure compatible with the OSS? (e.g. do you identify a clear step which can be referred to as a “draft decision”? Are the parties heard before you produce such draft decision?)

Yes, our national administrative procedure is compatible with the OSS, and no administrative problem occurred during this one and a half years of carrying out the procedures, we could not find a solution to.

Although some legal institution originated from OSS procedures did not have and still not has an adequate equivalent in the Hungarian administrative procedural law and the national laws regarding the operation of the Authority. For example, there is no clear definition of the draft decision and there are no regulations regarding the communication of the draft decision’s content with the stakeholders in our national legislation. When a formal Authority procedure is initiated, the Authority is obliged to consult with the parties and assure that they can inspect the evidences. During the less formal inquiries the Authority usually obtains the parties’ (data controllers, data processors) statements, but not obligated to do so.

e. Were you in the situation of the application of the derogation provided for in Article 56(2) GDPR (so-called “local cases”, i.e. infringements or complaints relating only to an establishment in your Member State or substantially affecting data subjects only in your Member State)?

The Authority has already initiated an Article 56(2) procedure. We sent the local case request to the Ireland DPA regarding a complaint we received from a Hungarian complainant about Google violating his right to access. Having regard to the circumstances of the case the Ireland DPA agreed that the Hungarian SA can handle the case as the Lead Supervisory Authority.

f. Is the OSS living up to its expectations? If not, what would you identify as its shortcomings? How can they be remedied?

Our experience regarding this topic is generally quite positive, because the Lead Supervisory Authorities in most of the cases took notice of our comments, as well as our objections from the perspective of the substantive law. On the other hand there are quite significant differences between the member states regarding their procedures and willingness to take definite action against the data controllers. Because of that in some cases the possibility of the decision’s efficient enforcement seems somewhat questionable to us.

1.2. Mutual assistance – Article 61

a. Did you ever use this tool in the case of carrying out an investigation?

The Authority has already initiated Art. 61 Mutual assistances in order to clarify details of cases received from Art. 56 procedure initiating DPAs or to request information from DPAs regarding our investigations.

The Authority also recently use Art. 61 Voluntary Mutual assistance to collect opinions and best practices from DPAs about data protection topics.

b. Did you ever use this tool in the case of monitoring the implementation of a measure imposed in another Member State?

The Hungarian DPA has never used Art. 61 Mutual assistance procedure for this kind of purpose, but we do received such requests from other DPAs.

c. Is this tool effectively facilitating your work? If yes, how? If not, why?

Yes, these procedures are definitely making communication between DPAs more efficient and regulated, therefore requesting and receiving information became much easier.

d. Do you encounter any other problems preventing you from using this tool effectively? How could they be remedied?

The only complaint we may raise about these procedures (especially about Voluntary mutual assistances) that the asked DPAs don't answer the requests in time or give answers with hardly any details. Fortunately the IMI System already has a function which can be used in order to request more information from the asked DPAs, and the Secretary working together with the IMI Helpdesk in order to moderate to answer the requests properly.

1.3. Joint operations – Article 62

a. Did you ever use this tool (both receiving staff from another DPA or sending staff to another DPA) in the case of carrying out an investigation?

The authority has never used this procedure before.

b. Did you ever use this tool in the case of monitoring the implementation/enforcement of a measure imposed in another Member State?

The authority has never used this procedure before, which includes implementation or enforcement of imposed measures.

c. Is it effectively facilitating your work? If yes, how? If not, why?

The authority has never used this procedure before, so we don't have any information regarding how effective this procedure is.

d. Did you encounter any problems (e.g. of administrative nature) in the use of this tool? How could they be remedied?

The authority has never used this procedure before, so we don't have any information about possible problems regarding this procedure.

2. Consistency mechanism

2.1 Opinion - Article 64 GDPR

a. Did you ever submit any draft decision to the Board under Art 64(1)?

Yes, we submitted the Data Protection Impact Assessment list.

b. Did you ever submit any draft decision to the Board under Art 64(2)?

No, the Authority has never submitted draft decision to the Board.

c. Did you have any problems by complying with the obligations under Article 64(7) GDPR, i.e. taking utmost account of opinion of the EDPB? If so please describe them.

No, the Authority has never had any problems by complying with the obligations under Article 64(7) GDPR.

d. Was the “communication of the draft decision” complete? Which documents were submitted as “additional information”?

It was complete, but with no additional documents.

e. Were there any issues concerning the translations and/or any other relevant information?

Yes, there was an interpretation difference between the Authority and the EDPB.

f. Does that tool fulfil its function, namely to ensure a consistent interpretation of the GDPR?

In the light of our experience the tool fulfil its function.

2.2 Dispute resolution - Article 65 GDPR

a. Was this procedure used? If yes, what was your experience during the process?

The authority has never used this procedure before, so we don't have any experience about how it works.

b. Which documents were submitted to the EDPB?

