

European Commission  
Rue de la Loi 200  
B-1040 Brussels  
Belgium

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## **ISPA AUSTRIA'S CONTRIBUTION TO THE REPORT ON THE GENERAL DATA PROTECTION REGULATION**

ISPA - Internet Service Providers Austria welcomes the Commission's initiative to continue reporting on how the rules of the GDPR have been applied, 6 years after their entry into application and the opportunity to provide comments to the Report on the GDPR.

### **1. General comments**

#### **a. What is your overall assessment (benefits/challenges, increase in trust and awareness, etc.) of the application of the GDPR since May 2018? Are there priority issues to be addressed?**

The GDPR initially created awareness of prioritizing the protection of personal data and its guarantee. The protection of data and the rights of the individual has now been achieved. As the importance of protecting personal data continues to increase, GDPR is a milestone for society and its development.

The challenges include in particular:

- different interpretation and enforcement of the GDPR in the member states/by national data protection authorities
- different approaches by national legislators
- responsible supervisory authorities are equipped with different human/financial resources in the individual member states
- GDPR-compliant international transfers

Priority issues that should be addressed are:

- *Harmonization of international transfers*
- *uniform procedural rules when applying the GDPR*
- *a uniform interpretation of the obligations under the GDPR*

In order to act in compliance with the GDPR, a significant investment of time and resources is required by introducing an appropriate information management and data protection system in the respective company. Difficulties in implementation arose particularly for small and medium-sized companies. It would therefore be desirable to simplify procedures in order to reduce the administrative burden.

The preliminary check that entrepreneurs repeatedly demand (also with other European legal acts) to determine whether regulations can be technically implemented is also desired for the GDPR (compatibility with new technologies).

Finally, it should not be left unmentioned that a general guide (in particular by the national data protection authority DSB ) that also contains current decisions and interpretation aids would be of immense benefit. This would be particularly important for SMEs that do not have their own legal department.

## **2. Exercise of data subject rights**

- a. From the individuals' perspective: please provide information on the exercise of the data subject rights listed below, including on possible challenges (e.g. delays in controllers/processors reply, clarity of information, procedures for exercise of rights, restrictions on the basis of legislative measures, etc.).**

**From the controllers and processors' perspective: please provide information on the compliance with the data subject rights listed below, including on possible challenges (e.g. manifestly unfounded or excessive requests, difficulty meeting deadlines, identification of data subjects, etc.).**

The individual's perspective:

In everyday life, data subjects are often overwhelmed by a large amount of information in connection with data protection notices (particularly through complex legal language). In practice, information about the processing of personal data raises more questions than it answers. In

addition, the information is not even read by those affected. It would therefore be desirable to provide more understandable information for the data subject about their rights and for data protection authorities to support innovation in how data subject rights can be exercised.

Perspective of the controller and the processor:

We have not received any reports of problems in this regard, but administration can be very time-consuming.

- **Information obligations, including the type and level of detail of the information to be provided (Articles 12 to 14)**

The use of the EDPB guidelines for the provision of information in accordance with Articles 13 and 14 GDPR has apparently become established as a certain standard (standard for the information of customers/suppliers, website users, other data subjects who are "from outside" with the for the controllers interact).

- **Access to data (Article 15)**

The wording of Art 15 was not easy to interpret in practice, although recent ECJ rulings have provided clarity.


However the long duration of the proceedings before the European Court of Justice represents an unsatisfactory situation and stands in the way of legally compliant application of the GDPR.

- **Rectification (Article 16)**
- **Erasure (Article 17)**

In general the members have not reported any problems to us in connection with the data subject's right to cancellation. The right to erasure is generally recognised and implemented. However, in practice, the technical implementation of deleting data from backups may be complicated or not possible to comply with the principle of integrity.

- **Data portability (Article 20)**

The relationship between data portability under the GDPR and the Data Act could lead to misunderstandings in practice, which is why clarification in this regard would be desirable.

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- **Right to object (Article 21)**
- **Meaningful explanation and human intervention in automated decision making (Article 22)**

**Where possible please provide a quantification and information on the evolution of the exercise of these rights since the entry into application of the GDPR.**

- b. Do you avail of / are you aware of tools or user-friendly procedures to facilitate the exercise of data subject rights?**

Yes. For example, the Austrian data protection authority provides templates and forms that the data subject can use to submit complaints.

- c. Do you have experience in contacting representatives of controllers or processors not established in the EU?**
- d. Are there any particular challenges in relation to the exercise of data subject rights by children?**

It can be problematic for telecommunications operators if the contract is concluded with an adult, but the mobile phone is then used by a child, for example. In this context, declarations of consent can pose a challenge.

### **3. Application of the GDPR to SMEs**

- a. What are the lessons learned from the application of the GDPR to SMEs?**

Free advice on data protection issues for SMEs in particular by the national data protection authority would therefore be desirable.

