

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

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

N/a.

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?

Yes.

2018:

The NL SA registered in **202 cases as concerned SA**, and in **43 cases as lead SA**.

2019:

The NL SA registered in **232 cases as concerned SA**, and in **155 cases as lead SA**.

(please note that the NL SA is currently finalising its annual report over 2019)

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

There is a need for sufficient recourses for *all* EU SAs, taking into account that EU SAs have become (more) interdependent, especially in relation to the handling of cross-border cases and the handling of fundamental (legal) questions that concern multiple Member States. See for a more detailed answer under “1.1 f”.

In addition, the diverging and sometimes conflicting scopes of national (GDPR) implementing legislation is a point of attention. In practice, it differs from Member State to Member State whether their implementing legislation applies to controllers/processors located on their territory, offering services to their citizens or another definition of scope. This means that, in practice, data subjects, companies and SAs are dealing with a vast array of overlapping or sometimes conflicting national implementing laws. This holds particularly true for cross-border cases.

Lastly, diverging national procedural law and the relation between these national requirements and the OSS are a point of attention as well. This issue is however under discussion within the EDPB and – also taking into account the fact that the OSS has only been in place for a relatively short amount of time – it is at this point premature to make clear statements about this issue.

- c. How would you remedy these problems?

With regard to the diverging and sometimes conflicting scopes of national (GDPR) implementing legislation, it might be of interest to review this issue at EU level in order to properly map the current legal framework (more specifically: any overlapping or conflicting legal requirements) as a possible starting point for a more coherent approach.

- 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?)

Through the OSS-mechanism set out in Chapter VII, the GDPR provides SAs with a partly harmonised procedure. In the absence of exhaustive rules on the procedure that is to be followed in order to take a decision in accordance with that Chapter, the principle of procedural autonomy provides that it is for the legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the right which citizens derive from EU law. In accordance with established case law of the Court of Justice of the European Union, such procedural conditions cannot be less favourable than those relating to similar actions of a domestic nature and must not render practically impossible or excessively difficult the exercise of the rights conferred by EU law. No indications that the Dutch administrative procedure laid down in the Dutch General Administrative Law Act (Algemene wet bestuursrecht, GALA) would not adhere to those requirements have reached the Dutch SA thus far. Several topics related to the definition of a draft decision and at which stage the hearing of parties before reaching a decision must take place are subject of deliberation within the EDPB. It is hence premature to draw hard conclusions about the compatibility of the Dutch national administrative procedure with the OSS-mechanism.

- 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.

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

The GDPR provides an extensive and coherent legal framework for the protection and free flow of personal data within the European Union. An important part of this framework is the OSS-mechanism, which provides for effective and substantial means to ensure the consistent interpretation and application of the GDPR throughout the EU. So far, the supervisory authorities under the GDPR have gained valuable experience in the application and implementation of the OSS-mechanism. However, as the entry into force of the GDPR is still relatively recent, the experience gained must not be overestimated. It is hence, at this point in time, premature to make claims about shortcomings of the OSS-mechanism itself as provided by the GDPR.

However, it must be noted that the effective application of those means provided by the mechanism is contingent on the ability and opportunity of the SAs to do so. In other words: the GDPR equips SAs with effective and significant means to ensure consistent application of the GDPR, but their ability to do so in practice depends on the resources available to them. In the experience gained so far, it seems that the OSS-mechanism contributes to an important extent in bringing about a shift in the division and concentration of the workload. This makes SAs interdependent. The effective application of the OSS-mechanism by all SAs, and hence, the consistent interpretation and application of the GDPR that is facilitated by the OSS-mechanism, thus depends on all SAs being provided with sufficient resources to carry out their tasks. As it stands, this is a topic of attention.

1.2. Mutual assistance – Article 61

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

Yes.

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

No.

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

Yes. Although formal Article 61-requests are less used in comparison to (similar) informal requests, it remains necessary to have the possibility of making formal requests that entail legal consequences ex Article 61(8) GDPR, for instance when an informal request is not adhered to by the requested supervisory authority.

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

No.

1.3. Joint operations – Article 62

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

Not yet (although we see the added value of this instrument and intend to make use of it in the future).

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

No.

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

N/a.

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

N/a.

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. Our SA submitted one draft decision to the Board under Article 64(1)(a), concerning the adoption of a list of the processing operations subject to the requirement for a data protection impact assessment pursuant to Article 35(4).

- 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. The opinion of the EDPB advised the Dutch SA to make three alterations to the draft DPIA list, in addition to a more general recommendation. The Dutch SA has subsequently incorporated the advised changes in its DPIA list.

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

Yes. No documents were submitted as “additional information”.

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

No, not in this specific case (although it is premature to provide a definitive answer to this question, taking into account that the NL SA has so far submitted one draft decision to the Board).

