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compared with the earlier Framework Decision (which covered only transmission between Member States) that it repealed and replaced.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

Slovenia

**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)
Q2.1: Please specify the other investigative powers not listed above

- seizure or acquisition of an appropriate copy at the expense of the competent authority or processor, forensic copy or extract from the books and other documentation in any form using photocopiers or computer equipment of the competent authority or processor or supervisory authority;
- sealing the relevant part of the premises and equipment, business books and other documentation and electronic devices for a maximum of five working days;
- seizure of objects and business books and other documentation for a maximum of ten working days.

We may also exercise our powers under the Inspection Act.

Q3: Do you consider your investigation powers effective

☐ Yes
☐ No

Q3.2: If needed, please provide more details below:

Act on the Protection of Personal Data in the Area of Treatment of Criminal Offences (ZVOPOKD) however provides for certain restrictions in the exercise of investigative powers of the supervisory authority:

(1) The supervisory body is not competent to carry out inspections under ZVOPOKD and for misdemeanour supervision regarding:

1. the processing of personal data processed in a criminal case by a court carried out in the context of independent judicial decision-making or the decision of professional associates or judicial assistants by order of a judge, as defined by the law governing courts or by other laws determining their independent operation;
2. processing of personal data carried out within the framework of independent judicial decision-making of the Constitutional Court of the Republic of Slovenia in the cases referred to in the previous point.

(2) In supervising the processing of personal data and databases relating to undercover officers under the laws governing the tasks and powers of the police and criminal proceedings, police officers who have been assigned an adapted identity, and police officers of a foreign country with the status of undercover officers the law governing the tasks and powers of the police, protected witnesses under the law governing witness protection and persons who provide information to the police under the law governing the tasks and powers of the police (hereinafter: protected persons), the supervising person may not inspect a part of the document or collection which includes personal data on the identity of these persons and other data on the basis of which these persons could be identified, unless the protection of the personal data was submitted by the protected person as an applicant with a special position. The supervisory body shall exercise the supervision referred to in the previous sentence by performing supervision only with regard to the personal data of the protected person who submitted the application, and it is not admissible to disclose data on the operation of the competent authority in a specific case.

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?

Our powers and measures may not interfere with criminal cases of courts and cases of the Constitutional Court of the Republic of Slovenia when dealing with criminal cases of the court. We are also not allowed to access certain personal data in police records and files in ex officio inspection proceedings (namely personal data of undercover agents, protected witnesses and persons providing information to the police).

Q8: Do you consider your corrective powers effective?

- Yes
- No

Q8.1: Please explain why do you do not consider your corrective powers effective?

[Multiple replies are possible]

Considering the fact that the Act on the Protection of Personal Data in the Area of Treatment of Criminal Offences (ZVOPOKD), transposing the LED in Slovenia, has only been in force since 31. 12. 2020, it is still too early to give a more elaborate analysis on the effectiveness of our powers.

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\textsuperscript{[1]} and VIS\textsuperscript{[2]}?]

\[1\] Council Decision 2007/533/JHA.
\[2\] Council Decision 2008/633/JHA.

<table>
<thead>
<tr>
<th>SIS II and VIS</th>
<th>Other</th>
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<tr>
<td>47(2)(a)</td>
<td></td>
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<tr>
<td>47(2)(b)</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:

1

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)
☐ 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

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

Refusal of the competent authorities to provide access to personal data;
inactivity of the competent authorities

• 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

• 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
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?

3

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

Q18.6: Types of processing, in particular, using new technologies, mechanisms or procedures (Article 27 / Article 28 (1)(a) LED)- raised issues:

ANPR

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

We have set up a special section on our website that is dedicated to Act on the Protection of Personal Data in the Area of Treatment of Criminal Offences (ZVOPOKD). It contains general information on the Act, information on the rights of individuals deriving from it, on its inspection and other relevant information. We have also prepared some typical forms, issued on the basis of the provisions of ZVOPOKD.

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

- Yes
- No

Data breach notifications

Q21: How many data breach notifications have you received?

