

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

ANSWERS FROM THE GERMAN SUPERVISORY AUTHORITIES

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)?

DE SAs answer	Yes, a few of the German DPA’s received inquiries regarding the scope and content of adequacy decisions relating to Canada, Israel, Japan and/ or Switzerland.
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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?

DE SAs answer	The majority of German DPA’s does not have any verified information on this subject. However, one German DPA stated that as a member of the “Five Eyes” intelligence alliance (UK/USA Agreement) Canada allegedly uses controversial methods (https://en.wikipedia.org/wiki/Five_Eyes), which could affect the adequacy decision.
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3. In your view, should any third country or international organisation be considered by the Commission in view of a possible adequacy decision?

DE SAs answer	In the case of Brexit, the United Kingdom should be considered in view of a possible adequacy decision. In addition, the United Nations should be considered, since one German DPA received many questions from public bodies regarding the transfer of personal data to the United Nations and their specialized agencies. Regarding the amount of data flows from the EU and the ongoing data protection reform, it could be interesting to consider, amongst others, Australia and India as a third country and further consider the data protection situation in China and Russia.
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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, join 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?

DE SAs answer	Yes, for details please refer to the figures to be provided by the EDPB Secretariat, as agreed on occasion of the Cooperation ESG meeting on 20./-21. November 2019.
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- b. Did you encounter any problems/obstacles in your cooperation with the lead/concerned DPA? If yes, please describe them.

DE SAs answer	<p>The majority of German DPA´s stated to have encountered the following problems/obstacles in their cooperation with lead/concerned DPAs:</p> <ul style="list-style-type: none"> • Duration of procedures/long settlement procedures: In many cases LSAs would not submit a draft decision without delay (Art. 60(3) GDPR) (probably for reasons of lacking personal resources), or only after repeated requests. However, in some cases though not even after a period of several months until today draft decisions have been submitted by the LSA. Overall, there seems to be a lack of draft decisions that should be submitted by LSAs without delay, especially in cases concerning large scale data processing by big companies. In some cases, LSAs tried to avoid draft decisions by asking German DPAs, if they would agree to an informal procedure. • The GDPR does not grant the CSAs procedural rights until a draft decision is submitted by the LSA. If a procedure is protracted, the CSA has no possibility to influence the proceeding beforehand. The CSA is only informed on intermediate results with regard to the procedure, but not with regard to the content. Complainants often react to this with a lack of understanding. • German DPAs have encountered some difficulties with assumed LSAs not responding to Article 56 procedures in the IMI system or not handling the case due to “internal policy reasons” despite having acknowledged to be LSA. In some cases, the assumed LSAs did not react at all. In other cases, the assumed LSA refused to act as LSA, but then
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	<p>had to correct this decision. Another German DPA stated, that not all cases were accepted; by some LSAs obligation seen only for complaint based cases, not for media reports etc.</p> <ul style="list-style-type: none"> • National procedural rules can be in conflict with GDPR rules (e.g. national amicable settlements). • Information of case progress is not always available: Sometimes when asking the LSA to give an update on the case or respond to queries regarding the further procedure, no answers are provided, especially if we try it via Article 61 GDPR Voluntary Mutual Assistance in IMI. However, in accordance with Article 78 (2) GDPR the data subject needs to be informed every 3 months on the progress/further proceeding of the case. It is therefore difficult to fully comply with this obligation. • Problems were also identified in the identification of the LSA: If a controller has more than one establishment in the EU, it is often not possible to determine which the main establishment is. In the procedure according to Article 56 GDPR, relevant supervisory authorities sometimes do not react, so that further proceedings are not possible. • Sometimes LSAs reject complaints on the grounds of inadmissibility although the CSA with which the complaint was lodged has already deemed those complaints to be admissible. • Translation issues: Sometimes LSAs do not provide documents in English. • German Single Contact Point: During the initial phase of IMI as a tool for the cooperation procedure, in some instances, the LSA did not involve German SAs in the Article 60 procedure (e.g. draft decision) although those SAs had flagged themselves as CSAs. Those irregularities have almost entirely faded out during the last couple of months. Also in the early days of IMI, some LSAs failed to create case register entries after confirming their status as LSAs. • German DPAs sometimes have problems with cases, that started (shortly) before entry into force of the GDPR (25 May 2018) but are still ongoing (for example personal data that is not erased and therefore still stored by a company). Some LSAs refused to act in such cases since their national law does not allow them to treat pre-GDPR cases, even if the case would have been transferred to the authority in pre-GDPR times to assess in their own competence since the controller was always located in that country.
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c. How would you remedy these problems?

