

# Opinion of the Board (Art. 64)



**Opinion 7/2020 on the draft list of the competent supervisory authority of France regarding the processing operations exempt from the requirement of a data protection impact assessment (Article 35(5) GDPR)**

**Adopted on 22 April 2020**

# Table of contents

- 1 SUMMARY OF THE FACTS..... 5
- 2 ASSESSMENT..... 5
  - 2.1 General reasoning of the EDPB regarding the additions in the submitted list..... 5
  - 2.2 Application of the consistency mechanism to the draft list..... 6
  - 2.3 Analysis of the draft list..... 6
- Management of commercial activities..... 6
- 3 CONCLUSIONS / RECOMMENDATIONS..... 6
- 4 FINAL REMARKS..... 6

## The European Data Protection Board

Having regard to Article 63, Article 64(2), Article 64(3) and Article 35(1), (5), (6) of the Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter “GDPR”),

Having regard to Article 51(1)(b) of Directive 2016/680 EU 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, and repealing Council Framework Decision 2008/977/JHA (hereinafter “Law Enforcement Directive”),

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018<sup>1</sup>,

Having regard to Article 10 and 22 of its Rules of Procedure,

Having regard to Opinion 13/2019 on the draft list of the competent supervisory authority of France regarding the processing operations exempt from the requirement of a data protection impact assessment (Article 35(5) GDPR) by the EDPB

Whereas:

(1) The main role of the Board is to ensure the consistent application of the Regulation 2016/679 (hereinafter GDPR) throughout the European Economic Area. In compliance with Articles 35(6) and 64(2) GDPR, the Board shall issue an opinion where a supervisory authority (SA) intends to adopt a list of processing operations not subject to the requirement for a data protection impact assessment pursuant to Article 35(5) GDPR. The aim of this opinion is therefore to create a harmonised approach with regard to processing that is cross border or that can affect the free flow of personal data or natural person across the European Union. Even though the GDPR doesn't impose a single list, it does promote consistency. The Board seeks to achieve this objective in its opinions by ensuring that the lists do not contradict the cases where the GDPR explicitly states that a type of processing should undergo a data protection impact assessment (hereinafter “DPIA”), by recommending SAs to remove some criteria which, the Board considers not correlated with the absence of likelihood of high risks for data subjects, by recommending them to limit the scope of the types of processing in order not to contradict the general rules defined in the DPIA guidelines of the Article 29 Working Party<sup>2</sup>, endorsed by the EDPB, and finally by recommending them to use some criteria in a harmonized manner.

(2) With reference to Article 35(5) and (6) GDPR, the competent supervisory authorities may establish lists of the kind of processing operations which are not subject to the requirement for a DPIA. They shall, however, apply the consistency mechanism where such lists involve processing operations, which are related to the offering of goods or services to data subjects or to the monitoring of their

---

<sup>1</sup> References to “Member States” made throughout this opinion should be understood as references to “EEA Member States”.

<sup>2</sup> WP29 - 248 rev.1, 4 April 2017, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679- endorsed by the EDPB.

behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

(3) The EDPB ensures pursuant to Article 70(1) of the GDPR the consistent application of Regulation 2016/679 throughout the European Economic Area. Under Article 64(2), the consistency mechanism may be triggered by a supervisory authority, the EDPB Chair or the Commission for any matter of general application or producing effects in more than one Member State. Pursuant to Article 64(3) GDPR, the EDPB shall issue an opinion on the matter submitted to it provided that it has not already issued an opinion on the same matter.

(4) While the draft lists of the competent supervisory authorities are subject to the consistency mechanism, this does not mean that the lists should be identical. The competent supervisory authorities have a margin of discretion with regard to the national or regional context and should take into account their local legislation. The aim of the EDPB assessment/opinion is not to reach a single EU list but rather to avoid significant inconsistencies that may affect the equivalent protection of the data subjects across the EEA.

(5) The carrying out of a DPIA is only mandatory for the controller pursuant to Article 35(1) GDPR where processing is “likely to result in a high risk to the rights and freedoms of natural persons”. The national SAs can issue lists concerning certain processing activities, which always require a DPIA (blacklists) per Article 35(4) as well as lists where no DPIA is necessary per Article 35(5) (whitelists). When a processing does not fall within either of these two lists and is not mentioned by Article 35(3) GDPR, an ad hoc decision will have to be made by the data controller based on whether the “likely to result in a high risk to the rights and freedoms of natural persons” criterion is met. According to Recital 91 of the GDPR, a DPIA will not be mandatory when the processing is carried out by an individual physician, other health care professional or a lawyer, as it is not of a sufficient large scale. This exception covers only partially the cases when a DPIA will not be necessary, i.e. when there is no high risk to the rights and freedoms of natural persons.

(6) The lists produced by the competent supervisory authorities support a common objective, namely to identify the kind of processing operations for which the national SAs are certain that, under no circumstances, they will result in a high risk, and processing operations the national SAs deem unlikely to result in a high risk, and therefore do not require a DPIA. The Board refers to the DPIA guidelines of the Article 29 Working Party, which sets out criteria to consider in determining processing operations “likely to result in a high risk”.<sup>3</sup> As set out in these guidelines, in most cases, a data controller can consider that a processing meeting two criteria would require a DPIA to be carried out. However, in some cases, a data controller can consider that a processing meeting only one of these criteria requires a DPIA.

