

Evaluation of the LED under Article 62 – Questions to Data Protection Authorities / European Data Protection Board

Fields marked with * are mandatory.

Background

The Data Protection Law Enforcement Directive (LED)^[1] entered into force on 6 May 2016 and the Member States had to transpose it by 6 May 2018^[2]. It applies to the domestic and cross-border processing of personal data by competent authorities for the purposes of preventing, investigating, detecting or prosecuting criminal offences and executing criminal penalties, including safeguarding against and preventing threats to public security . The LED is the first instrument that takes a comprehensive approach to data protection in the field of law enforcement, including by regulating ‘domestic’ processing. It is therefore a significant development compared with the earlier Framework Decision (which covered only transmission between Member States) that it repealed and replaced.

By harmonising the protection of personal data by law enforcement authorities in EU and Schengen countries, it contributes to increased trust and data exchange between authorities for law enforcement purposes, provided such exchange is based on a law, while at the same time ensuring that the rights of individuals are effectively protected.

As required by the LED^[3], the Commission shall present to the European Parliament and to the Council a first report on the evaluation and review of the Directive by 6 May 2022^[4]. Following the review the Commission shall, if necessary, submit appropriate proposals for amendments, in particular taking account of developments in information technology and in the light of the state of progress in the information society^[5].

The LED stipulates that the Commission shall take into account the positions and findings of the European Parliament, of the Council and of other relevant bodies or sources^[6]. The Commission may also request information from Member States and supervisory authorities. The Commission has already started a dialogue with the Member States through the Council Working party on Data Protection. A dedicated questionnaire has also been sent to civil society organisations by the European Union Agency for Fundamental Rights (FRA).

For the purpose of the evaluation and review the Commission shall in particular examine the application and functioning of the LED provisions on international data transfers^[7]. Besides, this questionnaire seeks to cover other aspects with particular relevance for the supervisory authorities, such as the exercise of their tasks and powers and their cooperation with each other, as well as the consistent application of the LED in the EU.

As this questionnaire intends to contribute to evaluating the LED, in your replies please provide information on your activities (e.g. as regards the decision-making, awareness-raising, training etc.) which fall under the scope of the LED.

We would be grateful to receive the replies to this questionnaire in its online form in English, before **5 November 2021**, so that they can be sent to the European Commission as part of the EDPB contribution to the LED review by 17 December 2021.

Please note that your replies may be made public.

When there are several DPAs in your Member State, please provide a consolidated reply at national level.

When replying, please take into account that the questions below concern the period from the date when the LED was transposed in your Member State to 5 November 2021, unless otherwise specified.

Following the input from other stakeholders, it is not excluded that we might have additional questions at a later stage.

[1] Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.[2] Article 63(1) LED, [3] Article 62(1) LED,[4] Reports should subsequently be issued every four years. [5] Article 62(5) LED,[6] Article 62(4) LED, [7] Article 62(2) LED

QUESTIONNAIRE

We kindly ask the countries that have more than one SA to send us one consolidated reply.

* Select your Country

Sweden

Powers

* Q1: In your opinion, did the LED strengthen your investigative powers / corrective powers?

- Yes
 No

* Q2: Please list your investigative powers

- To obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks
- To obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance with Union or Member State procedural law
- To carry out investigations in the form of data protection audits
- Other(s)

*** Q2.1: Please specify the other investigative powers not listed above**

To obtain all help and information needed to supervise the processing

*** Q3: Do you consider your investigation powers effective**

- Yes
 No

Q3.2: If needed, please provide more details below:

*** Q4: Do you face any practical difficulties in applying your investigative powers?**

- Yes
 No

*** Q5: Have you conducted investigations and/or inspections on your own initiative or only on the basis of complaints?**

Multiple replies are possible

- On our own initiative
 On the basis of complaints

*** Q6: Do you have all the powers listed under Article 47(2)(a), (b – including rectification, erasure, restriction) and (c) LED?**

- Yes
 No

*** Q7: Do you have the same corrective powers towards all law enforcement authorities?**

- Yes

No

* Q8: Do you consider your corrective powers effective?

Yes

No

* Q9: Have you used your corrective powers?

Yes

No

Q9.1: Which corrective powers have you applied and in how many cases? [Please list the powers used according to article 47(2)(a), (b) and (c) LED. Amongst those cases, how many were related to the supervision of SIS II[1] and VIS[2]??]

[1] Council Decision 2007/533/JHA.

[2] Council Decision 2008/633/JHA.

