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compared with the earlier Framework Decision (which covered only transmission between Member States) that it repealed and replaced.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

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**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?
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

Q6.1: Which powers you do not have
Multiple replies are possible
- No power to issue warnings (Art. 47(2)(a) LED)
- No power to order the controller or processor to bring processing into compliance (including rectification, erasure and restriction) (Art. 47(2)(b) LED)
- No power to impose a temporary or definitive limitation, including a ban, on processing
- Other(s)

Q6.1.1: No power to issue warnings (Art. 47(2)(a) LED) - Please provide more information if possible:
The Danish DPA has all the corrective powers – except warnings – as mentioned in Article 47(2) LED.

Instead of warnings - according to Article 42 of the Danish Law Enforcement Act, the Danish DPA may:
- issue an opinion to the controller and the processor that planned processing operations are likely to contravene this Act
- order to bring processing activities into compliance with this Act, or
- temporarily or definitively restrict, including prohibit, the processing of personal data.

The most common way for the Danish DPA to bring processing activities into compliance with the Danish Law Enforcement Act is by giving criticism or severe criticism to the relevant authority. If needed, the DPA can order the controller or processor to bring processing operations into compliance. Rectification and erasure are not explicitly listed as a corrective power but they are covered by the DPA’s right to “order processing activities to be brought in compliance with this Act”

* Q7: Do you have the same corrective powers towards all law enforcement authorities?
  - Yes
  - No

* Q7.1: what are the differences?

The answer is yes, but we wanted to add the following:

The Danish DPA has the same corrective powers towards all law enforcement authorities where we are the competent authority. See the Danish Law Enforcement Act Article 1 for a description of the scope of the act.

When it comes to the processing of information carried out before the courts, the Danish DPA is not the competent authority, cf. the Danish Law Enforcement Act Article 38. The Danish Court Administration and the courts are then the competent authorities and they have the same powers as the Danish DPA.

* 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]?


<table>
<thead>
<tr>
<th>SIS II and VIS</th>
<th>Other</th>
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• Q9.1.2: Art.47(2)(b) : Number of cases related to the supervision of - SIS II and VIS:

2

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

25

• 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.

Firstly, the Danish Data Protection Agency does not keep statistics on this, but we have conducted a search in our case handling system and have been able to identify the amount of complaints mentioned below.

Secondly, when searching through the case handling system, the search can be set to find “complaints”. Some cases are originally received and registered as a complaint, but do not end up as one, eg. the complainant is not entitled to complain, the complaint is withdrawn, the complaint turns out to be a request for guidance etc. The numbers below also includes those cases.

As of 27 October 2021, the Danish DPA has received 223 complaints since the Danish Law Enforcement Act was adopted on the 27 April 2017.

• 2017: 17 complaints
• 2018: 46 complaints
• 2019: 72 complaints
• 2020: 37 complaints
• 2021: 52 complaints so far
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

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

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

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

1

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?

The Danish DPA notes that we do not keep statistics on how many opinions under article 47(3) we issue. We have reviewed our case handling system manually, which means that some uncertainty can be associated with the exact number of opinions issued.
The Danish DPA has issued a number of opinions, of which a clear majority concerns the proposed legislative or regulatory measures as mentioned in question 15. In total we have issued 72 opinions regarding proposed legislative or regulatory measures falling 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 Danish DPA has a continuous dialogue with competent authorities on various types of issues, including the issues mentioned in the question.

**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

On the Danish DPA’s website guidance can be found relating to law enforcement (https://www.datatilsynet.dk/hvad-siger-reglerne/vejledning/politi-og-retsvaesen).
The following documents are available on the website:
- Overview: The special rules regarding law enforcement
- Guidelines on exchange of personal data with the police
- Guidance on the exchange of personal data as part of the coordinated government effort against gang related crime
- Guidance on the exchange of personal data as part of the fight against radicalisation and extremism

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 Danish DPA has a continuous, transparent and open dialogue with competent authorities on various types of issues. The Danish DPA has committed a large amount of time and effort to different awareness-raising activities, but those activities have focused on data protection in general and not specifically on the LED. The activities have been held in close coordination with other public authorities and companies.

Data breach notifications

Q21: How many data breach notifications have you received?

The Danish DPA notes that we do not keep statistics on the number of data breaches we receive. The case handling system has been reviewed manually, which means that some uncertainty can be associated with the figures below.

It appears from the manual review that the Danish DPA has received 332 data breach notifications from law enforcement authorities. The DPA has followed up with further investigation in 18 cases (in one case it is currently still to be decided if further investigation is needed).

As for the remaining cases, the Danish DPA was able to process them without further investigation.

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

Approximately 5 % (See numbers above)
Q23: In what proportion have you advised or ordered competent authorities to take measures mitigating the risks? (%)

Except from four cases where investigations are still ongoing, the Danish DPA has ordered competent authorities to take measures mitigating the risks in all the cases mentioned above where further investigations was required.

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? (%)

The Danish DPA does not keep statistics on this matter and has not been able to identify any such cases by the available search criteria in our case handling system.

Power pursuant to Article 47(5) LED

Q25: Have you exercised your power to

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<tr>
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<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>
<td></td>
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<tr>
<td>commence or otherwise engage in legal proceedings?</td>
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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 Danish DPA notes that we do not keep statistics on the number of requests under Article 17 we receive. The case handling system has been reviewed manually, which means that some uncertainty can be associated with the figure below. After manually going through the case handling system, we found 15 requests under Article 17 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)
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

* 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?
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

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

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>In the Danish DPA, we do not have any employees strictly dedicated to handling cases regarding the LED. All cases relating to the LED are being handled by the International Division, which consists of seven employees. The</td>
<td>See 2017</td>
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International Division also deals with other cases and the Danish DPA does not have any statistics on the number or percentage of staff the LED related work represents.

<table>
<thead>
<tr>
<th>Year</th>
<th>Notes</th>
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<tr>
<td>2018</td>
<td>See above</td>
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<tr>
<td>2019</td>
<td>See above</td>
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<td>2020</td>
<td>See above</td>
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<tr>
<td>2021</td>
<td>See above</td>
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* 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?

  More awareness of and focus on data protection issues and data subjects’ rights.

* 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