



POLICY ON CONSULTATIONS IN THE FIELD OF SUPERVISION AND ENFORCEMENT

1. Aim of this paper

The aim of the present paper is to provide guidance to Data Protection Officers (DPOs) and data controllers (EU institutions and bodies¹) on consulting the EDPS in the field of Supervision and Enforcement. This paper intends to describe the legal background, delimit the scope of consultations and present some practical aspects to be considered by the DPOs and data controllers when submitting a consultation to the EDPS.

Consultations to the EDPS related to proposals on Union legislation (Policy field), as specified in Article 28.2 of the Regulation, fall outside of the scope of this paper.²

All references are to Regulation (EC) No. 45/2001³ ("the Regulation").

2. Legal basis

The EDPS may issue an opinion on data protection matters either following a request from the institution or body concerned, or on his own initiative. Article 41 of the Regulation defines the mandate of the EDPS, which includes, amongst others the responsibility *"for monitoring and ensuring the application of the provisions of this Regulation" as well as "advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data"*.

Article 28(1) of the Regulation stipulates that EU institutions and bodies shall inform the EDPS when drawing up administrative measures which relate to the processing of personal data. The title of Article 28 is "Consultation", and it is included in Chapter II ("General rules on the lawfulness of the processing of personal data"), Section 9

¹ This also applies to inter-institutional and *sui-generis* entities drafting such measures.

² See EDPS Policy paper "The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents", 18 March 2005, available at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/PolicyP/05-03-18_PP_EDPSadvisor_EN.pdf

³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1, 12.1.2001.

("Prior checking by the European Data Protection Supervisor and obligation to cooperate"). In addition, Article 46(d) provides that the Supervisor shall advise institutions and bodies in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data. Article 28(1) therefore requires, taken with Article 46(d), EU institutions and bodies to inform the EDPS, in due time on measures falling within its scope, as further discussed below to permit the EDPS to provide any advice that might be deemed necessary.

Furthermore, Article 46(d) of the Regulation imposes a duty upon the EDPS to *"advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data"*.

Article 46(d) therefore enables EU institutions and bodies to consult the EDPS on measures falling within its scope, and requires the EDPS to provide advice in response to any such consultation.

Therefore, subject to the practical considerations described at point 4.1 below, EU institutions and bodies are encouraged to inform and consult the EDPS.

3. Scope

3.1. Which issues can be submitted to consultation?

The nature of the consultations that can be submitted varies. In particular, they may deal with specific questions relating to the correct application of the Regulation, or deal with draft administrative measures to be adopted by the EU administration.

The term "administrative measures" has to be understood as a decision (legally binding) or any other act (not-legally binding) of the administration of general application relating to the processing of personal data carried out by the institution or body concerned. This could be the case of implementing rules of the Regulation (as specified in Article 24(8) of the Regulation), or internal rules (in the sense of Article 46(d) of the Regulation) adopted by the administration relating to the processing of personal data (e.g. use of e-mail, e-monitoring, archiving, etc.), etc.

It should be noted that consultations related to "administrative measures" can cover any matters related to data protection. Unlike Article 27(1) on prior checking, whereby only processing operations likely to present specific risks to the rights and freedoms of data subjects must be notified, there is no such limitation on consultations in Article 28.

With regard to Article 46(d), the language used to describe the material scope of the advisory role of the EDPS is very broad (*"all matters concerning the processing of personal data"*). As noted above, this paragraph also specifies a particular case where the EDPS shall give advice: *"before [the institutions or bodies] draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the*

processing of personal data". This is the basis for advice on cases involving specific processing activities or questions on the interpretation of the Regulation, even if they are not related to an "administrative measure".

3.2. Who can submit a consultation?

Advice can be given as the result of a consultation received from an EU institution or body itself (data controller) or from its DPO. Advice can also be provided by the EDPS on his/her own initiative.

4. Practical aspects

4.1. Before the consultation

Applying the Accountability Principle in Data Protection as part of the decision making process⁴

The principle of accountability⁵ is intended to ensure that controllers are generally in control and in a position from the outset to ensure and to demonstrate that the processing of personal data is performed in compliance with the Regulation. Accountability requires that controllers put in place internal mechanisms and control systems that ensure compliance and provide evidence to demonstrate compliance to external stakeholders, including supervisory authorities.⁶ This principle strengthens the role of data controllers and increases their responsibility throughout the information life cycle.

Thus, when an institution or body draws up measures affecting the right to data protection, it should ensure that proper attention is paid to respecting its obligations under the Regulation before the measure is adopted. One of the most effective means of ensuring this is to involve the DPO right at the outset and receive his or her advice.