DE SAs answer	<p>With regard to the remedy of the problems/obstacles described under II. 1.1. b, the majority of German DPAs stated that all DPAs should have a common understanding of the requirements set out in Article 60 GDPR. It could be useful to mandate an expert subgroup within the EDPB that identifies problems and obstacles within the OSS mechanism and proposes practical solutions in a structured manner, i.e. the adoption of guidelines. Although some of these issues are already being worked on in EDPB subgroups, e.g. the Cooperation ESG or the IT-User ESG, these only target issues whenever they come up. This way it is difficult to see the bigger picture.</p>
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Amongst others, the following issues were raised by a number of German DPAs:

- Unclear legal terms like “relevant information” or “undue delay” should be clarified, e.g. by internal guidelines, in order to exclude as far as possible "cultural differences" which may lead to different interpretations and practices in EU member states.
- The relationship between GDPR and national procedural laws should also be clarified, which at first is a task of the European Commission.
- Some DPAs even proposed there should be coherent administrative procedural rules within the GDPR, supervening national rules.
- An EDPB (internal) Guidance should expressly state that all DPAs have to actively participate and deal with the cases in the IMI system and cannot refuse to handle a case due to “internal policy reasons”.
- Apart from a statutory regulation, the supervisory authorities should voluntarily commit themselves to handle cross-border cases in a harmonized manner.
- There is no instrument for cases of inactivity by the LSA, which could be triggered by CSAs. Therefore, there is a need for a change of legislation.
- Assumed LSAs should be invited to examine their role more thoroughly and, when refusing to act as LSA, be obliged to provide a reasoned reply.
- The German Single Contact Point conducted active research in IMI and got in touch with LSAs which then got the German CSAs involved. This is a rather time-consuming exercise which could be avoided if the SAs abide by the GDPR and EDPB rules. The problem regarding the case register entries has been resolved as well by approaching those LSAs directly, sometimes with support of the EDPB secretariat.

In addition German DPAs stated with regard to remedying these problems at the present stage:

- By sending additional emails to the IMI department of the DPA. However, this has also been unsuccessful for some LSAs.
- For the continuation of the procedure, the instruments available for this purpose under Article 61 and, if applicable, Article 64 (2) GDPR should be used (cf. in particular No. 2.2.4 of the "Internal EDPB Document 3/2019 on Internal Guidance on Article 64 (2) GDPR").

- 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?)

DE SAs answer	<p>In principle, German administrative procedural law is compatible with the OSS. German “administrative act” (§ 35 VwVfG) and “regulatory fining notice” (§ 66 OWiG) are essentially equivalent to a “decision” in EU law and its drafts can be brought into OSS procedures. This is done after the addressee of the decision (controller/processor or complainant depending on whether or not the complaint was justified) has been heard (§ 28 VwVfG, § 55 OWiG). According to national procedural law in Germany the controller or processor has to be heard on the facts relevant to the decision before an administrative act affecting the rights of a party is adopted and measures are taken by the DPA.</p> <p>This can be done before the draft decision is submitted to the other supervisory authorities concerned. If the decision is changed during the cooperation process, no new hearing of the addressee is necessary if the factual findings on which the decision is based haven’t been changed to the detriment of the addressee.</p> <p>However, not every action taken by a German DPA is considered to be an administrative act (binding decision), which means that, for example, in case an action is abated, there is no legal requirement to prepare a draft decision. With regard to Article 60 GDPR, a draft decision is provided and available for other SAs.</p>
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- 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)?

DE SAs answer	<p>Some German DPAs reported application of the derogation provided for in Article 56 (2) GDPR in the following situations:</p> <ul style="list-style-type: none"> • regarding delisting cases for search engines, • in case the alleged infringement solely affected data subjects in a certain federal state in Germany, • these complaints often concern the right to erasure or the right of access.
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- f. Is the OSS living up to its expectations? If not, what would you identify as its shortcomings? How can they be remedied?