	SIS II and VIS	Other
47(2)(a)	<input type="checkbox"/>	<input type="checkbox"/>
47(2)(b)	<input type="checkbox"/>	<input checked="" type="checkbox"/>
47(2)(c)	<input type="checkbox"/>	<input type="checkbox"/>

* Q9.1.5: Art.47(2)(b) : Number of other cases NOT related to the supervision of SIS II and VIS:

7 cases regarding article 47(2)(b)

In addition to article 47(2) a,b,c, we have the power to issue guidance and/or recommendations as well as administrative fines. We have issued guidance/recommendations in 8 cases and administrative fines in 1 case.

* Q9.2: Have the competent authorities or processors complied with the decisions that you issued in the exercise of your corrective powers?

Yes

No

Complaints

* Q10: Has there been an increase in complaints following the LED transposition in your Member State?

Yes

No

* Q11: Please indicate the issues raised the most in these complaints, in particular as regards data subject rights.

The respect of the proportionality and necessity principle (Article 4 LED)

- The respect of the purpose limitation principle, including for subsequent processing
- Data minimisation principle (Article 4 (1)(c) LED)
- Accuracy of the data (Article 4 (1)(d) LED)
- Storage limitation principle (Article 4 (1)(e) LED) and appropriate time limits (Article 5 LED)
- Accountability of the controller (Article 4(4) LED)
- The determination of the legal basis (Article 8 / Article 10 LED)
- The conditions related to the processing of special categories of personal data (Article 10 LED)
- Automated individual decision-making, including the right to obtain human intervention in automated individual decision-making (Article 11 LED)
- Modalities for exercising the rights (Article 12 LED)
- The right to information (Article 13 LED)
- Right of access by the data subject and limitations to this right (Articles 14 and 15 LED)
- The right to rectification or erasure of personal data (Article 16 LED)
- Exercise of the data subject's rights in the context of joint controllership (Article 21 LED)
- Data protection by design and by default (Article 20)
- The obligation to keep track of the logs and purposes of processing regarding the logs (Article 25 LED)
- The obligation to conduct a data protection impact assessment (Article 27 LED)
- The obligation to ensure the security of processing, including data breaches (Articles 4(1)(f), 29 LED)
- Other

Q11.5: Storage limitation principle (Article 4 (1)(e) LED) and appropriate time limits (Article 5 LED) - raised issues:

Q11.11: The right to information (Article 13 LED) - raised issues:

Q11.13: The right to rectification or erasure of personal data (Article 16 LED) - raised issues:

*** Q12: Are you following up on all complaints?**

- Yes
- No

*** Q12.1: Please explain why you are not following up on complaints?**

We do follow up on complaints but have to distribute and balance our resources in order to leave room also for more strategic and ex officio supervision according to our adopted work plan. We have ongoing work to increase our complaints handling in the LED area with the aim to follow up on all complaints in 2022.

*** Q13: Have you received complaints by organisations representing data subjects under Article 55 LED?**

- Yes
- No

Consultations and advisory powers

*** Q14: Have competent authorities utilised the prior consultation procedure in accordance with Article 28 (1)(a) or (b) LED?**

- Yes
- No

*** Q14.1: In this context, did you provide written advice and/or use your corrective powers pursuant to Article 28(5) LED?**

- Yes
- No

*** Q14.1.1: in how many cases did you provide written advice and/or use your corrective powers pursuant to Article 28(5) LED?**

15 cases. We provide written advice in all prior consultation cases.

*** Q15: Have you established a list of processing operations subject to prior consultation pursuant to Article 28(3) LED?**

- Yes
 No

*** Q16: Does your national parliament / government consult you during the preparation of legislative or other regulatory measures with a data protection dimension ?**

- Not at all
 Occasionally
 Systematically

*** Q17: How many opinions under Article 47(3) LED, other than prior consultations pursuant to Art 28 (1) LED, have you issued upon request or on your own initiative?**

None

*** Q18: Please indicate the types of issues on which competent authorities have approached you for advice (e.g. data breach notifications, handling of data subjects' requests, security).**

[Multiple replies are possible – please note that as regards consultations in the context of DPIAs relevant replies should be made to Questions 17 and 18]

