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compared with the earlier Framework Decision (which covered only transmission between Member States) that it repealed and replaced.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.

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**QUESTIONNAIRE**

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

* Select your Country

Austria

**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)
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?
- 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]?


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<tr>
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<th>SIS II and VIS</th>
<th>Other</th>
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<tbody>
<tr>
<td>47(2)(a)</td>
<td></td>
<td></td>
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<tr>
<td>47(2)(b)</td>
<td></td>
<td>✔</td>
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<tr>
<td>47(2)(c)</td>
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Q9.1.5: Art.47(2)(b) : Number of other cases NOT related to the supervision of SIS II and VIS:

The Austrian DPA does not keep its own statistics in this regard.

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

Q10.1: Please indicate approximate increase in percentages.

The Austrian DPA does not keep its own statistics on LED complaints. In general, however, the number of complaints has increased.

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:

Mainly storage period of identification data by police.

Q11.12: Right of access by the data subject and limitations to this right (Articles 14 and 15 LED) - raised issues:

Alleged insufficient disclosure of processed data.

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

Mainly deletion of identification data.
Q11.18: The obligation to ensure the security of processing, including data breaches (Articles 4(1) (f), 29 LED) - raised issues:

Mainly reporting of data security breaches due to data disclosure.

* Q12: Are you following up on all complaints?
  - Yes
  - No

* 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

* 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?

In the case of requests from authorities the Austrian DPA provides general legal information. During the relevant period, approximately 15 legal information requests were made within the scope of the LED.

• 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

• Q18.16: Other - raised issues:

The main issues were the admissibility of video surveillance by private or public bodies, the admissibility of certain data processing, the right to complain to the supervisory authority and the question of the admissibility of data transfers.
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

Q19.1: Please list them below

The Austrian DPA provides a form for the notification of a data breach, which is publicly available on its website.

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?

The Austrian DPA regularly holds data protection presentations in which the LED is covered. From 2017 until now 250 presentations have been given.

Data breach notifications

Q21: How many data breach notifications have you received?

It should be noted that the Austrian DPA does not keep separate statistics or records of data breaches falling within the scope of the LED. In total, the AT SA received 344 data breach notifications in 2018, 929 data breach notifications in 2019 and 802 data breach notifications in 2020.

However, in the course of a subsequent file search, the following could be determined: Since the transposition and entry into force of the LED, the AT SA received a total of 26 data breach notifications that
fall within the scope of the LED.
In about a quarter of the cases, the AT SA requested further information in the course of its investigations.

• Q22: In what proportion have you followed up with investigations? (%)
  25

• Q23: In what proportion have you advised or ordered competent authorities to take measures mitigating the risks? (%)
  0

• 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? (%)
  0

Power pursuant to Article 47(5) LED

Q25: Have you exercised your power to

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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<tbody>
<tr>
<td>• bring infringements of your national law(s) transposing the LED to the attention of judicial authorities?</td>
<td></td>
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<tr>
<td>• commence or otherwise engage in legal proceedings?</td>
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</table>

• 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?

The Austrian DPA does not provide separate statistics on procedures falling within the scope of the LED. However, it could be assessed that since the 25.5.2018, 87 complaints had been lodged with the AT DPA, which fall within the scope of the LED.

• 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)

* Q27.1.2: Other - Please specify:

Under Austrian law, there is a separate procedure for this and data subjects can lodge a complaint with the Austrian DPA. The Austrian DPA does not keep precise records of the outcome of proceedings within the scope of the LED. The AT DPA did not face particular problems.

* 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

* 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
| 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 |

| Q33.1: Have you issued any guidelines, recommendations and/or best practices in this regard? |
|---------------------------|-----------------------------|
| 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 |

| Q37.1: Are there existing mechanisms on which you can rely for such cooperation? |
|---------------------------|-----------------------------|
| 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:

50 proceedings were brought before the Federal Administrative Court in 2018, 164 in 2019 and 319 in 2020. A small percentage of these are proceedings concerning LED. An individual statistic of the LED proceedings that have been appealed is not kept.

38.2: What was the outcome?

Multiselection is possible

- [ ] Complaints declared inadmissible
- [x] Decisions upheld
- [x] Decisions overturned

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

Most of the proceedings are currently still pending. Nevertheless, one case is presented in more detail.

