

EUROPEAN DATA PROTECTION SUPERVISOR

Policy on Consultations and Authorisations in the Field of Supervision and Enforcement



8 May 2020

Executive Summary

Replying to consultations from EUIs in their capacity as controllers (organisations processing personal data) is one of the tasks of the EDPS as supervisory authority for the EUIs.

Under Regulation (EU) 2018/1725, the data protection regulation for the EUIs, there are several situations in which EUIs can or have to consult the EDPS. In some cases, EUIs may want to obtain additional guidance on specific questions they face from the EDPS, while in others, they are obliged to consult (and in some cases, obtain authorisation from) the EDPS.

EUIs should channel their consultations through their DPOs. As internal knowledge hubs on data protection, DPOs are a valuable resource for the EUIs and can help to resolve many issues internally.

This document provides practical tips on consulting the EDPS and on what kind of reply to expect.

TABLE OF CONTENTS

1. Introduction	3
2. Accountability	3
3. Types of consultations	4
4. Further legal background	6
4.1. ADMINISTRATIVE MEASURES (ARTICLE 41)	7
4.2. GENERAL CONSULTATIONS (ARTICLE 57(1)(G))	7
4.3. PRIOR CONSULTATIONS (ARTICLES 40 AND 90)	7
4.4. TRANSFER AUTHORISATIONS (ARTICLE 48(3))	8
5. Practical aspects.....	8
5.1. BEFORE CONSULTING THE EDPS	8
5.2. AFTER SUBMISSION OF THE CONSULTATION.....	9
5.3. EDPS ANSWER TO THE CONSULTATION	9
5.4. FOLLOW-UP PHASE	10
6. Conclusion	10

1. Introduction

In their daily operations as controllers for the processing of personal data, the EU institutions, bodies, offices and agencies (EUIs) may find themselves in situations where they need further guidance regarding the compliance of their processing operations or other questions related to data protection. In some cases, consulting the EDPS is mandatory¹ (e.g. to obtain an authorisation), while in others, it is voluntary.

This paper provides guidance to Data Protection Officers (DPOs) and data controllers (EU institutions and bodies, collectively ‘EUIs’²) on consulting the EDPS in the field of Supervision and Enforcement. It situates consultations in the general accountability architecture of Regulation (EU) No. 2018/1725³ (‘the Regulation’), explains the legal background, the possible scope of consultations and presents some practical tips for DPOs and data controllers when submitting a consultation to the EDPS.

The main guiding principle for consultations is that they should contribute to the common good and the compliance of processing operations. In replying, we focus on the risks that planned processing operations may have and how to mitigate these risks. In that sense, consultations are not an additional layer of administrative burden, but assistance to controllers.

Unless noted otherwise, all references are the Regulation. Consultations to the EDPS related to proposals on Union legislation (Policy field), pursuant to Article 42 of the Regulation, are outside of the scope of this paper⁴.

2. Accountability

Accountability is one of the main principles of data protection (Article 4(2) of the Regulation). Controllers have to be in control of their processing operations and have to be able to ensure and to demonstrate that they process personal data compliance with the Regulation. The aim is to make sure that they fulfil the tasks assigned to them in the public interest in a way that minimises the impact on the fundamental rights of the persons affected.

This requires that controllers put in place control systems that ensure compliance and provide evidence to demonstrate this to external stakeholders, including supervisory authorities. The accountability principle strengthens the role of data controllers and increases their responsibility throughout the information life cycle. Linked with the risk-based approach of the Regulation, it forces controllers to think through possible consequences of their processing operations with a view to minimising their impact on the persons affected, while still fulfilling the controller’s tasks.

Thus, when EUIs draw up measures affecting the right to data protection, they should pay proper attention to their obligations under the Regulation before adopting them. EUIs should do the same when developing or upgrading their information systems.

One of the most effective means of ensuring this is for EUIs to involve their DPOs right at the outset and receive their advice. Data controllers should take into account that Article 45 of the

¹ There are also some cases where EUIs have obligations to consult the EDPS based on acts other than the Regulation, as is e.g. the case for Europol under Article 39 of [Regulation \(EU\) 2016/794, OJ L 135, 24.05.2016, p. 53–114](#). This paper does not cover those cases explicitly, but its principles apply accordingly. E.g. consultations under Article 39 of the Europol Regulation are functionally very similar to Article 40 / 90 consultations under the Regulation. Some specificities may apply.

² This also applies to inter-institutional and *sui-generis* entities.