- The respect of the proportionality and necessity principle (Article 4 LED)
- Storage limitation principle (Article 4 (1)(e) LED) and appropriate time limits (Article 5 LED)
- Accountability of the controller (Article 4(4) LED)
- The determination of the legal basis (Article 8 / Article 10 LED)
- Processing of special categories of personal data (Article 10 LED)
- Types of processing, in particular, using new technologies, mechanisms or procedures (Article 27 / Article 28 (1)(a) LED)
- Processing for purpose of research and/or innovation (Article 9(2) LED)
- Automated individual decision-making, including profiling (Article 11 LED)
- Modalities for exercising the rights (Article 12 LED)
- Handling of data subjects requests in relation to the exercise of their rights (Chapter III LED)
- Joint controllership, including on the arrangements of the joint controllers' responsibilities (Article 21 LED)
- Controller / processor arrangements (Article 22 LED)
- Data protection by design and by default, including anonymisation and pseudonymisation (Article 20 LED)
- The obligation to keep track of the logs and purposes of processing regarding the logs (Article 25 LED)
- Appropriate security measures (Article 4(1)(f) and Article 29 LED)
- Other

Q18.1: The respect of the proportionality and necessity principle (Article 4 LED) - raised issues:

Q18.2: Storage limitation principle (Article 4 (1)(e) LED) and appropriate time limits (Article 5 LED)- raised issues:

Q18.4: The determination of the legal basis (Article 8 / Article 10 LED)- raised issues:

Q18.5: Processing of special categories of personal data (Article 10 LED)- raised issues:

Q18.6: Types of processing, in particular, using new technologies, mechanisms or procedures (Article 27 / Article 28 (1)(a) LED)- raised issues:

Q18.15: Appropriate security measures (Article 4(1)(f) and Article 29 LED) -raised issues:

Awareness-raising, training and guidance

*** Q19:Have you issued guidance and / or practical tools supporting competent authorities or processors to comply with their obligations?**

- Yes
- No

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Q20: Have you provided training to / carried out awareness-raising activities for competent authorities and / or processors (DPOs included)?

- Yes
- No

*** Q20.1: how many and on which topics?**

Regular meetings/networking seminars with DPOs of competent authorities on different topics

Data breach notifications

*** Q21: How many data breach notifications have you received?**

147

*** Q22: In what proportion have you followed up with investigations?(%)**

3 out of 147 (2%)

*** Q23: In what proportion have you advised or ordered competent authorities to take measures mitigating the risks ?(%)**

One case was closed without any remarks. The other cases are still ongoing.

*** Q24: In what proportion has the communication to the data subject been delayed, restricted or omitted on the grounds set out in Article 13(3) LED? (%)**

We do not have this kind of statistics.

Power pursuant to Article 47(5) LED

Q25: Have you exercised your power to

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	Yes	No
* bring infringements of your national law(s) transposing the LED to the attention of judicial authorities?	<input type="radio"/>	<input checked="" type="radio"/>
* commence or otherwise engage in legal proceedings?	<input type="radio"/>	<input checked="" type="radio"/>

* Q26: Did you face difficulties in exercising this power?

- Yes
 No

Exercise of data subjects' rights through the SA

* Q27: How many requests under Article 17 LED have you received?

54

* Q27.1: What were the outcomes of the cases?

Multiple choices are possible

- Request declared inadmissible
 All or some data requested provided to data subject
 SA informed data subject that it has conducted all necessary verifications or a review
 Controller ordered to provide (partial) access to the personal data
 Controller ordered to rectify personal data
 Controller ordered to erase personal data
 Controller ordered to restrict the processing of personal data
 SA applied other corrective powers (e.g. a ban on processing and/or fines)
 Others

* Q28: Did encounter any particular problems?

- Yes
 No

International transfers

* Q29: Have you encountered cases where a controller transferred personal data based on a 'self-assessment' pursuant to Article 37(1)(b) LED?

- Yes
 No

* Q30: Have you carried out any investigations into data transfers based on derogations, in particular those set out in Article 38(1)(c) and (d) LED?

- Yes
 No

*** Q31: Have you received any information pursuant to Article 39(3) LED about data transfers based on Article 39(1) LED?**

- Yes
- No

*** Q31.1: have there been cases that raised issues of non-compliance with the requirements set out in Article 39(1) LED?**

- Yes
- No

*** Q31.1.1: please explain:**

We have had one case where this issue was raised.