- b. Have the guidance and tools provided by data protection authorities and the EDPB in recent years assisted SMEs in their application of the GDPR (see also the EDPB data protection guide for small business)?**

In some cases the guidelines are helpful. Public guidance is generally a welcomed support for SMEs to comply with the GDPR. Additional information and tools from national data protection authority could lead to a solution to the problem.

- c. What additional tools would be helpful to assist SMEs in their application of the GDPR?**

Standard forms for SMEs (for consent/cookies)

- Guidelines on the correct use of cookies or similar
- Harmonization of the idea of using cookies and other obligations under the GDPR
- Provision of checklists and more guidance by national authorities

#### **4. Use of representative actions under Article 80 GDPR**

- a. From the controllers and processors' perspective: are you aware of representative actions being filed against your organisation(s)?**

No.

- b. For civil society organisations: have you filed representative actions in any Member State (please specify: complaint to DPA or to court, claim for compensation; and the type of GDPR infringement) and if yes, what was your experience? Do you intend to take actions under the Representative Actions Directive?**

#### **5. Experience with Data Protection Authorities (DPAs)**

- a. What is your experience in obtaining advice from DPAs?**

The Austrian data protection authority provides general information, but not individual advice. This is likely due to DPAs being overburdened with a large number of technical breach notifications and

formal complaint-handling.

The EDPB should create a framework for data controllers to voluntarily reach out to DPAs in good faith, and the DPAs should play a more proactive role in engaging with other regulators to clarify their areas of competence to avoid conflicting rulings. Member States must also ensure that DPA's are appropriately resourced.

**b. How are the guidelines adopted so far by the EDPB supporting the practical application of the GDPR?**

Guidelines are very helpful.

**c. Are DPAs following up on each complaint submitted and providing information on the progress of the case?**

The Austrian data protection authority investigates every complaint. Due to limited resources, the duration cannot be predicted and the procedure may therefore take longer.

**d. Are you aware of guidelines issued by national DPAs supplementing or conflicting with EDPB guidelines? (please explain)**

No. The companies acknowledge the efforts of the Austrian DPA to work with fellow EDPB members on joint guidance in recent years, additionally further elaboration at national level to account for the specific Austrian context would be helpful.

**6. Experience with accountability and the risk-based approach**

**a. What is your experience with the implementation of the principle of accountability?**

Because of practical application issues (in particular, the relationship between the GDPR and the national telecommunications law) has arisen, we have created a Code of Conduct (CoC) for internet access service providers. With the help of the CoC, the accountability of the GDPR is clarified and leads to a uniform exercise of the obligations by the Internet access service providers.

- b. What is your experience with the scalability of obligations (e.g., appropriate technical and organisational measures to ensure the security of processing, Data Protection Impact Assessment for high risks, etc.)?**

Regular reviews are necessary, which can have cost implications for companies.

**7. Data protection officers (DPOs)**

- a. What is your experience in dealing with DPOs?**

In Austria, we have a guide for data protection officers. Against the background of the harmonized interpretation of the tasks, position and obligations of the DPO, a guide at European level would be very helpful. Also the EDPB's latest report on the role of DPOs should be mentioned, which contains helpful recommendations for companies.

- b. Are there enough skilled individuals to recruit as DPOs?**

Some people are of the opinion that there are not enough qualified people. The main problem is that not only legal but also technical knowledge is required to advise someone as an DPO.

- c. Are DPOs provided with sufficient resources to carry out their tasks efficiently?**

- d. Are there any issues affecting the ability of DPOs to carry out their tasks in an independent manner (e.g., additional responsibilities, insufficient seniority, etc.)?**

Yes, the multiple entrustments of an official data protection officer can be a problem, because they can rise to conflicts of interest.

**8. Controller/processor relationship (Standard Contractual Clauses)**

- a. Have you made use of Standard Contractual Clauses adopted by the Commission on controller/processor relationship?**

No.

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**b. If yes, please provide feedback on the Standard Contractual Clauses?**

**9. International transfers**

**a. For controllers and processors: Are you making use of the Standard Contractual Clauses for international transfers adopted by the Commission  
If yes, what is your experience with using these Clauses?**

Yes: When an international data transfer takes place, it is common for SCCs to be used.

**b. For controllers and processors: Are you using other tools for international data transfers (e.g., Binding Corporate Rules, tailor-made contractual clauses, derogations)? If yes, what is your experience with using these tools?**

GDPR requires data transfers to be grounded in mechanisms such as model clauses promulgated by the European Commission. While mandating certain safeguards where organisations transfer data out of the EEA is understandable, many of the solutions favoured under the GDPR (e.g., model clauses) have resulted in onerous administrative burdens for businesses, taking years for approval, and it is unclear whether the tangible benefits for data subjects are proportionate to this cost.

