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compared with the earlier Framework Decision (which covered only transmission between Member States) that it repealed and replaced.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

QUESTIONNAIRE

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

Select your Country

Italy

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

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

Q7.1: what are the differences?
Pursuant to the national law implementing the LED (Section 37.6 of the Legislative Decree No 51/2018), the Garante shall not be competent to supervise compliance with the provisions of this decree in respect of the processing operations by courts acting in their judicial capacity, or by the public prosecutor when acting in a judicial capacity.

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>
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<tbody>
<tr>
<td>47(2)(a)</td>
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<td>47(2)(b)</td>
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<td>47(2)(c)</td>
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Q9.1.4: Art.47(2)(a) : Number of other cases NOT related to the supervision of SIS II and VIS:

1

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

3

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)
- 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

Q11.4: Accuracy of the data (Article 4 (1)(d) LED) - **raised issues**:

In substance, the controller's obligation to notify the recipients of the rectification of inaccurate personal data

Q11.12: Right of access by the data subject and limitations to this right (Articles 14 and 15 LED) - **raised issues**:
In general, the right to obtain from the controller confirmation of the processing of personal data and access to those data

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

In general, the right to obtain from the controller without undue delay the rectification of inaccurate personal data and the erasure of unlawfully processed personal data

• 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?

In 4 cases: one concerning a facial recognition system to support police authorities in managing public order and security or else in handling specific investigations, the IT DPA issued a negative opinion, as the automated processing of biometric data on large scale was considered not to comply with the national law implementing the LED (Legislative Decree No 51/2018). In the other two cases regarding the use of body cams by law enforcement authorities, the IT DPA provided written advice and used its corrective powers pursuant to Article 28(5) LED to order the necessary measures to bring the processing operations into compliance with the Legislative Decree No 51/2018 (Opinions No 291 and No 290 of 22 July 2021). In another case, concerning the collection of biometric data through a video surveillance system with facial recognition functions in a public space aimed at allowing the local police to identify people under investigation or suspicious situations or automatically detect theft of objects, the IT DPA used its corrective powers pursuant to Article 28(5) LED to prevent the collection of biometric data in absence of an adequate legal basis pursuant to the Legislative Decree No 51/2018.

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?

On the IT DPA's initiative, 3 Opinions between 2019 and 2021 with regard to the legislation on the retention of telephone and electronic traffic data, on remote criminal trial and on wiretapping software; on request, the IT DPA provided 6 Opinions in the context of prior consultations pursuant to Art 28(2) LED on legislative or regulatory measures between 2018 and 2021 – namely, on the access by competent authorities to telephone and electronic traffic data for criminal investigation purposes, on the draft regulation concerning the processing operations performed by police authorities for LE purposes, on electronic access by municipal police to the Data Processing Center of the Police Department with regard to data and information relating to stolen or lost identity documents and residence permits, as well as to data and information relating to stolen vehicles, on the technical arrangements for the PNR data information system and for the transfer of those data to competent authorities by air carriers.

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:

The respect of the proportionality principle with regard to the national legislation on access to telephone and electronic traffic data by the public prosecutor for purposes of detection and prosecution of criminal offences

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

Storage limitation with regard to the retention of telephone and electronic traffic data as envisaged by the national legislation on data retention

Q18.6: Types of processing, in particular, using new technologies, mechanisms or procedures (Article 27 / Article 28 (1)(a) LED) - raised issues:
Limitations to be introduced into the national legislation on the use of wiretapping softwares for investigation purposes, including those which are not inserted in the suspects’ device, but connected to Apps placed on online App stores

Q18.9: Modalities for exercising the rights (Article 12 LED) - raised issues:
Ensuring compliance with the LED of the draft regulation on the Data Processing Center of the Police Department in relation to the modalities for exercising data subjects’ rights and information to made available or to be given to them with regard to their personal data

Q18.12: Controller / processor arrangements (Article 22 LED) - raised issues:
Ensuring that the private entities in charge of the acquisition of PNR data information system provide sufficient guarantees as regards data protection and that the processing carried out by such entities is governed by a contract with the controller in line with article 22 of the LED

Q18.13: Data protection by design and by default, including anonymisation and pseudonymisation (Article 20 LED) - raised issues:
Ensuring integrity, security and authenticity of data collected by wiretapping software, secure transmission and storage of those data into the servers of Public Prosecutors and log analysis of processing operations carried out by private providers for maintenance activities

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

notably with regard to the storage of personal data collected through wiretapping software in cloud systems outside the EU or the use of service providers established in non-EU countries for the purposes of remotely carrying out criminal trials

Q18.16: Other - raised issues:

Transfers of personal data in third countries

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

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

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

   3

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

   33%

• 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

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<td>• bring infringements of your national law(s) transposing the LED to the attention of judicial authorities?</td>
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<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?
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?*

- 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:*

Competent authorities contested the DPA’s decision in 3 cases but judicial proceedings are pending

*38.2: What was the outcome?*

Multiselection is possible
- Complaints declared inadmissible
- Decisions upheld
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?

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<tr>
<td>2017</td>
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<td>2018</td>
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<td>2019</td>
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<td>2020</td>
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<td>2021</td>
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<td>1.5</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

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

The DPA is understaffed compared to the workload
• 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?

  Awareness and accountability of competent authorities as regards the risks, rules and rights of data subjects in relation to the processing of personal data have increased at central level but not at local level also due to the territorial organization of the said authorities. In this connection, a specific Task Force was set up by the Police Department of the Ministry of the Interior in July 2019 with a view to identifying and implementing the necessary technical and organizational measures to ensure full compliance of police activities with the legislation on the protection of personal data at both central and local level.

• 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.

  Notably with regard to the use of new technologies such as artificial intelligence and facial recognition because of the complexity of the technical and legal issues involved.

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

  Q46.1: Please explain.
Some secondary legislation as envisaged by the national law implementing the LED to specify relevant features of the processing such as the storage periods or the entities entitled to access the data, the access methods, as well as the conditions for the exercise data subject rights – insofar as such features are not already laid out by laws or regulations - have not yet been adopted (see Section 5.2 of Legislative Decree No 51/2018). The same applies to the national guidance for the dissemination of police photographs and other personal data by police authorities for LE purposes, which is envisaged by the current regulation on processing operations performed by the police pursuant to Section 57 of the Personal Data Protection Code (see Section 14 of Presidential Decree No 15 of 15 January 2018)

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

- Yes
- No