

The General Data Protection Regulation 2020 Review

ICANN Government & Intergovernmental
Organization (IGO) Engagement

7 May 2020
GE-003



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Context

On 25 May 2018, the General Data Protection Regulation (GDPR) became applicable in the twenty-eight (at the time) member states of the European Union (EU), after being approved by the European Parliament and the Council in 2015. It came into force in the broader European Economic Area¹ on 20 July 2018.

The GDPR was a major overhaul of EU privacy rules, expanding their scope and strengthening their enforcement. In this respect, the GDPR reinforced the rights of individuals; most notably, the right to be forgotten, privacy by design, and rights on automated processing. It also provided stronger means of collaboration for data protection authorities (DPAs) and the power to issue punitive fines in cases of noncompliance of a similar magnitude as those that apply in antitrust.

The GDPR has been a pioneering law aimed at channeling lawmakers' efforts in regulating the adverse effects of digitization. Both intended and unintended effects of the law are felt around the globe and in practically every sector of economic activity.

The GDPR 2020 Review

In accordance with the [EU better regulation guidelines](#), EU legislation is normally subject to review after five years. The review may or may not lead to changes in the law concerned.

However, the GDPR review clause, Article 97, applies after only two years and every four years thereafter. In the context of each review, the Commission will prepare a report where it “shall examine, in particular, the application and functioning of (a) Chapter V on the transfer of personal data to third countries or international organisations... [and] (b) Chapter VII on cooperation and consistency” among national DPAs. If necessary, the Commission can propose amendments to the GDPR.

The 2020 review will examine how the European DPAs work together and make use of the tools provided by the GDPR to enhance their cooperation, and whether the GDPR ensures comparable enforcement of the law across EU member states. It will also assess the system for approval mechanisms of international data transfers outside the EU.

In addition, the 2020 review is likely to evaluate perceived inconsistencies in parts of the law where member states have been given a margin of discretion in how they apply certain GDPR rules. This will include a general stocktaking exercise on the implementation at the national level. Other points that could be examined include the relationship between the GDPR and sector-specific technologies, such as artificial intelligence (AI), smart mobility, and blockchain. In light of the COVID-19 crisis, the Commission will likely also consider the role of data protection in this context and on the use of technological tools such as contact-tracing apps to tackle the emergency.

The 2020 GDPR review, however, will not be a full revision and should not be expected to lead to substantial changes in the legislation. Although the GDPR review clause provides that “the Commission shall, if necessary, submit appropriate proposals to amend this Regulation,” as mentioned above, “in particular taking into account of developments in

¹ The European Economic Area (EEA) unites the EU Member States and the three EEA EFTA States (Iceland, Liechtenstein, and Norway) into an Internal Market governed by the same basic rules.
<https://www.europarl.europa.eu/factsheets/en/sheet/169/the-european-economic-area-eea-switzerland-and-the-north>

information technology,” the Commission has not indicated that such proposals are being considered.

The review will be carried out by the European Commission on the basis of information provided by EU member states, the European Parliament, and European DPAs. All of these institutions have already provided their input.² The European Commission also announced a public consultation inviting feedback from citizens and stakeholders on the scope of its GDPR 2020 evaluation, which was set to cover the international transfers of personal data to non-EU countries, and the cooperation mechanisms between national data protection authorities per the initiative’s published roadmap.³ The public consultation remained open from 1 to 29 April 2020.

The 2020 Review: A Closer Look

Based on the input sought and provided by the institutions so far, the review will include the Commission’s evaluation of cooperation among DPAs, especially the “one-stop shop” (OSS) mechanism. The OSS allows a controller to rely on one DPA, where it has the principal EU establishment, who will then coordinate with an authority of another member state if there is a cross-border issue. The DPAs produced a summarized report of the questionnaire sent by the Commission and published the responses per each country.⁴ The results of the questionnaire highlighted some difficulties in the collaboration among DPAs, especially related to funding, administrative differences, and divergent administrative requirements in the national laws. Consequently, the result is often a delay in the resolution of disputes and the overall enforcement of rules. Other problems concern different definitions of some terms such as “draft decision,” “undue delay,” “relevant information,” and “cultural differences,” which may lead to different interpretations and practices.⁵ Another item raised by the DPAs is the lack of funding, which will likely be addressed by the Commission.

It is worth noting that, in the past few months, German DPAs especially have voiced dissatisfaction with the current framework. An article in the *Handelsblatt*⁶, a leading German business newspaper, reported that the Federal Commissioner for Data Protection Ulrich Kelber has criticized the lack of decision by the Irish DPA in some cases concerning major tech companies, calling its inaction “unbearable.” For this reason, “his doubts grew day by day” on “whether the one-stop shop can stay as it is, whether it only requires minor corrections, or whether you have to take a major radical step.” As a result, he supported the idea of a European centralized body bound by European administrative law rather than by national law. The Hamburg Data Protection Authority Commissioner Johannes Caspar echoed similar concerns, criticizing the “massing of the leading control competence with few authorities.”

² See submissions from European Council: <https://data.consilium.europa.eu/doc/document/ST-14994-2019-REV-1/en/pdf>, European Parliament (press leak): https://www.politico.eu/wp-content/uploads/2020/03/SKM_C45820030616021.pdf?utm_source=POLITICO.EU&utm_campaign=9dc3058825-EMAIL_CAMPAIGN_2020_03_06_02_08&utm_medium=email&utm_term=0_10959edeb5-9dc3058825-189796441, and European Data Protection Board: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contributiongdprevaluation_20200218.pdf.