- *The constant interruption of international data flows, especially between the EU and US, are a problem. The high level of legal uncertainty also carries a risk of high fines for organisations transferring data outside of the EU, despite acting in good faith and within the framework of the EU's adequacy decision.*
- *As for binding corporate rules (BCRs), many companies have yet to use them. From our perspective, the administrative procedure should be simplified, comparable to Standard Contractual Clauses, to enable accountability and transparency.*
- *GDPR certifications and codes of conduct have the potential value as comprehensive accountability mechanisms. While the regime surrounding GDPR certifications and codes of conduct have still not been effectuated, there is still positive potential in implementing these tools.*



**c. Are there any countries, regional organizations, etc. with which the Commission should work in your view to facilitate safe data flows?**

Yes: USA, India, China and Russia.

**10. Have you experienced or observed any problems with the national legislation implementing the GDPR (e.g., divergences with the letter of GDPR, additional conditions, gold plating, etc.)?**

In §§ 12 and 13 Data Protection Act (Datenschutzgesetz) Austria has implemented a provision regarding processing of pictures and the respective data protection authorities ruled that these provisions are not applicable, because they are contrary to GDPR (e.g. restrict the possibilities of Art 6 Subsection (1) a to f GDPR.)

Austria furthermore still grants in § 1 Data Protection Act (Datenschutzgesetz) a right to data protection to legal persons (contrary to the GDPR) which poses additional burdens to data controllers.

**11. Fragmentation/use of specification clauses**

**a. Please provide your views on the level of fragmentation in the application of the GDPR in the Member States (due to Member State implementation of the GDPR or the use of facultative specification clauses, such as Articles 8(1) and 9(4) GDPR).**

While the GDPR wanted to harmonize data protection rules in the EU completely, there is still a need for harmonization. Member States' differing implementation of the GDPR led to the creation of diverging rules in practice. For harmonization, it is therefore necessary to wait for the ECJ's decision in each case, which can result in long waiting times.

**b. Please specifically identify the area in which you consider there to be fragmentation and whether it is justified.**

E.g. labor law, media law and the protection of children; for the most part no.



## **12. Codes of conduct, including as a tool for international transfers**

### **a. Do you consider that adequate use is made of codes of conduct?**

Yes, but there could be more CoCs in use in general, because they can provide incredible added value for users. E.g. The CoC we have drawn up is an aid for the lawful application of the GDPR for all internet access service providers that have signed the CoC. The advantage of CoCs is that other national provisions (the Telecommunications Act) can be taken into account for the lawful application of the GDPR.

### **b. Have you encountered challenges in the development of codes of conduct, or in their approval process?**

The long duration of the approval and development process.

### **c. What supports would assist you in developing codes of conduct?**

- Standard forms
- Standard clauses
- *Procedural guidelines*
- *Minimum standard that codes of conduct must meet*
- *clear definition of approval process and duration (by the approving authority)*

## **13. Certification, including as a tool for international transfers**

### **a. Do you consider that adequate use is made of certifications?**

No: So far there are 2 certifications in the EU according to Art 42 GDPR that are not being used appropriately. There is no experience in connection with certifications regarding data transfer to third countries.

**b. Have you encountered challenges in the development of certification criteria, or in their approval process?**

In general, it is a major problem in practice that companies bear the entire burden for the development of certification criteria. Furthermore, it would be very helpful to create uniform standards for the countries concerned.

**c. What supports would assist you in developing certification criteria?**

- standard forms and standard principles binding for authorities (and for SMEs)
- Definition of the procedure, procedure and schedule
- *Advice on applying for permits and feedback*

**14. GDPR and innovation / new technologies**

**a. What is the overall impact of the GDPR on the approach to innovation and to new technologies?**

The problem regarding the impairment of innovation is not the GDPR, but the lack of knowledge about the GDPR.

SMEs in particular struggle here. Initiatives on the part of the data protection authorities to teach SMEs, would be desirable.

***b. Please provide your views on the interaction between the GDPR and new initiatives under the Data Strategy (e.g., Data Act, Data Governance Act, European Health Data Space etc.)***

It is very uncertain to make a statement on this without jurisdiction of the ECJ. In practice, it is a major problem to reconcile the GDPR and the ePrivacy Directive, the Data Act, the Data Governance Act, etc. As it will be years before the ECJ rules on this, it would be desirable for the European institutions to draw up joint guidelines to clarify any overlaps between the GDPR and other legislation for companies.



For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria

A handwritten signature in blue ink, appearing to read "Stefan Ebenberger". The signature is fluid and cursive, with the first name "Stefan" and last name "Ebenberger" clearly distinguishable.

Stefan Ebenberger

Secretary General

ISPA – Internet Service Providers Austria is a voluntary business representation and act as the voice of over 220 internet service providers from various fields all along the internet value chain in Austria. Moreover, the majority of ISPA members are SMEs, and as such, face novel challenges from any new requirements.