The authority has never used this procedure before, so we did not submit any documents to the EDPB.

c. Who prepared the translation, if any, of that documents and how much time did it take to prepare it? Were all the documents submitted to the EDPB translated or only some of them?

The authority has never used this procedure before, so we don't have any information regarding the translations.

2.3 Urgency Procedure – Article 66

a. Did you ever adopt any measure under urgency procedure?

The authority has never used this procedure before.

3. Exchange of information: Standardised communication

a. What is your experience with the standardised communication through the IMI system?

Standardised communication makes the information exchange between authorities regulated and effective because of the deadlines given by the initiating DPAs. It also helps to systematize and handle requests and replies received from other DPAs much easier thanks to the system's search functions.

4. European Data Protection Board

- a. Can you provide an indicative breakdown of the EDPB work according to the tasks listed in Article 70?**

It is not clear what information would be helpful for the European Commission.

- b. For the EDPB Secretariat: Can you provide an indicative breakdown of the EDPB Secretariat work and allocation of resources (full-time equivalent) according to the tasks listed in Article 75?**

5. Human, technical and financial resources for effective cooperation and participation to the consistency mechanism

- a. How many staff (full-time equivalent) has your DPA? Please provide the figures at least for 2016, 2017, 2018, 2019 and the forecast for 2020.**

The full time employees of the authority:

2016: 73 employee

2017: 77 employee

2018: 103 employee

2019: 104 employee

2020 (requested): 117 employee

- b. What is the budget of your DPA? Please provide the figures (in euro) at least for 2016, 2017, 2018, 2019 and the forecast for 2020.**

The budget of the authority:

2016: 1 737 879 EUR (573 500 000 HUF)

2017: 1 946 364 EUR (642 300 000 HUF)

2018: 3 138 226 EUR (1 084 100 000 HUF)

2019: 3 505 152 EUR (1 156 700 000 HUF)

2020 (requested): 4 437 576 EUR (1 464 400 000 HUF)

- c. Is your DPA dealing with tasks beyond those entrusted by the GDPR? If yes, please provide an indicative breakdown between those tasks and those entrusted by the GDPR.**

Our Authority's Department of Regulatory Issues and Supervision of Data Classification and Department of Information Freedom are dealing with tasks not entrusted by the GDPR.

The Department of Regulatory Issues and Supervision of Data Classification is dealing with procedures related to;

- 1) **data processing for criminal investigation, national defence, and national security purposes.** (Since these three topics are not subject to the rules of the GDPR they continue to remain within the scope of national legislation, namely the Act CXII of 2011 on Informational Self-Determination and Freedom of Information.)

The Department of Regulatory Issues and Supervision of Data Classification conducts administrative procedures for the supervision of data classification.

2) regulatory issues;

The Department of Regulatory Issues and Supervision of Data Classification makes recommendations with respect to new laws and to the amendment of laws pertaining to the processing of personal data, the access to data of public interest and to data accessible on public interest grounds and it gives its opinion with respect to draft laws and to the amendment of laws.

3) participation in the joint supervisory activity of data protection authorities:

- Europol Joint Supervisory Body (JSB)
- Schengen Information System Supervision Coordination Group (SCG)
- Visa Information System SCG
- Eurodac SCG
- Customs Information System SCG

The Department represents the Authority (as the National Supervisory Authority of Hungary) in the supervision coordination groups of the Schengen Information System, the Visa Information System, Eurodac (European Dactyloscopy System), Europol, Customs Information System and cooperates with the European Data Protection Supervisor.

The Department cooperates with the organs and persons specified in Acts to represent Hungary in the common data protection supervisory bodies of the European Union and performs the tasks of the supervisory authority specified in Act CLXXXI of 2012 on the exchange of information in the framework of the second-generation Schengen Information System.

4) participation in the EDPB expert group's work:

The Authority takes part in every EDPB expert subgroup's activity.

Colleagues of the Department of Regulatory Issues and Supervision of Data Classification participate in the following expert groups:

- Borders, Travel and Law Enforcement Expert Group
- Privacy Shield annual review

The Department performs the tasks specified for the supervisory authority in Directive (EU) 2016/680.

The Department of Freedom of Information carries out the inquiries related to the fundamental right to freedom of information.

Pursuant to Act CXII of 2011 on the right to informational self-determination and on the freedom of information (hereinafter referred to as the InfoAct), the Authority also has the task of monitoring and promoting the fundamental right to access data of public interest and data accessible on public interest grounds. In the event of a breach of this right, the Authority may carry out an ombudsman-type inquiry (except for classified information, where the Authority may review the legality of a classification in an authority procedure).

There are basically three categories of notifications:

- the public authority refused to disclose data of public interest /data accessible on public interest grounds,
- the public authority charged a fee for fulfilling the request or the amount it charged is not acceptable,
- the public authority does not fulfill its duty to publish certain data of public interest specified in the InfoAct on its website.

According to Hungarian law, any data managed by an organ performing public duties which is related to its activities and the performance of its duties is non-personal data as a general rule and is publicly available to anyone.

d. How would you assess the resources from your DPA from a human, financial and technical point of view?