³ [OJ L 295, 21.11.2018, p. 39–98](#)

⁴ See EDPS Policy paper [‘The EDPS as an advisor to EU institutions on policy and legislation’](#), 4 June 2014.

Regulation gives the DPO the task ‘to ensure in an independent manner the internal application of this Regulation’. Furthermore, Article 45(2) states that DPOs ‘may make recommendations to the controller and the processor for the practical improvement of data protection and advise them on matters concerning the application of data protection provisions.’⁵

That said, there may be occasions in which either the controller and/or the DPO have a genuine doubt regarding the proper implementation of the Regulation. In such cases, the EDPS encourages them to consult.

Additionally, there are cases in which the Union legislator created a specific obligation to consult the EDPS and in some cases obtain an authorisation. EUIs should see such consultations as an additional control for cases judged by the legislator to be especially risky.

3. Types of consultations

As further explained in section 4 below, EUIs can or have to consult the EDPS in a number of situations. The following table provides a quick overview:

Type	Possible topics	Mandatory?
Article 57(1)(g)	Any question related to data protection in the EUIs’ role as controllers.	No
Article 41	Internal rules for the application of Article 25 and other administrative measures, such as implementing rules for the DPO.	Yes
Article 40 / 90	Prior consultations following a DPIA or in Article 40(4) cases	Yes
Article 48(3)	Ad-hoc clauses and administrative arrangements for transfers to third countries or international organisations.	Yes

Based on experience with the old Regulation, the EDPS expects that **Article 57(1)(g)** consultations will be the largest and most diverse group. In order to provide a reply that is suited to the specific needs of the submitting EUI, the EDPS may deal with them as “formal” or “informal” consultations at its own discretion.



Replies in **formal** 57(1)(g) consultations take the form of a signed letter and provide a thorough analysis of the issue at hand. The EDPS may publish them if they are relevant for a wider audience. Where the EDPS plans to publish a specific consultation, it will inform the EUI(s) concerned before, providing the text edited for publication. The EDPS may also use the general lines taken in consultation for other public materials. The EDPS will aim to issue formal replies within two months, with possible suspensions if further information is required before providing a comprehensive reply.

⁵ For more information on the role and tasks of DPOs, please refer to the [DPO paper](#).



Replies in **informal** 57(1)(g) consultations take the form of an email sent by the case officer. They do not bind the EDPS and are not published ex officio. These consultations offer a way for EUIs to obtain quick feedback on relatively easy cases, e.g. where the EDPS has an established line to take, or when questions can be answered in a general way, referring back to the principles of the Regulation. The EDPS may however use the anonymised content of such replies in public materials. The aim of informal replies is to provide rapid and actionable guidance in reply to simple or repetitive queries. Indicatively, the EDPS provides such informal replies within 15 working days. Should EUIs need a formal reply following such an informal consultation, that is possible as well.



While **Article 41(1)** only states that the EUIs ‘shall inform’ the EDPS in such cases, simply informing about an adopted text would render this information much less useful for EUIs themselves; it should be understood as a consultation⁶. The EDPS will aim to issue replies within two months, with possible suspensions if further information is required. Should your EUI’s decision-making procedures require a quicker reaction, please clearly indicate so when sending the request for consultation. Where the EDPS plans to publish a reply to a specific consultation, it will inform the EUI(s) concerned before, in the same way as for Article 57(1)(g) consultations.

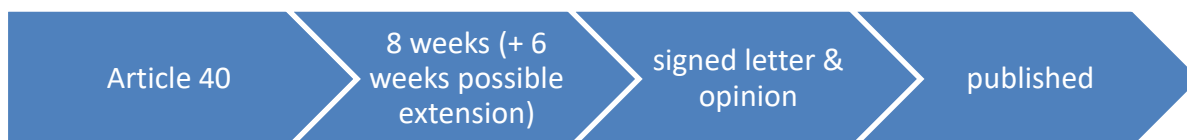


For internal rules for Article 25, consulting the EDPS prior to their adoption is mandatory under **Article 41(2)**. For further guidance, please refer to the [Article 25 Guidance](#). These consultations are usually not published.

In both Article 41(1) and (2) cases, the consultation should happen before adoption of the rules at a stage where the draft rules are stable, yet it is still feasible to adapt them before final adoption. The reason is that in this way, it is easier for the EUI to change problematic aspects of the measures. The EDPS will aim to issue replies within two months, with possible suspensions if further information is required. Should your EUI’s decision-making procedures require a quicker reaction, please clearly indicate so when sending the request for consultation.