DE SAs answer	<p>The majority of German DPAs stated, that to some extent, the OSS often works quite well (despite some difficulties as already described under section 1.1.b of this questionnaire), may contribute to a consistent application of the GDPR and its application has so far achieved largely satisfying results. Via IMI, cooperation among European DPAs has become real.</p> <p>The impression amongst German DPAs is, that the requirements of Article 60 GDPR – in particular with regard to the communication of draft decisions– have not fully been met yet, especially in large scale cases. A possible remedy would be a consequent implementation of the GDPR, in particular as regards the requirements of Article 60</p>
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GDPR and a common understanding of the necessary procedural steps among DPAs.

Generally, the OSS leads to the situation that certain SAs, depending on the number of data processors established in their Member State for which they serve as LSA, are faced with a significantly higher number of cross-border cases than other SAs. This by itself may lead to longer proceedings at national level given the limited resources of DPAs. The bureaucratic burden of the OSS for DPAs is high. The concept of LSA/single point of contact may have advantages for companies, but it is complex for DPAs in practice. However, timely proceedings in cross border cases are essential for the effective enforcement of the GDPR and its acceptance. The conditions of Article 60 GDPR therefore must fully be exercised by DPAs.

In addition with regard to the time limit set out in Article 64 (3) GDPR it has been suggested by the majority of the German DPAs that it should be increased from eight weeks to three months and that in Article 66 (4) of the GDPR from two to four weeks. Accordingly, it would then be necessary to examine whether the period of validity of provisional measures (Article 66 (1) of the GDPR) should also be extended. At the very least, however, one should consider extending all the time limits in the cooperation and consistency mechanism by 50%.

In addition to the answers already provided under section 1.1.c of this questionnaire, the following shortcomings, among others, have been identified:

- Lack of effectiveness of the procedures; so far, hardly any procedures have been properly finalized with a decision of the LSA.
- The complainants' understanding of long procedures without significant success decreases rapidly as the duration of the procedure increases (from interim to one and a half years in several cases). Furthermore, so far no successes can be publicly communicated.
- There is no instrument in the GDPR to proceed with the complaint if an LSA does not submit a draft decision or in cases of inactive LSAs.
- Changes in the data processing of well-known processors (e.g. WhatsApp in our jurisdiction) have not yet occurred, despite the long proceedings. Those shortcomings should not be tolerated by LSAs.
- The main problem is the long duration of the procedures; this can only be remedied so far, given that coordination processes and translations take time.
- Case handling in the IMI system is sometimes very sluggish. Therefore, all SAs should be requested to actively participate and deal with the cases in the IMI system in a timely manner.
- Lack of draft decisions in large-scale cases. In many cases, LSAs would not issue a draft decision.

	<ul style="list-style-type: none"> • More detailed information from the LSA within the draft decision (or in advance via VMA), in particular about the case facts, would be helpful to determine reasons for an objection. • Some procedures protract because of different administrative processes (i.e. amicable settlement in national legislation of some EU Member States) • Numerous IMI-numbers for one case • No procedure for case bundling existent (VMA procedure does not fit well) • Search function in IMI is insufficient <p>Therefore, at present the OSS is living up to its expectations to some extent only.</p>
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1.2. Mutual assistance – Article 61

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

DE SAs answer	The majority of German DPAs stated to have used this tool.
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b. Did you ever use this tool in the case of monitoring the implementation of a measure imposed in another Member State?

DE SAs answer	The majority of German DPAs has not used this tool for this purpose.
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c. Is this tool effectively facilitating your work? If yes, how? If not, why?

