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

ANSWERS FROM THE BELGIAN 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)?

We have not received questions nor concerns regarding adequacy decisions from specific stakeholders.

The Belgian DPA does want to emphasize that when adequacy decisions are being adopted or reviewed by the EC, the EDPB should be involved in a sufficiently early stage to ensure its effective participation. This means, that in order to allow the EDPB to carry out the necessary analysis, it should receive an English translation of all necessary documents sufficiently in advance.

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?

In order to preserve EU-consistency on this topic, we prefer to coordinate within the ITS ESG to provide a response to this question.

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

In order to preserve EU-consistency on this topic, we prefer to coordinate within the ITS ESG to provide a response to this question.

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, join 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, the Belgian DPA has been involved in several OSS cases. The Belgian DPA has submitted draft decisions via IMI as LSA and has also expressed relevant and reasoned objections as defined in article 60.4 GDPR when it was CSA.

The Belgian DPA has been identified in IMI as LSA authority for 35 cases since May 2018. This number is based on our own statistics and does not necessarily reflect the precise state of play in the Internal Market Information system (IMI) at the moment of writing.

The Belgian DPA has declared itself CSA in 593 cross-border cases, again according to our own statistics. We do not have statistics on the number of draft decisions that we have received so far on the basis of cases in which we have identified ourselves as a CSA.

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

Generally speaking the cooperation goes smoothly. When some issues occur, then can often be resolved by reaching out to the respective case handler of the other DPA.

On a practical level, we note that there often is a need of better understanding of issues. Bilateral communications between contact persons should therefore be facilitated (in any event, by including contact details of case handlers in the IMI-notification). Of course, it should be avoided that an alternative communication circuit emerges parallel to IMI.

However, we faced difficulties where complaints submitted to the Belgian DPA were inserted in the IMI-system to be handled by the LSA in another Member State. There is no systemic approach towards (regularly informing) the CSA on the state of play and facilitating a proper information exchange with complainants in Belgium.

Another type of difficulties arises, in cases where there are multiple complainants in multiple Member States (see below, under d) .

c. How would you remedy these problems?

As a first step, the EDPB could issue guidance on how to solve this; as a second step, the GDPR could be amended to clarify this.

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?)

Our national law does not contain specific provisions implementing the OSS. Therefore, the cross border cases are dealt with according to the same procedural rules of national law as the national cases. The "*draft decision*" of Art 60 GDPR is not a specific step in our procedure. In practice, this means that a "*draft decision*" is taken by the Litigation Chamber, after completion of the national procedure (including hearing of the parties, etc.;

see below) and then inserted in the IMI-system. We have not yet faced the situation where relevant and reasoned objections were submitted, but if these objections lead to a change of the decision, parties will have to be involved and heard again.

More generally, according to our national procedural law, parties (data subjects as well as controllers and processors) have the right to be involved and to be heard in the proceedings before the Litigation Chamber of the Belgian DPA.

The Litigation Chamber is an entity of the DPA that is mandated with hearing cases and imposing the sanctions. These proceedings are organised in a quasi-judicial manner, which includes exchanges of conclusions on the basis of the right to contradiction, taking into account the requirements of due process of Art 47 Charter and Art 6 ECHR. Of course, the latter requirements apply to all DPAs.

The main difficulty is to ensure the proper involvement of data subjects or complainants in our national proceedings when they are established outside Belgium. It is unclear how we guarantee the procedural rights in one-stop-shop cases, particularly in cases where the Belgian DPA acts as LSA and the data subject submitted its complaint to a CSA in a different Member State.

It follows from Art 77.2 GDPR provides that the communications with the complainant who submitted its complaint needs to go through the CSA. It is however not clear who will translate these communications, and, more importantly , how – on a practical level –this complainant should be involved in the proceedings before the Litigation Chamber.

Moreover, our national law provides for the possibility of a physical hearing. It is not fair that a data subject from a different Member State would *de facto* be deprived of this right. Partly, this could be resolved by organising the hearing via a video conferencing tool. However, this also would require translation, involvement of the local DPA etc.

This is even more problematic in cases with high numbers of complainants, sometimes from multiple Member States, also taking into account that the Schrems-ruling requires to handle complaints with due diligence.

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 time to handle a cross-border complaint is considerably longer than in national cases. This poses serious questions as to the effectiveness of the OSS. Moreover, it poses risks to the level playing field, whereas it is much easier to resolve national cases, sometimes leading to sanctions imposed on companies operating within the country, whereas similar infringements by multinational companies remain unsanctioned.

Moreover, this is difficult to explain to the complainant. More generally speaking, explaining that a complaint has been sent to another DPA and therefore not always being able to give an update on the current status of that complaint is challenging (see above).

Also divergences in national policies, priorities and procedures sometimes conflict with the objectives of the one-stop-shop cooperation. This may pose a serious problem for the effectiveness of data protection. On the one hand, DPAs should be able to set their own enforcement priorities; on the other hand, the effectiveness of these enforcement priorities is questionable when a DPA acts as an LSA, because these enforcement priorities do not bind the CSAs in the OSS-procedure.