EUIs may also wish to consult the EDPS at an earlier stage of preparing internal rules for Article 25. The EDPS will treat such cases in the same way as informal Article 57(1)(g) consultations.

⁶ Similar to the approach for administrative consultations under Article 28(1) of the old Regulation. Unlike for prior checks under Article 27 of the old Regulation, the lack of a reply by the EDPS does not imply approval.



In accordance with **Article 40**, EUIs shall consult the EDPS where, following a DPIA, they are unsure whether the controls they (plan to) implement are sufficient to mitigate the risks to data subjects to an acceptable level. Additionally, such consultations are required for processing operations listed in implementing acts adopted by the European Commission for Article 40(4). For further information, please see the [Accountability on the Ground toolkit](#). The toolkit includes further information on which information to provide in prior consultations.



Article 90 is the functional equivalent to Article 40 in Chapter IX of the Regulation, dealing with law-enforcement matters. The materials to be submitted are the same as for Article 40 consultations.

The EDPS will provide a reply within the legal deadlines set by Article 40 or 90, as applicable. As a rule, replies to both Article 40 and Article 90 consultations are published. However, the EDPS will remove security-relevant information before publication.

EUIs may also wish to consult the EDPS on matters related to DPIAs other than formal prior consultations under Articles 40(1) or 90. The EDPS will treat such cases in the same way as Article 57(1)(g) consultations (formal or informal, as the case may be).



The aim of **Article 48** consultations is to obtain a transfer authorisation from the EDPS. Replies take the form of a formal letter with (where it is granted) the transfer authorisation attached. The EDPS publishes transfer authorisations in full. The authorisation may contain conditions for it to become applicable, such as implementation of recommendations made before. The EDPS will aim to issue replies within two months, with possible suspensions if further information is required.. For further guidance, please refer to the paper on [transfer of personal data to third countries](#). Transfer instruments that follow a pre-approved template can be dealt with in a fast-track procedure. In that case, the EUI should include an explanation of any changes or amendments made to the template.

As a general reminder for all types of consultations, please note that the EDPS may have to disclose non-published consultations in reply to access to documents requests.⁷

4. Further legal background

The EDPS may issue an opinion on data protection matters, either following a request from the EUI concerned, or on its own initiative. Article 52 of the Regulation defines the mandate of the EDPS, which includes, amongst others the responsibility for ‘monitoring and ensuring the

⁷ See [Regulation \(EC\) 1049/2001, OJ L 145, 31.05.2001, p. 43-48](#).

application of the provisions of this Regulation’ and ‘advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

In some situations, EUIs *can* consult the EDPS; in others, they are *obliged* to do so.

4.1. Administrative measures (Article 41)

Article 41 states that:

- ‘1. The Union institutions and bodies shall inform the European Data Protection Supervisor when drawing up administrative measures and internal rules relating to the processing of personal data by a Union institution or body, whether alone or jointly with others.
2. The Union institutions and bodies shall consult the European Data Protection Supervisor when drawing up the internal rules referred to in Article 25.’

This is the successor to Article 28(1) consultations under the former Regulation (EC) No. 45/2001 (‘the old Regulation’).⁸ EUI should submit such consultation once the text for the draft administrative measure is stable, but can still be changed prior to formal adoption.

These consultations are mandatory.

4.2. General consultations (Article 57(1)(g))

Article 57(1) states that:

- ‘1. Without prejudice to other tasks set out under this Regulation, the European Data Protection Supervisor shall:
[...]
(g) advise, on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons’ rights and freedoms with regard to the processing of personal data;’

This is the successor to Article 46(d) consultations under the old Regulation.

These consultations are voluntary.

4.3. Prior consultations (Articles 40 and 90)

Article 40 states that:

- ‘1. The controller shall consult the European Data Protection Supervisor prior to processing where a data protection impact assessment under Article 39 indicates that the processing would, in the absence of safeguards, security measures and mechanisms to mitigate the risk, result in a high risk to the rights and freedoms of natural persons and the controller is of the opinion that the risk cannot be mitigated by reasonable means in view of the available technologies and costs of implementation. The controller shall seek the advice of the data protection officer on the need for prior consultation.
[...]
4. The Commission may, by means of an implementing act, determine a list of cases in which the controllers shall consult with, and obtain prior authorisation from, the

⁸ [OJ L 8, 12.01.2001, p. 1–11](#)

European Data Protection Supervisor in relation to processing of personal data for the performance of a task carried out by the controller in the public interest, including the processing of such data in relation to social protection and public health.’