DE SAs answer	<p>The majority of German DPAs considered this tool to be a helpful way to quickly and effectively advance complaints, which enhances communication with other DPAs and might help to reach colleagues quickly, have easier means of communication and to provide a secure solution for transferring documents containing personal data. It has been used by the majority of German DPAs, only a few indicated not to have sufficient experience for a judgement. At the same time, it was also stated by one German DPA that from their practical experience so far, the tool does not necessarily serve the purpose of simplification: Due to the cumbersome handling, no real added value would be apparent. An exchange between LSA and CSA could, for example, also take place via encrypted e-mail. In practice, it was found by another German DPA that answers would be much quicker received by means of email-communication. However, another German DPA stated that in its view, the chance of getting a timely response of another DPA would be much higher when using this tool as one to one workflow. Other IMI tools and possibilities of interaction (for example the “Communications” tab in Article 56 GDPR procedures or Article 60 GDPR Informal Consultation procedures) weren’t as effective. This is probably due to the mostly tight deadlines of mutual assistance procedures, the fact that these requests are prominently highlighted on the dashboard of the IMI system’s starting page, and recipients of such requests keep receiving</p>
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	e-mail reminders as long as they have not accepted and answered the request. Answering these requests would cause additional effort.
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d. Do you encounter any other problems preventing you from using this tool effectively? How could they be remedied?

DE SAs answer	<p>Only some of the German DPAs have experience working with this tool so far. One German DPA stated, that the use of the Voluntary Mutual Assistance procedure is considered to be very time-consuming as you have to relate it to an existing case register entry or create a new one. It would be helpful if such a procedure could also be started without an existing case register entry.</p> <p>In addition mutual assistance should not be used too frequently / for minor questions.</p> <p>In addition some of the German DPAs stated that there is a dispute regarding the interpretation of “relevant information” that is mentioned in Article 61 (2) GDPR. This should mean to share full documents where adequate, not only parts of them or abstracts.</p> <p>In some cases, answers would not be received in time and the DPA had to be contacted via e-mail.</p> <p>Probably the visibility of Art. 61 GDPR Mutual Assistance/Voluntary Mutual Assistance Requests for DPAs will be improved once this module is introduced in the “Notification” Section in IMI (according to the IT User Subgroup, this is scheduled).</p>
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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?

DE SAs answer	No, though one German DPA is considering to start a joint investigation with a DPA in another Member State. Another German DPA went to other DPAs in the EU for work shadowing.
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b. Did you ever use this tool in the case of monitoring the implementation/enforcement of a measure imposed in another Member State?

DE SAs answer	No.
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c. Is it effectively facilitating your work? If yes, how? If not, why

DE SAs answer	The majority of the German DPAs have no sufficient experience in using this tool. One German DPA stated that it facilitates controls.
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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?

DE SAs answer	Due to the lack of sufficient experience in using this tool, no answer can be provided.
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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)?

DE SAs answer	<p>Only a few of the German DPAs have submitted or have been involved in the process of submitting a draft decision under Article 64 (1) GDPR so far, among them:</p> <ul style="list-style-type: none"> • submission of DPIA list Germany, non-public sector, Article 35 (4) GDPR, • involvement in the submission process according to Article 64 (1) lit. a GDPR of the list pursuant to Article 35 (4) GDPR (Official name of the document “List of processing activities for which a DPIA is to be carried out”) in collaboration with the single contact point (SCP) of Germany, • submission by one German DPA and involvement of another German DPA in the submission process according to Article 64 (1) lit. c GDPR of the accreditation requirements for monitoring bodies pursuant to Article 41 (3) GDPR. <p>Several German DPAs stated that as recipient of such draft decisions, however, they have observed some general problems with draft decisions aimed at approving Binding Corporate Rules in accordance with Article 64 (1) lit. f GDPR. The fact that the action of third parties is required here is not taken into account in the procedure under the GDPR and therefore causes problems. After a negative opinion has been issued by the Board in such cases, and the DPA decides to follow it by, requesting the applicant to amend its BCR, there is no procedure ensuring that the EDPB is called upon verifying the amendments that have been made, and the law does not foresee the need for the EDPB to issue a new opinion regarding the amended BCR. The same problem may arise with basically any type of EDPB opinion under Article 64 (1) GDPR.</p>
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b. Did you ever submit any draft decision to the Board under Art 64(2)?

DE SAs answer	The majority of German DPAs has not submitted any draft decision under Article 64 (2) GDPR yet (please see section 2.1.a of this questionnaire), but some are planning to do so in the near future. However, one German DPA claims to have asked the Board several times to examine matters of general application or producing effects in more than one Member State. Some of the German DPAs are of the opinion that draft decisions are not a relevant subject to Article 64 (2) GDPR.
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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.

DE SAs answer	No.
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d. Was the “communication of the draft decision” complete? Which documents were submitted as “additional information”?