(7) The opinion of the EDPB shall be adopted pursuant to Article 64(3) GDPR in conjunction with Article 10(2) of the EDPB Rules of Procedure within eight weeks from the first working day after the Chair and the competent supervisory authority have decided that the file is complete. Upon decision of the Chair, this period may be extended by a further six weeks taking into account the complexity of the subject matter.

---

<sup>3</sup> Recitals 75, 76, 92, 116 GDPR.

## HAS ADOPTED THE FOLLOWING OPINION:

### 1 SUMMARY OF THE FACTS

1. The competent supervisory authority of France has submitted its draft list to the EDPB, which contains two additions to their previously adopted list. The decision on the completeness of the file was taken and the request circulated on 26 February 2020.
2. The opinion must be adopted on 22 April 2020.

### 2 ASSESSMENT

#### 2.1 General reasoning of the EDPB regarding the additions in the submitted list

3. Any list submitted to the EDPB has been interpreted as further specifying on the one hand Article 35 GDPR, which will prevail in any case, and on the other hand recital 91. Thus, no list can be exhaustive.
4. This opinion does not reflect upon items submitted by the French Supervisory Authority, which were deemed outside the scope of Article 35(6) GDPR. This refers to items that neither relate “to the offering of goods or services to data subjects” in several Member States nor to the monitoring of the behaviour of data subjects in several Member States. Additionally, they are not likely to “substantially affect the free movement of personal data within the Union”. However, for the sake of clarity, the Board will enumerate the items of the list, which were deemed outside the scope of Article 35(6) GDPR. Further, any processing operations that relate to law enforcement were deemed out of scope, as they are not in scope of the GDPR.
5. This opinion will not comment on any items on the list, which fall within the scope of recital 91.
6. The opinions on the Article 35(4) GDPR lists also aimed at defining a consistent core of processing operations, which the Board requested all Supervisory Authorities to add to their list if not already present in order to ensure consistency. The Article 35(5) GDPR lists may not exempt these general processing operations as a rule.
7. The lists established by SAs pursuant to Article 35(5) GDPR are inherently non-exhaustive. These lists contain types of processing regarding which national SAs are certain that, under no circumstances, they will result in a high risk to the rights and freedom of natural persons, and processing operations the national SAs deem unlikely to result in a high risk. Such lists cannot enumerate all cases in which a DPIA will not be necessary. In any event, the obligation of the controller or processor to assess the risk of the processing and to comply with the other obligations imposed by the GDPR remain applicable.
8. When this opinion remains silent on an item from the list, it means that the Board is not asking the French Supervisory Authority to take further action.
9. Finally, the Board recalls that transparency is key for data controllers and data processors. In order to clarify the entries in the list, the Board is of the opinion that making an explicit reference in the lists to the criteria set out in the guidelines could improve this transparency.

## 2.2 Application of the consistency mechanism to the draft list

10. The draft list submitted by the French Supervisory Authority relates to the offering of goods or services to data subjects, relates to the monitoring of their behaviour in several Member States and/or may substantially affect the free movement of personal data within the Union mainly because the processing operations in the submitted draft list are not limited to data subjects in this country.
11. The EDPB notes that for the items 13 and 14 that each mentioned “frame of reference” document is deemed to be part of the draft decision.
12. Further, the EDPB has previously considered the items 1-12 of the submitted draft decision in the context of its Opinion 13/2019.
13. Regarding item 13 and considering Article 64(3) GDPR, the Board recalls that in its Opinion 13/2019 to the FR SA it stated that for these kinds of processing the scope needs to be restricted by “stating that it does not apply to the processing activities concerning debts which have been acquired from a third party, and that it only applies to debts owed in the context of a business to consumer relationship. Furthermore, the Board recommends that evaluation and scoring be explicitly excluded from scope of this item.”

## 2.3 Analysis of the draft list

14. Taking into account that:
  - a. Article 35(1) GDPR requires a DPIA when the processing activity is likely to result in a high risk to the rights and freedoms of natural persons; that
  - b. Article 35(3) GDPR provides a non-exhaustive list of types of processing that require a DPIA, and that
  - c. the Board presently only considers the item 14 of the submitted draft decision, the Board is of the opinion that:

### MANAGEMENT OF COMMERCIAL ACTIVITIES

15. The Board recalls its reasoning in its Opinion 11/2019 where it requested for these kind of processing activities the restriction of “the scope of this item by covering only business-to-customers relations, excluding the processing of sensitive data or data of highly personal nature and by excluding data processing on a large scale.” The Board therefore recommends that the FR SA reduces the scope of this item in the same way.

## 3 CONCLUSIONS / RECOMMENDATIONS

16. The draft list of the French Supervisory Authority may lead to an inconsistent application of Article 35 GDPR and recommends that the following changes be made:
  - ) Regarding management of commercial activities: the Board recommends to restrict the scope of this item by covering only business-to-customers relations and the exclusion of the processing of sensitive data or data of highly personal nature from the item.

## 4 FINAL REMARKS

17. This opinion is addressed to the Commission Nationale de l’Informatique et des Libertés (French Supervisory Authority) and will be made public pursuant to Article 64(5)(b) GDPR.

18. The French Supervisory Authority shall communicate the final decision to the Board for inclusion in the register of decisions which have been subject to the consistency mechanism, in accordance with Article 70(1)(y) GDPR.

For the European Data Protection Board

The Chair

(Andrea Jelinek)