Article 58(3)(b) and (g) contain the corresponding authorisation and advisory powers of the EDPS.

Article 90 states that for processing operations falling in the scope of chapter IX:

‘The controller shall consult the European Data Protection Supervisor prior to processing which will form part of a new filing system to be created, where:

- a) a data protection impact assessment under Article 89 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk; or
- b) the type of processing, in particular, where using new technologies, mechanisms or procedures, involves a high risk to the rights and freedoms of data subjects.’

For further information, please see the [Accountability on the Ground toolkit](#).

These consultations are mandatory.

4.4. Transfer authorisations (Article 48(3))

Article 48 states that:

‘3. Subject to the authorisation from the European Data Protection Supervisor, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or

(b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights. [...]

Under Article 57(8)(e) and (f), the EDPS has the power to authorise use of such contractual clauses and provisions.

EUIs cannot rely on Article 48(3) of the Regulation without having consulted and obtained an authorisation from the EDPS⁹.

These consultations are mandatory.

5. Practical aspects

5.1. Before consulting the EDPS

The DPO of each EUI is the main interlocutor for the EDPS. Preferably, EUIs should channel consultations through their DPO.

⁹ Authorisations granted by the EDPS under Article 9(7) of the old Regulation remain valid until amended, replaced or repealed, see Article 48(4) of the Regulation.

In those cases where the Regulation states that the controller shall consult the EDPS, EUIs can also channel this through the DPO, since the DPO is part of the EUI acting as controller.

Having the DPO as the main channel for consultations ensures that DPOs are in the loop of developments relevant to data protection in their EUI. This also allows all sides to keep track of their interactions more easily.

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

DPOs and EUIs should check whether the EDPS has already given advice on a similar or analogous subject. The EDPS website provides [guidelines](#) on numerous topics, replies to different [kinds](#) of [consultations](#), as well as further information only accessible to DPOs.

EUIs should also prepare a clear and complete description of the factual context relevant to the consultation.

While the DPO is the preferred channel for receiving consultations, EUIs may also want to consult the EDPS directly as controllers, or via their data protection coordinators. In those cases, the EDPS reply will always copy in the EUI's DPO in the reply. When receiving such requests without the EUI's DPO in copy, the EDPS will check whether the EUI has involved its DPO before and may refer the matter back to the EUI's DPO.

Make sure that you submit prior consultations early enough before the scheduled start of processing for the EDPS to deliver the Opinion and for you to address any possible recommendations.

5.2. After submission of the consultation

When receiving a consultation, we acknowledge receipt and carry out a preliminary analysis of the matter. It may be that similar issues are the subject of analysis in another case. In this case, the EDPS may decide not to handle the additional consultation individually, or to join the cases. The acknowledgment of receipt mentions as which type of consultation we treat a case.

The EDPS may need to ask for further written information, set up meetings or conduct fact-finding visits, depending on the complexity of the consultation. Such requests for further information usually suspend deadlines for the EDPS to reply. Only Article 40 and 90 have specific legal deadlines for the EDPS to reply. In case an extension is needed, the EDPS will inform the EUI about this in due time. For other kinds of consultation without a legal deadline, the EDPS will reply within a reasonable period of time, taking into account the characteristics of the consultation. As a rule, the EDPS will deliver its opinion within two months following receipt of the consultation. This period may be suspended until the EDPS has obtained any further information requested.

5.3. EDPS answer to the consultation

Replies to informal 57(1)(g) consultations are sent as e-mails, signed by case handlers. All other types are sent as signed letters. Should the EDPS intend to publish a reply, we will send the version edited for publication to the EUI's DPO for information, giving a deadline to raise any objections to publication. The final decision whether or not to publish is made by the EDPS.

5.4. Follow-up phase

In line with the accountability principle, it is for controllers to ensure that they comply with the Regulation. The EDPS trusts that EUIs take its advice into due account.

That said, some consultations might require further follow-up, either to confirm that recommendations were actually implemented or to deal with follow-up questions. If the EDPS expects the EUI to report on the implementation, the reply will clearly indicate so.

6. Conclusion

As supervisory authority for data protection in the EUIs, the EDPS encourages EUIs to consult in case of doubt or when seeking further guidance. However, EUIs should first internally consult their DPO, who in many cases will be able to resolve the issue at hand. In a second step, EUIs can then consult the EDPS. Consultations are also valuable for the EDPS to gain a better understanding of the issues EUIs face.

For those cases in which consultation (and possibly authorisation) is mandatory, the EDPS will analyse the information submitted and take the appropriate steps.