

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

ANSWERS FROM THE SLOVENIAN 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)?

Not specifically.

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?

Not specifically.

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

We propose the Commission to consider adoption of an adequacy decision for the Republic of North Macedonia. Pursuant to the Personal Data Protection Act, a predecessor of the GDPR in Slovenia, the SI DPA had the power to issue national adequacy decisions and it did so (among some others) for FYRO Macedonia.

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, in more than 60 cases.

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

The problems, we would like to raise are:

1. When creating an Article 56 procedure, looking for an LSA to confirm its position as a lead and creating an IMI case register entry, a CSA may encounter that assumed LSA does not react to the notification in the given timeframe. There is no formal mechanism available to the CSAs in this regard. The same applies when requesting to handle the case locally.
2. Bundling cases – the use of Art 60 informal consultations: For CSAs it is sometimes very time consuming tracking the cases in IMI if they are bundled. To track whether a certain Art. 60 IC communication is connected to a case where an SA has opted to be CSA, the information on connected procedures is analysed, normally oriented towards discovery of the main case register entry, connected to the Art. 60 IC and to the linked Art. 56 procedure. This process normally enables a CSA to connect all the procedures and documentation in the case of a single data processing activity of a certain data controller. However, bundling complicates this, especially when a bundled case register entry of a very general nature is used to create very specific Art. 60 IC communications about very specific processing operations.
3. Translation costs and effort – the documentation in the procedures that must be translated can be vast and the SAs are encountering many unforeseen costs related to this, also in terms of staff that needs to be fluent in English, and is able to ensure complex legal balancing between the national procedural provisions and the GDPR provisions.

- c. How would you remedy these problems?

In our experience so far we have initiated e-mail communications with the authorities in question and reminded them to take action in IMI, before closing date. A more formal mechanism in IMI would be beneficial.

When bundling cases consideration should be made to bundle on a more granular level. That would make tracking of cases easier for CSAs also. Currently the focus is on the LSAs trying to make their use of IMI more transparent with bundling, but for the CSAs bundling is a lot less transparent and requires a lot of effort in internal management of cases. More sensible bundling with the CSA perspective in mind would benefit the use of IMI.

The financial resources for SAs need to be raised for SAs to be able to cope with the new powers and competences.

- 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?)

The draft decision in IMI would in our case be the final decision in an inspection procedure or a final decision in an administrative procedure concerning execution of data subject rights. Before the decisions are final, in

our system, the parties have the right to be heard, e. g. they are informed appropriately about the alleged breach of the law and they have the possibility to react upon it.

- 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, currently we have one such case, we have requested to deal with under the local case procedure. It is not finalized yet.

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

The OSS is a big contribution of the GDPR however there are many procedural issues the GDPR does not clarify, which is a definite shortcoming, especially considering the biggest cases against the multinationals which will be facing many legal obstacles and which due to national procedural legal obligations that require lengthy proceedings. The review of the GDPR should take into account to remedy this by including more definite procedural provisions regarding the OSS cases.

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?

We find it effective in terms of ensuring that the requested authority deals with the issue in a given timeframe and there is a formal procedure behind it. We generally have positive experience with the procedure.

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

There are some issues we would like to raise: Receiving a complaint for an SA means an obligation to provide feedback to the complainant, usually in a timeframe, set by national procedural legislation. If an SA receives a complaint and discovers that a similar or same case is already being dealt with by an LSA, the SA forwards the complaint to the LSA and becomes CSA. In such case, by using the Art. 61 VMA procedure to forward the complaint, the CSA is facing uncertainty as there are no legal deadlines for the LSA to react upon it, whereas the CSA must respect the national deadlines in relation to informing the applicant. If it is clear that the complaint refers to specific data processing already being dealt with by the LSA it would be more appropriate to use the Art. 61 MA procedure as it legally more certain for a CSA. The Art. 61 VMA is more appropriate in the context of sending complaints that are subject to preliminary assessment whether they are being similar to an existing Case register entry. However, in such case there is also uncertainty for the CSA, as there is no legal deadline and obligation for a LSA to provide feedback to the CSA that sent a complaint.

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?

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?

N/a

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

The national law is expected to provide a framework to allow for the provisions on joint operations to fully function, e. g. to provide authority to staff of another SA under given circumstances of the case.

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 (national DPIA list).

- 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”?

Yes we have communicated our national decision.

- 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?

Mostly.

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?

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?

