

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

ANSWERS FROM THE LITHUANIAN 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.

Please be informed that in Lithuania the supervision of application of GDPR is done by two institutions: State Data Protection Inspectorate of the Republic of Lithuania and The Office of the Inspector of Journalist Ethics. The Office of the Inspector of Journalist Ethics is responsible for press matters while State Data Protection Inspectorate – for other data processing activities.

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)?

State Data Protection Inspectorate (MAIN DPA): NO.

The Office of the Inspector of Journalist Ethics (DPA for press matters): 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?

Neither the State Data Protection Inspectorate (MAIN DPA) nor the Office of the Inspector of Journalist Ethics (DPA for press matters) has such information.

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

State Data Protection Inspectorate (MAIN DPA): NO.

The Office of the Inspector of Journalist Ethics (DPA for press matters): NO.

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?

State Data Protection Inspectorate (MAIN DPA) has been involved in OSS cases – in 3 cases the Inspectorate is LSA.

The Office of the Inspector of Journalist Ethics (DPA for press matters) hasn't been involved in OSS cases.

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

Yes, the State Data Protection Inspectorate (MAIN DPA) sometimes faces with the problems of faster communication between SA'S (for example, the process of deciding which DPA will be LSA an which CSA takes quite long time just because sometimes the Inspectorate doesn't get the answer in proper time from other SA'S).

- c. How would you remedy these problems?

Consensus from all SA'S to be more active in participating or giving response.

- 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?)

Even though in national legislation there is no definition of "draft decision", the State Data Protection Inspectorate (MAIN DPA) does not face any problems defining this concept in national law. According to the Law on legal protection of personal data both parties are heard during the investigation and before issuing decision or "draft decision".

On the other hand, when OSS procedure is started, the rules of terms counting are undefined or inaccurate, also it is unclear in which language the draft decision has to be submitted. Furthermore, there is a need of more time for preparation and assessment of 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)?

State Data Protection Inspectorate (MAIN DPA): YES.

The Office of the Inspector of Journalist Ethics (DPA for press matters): YES.

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

State Data Protection Inspectorate (MAIN DPA) thinks that in general – yes (OSS is living up to its expectations, it strengthens the cooperation between SA'S, helps to exchange the opinion and information), with the exceptions mentioned in question b. On the other hand, it is difficult to use OSS mechanism properly because of different national administrative procedures (it includes duration of proceedings, complaint admissibility

criteria and etc.), complicated use of IMI system, which requires a lot of time, translation costs (includes time, financial and human resources).

Furthermore, there are a lot of questions when data controller doesn't have establishment in ES (for example, how to ensure the proper process, inform about investigation and in later stage – about legally binding sanctions).

Because The Office of the Inspector of Journalist Ethics (DPA for press matters) did not experience OSS yet, it is tricky for them to answer the question if it is living up to its expectations, but generally speaking the Office of the Inspector of Journalist Ethics thinks that the OSS is a highly appreciated procedure that provides possibility to optimize processes for quicker decisions.

1.2. Mutual assistance – Article 61

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

The State Data Protection Inspectorate (MAIN DPA) in the case of carrying out an investigation used this tool twice; The Office of the Inspector of Journalist Ethics (DPA for press matters) – never.

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

The State Data Protection Inspectorate (MAIN DPA) never used this tool in such case, but The Office of the Inspector of Journalist Ethics (DPA for press matters) did.

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

The State Data Protection Inspectorate (MAIN DPA) has too little experience using this tool in order to give proper answer about its effectiveness. But it must be mentioned that in two cases where State Data Protection Inspectorate (MAIN DPA) used this tool, the information from other SA'S has been received without any problems, it was useful and in the future the Inspectorate will definitely use this tool again, where necessary.

In the Office of the Inspector of Journalist Ethics (DPA for press matters) opinion this tool creates a potential to share the experience and also a chance to harmonize the appliance of GDPR, also is a good to practice sharing tool.

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

The State Data Protection Inspectorate (MAIN DPA) didn't face any problems concerning this tool yet. The Office of the Inspector of Journalist Ethics (DPA for press matters) thinks that is quite difficult to use this tool.

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?