Our Authority requested 114 staff members for 2019, and that is guaranteed by the budget of the Hungarian SA. In the meantime, the sufficient number of staff members remains under monitoring. Should the number of staff members prove to be insufficient, we will request additional budget for that purpose. At the beginning of 2020 we can already foresee that for the following calendar year additional human resources must be requested.

e. More specifically, is your DPA properly equipped to contribute to the cooperation and consistency mechanism? How many persons work on the issues devoted to the cooperation and consistency mechanism?

According to our current experience the Authority is properly equipped to contribute to the cooperation and consistency mechanism, nevertheless we are constantly monitoring our system to determinate whenever we need to request more resources. In 2020 further staff members must be allocated to this area.

Currently we have 3 employees who are working full time in connection with cooperation and consistency mechanism, and 30 employees who have tasks related to the mechanisms.

6. Enforcement

a. How many complaints (excluding request for information) did you receive since May 2018? What kind of communication with you/request do you qualify as a complaint?

Our Authority received approximately 3781 complaints since May 2018.

We qualify a request as a complaint if the complainant submitting a notification of an alleged infringement relating the processing of personal data or an imminent threat of such an infringement.

b. Which corrective powers did you use since May 2018?

The authority issued warnings and reprimands, ordered the controller or the processor to comply with the subject's request to exercise his/her rights and with the provisions of this Regulation. The authority also imposed a temporary or definitive limitation including a ban on processing and imposed administrative fines.

c. Are you resolving any possible infringements of the Regulation with the help of so-called "amicable settlements"?

Even though there are regulations in the Hungarian administrative procedural codex and other laws concerning the Authority which give opportunity for peaceful dispute resolution between the data subject and data subject/controller, but this practice is alien from the traditional Hungarian jurisdictional approach and practice. Therefore the Authority doesn't apply such procedures which could be equivalent of the peaceful settlement procedure referred in Recital 131 of the GDPR.

d. How many fines did you impose since May 2018? Please provide examples.

The authority imposed total 210 847 Euro fine in 38 cases since May 2018.

Examples:

1. Failure to disclose information about the processing of personal data and failure to disclose documents of the complainant's legal relationship. (GDPR Art. 12 (3); GDPR Art. 15 (1) f))
2. Unlawful data processing, in the absence of a legitimate purpose and the data subject's consent: the complainant's personal data have been transferred to a debt collector company operating without proper authorization. (GDPR Art. 5 (1) a) and b); GDPR Art. 6 (1))
3. The complainant's request for access and data restriction was only partially answered, and the data controller failed to comply with the complainant's request for access to camera recordings and the reproduction of sound recordings, therefore violated the complainant's right to access to personal data. The controller also failed to inform the complainant of the exact legal references and that their personal data was being processed and did not provide a copy of a circular. (GDPR Art. 12 (3) and (4); GDPR Art. 15 (1); GDPR Art. 18 (1))
4. Managing hundreds of thousands of data subjects data on an inadequate legal basis, and violating the the purpose limitation and data minimization principles. (GDPR Art. 5 (1) b) and c); GDPR Art. 5 (2); GDPR Art. 6)

e. Which attenuating and or aggravating circumstances did you take into account?

Attenuating circumstances:

- The data controller/processor partially complied with authority's previous warnings
- The infringement resulted from an incorrect interpretation of the law;
- The data controller/processor revoked pending enforcement procedures;

- The data controller/processor took steps to prevent the processing of identity documents in the future;
- The data controller/processor has not been condemned by the GDPR before.

Aggravating circumstances:

- Large number of concerned data subjects;
- Intentional infringement of data protection regulations;
- Festival organizers in the light of great public attention (general prevention);
- The fine will only achieve its purpose if the amount is appreciable;
- The infringement is occurred for a long period of time;
- The data controller/processor was grossly negligent;
- The data controller/processor misinformed the complainant;
- The data controller/processor has not taken any actions to correct its infringement;
- The data controller/processor misinformed the Authority (only responded properly after repeated request);
- The data controller/processor did not reply to the Authority's request within the time limit.

7. Additional requests

7.1 Data Breaches

The Hungarian SA received **744** personal data breach notification by 30th November 2019.

7.2 Initiatives for SMEs

In order to ensure the SME's compliance with the GDPR and gather valuable information about the difficulties they face, NAIH is operating a hotline for SMEs between 15 March 2019 and 15 March 2020 to assist them in the compliance with the GDPR. In this period NAIH provides information for SMEs regarding the interpretation and proper application of the GDPR. This EU co-funded project is taking place in a framework of a consortium including several stakeholders.

The responses shall be formulated so as to provide graspable assistance in the interpretation of law applicable relevant to the merit of the question, and to highlight the relevant aspects in the application of law related to the given question, the factors to be considered among them, and their significance. The answer shall contain no opinion as to the lawfulness of any concrete data processing. The consortium is also drafting an innovative handbook for SMEs based on the questions and answers in the indicated period.