EDPS

EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

How the EDPS conducts investigations

edps.europa.eu

1. Introduction

The EDPS conducts **investigations** in accordance with:

- Art. 57(1)(f) of Regulation 2018/1725 (EUDPR),
- Art. 43(2)(b) of the Europol Regulation,
- Art. 85(2)(b) of the EPPO Regulation,
- Art. 40(2)(b) of the Eurojust Regulation, and
- the general principles of EU law and good administrative practices common to the EU institutions, bodies, offices and agencies (EUI).

Investigations as defined in the EUDPR are named "inquiries" under Europol's, EPPO's or Eurojust's Regulations. The EDPS uses these two words alike.

The investigation procedure is structured in different phases. In all phases, the EDPS strictly complies with the principles of proportionality and fairness and applies the EDPS' core values: **impartiality, integrity, transparency and pragmatism.**

2. Investigation

The EDPS may decide to start an investigation when we have a strong suspicion of an infringement of data protection rules by an EUI.

The aim of the investigation is to check whether an infringement of the applicable data protection rules, in particular the EUDPR, has occurred and to establish its circumstances.

2.1.1. Deciding to open an investigation

To open an investigation, the EDPS issues a formal decision. The decision includes a request for the necessary evidence for the EDPS to conduct an investigation.

The EDPS will fix a deadline for the EUI(s) concerned and any other party to the investigation to reply to the request.

2.1.2. Opening meeting

An Opening meeting may be organised at the EDPS' suggestion, or following a well-reasoned request submitted by a party to the investigation.

The Opening meeting is a less formal part of the proceedings. This allows the EDPS to explain the scope and procedure of an investigation. If necessary, it is also an opportunity for EUIs that are being investigated to present complex or unclear evidence orally at the beginning of the investigation as a way of guiding the EDPS.

An opening meeting can be organised at the EDPS' premises or online, depending on the circumstances of the investigation.

Following the opening meeting, a detailed draft of the minutes will be sent to all the parties to the investigation for comments.

2.1.3. Evidence - gathering meeting

An evidence-gathering meeting can be organised if, for example:

- the evidence submitted by the EUI needs to be clarified; or
- there are inconsistencies between the information that the EDPS has received from different parties to the investigation; or
- there are issues with the EDPS' understanding of the facts.

If this is the case, the EDPS may suggest organising an evidence-gathering meeting, or a party may submit a well-reasoned request for this type of meeting.

An evidence-gathering meeting can be organised at the EDPS' premises, or online, depending on the specific case. In exceptional situations, the EDPS may decide to organise an evidence-gathering meeting at the EUIs' premises.

The scope of an evidence-gathering meeting is defined by the EDPS on a case-by-case basis. The meeting can be limited to one issue and one party, or concern a wide range of issues and several parties. The EDPS informs parties about an evidence-gathering meeting in a specific announcement letter.

When only one party is invited to an evidence-gathering meeting, the EDPS will inform other parties before it takes place. If the other party expresses its wish to participate, it must submit to the EDPS a reasoned request to attend the evidence-gathering meeting and the EDPS will then decide whether the party can attend.

If the other party did not express its wish to participate in the evidence-gathering meeting, we will send them a copy of the final minutes of the hearing.

Following the evidence-gathering meeting, the EDPS sends a detailed draft of the minutes to the parties that attended, for comments.

2.1.4. On-site inspection or remote inspection

The EDPS may organise an inspection when it is necessary to gain practical knowledge about how data processing is done by an EUI or to check the measures it has in place. The inspection can take place on site or remotely, at an EUI's facilities or at the premises of a contractor processing data on its behalf.

The scope of an inspection is defined by the EDPS on a case-by-case basis. The EDPS informs the parties of an inspection in a specific announcement letter.

Following the inspection, the EDPS sends a detailed draft of the minutes to the parties for comments.

2.1.5. Preliminary assessment

The main purpose of the preliminary assessment is to make sure that the parties' rights of defence, in particular the right to be heard, are fully respected before the EDPS takes a decision adversely affecting them. The preliminary assessment informs the parties of:

1) all the established facts and documents that the EDPS will rely on to reach its final decision;

2) the EDPS' initial legal assessment of the facts, and any alleged infringements of the EUDPR;

3) the corrective measures envisaged by the EDPS, in light of aggravating or mitigating factors.

We provide this document to allow the parties to make their views known before any possible enforcement action.

In this final stage of the investigation, both the EDPS and the parties may only refer to the facts and evidence presented during the investigation and must refrain from submitting new evidence or relying on new material.

The parties may submit written observations on the preliminary assessment.

2.1.6. Hearing

The EDPS may organise a hearing after it has issued its preliminary assessment. The purpose of the hearing is to allow a party to exercise its rights of defence, in particular the right to be heard, by presenting its observations on the EDPS' preliminary assessment. If we organise a hearing, we do so before we take any individual measure that could adversely affect a party.