Neither State Data Protection Inspectorate (MAIN DPA) nor The Office of the Inspector of Journalist Ethics (DPA for press matters) ever used this tool.

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

State Data Protection Inspectorate (MAIN DPA): NO.

The Office of the Inspector of Journalist Ethics (DPA for press matters): NO.

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

State Data Protection Inspectorate (MAIN DPA) never used this tool, so at the moment it is impossible to answer this question.

The Office of the Inspector of Journalist Ethics (DPA for press matters): NO.

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

State Data Protection Inspectorate (MAIN DPA) didn't encounter any problems because never used this tool in practise.

The Office of the Inspector of Journalist Ethics (DPA for press matters): NO.

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, State Data Protection Inspectorate (MAIN DPA) submitted draft decision to the Board under GDPR 64(1)(a) – before adopting a list of the processing operations subject to the requirement for a data protection impact assessment pursuant to Article 35(4).

The Office of the Inspector of Journalist Ethics (DPA for press matters) didn't submit any draft decisions to the Board under GDPR Article 64(1).

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

State Data Protection Inspectorate (MAIN DPA) and The Office of the Inspector of Journalist Ethics (DPA for press matters) never submitted draft decisions to the Board under GDPR Article 64(2).

- 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, the communication of the draft decision under Article 64(1)(a) was completed successfully.

- 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?

It would if all supervisory authorities used GDPR Article 64(2) properly.

2.2 Dispute resolution - Article 65 GDPR

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

State Data Protection Inspectorate (MAIN DPA), also The Office of the Inspector of Journalist Ethics (DPA for press matters) never used this procedure. Because of this the answers to questions below are not given.

- b. Which documents were submitted to the EDPB?

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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?

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2.3 Urgency Procedure – Article 66

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

State Data Protection Inspectorate (MAIN DPA): NO.

The Office of the Inspector of Journalist Ethics (DPA for press matters): NO.

3. Exchange of information: Standardised communication

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

In the opinion of State Data Protection Inspectorate (MAIN DPA) it is quite difficult to use IMI system: 1) too many steps need to be done in order to complete the task; 2) sometimes “search system” doesn’t find the case that was searched, so other tools must be used in order to find it.

The Office of the Inspector of Journalist Ethics (DPA for press matters) does not have experience with the standardised communication through the IMI system.

4. 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.

State Data Protection Inspectorate (MAIN DPA):

- In 2016, 2017, 2018, 2019 had 32 workplaces;
- In 2020 – 38 workplaces.

The Office of the Inspector of Journalist Ethics (DPA for press matters):

- In 2016–2018 – 18 full time staff;
- In 2019, 2020 – 14 full time staff.

- 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 State Data Protection Inspectorate (MAIN DPA):

- In 2016 – 716 000 Eur;
- In 2017 – 729 000 Eur;
- In 2018 – 1 111 000 Eur;
- In 2019 – 1 120 000 Eur;
- Forecast for 2020 – 1 216 000 Eur.

The budget of The Office of the Inspector of Journalist Ethics (DPA for press matters):

- In 2016 – 342 000 Eur;
- In 2017 – 348 000 Eur;
- In 2018 – 358 000 Eur,
- In 2019 – 362 000 Eur;
- Forecast for 2020 – 365 000 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.

Yes, beyond the tasks which are entrusted by the GDPR, State Data Protection Inspectorate (MAIN DPA) also implements Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS. 108) and controls the processing of personal data under:

- Convention implementing the Shengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders;
- Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences;
- Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation);

- Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation');
- Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes;
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast);
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast);
- Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA;
- Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011;
- Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226;
- Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006;
- Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU;
- Regulation (EU) 2019/816 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction

information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726;

- Directive (EU) 2016/681 of the European parliament and of the council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime;
- Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance);
- Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

The Office of the Inspector of Journalist Ethics (DPA for press matters):

„The tasks entrusted by the GDPR is one of the other 11 functions vested in the Office of the Ombudsman for Journalists Ethics. The main function of the Office is the protection of personal non-property rights (honour and dignity, privacy, personal data) in the field of public information. According to the legal regulation in force in Lithuania, the function of the Inspector of journalist ethics is to monitor the application of the Regulation and to ensure that it is applied when personal data are processed for journalistic purposes and for academic, artistic or literary expression purposes”.