A regional prosecutor's office has challenged a decision of the DPA which was about the relationship between the National Code of Criminal Procedure (§ 106 STPO - complaint on infringement) and the National Data Protection Act (§ 24 DSG - complaint to the DPA). The DPA has assumed jurisdiction here because § 106 StPO and § 24 DSG pursue different objectives. Furthermore, the decision dealt with the relationship between §§ 26 und 51 StPO and § 1 para. 2 last sentence DSG as well as Article 4 para. 1 lit. c LED, in particular whether an accused person must also be granted access to those parts of the file that do not concern his or her proceedings at all, but only another person against whom a joint investigation is being conducted. Here, too, the DPA was of the opinion that an unrestricted right of access is not in line with the principle of data minimisation. There is no decision on the appeal yet.

Q38.2.2: If possible, please provide additional information on decisions overturned

Most of the proceedings are currently still pending. Nevertheless, one case is presented in more detail.

Decision of the Federal Administrative Court (W274 2225373-1)

The DPA decided that the Code of Criminal Procedure (StPO) does not always take precedence over the Third Section (concerns the "Processing of personal data for the purposes of police security, including police state protection, military self-protection, the investigation and prosecution of criminal offences, the enforcement of criminal penalties and the execution of measures") of the National Data Protection Act (DSG) - contrary to the Federal Administrative Court’s assumption - and that the LED must also be taken into account when interpreting the StPO (here: Recital 20 in conjunction with Article 4 para. 1 lit. c LED) as the StPO cannot be interpreted contrary to the provisions of the LED. The DPA thus concluded that §§ 135 et seq. StPO must be interpreted restrictively in light of the principle of data minimisation (LED as well as § 1 DSG), which is why, in the context of information pursuant to §§ 135 et seq. StPO, only that information should be provided to the data subjects which is absolutely necessary to protect their legal interests. The DPA has lodged an appeal against the Federal Administrative Court’s decision with the Supreme Administrative Court.
**Cooperation**

- **Q39:** Have you used the mutual assistance tool under Article 50 LED?
  - [ ] Yes
  - [ ] No

**Q39.1:** Please provide numbers for:
Requests you received - please indicate the type of cooperation requested, differentiating between:

<table>
<thead>
<tr>
<th>Type of Cooperation</th>
<th>Nbr</th>
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<tbody>
<tr>
<td>Request for information</td>
<td>1</td>
</tr>
<tr>
<td>Request to carry out investigations</td>
<td>0</td>
</tr>
<tr>
<td>Request to carry out inspections</td>
<td>0</td>
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<tr>
<td>Other</td>
<td>0</td>
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**Q39.2:** Please indicate how you replied to those requests:

<table>
<thead>
<tr>
<th>Type of Response</th>
<th>Nbr</th>
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<tbody>
<tr>
<td>Requests declined</td>
<td>0</td>
</tr>
<tr>
<td>Information provided</td>
<td>1</td>
</tr>
<tr>
<td>Investigation carried out</td>
<td>0</td>
</tr>
<tr>
<td>Inspection carried out</td>
<td>0</td>
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<tr>
<td>Other</td>
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**Q39.3:** Requests you sent - please indicate the type of cooperation requested, differentiating between:

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<tr>
<th>Type of Cooperation</th>
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<tbody>
<tr>
<td>Request for information</td>
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<tr>
<td>Request to carry out inspections</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
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Q40: Have you encountered any obstacles (e.g. of an administrative nature) when requesting or providing assistance to another DPA?

- Yes
- No

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?

<table>
<thead>
<tr>
<th>Year</th>
<th>Number (FTE)</th>
<th>%</th>
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<tbody>
<tr>
<td>2017</td>
<td>0.5</td>
<td>3</td>
</tr>
<tr>
<td>2018</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>2019</td>
<td>1.5</td>
<td>6</td>
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<tr>
<td>2020</td>
<td>2</td>
<td>6</td>
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<tr>
<td>2021</td>
<td>2</td>
<td>6</td>
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</table>

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

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

- Yes
- No

Horizontal questions

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

The most significant impact is the now existing jurisdiction over public prosecutors’ offices, which was initially contested by them, but is now accepted due to the case law of the Federal Administrative Court, although an official appeal on this issue (brought by a public prosecutor’s office) is still pending before the Administrative Court.
Q45: Have you identified any specific challenges regarding the application of the LED in relation to new technologies? Please explain?
- Yes
- No

Q46: Have you identified any important problems regarding the transposition of the LED in your Member State?
- Yes
- No

Q47: Is there anything else you would like to mention relevant for the LED evaluation that is not covered in this questionnaire?
- Yes
- No