

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

REPLY FROM THE PORTUGUESE DATA PROTECTION SUPERVISORY AUTHORITY

The General Data Protection Regulation ('GDPR') entered into application on 25 May 2018, repealing and replacing Directive 95/46/EC. The GDPR aims to create a strong and more coherent data protection framework in the EU, backed by strong enforcement. The GDPR has a two-fold objective. The first one is to protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The second one is to allow the free flow of personal data and the development of the digital economy across the internal market.

According to Article 97 of the GDPR, the Commission shall submit a first report on the evaluation and review of the Regulation to the European Parliament and the Council. That report is due by 25 May 2020, followed by reports every four years thereafter.

In this context, the Commission shall examine, in particular, the application and functioning of:

- Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 45(3) of this Regulation and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC; and
- Chapter VII on cooperation and consistency.

The GDPR requires that Commission takes into account the positions and findings of the European Parliament and the Council, and of other relevant bodies and sources. The Commission may also request information from Member States and supervisory authorities. As questions related to Chapter VII concern more directly the activities of the DPAs, the present document focuses primarily on that aspect of the evaluation, while also seeking their feedback on Chapter V related issues.

We would be grateful to get the replies to the questions (in English) by 15 January 2019, at the following e-mail address: JUST-EDPB@ec.europa.eu.

Please note that your replies might be made public.

When there are several DPAs in a given Member State, please provide a consolidated reply at national level. In the context of the preparation of the evaluation report, and following the input from other stakeholders, it is not excluded that we might have additional questions at a later stage.

I. CHAPTER V

The GDPR provides that the adequacy decisions adopted by the Commission under Directive 95/46 remain in force under the GDPR until amended, replaced or repealed. In that context, the Commission is tasked to continuously monitor and regularly evaluate the level of protection guaranteed by such decisions. The 2020 evaluation provides a first opportunity to evaluate the 11 adequacy decisions adopted under the 1995 Directive. This does not include the decision on the Privacy Shield that is subject to an ad hoc annual review

process and the Japanese adequacy decision that was adopted last year under the GDPR and is also subject to a specific evaluation exercise (the first one will be in 2021).

1. Has any stakeholder raised with your authority any particular question or concern regarding any of the adequacy decisions adopted under the 1995 Directive (with the exception of the EU-US adequacy decision which is not covered by this evaluation process)?

No.

2. Does your authority have any information on the developments of the data protection system of any of the countries/territories subject to a Commission adequacy decision under the 1995 Directive that you would consider relevant for the Commission's evaluation?

No.

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

Yes. That is the case of the country **Cabo Verde**, which has a data protection law that was very much aligned with Directive 95/46/EC and has an independent data protection authority to monitor the compliance with the law. Convention 108 was ratified by Cabo Verde and entered into force in the country on 1/10/2018.

In a near future, it could also be considered the country of **S. Tomé e Príncipe**, which was just accredited in the International Conference. The data protection law is closely inspired in Directive 95/46/EC and it has a recent independent DPA.

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. As LSA, 3 cases. As CSA, 297 from November 2018. There are some other cases between June-October but no precise figures are available at this moment.

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

The OSS mechanism is very burdensome and its implementation through the IMI system is bureaucratic and takes excessive time. Furthermore, there are significant differences in MS legal systems, which have a direct impact in the handle of cases, bringing difficulties to cooperation among SAs. The attempts for common approaches and procedures are welcome but often do not reflect each other legal requirements. Though adopted collectively, it does not mean that then they can be actually implemented.

The most notable failure of the IMI system is the need for some SAs to report and exchange information on the undergoing cases for other means (such as in the EDPB meetings, orally and through charts with cases overview).

- c. How would you remedy these problems?

It is still too soon for a concluding assessment. However, a platform/system specifically designed for the OSS having into account the tasks and roles of SAs could be a key improvement. On the other hand, a more harmonised way of handling complaints – since the requirements for submission to the decision making process - could be very beneficial for a smooth cooperation procedure. This could only be achieved through regulation that indeed be applicable to all in the same manner.

- 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?)

A draft decision in the meaning of the GDPR has to be issued and to circulate among the other CSAs previously to the hearing of the defendant, once there cannot be differences in the infringements identified and assessed before and after the defendant is heard. Therefore, the SA has to lay down the facts finding and its assessment in order to identify which legal provisions were infringed and what are the corrective measures abstractly applicable. This assessment has to be shared and agreed by the SAs in this first instance before the defendant is formally accused. After the exercise of the right of defence, the SA will draft another draft (final) decision taking into account the arguments invoked by the defendant, and precisely imposing the sanction, that will be submitted to the other CSAs and eventually to the EDPB. After this procedure and eventual opinion, a final decision is issued and notified to the defendant. Such decision can be challenged in the court.

- 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)?

No.

