

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

ANSWERS FROM THE IRISH 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 questions or concerns have been raised formally with the DPC on existing adequacy decisions adopted under the 1995 Directive.

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?

None that are not already being progressed by the Commission.

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 DPC has had involvement in approximately 1,000 cases since May 2018, as either lead supervisory authority (LSA) or as a concerned supervisory authority (CSA). This figure will likely not tally with the

statistics provided by the IMI system, as the IMI system “bundles” individual cases into case registers, with each case register containing multiple individual cases.

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

Many of the problems or obstacles experienced by the DPC in cooperation relate to the suitability of the IMI system. The IMI is not designed or intended to be used as a case management system; rather, it is intended as a simple notifications or messaging system. This means that it is very difficult for supervisory authorities to search for IMI entries, to link relevant IMI entries and to track cases. Not only does this present challenges for CSAs, it also creates challenges for LSAs, in being operationally efficient and also in being transparent to CSAs. At the DPC, we have had to implement several spreadsheets and databases to mitigate the problems with the IMI.

In the first year of cooperation under the GDPR, the DPC experienced several instances where it could take several months for a CSA to transmit complaint files to the DPC as LSA. This led to months-long delays for data subjects in the handling of their complaints. However, in the DPC’s experience, these long delays in transmitting complaint files are becoming less frequent.

- c. How would you remedy these problems?

A gap analysis should be completed on the EDPB’s requirements for a fit-for-purpose central system to support cooperation as compared with the current IMI functionality and capability.

- 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, Section 113 of the Irish Data Protection Act 2018 explicitly refers to “draft decision”.

- 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, this has arisen for a small number of cases for which the LSA has confirmed that the DPC should proceed to handle the case locally.

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

18 months is a relatively short timeframe in which to measure the success of the One Stop Shop model, particularly given that there has not yet been any draft decision subject to Article 60 that has involved a significant corrective power being applied (e.g. a substantial fine).

1.2. Mutual assistance – Article 61

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

Yes, frequently.

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

Not as such.

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

Yes, this tool is reasonably useful. However, at the DPC, we also rely on informal cooperation with EDPB colleagues on a very frequent basis, as an efficient and prompt way to make progress e.g. by email, conference call, etc.

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

As above relating to IMI.

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?

The DPC has made several efforts during 2019 to encourage EDPB colleagues to consider participating in a joint operation on one of the DPC's inquiries. To seek some momentum on this, the DPC has prepared a draft Joint Operations Agreement and circulated to other EDPB colleagues, as no other EDPB members had commenced a joint operation by that point. This Agreement is required by the Joint Operations guidelines that were adopted at the end of 2016 by the Article 29 Working Party.

The DPC has had discussions with several other EDPB members during 2019 on potential joint operations, at varying levels of specificity, including DPAs of Spain, Belgium, Italy, UK, France, German Federal, Netherlands and Sweden.

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

See above – no joint operations have been commenced so far. In any case, the DPC would not view a joint operation as necessarily the most suitable approach for this purpose of monitoring implementation / enforcement in another Member State by another authority.

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

See above. The DPC's view is that this tool will become an effective cooperation mechanism in the future but it has not yet been put into practice.

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

See above.

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, under Article 64(1)(a) so far. Submission under Article 64(1)(f) is imminent.

- 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”?

N/A

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

N/A

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

This tool is a work-in-progress, particularly in the effectiveness of Article 64(1)(f).

2.2 Dispute resolution - Article 65 GDPR

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

Not yet

- b. Which documents were submitted to the EDPB?

N/A

- 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?

N/A

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?

See responses to question 1.1 above.

4. European Data Protection Board

- a. Can you provide an indicative breakdown of the EDPB work according to the tasks listed in Article 70?
We assume that a consolidated response to this question is being prepared via the SAESG discussion.
- 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	2017	2018	2019	2020
52	85	110	140	176

- 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	2017	2018	2019	2020
€4.7m	€7.5m	€11.7m	€15.2m	€16.9m

- 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.

The Irish Data Protection Act 2018 also transposed the Law Enforcement Directive (Directive 2016/680), which assigns supervisory tasks to the DPC. The DPC also has supervisory tasks set out in the Irish ePrivacy Regulations (Statutory Instrument No. 336/2011 - European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011) which is the transposition of the Privacy and Electronic Communications Directive 2002/58/EC.

Otherwise, the DPC's tasks are mainly only those tasks required of a public body in Ireland, for example, relating to accountability for expenditure of public funds, and so on.

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

There is no DPA with the infinite resources that would be required to address all data protection regulatory matters that fall to a DPA. The DPC has received substantial annual budget increases in recent years, as set out in the table at b above. However, the increase for 2020, relative to 2019, was significantly less than the DPC requested and the DPC will continue to seek budget increases in the years ahead.

- 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?

Staffing for the cooperation and consistency mechanism is a key priority for the DPC. The DPC established a new central team in May 2018 to monitor, coordinate and track progress of all cooperation cases and requests. The size of this team has been increased in 2019 to reflect the

increasing volumes being handled via the IMI and to mitigate the usability issues of the IMI, set out above.

All seven Deputy Commissioners, and their teams, at the DPC have some specific accountability for matters relating to cooperation and consistency, including cross-border case management and investigations. The DPC has attended almost all EDPB expert subgroup meetings in 2019, with very few exceptions.

The DPC would welcome participation by EDPB colleagues in joint operations to collaborate with DPC staff.

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?

The DPC has received over 12,000 complaints since May 2018. This figure does not include requests for information. The DPC applies a relatively broad interpretation to what qualifies as a complaint; for example, the individual does not need to reference a particular legal provision. We accept complaints mainly by webform, email or letter.

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

None to date.

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

Under Section 109 of the Irish Data Protection Act 2018, the DPC takes steps as considered appropriate to arrange or facilitate an amicable resolution of the subject matter of any complaint where it is considered that there is a reasonable likelihood of the parties reaching an amicable resolution within a reasonable time. This approach means that the data subject may achieve vindication of their rights in a relatively short time period. Even if an amicable resolution is achieved, this does not preclude the DPC from examining the matter from an enforcement perspective, for example, if issues with the data controller recur or appear to be systemic.

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

No fines imposed to date.

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

N/A

Additional questions:

- National statistics on data breaches

The DPC has received over 9,500 notifications of data breaches since May 2018.

- National initiatives to give guidance to SMEs or any other specific support to the SMEs. The DPC is collaborating with Croatian colleagues on a joint initiative over the next two years which is specifically seeking to provide support to the SME sector, supported by a Commission grant. In addition, the DPC is continuing to issue guidance on our website that is intended to support the SME sector.