DE SAs answer	<p>Kindly note that the majority of German DPAs has not submitted any draft decision yet and therefore, due to the lack of sufficient experience could not answer this question. However, the German DPAs, who already submitted draft decisions (please see section 2.1.a of this questionnaire) stated „Yes“ and provided the following details:</p> <ul style="list-style-type: none"> • In the case of the DPIA lists, there were no complaints or requests for additional information from either the Secretariat or the Board itself, so we suppose that the communication of the draft decision must have been complete. • For the list pursuant to Article 35 (4) GDPR: List and a formal letter to the EDPB Secretariat. • For the accreditation requirements for monitoring bodies pursuant to Article 41 (3) GDPR: Draft Decision (General and specific notes) and catalogue “Accreditation requirements for monitoring bodies according to Article 41 (3) GDPR.
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e. Were there any issues concerning the translations and/or any other relevant information?

DE SAs answer	<p>Kindly note that the majority of German DPAs has not submitted any draft decision yet and therefore due to the lack of sufficient experience could not answer this question. However, the German DPAs, who already submitted draft decisions (please see section 2.1.a of this questionnaire) stated the following:</p> <ul style="list-style-type: none"> • Regarding the translations of the EDPB opinions on the DE DPIA lists, we got the impression that these translations were not done by somebody familiar with the matter at hand. In a number of cases, the translations used generic terms that were not strictly false, but did not correspond to the terms used during the work on the lists, and therefore might have been misleading. • Proofreading of translations of EDPB decisions and opinions comes with a significant workload for DPAs and absorbs significant resources that could better be used for improving data protection on the substance. • However, for future submissions of national certification schemes pursuant to Article 42 (5) GDPR it is unclear which documents have to be submitted and which of them have to be translated into English. • Regarding the text of the GDPR it is unclear what happens if the competent DPA referred to in Article 64 (1) GDPR amends its draft decision following the Board’s opinion. Whereas Article 10 of the Rules of Procedure of the EDPB has been
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	amended in the meantime, it was suggested that this issue should be better clarified in GDPR directly.
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f. Does that tool fulfil its function, namely to ensure a consistent interpretation of the GDPR?

DE SAs answer	<p>With regard to the function of this tool to ensure a consistent interpretation of the GDPR, the majority of German DPAs stated the following:</p> <ul style="list-style-type: none">• In the case of the DPIA lists: yes. The lists and the underlying approach were discussed in the Tech ESG and as a result there was a common understanding of how to interpret the terms and provisions used in Article 35 GDPR and the DPIA Guidelines document, so the consistency mechanism did precisely what it was supposed to do.• The Article 64 GDPR procedure functions for opinions on BCRs, but also due to the informal process which the EDPB concluded to follow before opening the procedure. Using Article 64 (2) GDPR for an EDPB opinion on administrative arrangements pursuant to Article 46 (3) lit. b GDPR has contributed to a consistent interpretation of this safeguard.
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2.2 Dispute resolution - Article 65 GDPR

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

DE SAs answer	No.
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b. Which documents were submitted to the EDPB?

DE SAs answer	None, since this procedure has not been used so far.
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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?

DE SAs answer	n/a, since this procedure has not been used so far.
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2.3 Urgency Procedure – Article 66

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

DE SAs answer	No, with the exception of one case, where a German DPA had started an administrative procedure against Google regarding their Voice Assistant and human transcripts of voice samples based on Article 66 GDPR. However, no measure were taken because Google stopped the specific data processing.
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3. Exchange of information: Standardised communication

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

DE SAs answer

IMI is regarded as a secure, standardized and helpful system, which provides good means for securely transferring essential information regarding complaints containing personal data and for securely exchanging law application practices and opinions according to the procedures set out in the GDPR.

It facilitates contact and cooperation between supervisory authorities. However, the system could be enhanced in detail especially towards user friendliness. IMI is continuously being updated and enhanced by the EDPB-Helpdesk in collaboration with the IT-Users-Expert-Subgroup.