⁴ See EDPS Policy Paper *Monitoring and Ensuring Compliance with Regulation (EC) 45/2001*, Brussels, 13 December 2010, available at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/PolicyP/10-12-13_PP_Compliance_EN.pdf . "This policy paper elaborates how the EDPS monitors, measures and ensures compliance with Regulation (EC) 45/2001 ("the Regulation"), and explains the nature of the various enforcement powers, as well as when and how the EDPS will use them. (...) Furthermore, the EDPS is keen to see the institutions and bodies take a proactive approach to this responsibility by embracing the notion of "accountability" (as recently elaborated by the Article 29 Working Party)¹ and by doing so fostering data protection in practice."

⁵ See: Article 29 Data Protection Working Party, "Opinion 3/2010 on the principle of accountability", WP 173, adopted on 13 July 2012, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp173_en.pdf

⁶ The accountability principle has also been enshrined in Article 22 of the Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, 25.1.2012, available at: http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

Data controllers should take into account that Article 24(1)(c) of the Regulation has tasked the DPO with "*ensuring in an independent manner the internal application of the provisions of this Regulation*". Furthermore, the Annex of the Regulation stipulates that "*1. The data Protection Officer may make recommendations for the practical improvement of data protection to the Community institution or body which appointed him or her and advise it and the controller concerned on matters concerning the application of data protection provisions*".

In order to be more effective, data controllers should therefore first seek the expert, internal advice of their DPO. This advice will normally provide an appropriate solution. However, if the DPO is not in a position to give a satisfactory answer, for example in a complex or novel case, the DPO or the data controller should refer the consultation to the EDPS.

Precedents check and fact-finding completion

DPOs and institutions should check whether the EDPS has already given advice on a similar or analogous subject. They should also prepare a clear and complete description of the factual context relevant to the consultation.

Complexity and impact assessment

The EDPS would encourage data controllers to submit consultations under Articles 28(1) and 46(d) of the Regulation when the matter presents: (a) a certain novelty or complexity (where the DPO or the institution has a genuine doubt), or (b) a clear impact on data subjects' rights (either due to the processing activities' risks, due to the extension of the measure, etc.).

As to (a), the consultation could be related to matters of interpretation or difficulties in applying the rule to concrete cases (e.g. no precedents or contradictory precedents in the field, lack of doctrine, lack of clarity in the definition of certain concepts included in the Regulation, evaluation of the impact of new technologies on data subjects' rights, etc).

As to (b), the consultation could be related to matters affecting all staff, or posing appreciable risks to the rights and freedoms of data subjects (without prejudice to Article 27 paragraphs 1 and 2. In particular, even when a processing activity has been submitted to prior check, a matter of interpretation/application of the law might arise afterwards, justifying the submission of a consultation).

4.2. After submission of the consultation

EDPS preliminary analysis and actions

When the EDPS receives a consultation, a preliminary analysis of the matter is carried out. It may be that similar issues are the subject of analysis in the context of a prior check, another consultation or an own initiative inquiry. In this case, the EDPS might

decide not to handle the additional consultation individually, or to join the cases. The EDPS might need to ask for further written information, set up a meeting or conduct a fact finding visit, depending on the complexity of the consultation.

It has to be noted that the Regulation does not impose any specific deadline for the provision of the answer to the consultation. However, the EDPS' answer should be provided within a reasonable period of time, taking into account the characteristics of the consultation. As a general rule the EDPS will deliver his opinion within two months following receipt of the consultation. This period may be suspended until the EDPS has obtained any further information that he or she may have requested.

EDPS answer to the consultation

The answer to the consultation would normally take the form of an opinion and, depending on the case, might include recommendations. The EDPS would expect a reply from the controller within a set period, giving feedback to the EDPS. In this case, a follow-up period will be opened. The EDPS could also check the implementation of these recommendations in practice or the consideration by the data controller of the guidance provided, in the context of an inspection.

Communication

The EDPS will normally decide to publish opinions in answer to consultations on its website, subject to the following criteria:

- (a) relevance of the subject-matter for other DPOs, controllers, data subjects;
- (b) novelty of the interpretation or as regards the application of the law;
- (c) impact of new technologies on data subjects' rights.

In addition, a consultation might not be published on the website at the request of the data controller or the DPO. In such a case, the data controller or the DPO should explicitly request such treatment and clearly state the reasons for so doing. Depending on the specificities of the case, the EDPS might decide that a final opinion or answer will not be published on the website, in whole or in part. This decision would be adopted without prejudice to the fact that such opinions might be disclosed upon request and in the light of Regulation (EC) No. 1049/2001).

5. Conclusions

The EDPS emphasises that data protection rules should be taken into account when administrative measures are drawn up which relate to the processing of personal data.

In such cases the EDPS advises data controllers to consult their DPO from the outset. Consultations may be referred to the EDPS thereafter in cases of complexity or when related to appreciable risks to the rights and freedoms of the data subjects.