- f. Is the OSS living up to its expectations? If not, what would you identify as its shortcomings? How can they be remedied?
See answer to Q.1.1 b. and c.

1.2. Mutual assistance – Article 61

- a. Did you ever use this tool in the case of carrying out an investigation?
Yes.
- b. Did you ever use this tool in the case of monitoring the implementation of a measure imposed in another Member State?
No.
- c. Is this tool effectively facilitating your work? If yes, how? If not, why?
Still soon to make an assessment. Not enough experience.
- d. Do you encounter any other problems preventing you from using this tool effectively? How could they be remedied?
Still soon to make an assessment. Not enough experience.

1.3. Joint operations – Article 62

- a. Did you ever use this tool (both receiving staff from another DPA or sending staff to another DPA) in the case of carrying out and investigation?
No.
- b. Did you ever use this tool in the case of monitoring the implementation/enforcement of a measure imposed in another Member State?
No.
- c. Is it effectively facilitating your work? If yes, how? If not, why?
Not applicable
- d. Did you encounter any problems (e.g. of administrative nature) in the use of this tool? How could they be remedied?
Not applicable

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.
- 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.
Only one case. Not enough to assess.
- d. Was the “communication of the draft decision” complete? Which documents were submitted as “additional information”?
Not applicable
- e. Were there any issues concerning the translations and/or any other relevant information?
Not really, though translations represent additional work for the SAs, even if only reviewing them.

- f. Does that tool fulfil its function, namely to ensure a consistent interpretation of the GDPR?
 Only one case. Not enough to assess.

2.2 Dispute resolution - Article 65 GDPR

- a. Was this procedure used? If yes, what was your experience during the process?
 No.
- b. Which documents were submitted to the EDPB?
 Not applicable.
- 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?
 Not applicable

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 answer to Q.1.1 b.
 Standardised communication is useful, but the IMI system is not very suitable for the daily work of handling cases. Yet it was not fully tested for all the articles.

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.

FULL-TIME STAFF				
2016	2017	2018	2019	2020
26	22	20	25	27

- 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.

BUDGET in Million Euros*				
2016	2017	2018	2019	2020
1,285	2,785	2,588	2,152	2,385

* These amounts correspond to the initial budget, which then are subjected to additional legal financial restraints that lower down the actual available budget. Rules change every year, so it is very difficult to have comparable values.

- 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.

In Portugal, the DPA is also competent for the Law Enforcement Directive, for all national parts of the European IT Large-scale information systems and for other national databases and information exchanges established by virtue of Union law (such as FIU, PNR data, ENU, Prüm, Eucaris, ECRIS).

The DPA is also competent for the e-Privacy Directive.

An indicative breakdown could be: GDPR: 65%; LED: 10%; e-Privacy: 25%

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

The DPA's resources are manifestly insufficient and put at risk the performance of its tasks, in the whole extent envisaged by law. This situation is not new, actually it has been like this for many years.

The new legal framework and new demands have just highlighted and aggravated the problem.

The increase of the human resources is strongly conditioned by legal restraints that exclude hiring in the market, outside the public administration staff.

- 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?

Our DPA is far from being equipped to the cooperation and consistency mechanism. There is only one person (almost entirely) dedicated to that task. There is another person who occasionally provides assistance. When the DPA acts as LSA, an inspection team will give support as needed.

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?

From 25 May 2018-30 November 2019:

- 1394 **complaints** resulted in opened proceedings.
- 400 **data breach** notifications

As a general rule, complaints can be submitted through a dedicated form in the DPAs website. Exceptionally, they can also be submitted by email or post mail (cf. Law 58/2019, 8 of August, national law implementing GDPR).

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

The DPA has already used the powers under article 58(2)(c),(d), (f),(g) and (i).

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

There is no such possibility in the Portuguese legal system.

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

The PT DPA has applied so far 7 fines (in a total of 430.000 Euros) under the GDPR. During this period the DPA has also applied other fines under the previous Data Protection Law and under the e-Privacy Law (Law 41/2004, as amended by Law 46/2012).

Most of the fines were related to the rights of the data subjects: lack of the right to information and failure to ensure the right of access.

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

When making the assessment of the infringements, the DPA checks against the specific case all the criteria of Article 83(2) GDPR. Therefore, before deciding on the measure of the penalty, the DPA takes into account all applicable factors.

Additional questions:

- Data breach notifications received between 25 May 2018 and 30 November 2019:

The statistics for the DBN are included in the questionnaire with the number of complaints.

- Initiatives for SMEs:

As to specific initiatives addressed to the SMEs, the PT DPA developed two models of the register provided by Article 30 GDPR (one for controllers and the other for processors).

For the last 2,5 years, the DPA has participated in dozens of GDPR raising awareness initiatives all over the country, most of them addressed to SMEs.

Also, the DPA provides general basic guidance through FAQs section in its website, on issues about which there are more interest, in particular from SMEs.