A hearing can be organised at a party's request. The EDPS will, in principle, not refuse a request to organise a hearing unless the party making the request has already been given an opportunity to make its views known about every element in our preliminary assessment that we intend to rely on for our decision (see 2.1.5).

We may decide to organise a hearing at our premises or online. The scope of a hearing is usually defined by the EDPS on the basis of the party's request. The scope can be limited to one issue and one party only or cover a wide range of issues and several parties.

When only one party is invited to a hearing, we will inform other parties before it takes place. We will allow the other party to express its wish to attend the hearing within a prescribed deadline. If the other party expresses its wish to participate, they will be invited to the hearing.

If the other party did not express its wish to participate in the hearing, we will send them a copy of the final minutes of the hearing.

Following the hearing, the EDPS will send a detailed draft of the minutes of the hearing to the parties that attended for comments.

2.1.7. Final decision

The EDPS concludes the investigation by issuing a final decision. The EDPS' final decision will establish whether or not there has been an infringement of a provision of the EUDPR, or of other applicable data protection instruments.

If there is an infringement, the EDPS decides:

- whether or not to exercise its corrective powers;
- if applicable, which corrective powers to use, in accordance with Art. 58(2) of the EUDPR, Art. 43(3) of the Europol Regulation, Art. 40(3) of the Eurojust Regulation or Art. 85(3) of the EPPO Regulation.

The EDPS will assess the compliance of an EUI from the date the EDPS' investigation is opened. The EDPS will not take into account actions that an EUI has taken to improve its compliance with the EUDPR after this date, when establishing whether there has been an infringement. Nevertheless, we will take an EUI's actions to improve its compliance into account when deciding whether to exercise our corrective powers. This is because we can consider the actions an EUI takes after we launch an investigation, to mitigate or aggravate an infringement.

Our final decision will set a deadline by which a party must have implemented any corrective measures. We may also set a deadline for parties to provide us with a **reply to our decision under Article 59 EUDPR**. We fix the deadline to reflect the circumstances of the case, including the severity of the risks posed to the rights and freedoms of individuals, the number of affected individuals and the work involved in complying with the EDPS' corrective measures.

2.1.8. Publication

In line with the EDPS' Policy on monitoring and ensuring compliance, the EDPS strives to be as transparent as possible in its work.

The EDPS generally makes public the fact that a preliminary assessment has been sent to the parties, and publishes all final decisions of our investigations on the EDPS website. The parties are informed about the publication of these decisions and are asked whether any part of the decision should be kept confidential and so not published.

2.1.9. Follow-up

In cases where an infringement has been established and a follow-up measure, such as a corrective measure, is to be implemented by an EUI, this must be done by the strict deadline fixed in the EDPS' final decision.

Failure to comply with a corrective measure may lead to:

- an administrative fine under Article 66 of the EUDPR and Article 43(3)(l) of the **Europol Regulation**, in case of failure to comply with an EDPS Order pursuant to (d) to (h) and (j) of Art. 58(2) EUDPR and pursuant to (c), (e), (f), (j) and (k) of Article 43(3) of the **Europol Regulation**. The EDPS has no power to issue an administrative fine as regard to Eurojust or the EPPO.

- the EDPS referring the matter to the Court of Justice under Article 58(4) EUDPR, Article 43(3)(h) of the **Europol Regulation**, Article 40(2)(f) of the **Eurojust Regulation** and Article 85(2)(f) of the **EPPO Regulation**.

3. Confidentiality

During an investigation, the EDPS' case officers are bound by:

- **a confidentiality obligation**, pursuant to Art. 17 of the Staff Regulations; and
- **professional secrecy**, pursuant to Art. 339 TFEU, Art. 56 of the EUDPR, Art. 41 of the Eurojust Regulation, Art. 43(6) of the Europol Regulation and Art. 86 of the EPPO Regulation.

4. Duty of cooperation with the EDPS

It is the duty of EUIs to cooperate with the EDPS in its tasks, following Article 32 and Article 58(1)(d) EUDPR, Article 43(4)(a) of the Europol Regulation, Article 40(4) and (6) of the Eurojust Regulation or Article 70 and Article 85(4) of the EPPO Regulation.

5. Right to be heard

The EDPS guarantees the right to be heard by:

- allowing EUIs, and any other party who may be affected by an investigation, to provide their views during each phase of an investigation;
- informing EUIs, and any other party who may be affected by this investigation, of all the facts and documents that the EDPS intends to rely on for its final decision.

6. Exchanging information with other Data Protection Authorities

The EDPS may decide to share some or all of the evidence during an investigation or resulting from its investigation with the other Data protection authorities (DPAs) in the EU and internationally, to the extent that is necessary for the performance of the EDPS' and DPAs' tasks.