The following obstacles and suggestions with regard to possible enhancements of the IMI system have been identified by German DPAs:

- the usability of IMI could benefit from clarifications regarding the determining deadlines (reply or closure date?), an overall search functionality, an in-built reminder function for users and a standardized interface with DPAs document management systems,
- it would be helpful if IMI would allow for direct communication between IMI-users (“email or chat within IMI”),
- especially from a German point of view it would be very beneficial if LSAs and CSAs could be defined as search parameters,
- it would be helpful to see which cases a DPA has already worked on
- IMI should also assist a DPA in reminding them to submit draft decision or give substantiated feedback to initiating DPAs after a given time frame. The lack of feedback in some cases is a major concern for initiating DPAs.
- due to the complexity of the cross-border procedures the standardized communication through the IMI system is very time-consuming
- Inconsistent use of IMI by different DPAs
- exchange of information still takes quite some time and to some extent, there are divergent ways of use of the system
- big amount of emails
- Difficult to find cases (clumsy search functions)/ a lot of necessary steps to find the relevant information because of several tabs to look at (case description, comments, attached documents)
- slow system
- no interface for transfer of cases into local case management systems
- text fields are too small
- comments were ignored in some cases, requiring communication outside the IMI system. However, in some cases (e.g. when the recipient does not respond via the IMI system), a German DPA stated that it still tends to send an additional e-mail to the person named as “Case Contact Person” in the IMI procedure or to an

	<p>individual known to them from the relevant DPA. This is in order to ensure their comment in IMI is not ignored or missed and to speed up the handling of the case.</p> <ul style="list-style-type: none"> • Difficult for new employees to deal with • Lack of training for the staff of the DPAs <p>Notwithstanding, it is to be welcomed that a lot of improvements including the change requests from Germany have already been implemented by the IMI Helpdesk. There are lists of IMI change requests from the German DPAs which are available on demand.</p> <p>In addition the German Internal Consultation module is a useful tool for the internal discussion of procedures and is widely used.</p>
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4. European Data Protection Board

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

DE SAs answer	n/a, this should be answered by EDPD Chair or Sec., it is estimated approximately 70% for discussions on guidelines
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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.

DE SAs answer	DE SAS /year	2016	2017	2018	2019	forecast 2020*
	total number of staff	583.39	678.17	783.42	887.63	1002.17*
<p>* The figures for 2020 are indicative figures. The preparation of the budget for 2020 and its approval is still under negotiation. Therefore, it is not possible to make a reliable prediction for 2020 at this stage.</p>						

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. .

DE SAs answer	DE SAS /year	2016	2017	2018	2019	forecast 2020*
	total budget in EUR	51,671,540	56,790,875	64,496,694	76,599,800	85,837,500*

* The figures for 2020 are indicative figures. The preparation of the budget for 2020 and its approval is still under negotiation. Therefore, it is not possible to make a reliable prediction for 2020 at this stage.

- 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.

DE SAs answer Yes, in addition to the tasks entrusted by the GDPR, most German DPAs perform tasks entrusted by the national legislation implementing Directive (EU) 2016/680 and all German DPAs perform tasks entrusted by the national legislation implementing Directive (EU) 2002/58. In addition, some German DPAs control public bodies with regard to rights of access to documents and information (“freedom of information”), as provided in the respective national legislation. Tasks entrusted by the GDPR amount from 80 – 95 % while other tasks may amount from 5-20 %, all depending on the respective national legislation. An exact indicative breakdown can therefore not be given.

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

DE SAs answer In an overall view, the German DPAs had an increase in staff and budget. However the majority of the German DPAs stated that the current staffing is not found to be sufficient for the effective performance of its tasks in the sense of Article 52 (4) GDPR. At present, the staffing does not allow an adequate and proactive fulfillment of the statutory tasks, despite the recent increases in resources. Overall, there is still a pent-up demand for human resources in order to avoid a situation incompatible with EU law due to insufficient resources.

- 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?

DE SAs answer No, almost all German DPAs stated that the current staffing is not found to be sufficient for the effective performance of this task.

The internal organization differs from DPA to DPA, but most of the German DPAs have no special or additional staff to contribute to the cooperation and consistency mechanism. Some German DPAs have set up departments specifically designed for the mechanism. However, when assigned accordingly, the other desk officers deal with international cases as well, with support by the respective department. An exact number can therefore not be provided. From an overall perspective it can be stated that the handling of IMI procedures requires additional staff. At minimum, one person for every DPA has been assigned to look through the IMI e-mails and invoke internal processes for the handling of the case. In some cases, therefore all staff members, with the exception of the internal administration, deal with the cases placed in the IMI within the scope

of their professional responsibilities and all are required to keep informed of the developments of the expert subgroups in their fields.