We noted a number of shortcomings in (the practical application) of the OSS. We think it would be a good first step if the EDPB provides for an inventory based on all DPA input.

1.2. Mutual assistance – Article 61

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

So far, the Belgian DPA has not yet taken own initiatives to launch a mutual assistance request in the context of an ongoing investigation. Nevertheless, we did receive a limited number of such requests from other SA's.

These SA's requested for example to verify the presence of a controller or processor on our territory, or to identify the host of a specific domain name. The Belgian DPA was always able to assist the requesting SA.

Nevertheless we did identify some difficulties: the legal grounds for refusing a mutual assistance request in article 61.4 GDPR are quite limited, which leaves little leeway for an SA to refuse the request even if there would be very good reasons to do so (for example a lack of resources to carry out the request).

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

No. The scope and nature of this question is unclear.

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

Generally speaking the Belgian DPA uses a mutual assistance requests to follow-up on the proper handling of its complaints by a LSA. Normally complaints are handed over via a voluntary mutual assistance request, but in exceptional cases where we felt that insufficient progress was made in the complaint handling process, we have used an mutual assistance request in an attempt to encourage the LSA to take action.

The practical implementation of voluntary mutual assistance requests in IMI does pose some difficulties. For a single complaint, multiple requests with always a new reference number have to be exchanged between the LSA and the CSA. The lack of a clear unique reference number in IMI for a specific case can make it hard to keep proper track of a specific case if one of the authorities forgets to mention the national case number.

Apart from handing over complaints to identified LSA's, we don't use (voluntary) mutual assistance requests very often.

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

We avoid using (voluntary) mutual assistance requests for the purposes of asking informative questions that are not related to a specific case (for example to compare Member State legislation). We believe that such kind of questions undermine the proper use of mutual assistance requests. SA should use other means, such as Confluence, for exchanging such kinds of information.

The number of exchanged mutual assistance requests should be kept to the necessary minimum to ensure that every request is taken seriously. This is especially important to ensure that article 64.2 GDPR can and will be triggered when a competent supervisory authority does not comply with the obligations for mutual assistance. An inflation of mutual assistance requests can undermine the effective use of article 64.2 GDPR.

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. Also we note that a revision of the documents relating to joint operations are currently under discussion in the COOP ESG.

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

No. The scope and nature of this question is unclear.

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

The question does not apply to us given the fact that we have not yet been involved in joint operations.

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

The question does not apply to us given the fact that we have not yet been involved in joint operations.

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. Currently the Belgian DPA has submitted three draft decisions under art. 64(1) GDPR:

- One for the approval of a BCR – 64.1.f (approved)
- One for the approval of the accreditation criteria for monitoring bodies – 64.1.c (pending)
- One for the approval of the black list of processing operations for DPIA's – 64.1.a (approved)

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

Yes. The Belgian DPA has solicited an opinion of the Board under art. 64(2) GDPR once on a matter of general application. This request resulted in opinion 05/2019 *on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities*.

c. Did you have any problems by complying with the obligations under Article 64(7) GDPR, i.e. taking outmost account of opinion of the EDPB? If so please describe them.

No problems worth mentioning. Articles 10.6 and 10.7 of the EDPB rules of procedure are sufficiently clear. Of course it would have been preferable that the GDPR itself provided for a clear procedure to follow-up on the amendments made by the requesting SA.

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

This question is unclear. In our view the necessary additional information depends on the precise ground on which the art. 64 is triggered (this can be entirely different depending on whether you trigger an opinion for a BCR-file or a matter of general application).

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?

For the purposes articles 64.1.a)-e) GDPR we believe that it is cumbersome to adopt 28 different EDPB-opinions on every single proposal of a national SA. We end up with a multiplicity of instruments that have been adopted on a national level and it is unlikely that – once approved – stakeholders will actually look at the opinions issued by the EDPB. The current intermediary situation does not seem viable on the long term.

It would be far more efficient and conducive for EU-wide harmonization if the EDPB would only have to adopt these decisions once and they would automatically be recognised across the EEA. This would avoid tricky questions on the precise status of national draft decisions that have passed the scrutiny of the EDPB as is currently the case in relation to the DK clauses art. 28.8 GDPR once they will be approved.

Also adopting distinct black list for DPIA (art. 35, 4 GDPR) was in our experience not a very efficient exercise.

Of course, it is the text of the GDPR itself that imposes us this way of functioning. Even though we do not believe that the approach chosen by the legislator is very efficient, we do acknowledge that the opinions of the EDPB do contribute to consistency on the core requirements of all these tools. Nevertheless, companies and data subjects will still have to take into account small but significant differences across Member States.

Clearly article 64.2 GDPR is a useful instrument in coordinating within the EDPB and to reach common positions for urging questions.

2.2 Dispute resolution - Article 65 GDPR

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

No, the Belgian DPA did not yet face or trigger an article 65-procedure.

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?

No.

3. Exchange of information: Standardised communication

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

The IMI system is a communication tool. On the long term we feel a growing need for something closer to a case handling tool.