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

Article 64 provides the SAs with two significant tools, both of which contribute to an important extent and in a direct and tangible manner to the consistent interpretation of the GDPR. In the experience gained so far, the results of the Article 64-procedures are auspicious and positive. Besides the opinions issued so far, there are many topics that would merit being taken up at EDPB level through the Article 64 (2)-procedure. However, the capacity to take up such topics, even when it concerns particularly pressing or complex issues, is limited. The ability to do so depends for an important part on the availability of resources and time of the individual SAs and the EDPB Secretariat. Thus, though the Article 64-tools can significantly and palpably contribute to the consistent interpretation of the GDPR, their operational usability depends on the individual SAs and the EDPB Secretariat being allocated with sufficient resources.

2.2 Dispute resolution - Article 65 GDPR

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

Until now, this procedure has not been used. Two points of attention can however be noted:

i. Timeframe/capacity

Article 65 dispute settlement procedures can involve factually and legally very complex cases. Such cases require careful consideration, in particular when taking into account that the consequences of the binding EDPB-decision that is the result of the Article 65 procedure can be far-reaching. In addition to this complexity, it can generally not or very limitedly be predicted or planned when the Article 65 procedure will be triggered. It is hence expected that Article 65 procedures, when triggered, will come on top of regular (planned) activities and ongoing procedures that are also subject to deadlines. Taking these factors into account, this creates a risk, which could be remedied by ensuring that both the EDPB Secretariat and the individual SAs are sufficiently equipped and have sufficient resources at their disposal to handle Article 65 dispute settlement procedures, and on the other hand by increasing (possibilities for a *limited* extension of) the current timeframe of the procedure.

ii. Withdrawal

It is unclear whether Article 65(1) read in combination with Article 60(4) and Article 63 of the GDPR, leaves room for withdrawal of a dispute, once filed at the EDPB. That means that, even in a case where parties to the dispute would have been able to resolve the dispute after all, the Board might technically not be relieved of its duty to adopt a binding decision ex Article 65. For reasons of expedience, it might be advisable to include such a possibility.

- 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?

The NL SA has not adopted measures under the urgency procedure ex Article 66 GDPR.

3. Exchange of information: Standardised communication

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

The experience of the NL SA with the standardised communication through the IMI system is generally positive. Suggestions for improvement have generally been satisfactorily addressed by/within the EDPB IT Users subgroup and with the help of the EDPB Secretariat IT-team.

4. European Data Protection Board

- a. Can you provide an indicative breakdown of the EDPB work according to the tasks listed in Article 70?
- b. *For the EDPB Secretariat:* Can you provide an indicative breakdown of the EDPB Secretariat work and allocation of resources (full-time equivalent) according to the tasks listed in Article 75?

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

- a. How many staff (full-time equivalent) has your DPA? Please provide the figures at least for 2016, 2017, 2018, 2019 and the forecast for 2020.
- 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
FTE	73,1	102,7	157	179,4	188
€ Budget (in mln)	8,1	10,5	12,9	18,6	18,6

- 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, the NL SA is also entrusted with supervisory tasks in the areas of the Law Enforcement and Border control. This includes:

- Supervisory tasks regarding Law Enforcement include supervision of (the national implementation of) Directive 2016/680 (Law Enforcement Directive), the Europol Regulation (i.e.: the national component, as well as Cooperation with the EDPS) and Eurojust (ibid);
- Supervisory tasks in the area of border control include supervision of the Schengen acquis (i.e.: the national components), the Eurodac Regulation (ibid), the Visa Information System (ibid), the IMI (ibid) and PNR;
- In the near future the NL SA will moreover be entrusted with additional supervisory tasks (i.e.: national components and cooperation with the EDPS) related to the processing of personal data in the EES, ETIAS, EPPO as well as the Interoperability Regulations. This includes participation in the Coordinated Supervision Committee.

While it is, at this time, not possible to provide a clear breakdown between those tasks and those entrusted to the NL SA based on the GDPR, it should be noted that these additional (new) tasks require sufficient resources and specific expertise.

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

At the moment, our resources are a concern, not only taking into account that the workload of the NL SA has increased significantly since the entering into force of the GDPR, but also taking into account that the NL SA will have to carry out (additional) tasks in the area of Law Enforcement and Border Control as well.