³ See Roadmap at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12322-Report-on-the-application-of-the-General-Data-Protection-Regulation>.

⁴ See https://edpb.europa.eu/individual-replies-data-protection-supervisory-authorities_en.

⁵ See German Supervisory Authorities contribution page 5 at https://edpb.europa.eu/sites/edpb/files/de_sas_gdpr_art_97questionnaire.pdf

⁶ See “Datenschützer Kelber bringt neue EU-Behörde gegen Facebook & Co. ins Spiel” at <https://www.handelsblatt.com/politik/deutschland/datenschutz-verstoesse-datenschuetzer-kelber-bringt-neue-eu-behoerde-gegen-facebook-und-co-ins-spiel/25479302.html>, Handelsblatt 28.01.2020

At the end of 2019, European Data Protection Supervisor Wojtek Wiewiorowski said in an interview⁷ that “divergence is not only down to legal and cultural differences, but also to the political situation” in the member states, and that “sometimes it’s a very vivid discussion.” He added, however, that “when the decision is done, and the voting has been done, and there is somebody who has been outvoted by the others, they are following the decision of all.”

On international data transfers, the review will most likely include a point on the state of play of the revision of the so-called Standard Contractual Clauses. These are a set of previously made contractual terms and conditions, committed to by the sender and the receiver of personal data. This revision has been on hold due to the Schrems II case⁸ pending before the European Court of Justice.

When it comes to discrepancies of implementation between member states, the Commission is expected to address the differences allowed by the GDPR. This will cover issues such as age limits to protect the privacy of children and the notion of consent, as well as other outstanding inconsistencies related to countries’ transposition, which are considered problematic for ensuring effective enforcement of the law.

Finally, the revision will also likely contain an assessment of how the GDPR contributes to this Commission’s broader policy goals such as sustainability and digitalization of EU industry and society, and how these goals relate to the protection of personal data.

Relevance for ICANN and ICANN Org’s Contribution to the Open Consultation

The requirements of the GDPR have had a significant impact on the personal data processing activities of the whole Internet community. This includes the processing and availability of registration data in relation to the administration of generic top-level domains (gTLDs).

The ICANN community and the ICANN organization (org) are working to develop and implement a model that will enable access to non-public registration data for legitimate purposes as prompted by the European Data Protection Board (EDPB)⁹ among others. Developing and implementing this global system requires a balancing of the law’s data protection requirements with the legitimate interests of parties seeking access to non-public gTLD registration data, including the important public interest goals that legitimate access to non-public registration data serves for all parties involved, including data subjects. This presents a number of challenges.

The potential negative impact on the processing of domain names in the context of Internet traffic management, should processing of DNS data for traffic management purposes be deemed unlawful unless consent of all users is obtained, should also not be underestimated.¹⁰

⁷ The interview was circulated as part of Politico Pro subscription emails

⁸ See

<http://curia.europa.eu/juris/fiche.jsf?jsessionid=64EDEB02E1185F51365CA9D35AEB0C51?id=C%3B311%3B18%3BRP%3B1%3BP%3B1%3BC2018%2F0311%2FFP&ogp=&for=&mat=or&lqrec=en&jge=&td=%3BALL&jur=C%2CT%2CF&dates=&pcs=Oor&lg=&parties=schrems&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=6264483>

⁹ See https://edpb.europa.eu/news/news/2018/european-data-protection-board-endorsed-statement-wp29-icannwhois_en

¹⁰ See the 3 December letter of the European Data Protection Board (EDPB) to the Body of European Regulators for Electronic Communications (BEREC) concerning the EDPB’s interpretation of several key technical elements of the processing of electronic communications data and metadata <https://edpb.europa.eu/our-work-tools/our-documents/letters/edpb-response->

ICANN org welcomed the opportunity to provide feedback in the course of the European Commission's GDPR evaluation initiative. While there are other GDPR provisions of concern for ICANN, ICANN org's submission¹¹ was focused on international transfers of personal data to non-EU countries and the cooperation mechanism between national data protection authorities, as the main topics of this review. Both availability of effective transfer mechanisms and efficient and consistent decision-making by supervisory authorities in matters of general application are particularly important when it comes to global operations such as the coordination of the Internet's unique identifiers that ICANN performs.

Additionally, ICANN org's submission included the topic of joint controllership, as currently great uncertainty exists as to the scope of joint controllership and the content of arrangements required between joint controllers. This, as also highlighted through the paper "Exploring a Unified Access Model for gTLD Registration Data"¹² submitted to the EDPB, is a matter that significantly affects the development and implementation of a WHOIS system, which includes multiple actors across the world and can meaningfully meet the public interest functionality the system is expected to serve at a global scale.

It is worth noting that other contributions¹¹ were submitted to the open consultation referring to the WHOIS issue in addition to ICANN org's.

Release of the Review

The release of the 2020 evaluation report and review of the GDPR was delayed to June and is now scheduled for 3 June 2020.

[bereg-request-guidance-revision-its-guidelines_en](https://www.berec.europa.eu/regulatory-activities/request-guidance-revision-its-guidelines_en) and ICANN's technical analysis of the EDPB letter to BEREC <https://www.icann.org/en/system/files/files/octo-009-en.pdf>

¹¹ See ICANN contribution at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12322-Report-on-the-application-of-the-General-Data-Protection-Regulation/F514217>

¹² <https://www.icann.org/en/system/files/files/unified-access-model-gtld-registration-data-25oct19-en.pdf>