Please see answer under question 1. 1. – Bundling of cases. The use of IMI is time consuming and requires a number of staff dealing with specificities of IMI and administration of the IMI system.

4. European Data Protection Board

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

In total the work in relation to the Art. 70 tasks of the EDPB has taken up an adequate of 4 FTE within the Slovenian SA.

- 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: 33 FTE.

2017: 34 FTE:

2018: 43 FTE.

2019: 47 FTE (plan was 49).

Plan 2020: 49 FTE (not yet fully approved).

- 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: 1.335.457,02 EUR.

2017: 1.459.747,90 EUR.

2018: 1.833.399,66 EUR.

2019: 2.242.236,00 EUR.

Plan 2020: 2.266.485 EUR (this budget approved by the parliament, but the IC estimated that to be able to implement fully our powers we would need higher budget).

- 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 Slovene Information Commissioner is responsible for both personal data protection and access to public information (in this area the IC acts as appellate body). In the area of personal data protection the IC is responsible for tasks entrusted by the GDPR and for DP supervision of the law enforcement sector (under the Police Directive). We have also some limited powers under the Law implementing the e-Privacy Directive.

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

Our estimate is that taking into account substantial scope of work which the IC has under GDPR as member of the EDPB and in particular under the OSS mechanism, and as member of CSC (and other existing tasks related to the supervision of Eurodac, SIS II, VIS, CIS regulations) we would need more human and financial resources to be able to fully implement our duties.

- 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?

No, we would definitely need more staff to work on these issues which proved to be the main challenge in the context of the use of GDPR. Furthermore procedurally this work would need to be better aligned. The fact is that these procedures are closely linked to the national procedural regulations which vary from country to country. In total ca. 5 FTE work on these issues.

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?

Since May 2018 until end of November the SI DPA received 1666 complaints all together (including DBNs). We consider every communication with us in which there is a claim of an irregularity as a complaint.

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

The following corrective powers were used:

- orders to comply with the data subject's requests to exercise his/her rights (58/2/c);
- orders to bring processing operations into compliance with the provisions of the Regulation (58/2/d);
- imposition of temporary or definitive limitation including a ban on processing (58/2/f);

Additionally we also issued warnings, reprimands and fines but pursuant to the Personal Data Protection Act, a predecessor of the GDPR in Slovenia (see answer to the question following), not pursuant to the GDPR.

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

The Slovenian legal system does not provide a legal basis for an amicable settlement in the data protection cases, not even with regard to the GDPR. In practice, however, we may encounter data protection cases with a similar conclusion, although not under the term amicable settlement. Such as when a complaint by the complainant regarding the exercise of his/hers individual right is withdrawn after the right has been executed. In such cases the administrative proceedings are stopped with a formal act because there is lack of legal interest to continue. Similarly, a Data Protection Supervisor may decide not to start the inspection procedure, if the issue in question (say a complainant's right to deletion of data), has been executed in the meantime by the data controller and the Information Commissioner has been notified thereof. Since the breach in question has been remedied there is no formal reason to start an inspection procedure.

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

The SI DPA has not yet imposed any fines under the GDPR. We may only issue fines for breaches of the Personal Data Protection Act – implementing the 1995 Directive (hereinafter: PDPA-1, you can find the English version on <https://www.ip-rs.si/en/legislation/personal-data-protection-act>), a predecessor of the GDPR in Slovenia, but only in relation to the provisions that are still in force and have not been replaced by the GDPR. As for the fines foreseen in the GDPR, the legislative amendments, giving the SI DPA the power to issue GDPR fines, have not yet been passed in Slovenia, expected in January 2019. Hence, we do not yet have the power to issue fines in relation to the GDPR.

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

See previous answer.

Additional questions

1. Number of data breach notifications to SAs between 25 May 2018 and 30 November 2019: 193.

(125 in 2019 and 68 in 2018)

2. Initiatives for SMEs

Support for SMEs is provided by guidelines and other targeted materials/activities:

- guidelines: 6,
- infographics: 6,
- forms (templates): 6,
- pro bono lectures for data controllers and processors: more than 150,
- An EU funded project RAPiD.si is also being implemented, with the focus on SMEs, providing:
 - articles in SME related magazines: 8,
 - monthly LinkedIn publication and newsletter for SMEs,
 - a dedicated SME helpline: 1008 calls received
 - a website specifically oriented towards SMEs (upravljavec.si)
 - seminars and lectures for SMEs, organized in partnership with the Chamber of Commerce and Industry of Slovenia