As already mentioned, a very practical concern is the fact that every IMI-procedure has a different reference number even though it might be connected to the same case. Almost all SA's are obliged to keep an internal Excel-file to be able to keep track of the cases that have been introduced in and received via IMI. The use of this external Excel-tool shows in part a shortcoming of IMI.

Furthermore, a specific solution was developed to bundle cases in IMI. Although we believe that this solution alleviates a need on the short term, it is our experience that bundling complaints in case registers is not very transparent for CSA's and remains very challenging to handle for LSA's. The multiplicity of requests and notifications makes it difficult to keep track of important developments.

Nevertheless, the majority of so-called shortcomings do not stem from the IMI-system itself, but rather from conceptual problems that have not been resolved in the GDPR itself. Discussion on the concept of local cases and the fact that SA's send so many complaints via IMI simply reveals that it is unclear what cases will be dealt with together in the one-stop-shop-mechanism and which complaints will be dealt nationally. No IT-system can solve this problem.

In spite of the difficulties that we experience, we are satisfied with the vivid user community that convenes in the IT USER subgroup.

4. European Data Protection Board

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

This question is not clear.

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	2017	2018	2019	2020
FTE	53.75	54.63	54.74	59.24 (on 31/10/2019)	65

In 2019, 36 of the 59 FTE were case handlers. The other FTE's are administrative support.

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
Budget	€ 8.132.800	€ 8.472.000	€ 8.217.300	€ 8.197.400	€ 8.962.200 (subject to approval of the Belgian Parliament)

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.

No, we do not deal with tasks beyond those entrusted by the GDPR.

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

In our strategic plan that we have submitted to the Belgian Parliament we indicate that we have perceived a systematic increases of workload (both increasing existing workload and new tasks that have been entrusted to us by the GDPR) while our human and financial resources have not been meaningfully increased. Although this is not reflected in the budget our government allowance has even been reduced with 4% since 2015 (the budget is higher since we used financial reserves).

A substantive increase of both financial and human resources is required to enable an effective execution of the tasks entrusted to us by the GDPR. In the next five years we would like to recruit at least 20 FTE. Under the current circumstances we are not able to properly execute all our missions.

As for technical expertise, we have recently recruited 4 FTE with a background in information technology or engineering. Nevertheless, for complex actions such as the gathering and conserving digital proof, we have to rely on external experts since it is not cost-effective to develop this expertise in-house.

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?

We don't have staff that exclusively devote itself to the cooperation and consistency mechanism. Depending on their tasks they will also integrate aspects relating to cooperation and consistency. Approximately twelve people are confronted on a regular basis with questions relating to cooperation and consistency in their day-to-day operations. We notice that it requires additional efforts to keep track of one-stop-shop decisions that are final and that could be used to base new decisions on. For the time being we do not have the resources to assure a systematic follow-up on all final one-stop-shop decisions.

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?

- 2018 (25/5/2018 – 31/12/2018) – 258
- 2019 (1/1/2019 – 30/11/2019) – 283

A complaint comprises formal complaints and express requests for mediation of the data subject. A request for mediation can be transformed in a formal complaint if the outcome of this mediation is not satisfactory.

For both the formal complaint and the request for mediation we have a separate form that is available on our website. Data subjects can choose to submit immediately a formal complaint or to request a mediation first.

A complaint does not comprise questions for information.

As for data breaches:

- 2017– 22
- 2018 – 445
- 2019 (1/1/2019 – 30/11/2019) – 775

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

In OSS-cases: ordering the controller to respond to the exercise of data subject rights (in our other OSS cases where the Belgian is LSA our investigation is still ongoing).

In national cases: warning, reprimand, order to respond to the exercise of data subject rights, fines…

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

In national case files we have resolved several complaints through amicable settlements. We have not used this competence yet in cross-border cases.

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

We have imposed fines in 4 national cases (in three of these four files: incompatible further use of personal data during political campaigns – complaints against individuals: 2.000 euros and 5.000 euros depending on the concrete circumstances of the case). The remaining case concerned the illegal use of the electronic e-ID card (including national identification number) for customer loyalty card: 10.000 euros (an appeal has been lodged against this decision).

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

Attenuating factor: the problem was solved during the procedure before the DPA. Aggravating factor: quality of the controller (public function – politician, possible financial interest), the fact that a violation is linked to purpose limitation as a fundamental principle of the data protection regime. In addition, the other criteria of article 83 were taken into account to determine a proportionate an dissuasive fine: gravity, nature duration ..

Additional questions:

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

  - 2017– 22
  - 2018 – 445
  - 2019 (1/1/2019 – 30/11/2019) – 775

- Initiatives for SMEs:

  - In 2018 we have published a GDPR brochure for SME's;
  - In 2019 we have initiated a large-scale SME consultation with a questionnaire to identify their needs with regard to GDPR-compliance;
  - In January 2020 we will initiate the BOOST-project together with a number of academic partners. The project is co-financed by the European Commission and will seek to produce guidance and tools for the topics of transparency, DPIA and the concept of controllership.