

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

ANSWERS FROM THE SLOVAK 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)?

NO

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?

NO

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

United Kingdom, in case of no-deal Brexit

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?

Cases in the Case Register: 1 as LSA and 226 as CSA

Article 60 procedures: 0 as LSA and 46 as CSA

- b. Did you encounter any problems/obstacles in your cooperation with the lead/concerned DPA? If yes, please describe them
- Sometimes, the Office confirms that it is CSA in the Art. 56 procedure but later the LSA does not designate the Office as CSA in the Case register or in the related Art. 60 procedures. Usually, the reason is that the case register is created too early in comparison with the Art. 56 procedure (for confirmation whether we are CSA is still open).
 - Sometimes, other DPAs (both LSA and CSA) do not reply in the set or reasonable time period.
- c. How would you remedy these problems?
- The LSA should regularly check the Art. 56 procedure if it is still open.
 - Remind the DPAs their obligation to reply in set or reasonable time period.
 - Provide practical clarification of notion “relevant and reasoned objection” for unproblematic applying of this institute.
- 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?)

Our national legislation contains the reference to the OSS mechanism, so the GDPR is directly applicable here. Our national legislation does not define nor use the term “draft decision”. However, the Administrative Code sets an obligation to provide the parties with the opportunity to express their view regarding the supporting evidence and the methods of its establishment prior to the decision and, if appropriate, to suggest some additional evidence to be provided. So, the parties are heard before the preparation of the decision starts.

- 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)?

Yes. See letter a) last sentence.

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

In general, yes. The problems are the differences in the administrative rules among the member states (e.g. possibility to close the case by reaching the amicable settlement which it is even not considered to be a decision or the possibility not to deal with certain cases which exists in some member states and in some not). The harmonizing approach should be applied with the aim to reach the consistency.

1.2. Mutual assistance – Article 61

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

Yes.

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

No.

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

Yes, it makes the communication between DPAs more official.

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

Once we were conducting the preliminary vetting and we needed the assistance from the controller established in Netherlands, so we asked our Dutch colleagues to forward our request for assistance to the controller. There was a misunderstanding and the Dutch DPA refused to act. We communicated the problem on the expert subgroup meeting and it was solved quickly.

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 and investigation?

NO

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

NO

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

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

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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 asked Board for the opinion on List of processing operations which are subject to the requirement for DPIA.

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

NO

- 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

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

Yes, it was complete. At the beginning, we uploaded draft decision on List of processing operations which are subject to the requirement for DPIA. Then we uploaded also explanatory report. After opinion of EDPB, we uploaded final decision.

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

NO

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

In general yes, but we think that we should have only one list of processing operations which are subject to the requirement for DPIA for all SAs.

2.2 Dispute resolution - Article 65 GDPR

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

Yes, it was triggered under the Art. 65 (1) (a) by the Czech DPA as LSA, IMI number 74426 in the case register number 54247. As CSA, the Office had expressed its relevant and reasoned objections against the draft decision number 64697. However, the whole procedure was withdrawn by the Czech DPA before any opinion was issued by EDPB as the Czech DPA came to the conclusion that the document in dispute was not a decision in the sense of GDPR (it was an inspection protocol).

- b. Which documents were submitted to the EDPB?

As CSA the Office delivered the relevant and reasoned objections against the draft decision to the Czech DPA which were then submitted to the EDPB. Later the Office uploaded its statement directly in the Art. 65 procedure.

- 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 Office prepared the translation of the objections. The Czech DPA offered translation of the objections but the Office did not accept it. Later, the Office prepared and uploaded its statement in English. The translation of the objection and the statement took a reasonable time.

2.3 Urgency Procedure – Article 66

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

NO

3. Exchange of information: Standardised communication

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

We are satisfied how the IMI system works.

4. European Data Protection Board

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

2016 41 employees

2017 40 employees

2018 43 employees

2019 49 employees

2020 max limit is 51 employees

- 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.

2016 1 174 554,17 EUR

2017 1 236 279 EUR

2018 1 138 252 EUR

2019 1 731 419 EUR

2020 1 859 514 EUR

- 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.

Law enforcement Directive implementation law and Coordinated supervision of EU agencies and large scale systems together with the EDPS (ie. Europol, SIS II, VIS, Eurodac, CIS, IMI, EES, Ethias, ECRIS TCN)

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

The Office is of the opinion, that from the "human" point of view, we are not secured sufficiently. The Office in these days does not have sufficient financial resources for ensuring proper functioning. We do not see any change in near future, we do not expect to move forward. With more and more complaints from data subject and also petitions from others actors, we see that there is a need to increase number of employees. The Office have limit for 2020 in amount of 51 employees. We also see the Office needs better material and technical support. As you can see from our answer in question 5b, budget of the Office for 2020 will increase only for 100 000 EUR. This is not sufficient for proper functioning of Office in future.

State of play (IT+sec):

- i. Insufficient budgetary allocations for information technologies and security solutions
 - ii. Technological environment is not aligned with DPA mission – complex information systems are not implemented
 - iii. Lack of employees
- 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?

See previous answer. We need more employees for handling complaints – national or cross-border.

Administrative part of cooperation and consistency mechanism via IMI system is covered by 3 employees from Department of administrative proceeding. These 3 employees also cover cross-border cases.

As regards voluntary mutual assistance, answers are prepared by one employee from Department of legal services.

When we asked for opinion of the Board under art. 64 GDPR, this is determined case by case. We have only asked for DPIA list – this was prepared by Department of Inspection (3 employees) in cooperation with Department of legal services (consulted with whole department – 10 employees).

When some other SA asks for opinion under art. 64 GDPR, employee who represents our SA in competent expert subgroup deals with it. It depends on this employee how s/he cooperates with other colleagues/departments.

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?

We received 728 complaints. Complaint can be lodged

- in writing, i.e. in a paper form
- electronically with authorization under a special regulation on electronic exercise of public authority; complaint made electronically without the authorization under the special regulation on the electronic exercise of the public authority (i.e. an ordinary email without the electronic signature) shall be completed within three working days in writing or electronically authorized under a special regulation on electronic exercise of public authority or personally at the Office – verbally into minutes .
- personally at the Office, i.e. verbally into minutes.

If the complaint is delivered to the Office by a person other than the data subject, the complaint is considered as a petition to initiate the proceedings without a complaint and the natural or legal person which has submitted the petition is not considered as a party to the proceeding.

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

We used corrective powers under art. 58 par. 2 lett. b), c), d) a i) GDPR.

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

We have not used amicable settlements.

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

We imposed 12 fines. Most common infringements are: infringement of principle of lawfulness, infringements of principle of integrity and confidentiality, controller did not act on request of data subject.

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

We take into account all circumstances listed in art. 83 par. 3 GDPR.

Additional questions:

- **National statistics on data breaches**

158 notifications

- **National initiatives to give guidance to SMEs or any other specific support to the SMEs**

We do not have specific guidelines for SMEs, but employees of the Office attend a lot of seminars/workshops/conferences, where they provide lectures in this matter. During Data protection Day 2019 the Office organized workshop. One of the topic was Processing of personal data by SMEs. We also received a lot of emails from SMEs for providing guidance. Our Department of legal services handles this emails and provides sufficient and quick answers. We publish EDPB Guidelines & Opinions on the or website and we adopted DPIA list (35.5 GDPR).