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?

DE SAs answer	<p>German DPAs qualify every kind of submission by data subjects that involves an alleged infringement of the right to informational self-determination as a complaint within the meaning of Article 77 GDPR.</p> <p>The number of complaints received by German DPAs as of October 2019 are as follows:</p> <table border="1"> <thead> <tr> <th>DE SAs</th> <th>complaints since 5/2018</th> </tr> </thead> <tbody> <tr> <td>total</td> <td>66,965*</td> </tr> </tbody> </table> <p>* Kindly note that these are preliminary figures only, the next evaluation will not take place until 31 December 2019. After this stage final figure of complaints received until 31 December 2019 by all German DPAs can be delivered upon request.</p>	DE SAs	complaints since 5/2018	total	66,965*
DE SAs	complaints since 5/2018				
total	66,965*				

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

DE SAs answer	<p>German DPAs have widely used all corrective powers provided for in Article 58 (2) lit. a, b, c, d, f, g and i GDPR, Article 58 (6) GDPR and have imposed a number of administrative fines pursuant to Article 83 GDPR.</p>
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- c. Are you resolving any possible infringements of the Regulation with the help of so-called “amicable settlements”?

DE SAs answer	<p>There is no national legal provision for amicable solutions. The legal institution of amicable settlement in the sense of Recital 131 does not exist in German administrative law. Thus, the majority of the German DPAs stated that possible infringements of the Regulation are not being resolved with the help of „amicable settlements”.</p> <p>But several German DPAs stated that</p> <ul style="list-style-type: none"> - in most of our cases controllers comply with the GDPR on a voluntary basis after they have been confronted with the infringement and our assessment. Therefore, in these cases a formal order is not necessary. In practice the procedures are designed in such a way that the result is comparable to an amicable settlement in order to comply with recital 131. - minor infringements are handled with an informal procedure in cases where the controller is willing to cooperate.
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-it tries, within the framework of a non-binding clarification of the facts of the case, to convince the person responsible by means of legal information, e.g. to carry out the action lawfully requested by the complainant. If the person responsible acts quickly in good cooperation with the authority and remedies the infringement, the complaint is regularly settled. In this respect, one can speak of an amicable agreement that ends the case.

- it advises a controller or processor to act in a specific way in order to be compliant. If the controller or processor then acts like the DPA advised, often there is no need to use corrective powers, though this is not to be considered as an “amicable settlement”.

However, one German DPA stated that a LSA from another Member State usually asks them to forward an answer to the complainant by endeavoring the “amicable settlement” solution and to be translated and transmitted to the complainant. In at least one case, this solution has been successful. The “amicable settlement” solution is dealt with in the Cooperation subgroup.

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

DE SAs answer

Please see below the total number of fines issued by German DPAs under GDPR:

DE SAs	fines issued under GDPR
total	208

For example, fines have been imposed in the following cases or for the following infringements:

- failure to designate a DPO
- insufficient authentication measures in call centers
- against a Social media platform provider based in Baden/Württemberg Germany: The company had stored its users’ passwords without encryption. Due to a hack, 330.000 plain text passwords were stolen and later published online.
- fine against a police officer who used his access to work-related data bases to obtain a woman’s personal data, including her phone numbers and then contacted her for private grounds,
- fine against the former regional president of the Young socialists (JuSos) Baden-Württemberg for misusing a list of delegates (with and without political function) originally created during the organisation of the “small regional party convention” for inner-party opinion-forming purposes, by sharing said list with other people,
- fines on a delivery service in one fine notice because of violations of Art. 17 (1) lit. a GDPR, Article 6 (1) GDPR, Article 12 (3), Article 15 (1) GDPR, Article 12 (2) GDPR and Article 31 GDPR,
- an internet bank was fined because of violations of Article 5 (1) lit. a GDPR in conjunction with Article 6 (1) GDPR; of Article 12 (3) GDPR in