None.

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

N/A

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

N/A

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? (%)

N/A
Power pursuant to Article 47(5) LED

Q25: Have you exercised your power to

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<th>Yes</th>
<th>No</th>
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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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<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?

None.

* 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

* Q27.1.2: Other - Please specify:

No such cases.
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

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>/</td>
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<td>2018</td>
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<td>2020</td>
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<tr>
<td>2021</td>
<td>0.5 FTE</td>
<td>Less than 1.55</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:

Unfortunately, since the transposition of the LED into our national law, no additional manpower has been appointed to our DPA nor is it foreseen. The same stands for any increase in the budget. None of our employees cannot deal exclusively with LED matters, but have to do other work due to the large amount of 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?

It is too early to give a thorough analysis on the implementation of the ZVOPOKD, However, the issues highlighted under Q46 may well result in difficulties as regards the implementation of LED.

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.
It is too early to give a thorough analysis on the implementation of the ZVOPOKD, however, the issues highlighted under Q46 may well result in difficulties as regards the implementation of LED.

**Q46: Have you identified any important problems regarding the transposition of the LED in your Member State?**

- Yes
- No

**Q46.1: Please explain.**

As already mentioned, the LED in Slovenia has only been implemented since 31.12.2020. It is therefore early to give a thorough analysis on the implementation; however, two issues may already be highlighted. The ZVOPOKD in Article 75 provides for one supervisory authority under the LED, which is the Information Commissioner. The Information Commissioner’s powers are specified in various aspects by Articles 31, 32, 36, 38, 39, 40, 50, 52, 76, 77 and 78. The Information Commissioner gave extensive comments in the process of the drafting of the ZVOPOKD which have not fully been addressed by the legislator. Available only in Slovene at: https://www.ip-rs.si/fileadmin/user_upload/Pdf/pripombe/2020/Drzavni_zbor_RS_Sezaj_Odbora_zar_PRavosodje_ZVOPPOKD_opravilo_02112020.pdf and https://www.ip-rs.si/fileadmin/user_upload/Pdf/pripombe/2020/Drzavni_zbor_RS_ZVOPPOKD_mnenje_IP_30092020_koncno.pdf. The first issue which we think could lead to the limitations of implementation of effective investigation procedures is related to the transposition of Article 47(1) and the power of the Information Commissioner to obtain from the controller and the processor access to all personal data that are being processed and to all information necessary for the performance of its tasks. Article 47(1) is transposed in Slovene law by Articles 76 and 77. Article 77(2) defines that the supervisory authority is not allowed to access certain personal data in police records and files in ex officio inspection proceedings (namely personal data of undercover agents, protected witnesses and persons providing information to the police). This limitation of access to certain personal data could lead to ineffective provision of protection of personal data guarantees to individuals and in particular data subjects’ rights by the Information Commissioner in such cases and to ineffective implementation of the inspection procedures regarding these data. It is however too soon to give a more elaborate analysis of wider implications of these limitations in situations when the Police would in practice (un)justifiably invoke these limitations in specific inspection proceedings since these limitations are new and have not existed so far in the previous ZVOP-1.

The second issue is the limited sanctioning of only selected data protection provisions by the ZVOPOKD. Namely ZVOPOKD fails to provide for sanctioning of various provisions stemming from LED thus the Information Commissioner cannot issue a warning in case of identified breaches of these provisions. ZVOPOKD for example does not fully provide for the sanctioning of the breaches of the legality of processing (under Art. 6(3) and under Art. 7(2)(1), of the breaches of the provisions regarding the automated individual decision-making (Art. 11), breaches of data subjects rights, breaches regarding the reporting of data breach to the Information Commissioner and several other provisions stemming from LED.

Furthermore, the definition of personal data as provided by in Art. 4(1) of ZVOPOKD is not fully in line with...
the definition provided by Art. 3 LED which could in practice lead to certain categories of personal data falling out of the scope of protection under ZVOPOKD.

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

☐ Yes
☐ No