*** Q32: Have you carried out activities to promote the awareness of controllers/processors (specifically) with respect to their obligations under Chapter V of the LED?**

- Yes
- No

*** Q33: Have you exercised your advisory powers towards the government and/or competent authorities with respect to data transfers under Chapter V of the LED, for instance as regards the level of appropriate safeguards under Article 37(1)(a), (b) LED)?**

- Yes
- No

*** Q34: Have you provided (or been asked to provide) assistance to Member States in assessing and, where necessary, reviewing their international agreements involving international data transfers (for instance, relating to mutual legal assistance, police cooperation) that were concluded prior to 6 May 2016?**

- Yes
- No

*** Q35: Have you received/handled complaints (by data subjects and/or bodies, organisations or associations in accordance with Article 55) specifically addressing the issue of data transfers?**

- Yes
- No

* Q36: Have you exercised your investigative and/or enforcement powers with respect to data transfers?

- Yes
- No

* Q37: Have there been cases in which you have cooperated with foreign data protection authorities (for instance, exchange of information, complaint referral, mutual assistance)?

- Yes
- No

Judicial review

* Q38: Have data subjects / competent authorities / processors contested your decisions (or inaction) before national courts?

- Yes
- No

* 38.1: Please indicate the number of cases respectively for data subjects and competent authorities /processors:

one case - competent authority

38.2: What was the outcome?

Multiselection is possible

- Complaints declared inadmissible
- Decisions upheld
- Decisions overturned

Q38.2.1: If possible, please provide additional information on decisions upheld

The competent authority appealed our decision to issue an administrative fine. Our decision was upheld by the court.

Cooperation

* Q39: Have you used the mutual assistance tool under Article 50 LED?

- Yes
- No

*** Q40: Have you encountered any obstacles (e.g. of an administrative nature) when requesting or providing assistance to another DPA?**

- Yes
- No

*** Q40.1: Please describe them as well as possible solutions.**

Not applicable

Human, financial and technical resources

Q41: How many persons (in full time equivalents) in your DPA (respectively EDPB Secretariat) work on issues that fall within the scope of the LED specifically?

	Number (FTE)	%
* 2017	8	14
* 2018	8	10
* 2019	8	9
* 2020	7	7
* 2021	7	6

*** Q42: How would you assess your DPA's resources for its work on the LED from a human and financial point of view?**

- Sufficient
- Insufficient

Q42.1: Please explain why the resources are insufficient:

For the Swedish DPA, LED has increased the number of mandatory tasks, which in some ways has limited the available human resources for risk based supervision. There is also a competition of resources between the GDPR and the LED.

*** Q43: Do you face any specific challenges when supervising competent authorities in terms of expertise (criminal law / technical / IT) and IT resources?**

- Yes
- No

*** Q43.1: what are the challenges you are facing?**

- Insufficient expertise in criminal law
- Insufficient expertise in working methods and practices of law enforcement authorities
- Insufficient expertise in international cooperation in criminal matters
- Insufficient expertise in technologies used in the area of law enforcement
- Insufficient IT resources
- Others challenges

Q43.1.4: Insufficient expertise in technologies used in the area of law enforcement- please provide more details below:

Q43.1.5: Insufficient IT resources-please provide more details below:

Horizontal questions

*** Q44: In your opinion, what has been the main impact(s) of the transposition of the LED in your Member State?**

Sweden already had a high level of data protection in the field of law enforcement before the LED. The transposition of the LED therefore hasn't meant a big change for us as country or the level of data protection.

However, the possibility to issue administrative fines is welcome and can be used as a powerful tool for achieving compliance.

*** Q45: Have you identified any specific challenges regarding the application of the LED in relation to new technologies? Please explain?**

- Yes
 No

*** Q45.1: Please explain.**

New technologies, or the use of technologies in a new way, has been the focus in several of the prior consultations. For the Swedish DPA, it's obvious that the competent authorities are pushing the boundaries for the sake of having more powerful tools to fight crime. Examples in Sweden are increasing use of camera surveillance techniques and biometrics. The latest developments show the importance of prior consultations before new tools are introduced.

*** Q46: Have you identified any important problems regarding the transposition of the LED in your Member State?**

- Yes
 No

*** Q46.1: Please explain.**

The transposition of article 10 has rendered us some problems since the national legislation fails to give enough guidance on when special categories of data may be processed.

*** Q47: Is there anything else you would like to mention relevant for the LED evaluation that is not covered in this questionnaire?**

- Yes
- No

*** Q47.1: Please specify.**

One thing that comes to our mind is that it would be interesting to evaluate if article 17 is an effective tool for enhancing data protection in the field of law enforcement. Due to the kind of requests we have received so far, and the results of these, the Swedish DPA questions whether this is an effective tool in light of the resources it requires.