	<p>conjunction with Article 15 (1) lit. a, b, c and d GDPR and of Article 7 (1) GDPR,</p> <ul style="list-style-type: none"> • a German real estate company was fined for an infringement of Article 25 (1) GDPR and Article 5 GDPR and various infringement of Article 6 GDPR in 15 individual cases (The decision to impose a fine has not yet become final, because the company has the right to lodge an appeal against the fine) • fine against a company which didn't have a contract with the processor in writing (Article 28 (9) GDPR) and infringed the rights of the data subjects by using an intransparent and unclear language (Article 12 (1) GDPR), • late notification of a data breach and no information to the data subjects • direct marketing despite contradiction • late notifications pursuant to Article 33 GDPR • unauthorized data retrieval by employees • improper use of data obtained for official purposes (infringements of Article 5 and 6 GDPR) • unauthorized processing of employee data • video surveillance at points of sale • video surveillance of employees • disclosure of lawyer/client relationships to a third party • unlawful collection of personal data via Dashcam • unlawful transfer of personal data without appropriate security measures • no or insufficient information to the supervisory authority • disposal of personal data without necessary safeguards • unlawful disclosure of personal data in social media • improper use of dash cams • video surveillance of employees and customers • in the public health sector for mixing up patient data and not providing sufficient TOM • inadmissible video surveillance • shipping of advertising emails • email delivery • infringements of rights of access • lack of cooperation • covert video surveillance • unanswered request for information • failure to provide the Supervisory Authority access to the controller's premises.
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e. Which attenuating and or aggravating circumstances did you take into account?

DE SAs answer	<p>German DPAs takes into account all criteria stated in Article 83 (2) GDPR, insofar as they are relevant to the individual case. Regarding Article 83 (2) lit. k GDPR, we furthermore take into account the economic situation of the person concerned (attenuating or aggravating) and whether the entity/person concerned confessed the infringement.</p>
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Furthermore the independent data protection authorities of the Federation and the Länder (Datenschutzkonferenz – DSK) have adopted a fining concept, which according to its intention serves as the basis for the admeasurement of fines in proceedings against undertakings in the scope of application of the GDPR. It defines a range for regular (negligently) committed infringements of the GDPR. In terms of common practice, the criteria in Article 83 (2) lit. c, d, f, h and j GDPR can have an attenuating or aggravating effect, whilst the criteria in Article 83 (2) lit. e, g and i GDPR may have an aggravating effect only. However, the criteria in Article 83 (2) lit. d, i and j GDPR have not been of noteworthy significance, yet. In detail, the following circumstances are considered as attenuating or aggravating:

Criteria (Article 83 (2) GDPR)	Attenuating circumstances	Aggravating circumstances
a	<ul style="list-style-type: none"> • (very) short duration • Nature, scope or purpose of the processing are generally favoured under data protection law • (very) few concerned data subjects • (very) little / no suffered damage 	<ul style="list-style-type: none"> • (very) long duration • Nature, scope or purpose of the processing are to be disapproved / critical under data protection law • (very) many concerned data subjects • (very) severe suffered damage
b	light negligence	intent
c	measures have excluded damage	necessary measures not initiated
d	Low risk	(very) high risk
e	-	one or more relevant offences
f	Cooperation clearly exceeded the expected level	no / poor cooperation in the administrative procedure
g	-	<ul style="list-style-type: none"> • special categories • other particularly sensitive data
h	Controller reported the offence by itself	Offence reported by complainant / reference / press
i	-	Non-compliance with specific measures
j	compliance regarding approved codes of conduct or approved certification mechanisms	Non-compliance regarding approved codes of conduct or approved certification mechanisms

	k	<ul style="list-style-type: none">• economic situation (e.g. imminent insolvency)• confession of guilt	economic situation (e.g. very high turnover profitability)	
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Additional information requested by Secretariat

Number of data breaches (since 25 May 2018 until 30 November 2019)

DE SAs answer		
	DE SAs	data breaches under GDPR
	total	46.561*

* No complete information possible as we haven't received answers from all German DPAs.

Initiatives for SME's

- permanent consultations via telephone and in person for controllers, processors and data protection officers of SMEs, including start-ups
- participation in training events, seminars and workshops as guest speakers aiming to support SMEs in implementing and monitoring their GDPR compliance
- publication of a wide range of guidance material and Q&As aimed for SMEs on various websites of DE SAs