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

In State Data Protection Inspectorate (MAIN DPA) opinion, even though the budget of the MAIN DPA and the workplaces in our institution in the past few years have increased, the State Data Protection Inspectorate is still in need of human, technical and financial resources because of the increased importance of international cooperation after GDPR.

The Office of the Inspector of Journalist Ethics (DPA for press matters):

„For the last five years The Office has been constantly asking for the budget extension, as the human, financial and technical resources are obviously inefficient. The budget never increased though and it is not likely to increase for the year 2020. Dynamics of complaints about data protection, the increased public attention to this area, makes it evident that the workload in this area has tripled and represented a major challenge for The Office, as The Office has received no funding for the preparation or implementation of personal data protection reform at all”.

- 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?

All 13 persons who work in the Supervisory Division of the State Data Protection Inspectorate (MAIN DPA) also deals with the issues devoted to the cooperation and consistency mechanism. Despite this fact there is still lack of human resources to contribute to the cooperation and consistency mechanism properly.

The Office of the Inspector of Journalist Ethics (DPA for press matters) is definitely underequipped and cannot

properly contribute to any of issues concerning GDPR.

5. 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?

State Data Protection Inspectorate (MAIN DPA):

- Received 644 complaints from 2018-05-01 to 2018-12-31 and 806 complaints from 2019-01-01 to 2019-12-06, total – 1450 complaints.
- According to the Law on Public Administration of the Republic of Lithuania complaint is a written application by a person to a public administration entity stating that his or her other rights or legitimate interests have been violated and asking for their defence.

The Office of the Inspector of Journalist Ethics (DPA for press matters):

- Since May, 2018 has received 198 complaints.
- In the Office of the Inspector of Journalist Ethics (DPA for press matters) opinion the communication is believed to be a complaint if it provides information about the possible infringements of the non-property rights of the person.

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

State Data Protection Inspectorate (MAIN DPA):

- GDPR Article 58(2)(b) (issued reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation);
- GDPR Article 58(2)(c) (gave orders to the controllers or the processors to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation);
- GDPR Article 58(2)(d) (gave orders to the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period) – this corrective power is mostly used.
- GDPR Article 58(2)(f) (imposed a temporary or definitive limitation including a ban on processing);
- GDPR Article 58(2)(i) (imposed an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case).

The Office of the Inspector of Journalist Ethics (DPA for press matters) issued warnings and reprimands.

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

State Data Protection Inspectorate (MAIN DPA) doesn't resolve any possible infringements with the help of “amicable settlements” because in national law (Law on legal protection of personal data) there is no such legal regulation.

The “amicable settlement” is quite frequently used by The Office of the Inspector of Journalist Ethics (DPA for press matters).

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

State Data Protection Inspectorate (MAIN DPA) did not impose any fines in 2018. In the 2019 Inspectorate has already imposed 6 fines:

- 2 fines (500 Eur for not submitting the information to DPA);
- 2 fines (2395 Eur and 1 000 Eur for improper execution or failure to execute orders given by Inspectorate);
- 2 fines (61 500 Eur and 3 000 Eur for GDPR infringements).

The Office of the Inspector of Journalist Ethics (DPA for press matters) prefers education, not fines.

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

State Data Protection Inspectorate (MAIN DPA) follows the Guidance on the application and setting of administrative fines for the purposes of the Regulation 2016/679 prepared by Article 29 Data Protection Working party.

ADDITIONAL INFORMATION:

6. DATA BREACHES:

Data Breaches Notifications – 268 (2018 – 93, 2019 – 175).

7. INITIATIVES FOR SMEs:

- Presentations and seminars for various SME's audiences;
- Publication of guidance material and FAQs on SAs website;
- Attending conferences and other events;
- Meetings with the representatives of the SME;
- Huge amount of consultations for SME;
- SME is one of the target audiences of the SolPriPa project, promoting high standards of data protection as a fundamental right and central factor of consumer trust in digital economy, co-financed by the European Commission. 20 seminars, preparing of the guidance, presentations, leaflets.