In 2016, an independent review has been carried out, both to map the additional workload of the NL SA as a consequence of the GDPR, as well as to clarify the resources needed for the NL SA in order to effectively carry out the tasks entrusted to it based on the GDPR. This independent review resulted in three separate scenario's (i.e.: scenario low, scenario medium, scenario high), regarding both the estimated workload, as well as regarding the necessary resources. In this regard it should be noted that – at this moment - the actual workload of the NL SA has surpassed even the highest estimated scenario (scenario 3), while the resources attributed to the NL SA at the moment fall short of the lowest scenario (scenario 1). This means that, in practice, there is a clear and strong tension between the actual workload of the NL SA and the resources attributed to the NL SA, which influences the effective application of the GDPR. As a result, negotiations between the NL SA and the Dutch Ministry of Justice and Security have taken place, resulting in a new independent review in order to map the workload and necessary resources of the NL SA, based on the current situation. This review will take place at the beginning of 2020. At the moment, the resources allocated to the NL SA remain a serious concern however.

- 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?

As mentioned, the resources allocated to the NL SA are – at the moment – a concern. While the NL SA aims to (internally) allocate sufficient means and resources in order to contribute to the cooperation and consistency mechanism, in general additional recourses are needed.

In practice – taking into account the European nature of data protection legislation - the different tasks related to the application of the cooperation and consistency mechanisms form an integral part of the work of the NL SA and are therefore divided over several teams, depending on the nature of the task (i.e. policy related, complaint handling, data breach notifications, SCCs/BCRs, international codes of conduct, legal department etc.). It is therefore not possible to provide a clear overview of the full amount of fte contributing to the application of the cooperation and consistency mechanism. The international investigation team – which in principle handles all cross-border cases and complaints – however consists of approx. 10 fte. In addition, approx. 5 fte are allocated to international policy work directly related to the cooperation and consistency mechanism (such as EDPB related tasks, attendance of subgroups, acting as rapporteur). In addition, several other departments take part in/provide assistance with tasks related to the cooperation and consistency mechanism.

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 NL SA received 37.275 complaints from May 2018 until November 2019. These complaints can be divided into the following categories:

- 11.758 complaints as mentioned in art. 77 GDPR (i.e.: an alleged infringement if the data subject considers that the processing of personal data *relating to him or her* infringes this regulation);
- 25.517 other complaints (such as complaints regarding the processing of personal data that do not directly relate to the personal data of the complainant).

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

Since May 2018, the following corrective powers have been used by the NL SA:

Fines (Article 58(2)(i) and Article 83 GDPR):	4
Reprimands (Article 58(2)(b):	2
Order to bring processing operations into compliance (Article 58(2)(d):	2
Incremental penalty payment (Article 16 Dutch GDPR Implementing Law and Article 5:32 Dutch General Administrative Law Act):	2
Temporary or definitive ban on processing (Article 58(2)(f):	1

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

In the absence of a clear definition of what constitutes an “amicable settlement”, there is no straightforward answer to this question. Based on Dutch Law, the NL SA can, for instance, “mediate” between parties under certain conditions. In addition, it is standard practice for the NL SA to try to reach for an informal resolve of cases, including complaints, where this is possible, feasible and proportionate, taking into account that art. 57 (1) (f) states that complaints should be handled (...) and investigated (...) to the extent appropriate.

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

See the answer to question 6.b above.

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

The NL SAs applies its Fining guidelines in these cases. These guidelines have been formally updated and adopted in February 2019 and have been made public in the State Journal of the Netherlands. Based on the GDPR and the national guidelines, the NL SA takes several circumstances into account when issuing a fine, such as: nature, duration and gravity of the infringement, cooperation with the SA, the existence of earlier infringements, whether special categories of data were involved, actions taken by the controller to mitigate the negative consequences of the infringement etc.

Finally, please remember that the EU COM also asked during last plenary to provide:

- National statistics on data breaches and
- National initiatives to give guidance to SMEs or any other specific support to the SMEs.

- The NL SA received 37.413 data breach notifications from May 2018 until November 2019.

- NL →
 - starting in 2018 an information campaign to inform the general public and organisations about the upcoming GDPR, to help them prepare (Hulp bij privacy' (help with privacy). We launched a special website www.hulpbijprivacy.nl). We pushed this website with social content, radio commercials, events and advertisements. We also developed several tools. For example <https://rvo.regelhulpenvoorbedrijven.nl/avg/#/welkom>. Step by step organisations could find out what to do to prepare for the GDPR.

 - 2019: we continued a campaign started in 2018 to inform about the GDPR. We aimed at different target audiences (general public, youngsters and SME).

Activities

- Campaign aimed at SME
- Awareness campaign aimed at general public (increasing media usage)
- Development of educational material for secondary schools

Output SME

- Online privacyvideos
- Advertisements
- SME events
- 5 issues (content, social posts, interviews, videos)
- Radio commercials

Output General public

- Radio commercials

- Social posts
- Privacy video

Output Youngsters

- Webapp, smartphone challenge www.ietelefoondebaas.nl
- Educational material to be used in combination with smartphone challenge
- Social posts