

European Commission Reviews First Two Years of GDPR: A Success Story with Room for Improvement

On 24 June 2020, the European Commission (the **Commission**) published an evaluation report assessing the first two years of application of the General Data Protection Regulation (the **GDPR** – hereinafter the **Report**). Overall, the Commission is of the opinion that the GDPR has met its objectives of strengthening an individual's right to personal data protection and guaranteeing the free flow of personal data within the EU. The Commission observes that the GDPR is becoming a global standard for data protection. However, it also notes the need for further cooperation and implementation at Member State level.

According to the Commission, the GDPR has been an empowering tool enabling European citizens to increasingly use and enforce their rights since it became fully applicable on 25 May 2018. Particularly during the Covid-19 crisis, it has proven to be an essential and flexible tool to ensure that new technologies, such as contact tracing apps, comply with fundamental rights. The Report identifies the following challenges that indicate room for improvement in the coming years.

National divergences

The GDPR provides a harmonised set of rules but a certain degree of fragmentation is still present. National divergences appear where the provisions of the GDPR allow some flexibility. An example is the different approach between Member States in determining the minimum age for a minor to consent to the use of their data in relation to information society services. Article 8 of the GDPR allows Member States to provide for a lower age than 16 and some Member States opted for the age of 13 or 14. These differences create uncertainty for both children and their parents in addition to difficulties for businesses working across borders.

The same is true for Member States' different legislative approaches in implementing derogations, as regards the level of specification and safeguards, from the general prohibition to process special categories of personal data, including for health and research purposes. The Commission plans to map the different national approaches in this regard following which it will support the establishment of code(s) of conducts to contribute to a more consistent approach in this area. These measures should facilitate cross-border processing of personal data.

Cross-border enforcement

Although the GDPR strengthened procedural rights, encompassing the right to lodge a complaint with a data protection authority (**DPA**), there is a need to facilitate the exercise and full enforcement of data subjects' rights. Currently, there are many differences in, for instance, the complaint-handling procedures and the duration of proceedings due to different national timeframes. The Commission stresses the important role played by the DPAs in ensuring the GDPR's enforcement at national level, but the development of a truly common European data protection culture between DPAs is an on-going process. The Commission therefore calls upon the Member States to provide the DPAs with adequate resources as required by the GDPR.

New technologies

Further challenges lie ahead in clarifying how to apply the proven data protection principles to specific technologies, such as artificial intelligence, blockchain, the “Internet of Things” or facial recognition. Moreover, the Commission indicates that a stronger and more effective enforcement of the GDPR vis-à-vis large digital platforms and integrated companies, including in areas such as online advertising and micro-targeting, is essential to protect European citizens.

Higher burden for SMEs

In the Report, the Commission acknowledges the higher burden for small and medium-sized enterprises (**SMEs**) to implement the GDPR. DPAs have already provided templates for, for instance, processing contracts, but further efforts are needed to provide practical tools to facilitate the implementation of the GDPR by SMEs, preferably on the basis of a common European approach.

Developing a modern international data transfer toolbox on the basis of “adequacy decisions”

In order to develop a modernised toolbox to facilitate the transfer of personal data from the EU to a third country or international organisation, the Commission has actively engaged with key partners with a view to reach so-called “adequacy decisions”. Such a decision enables the safe and free flow of personal data to the third country concerned without the need for the data exporter to provide further safeguards or obtain any authorisation. According to the Report, the adequacy process with the Republic of Korea is at an advanced stage, and exploratory talks are ongoing with other partners in Asia and Latin America. Adequacy also plays an important role in the future relationship with the UK as an enabling factor for trade and an essential prerequisite for close and ambitious cooperation in the area of law enforcement and security.

Besides its adequacy work, the Commission will update the standard contractual clauses in light of new requirements introduced by the GDPR. And to make full use of the international dimension of EU data protection rules on the basis of the GDPR’s extended territorial scope, the Commission asks DPAs to send a clearer message to foreign operators that the lack of an establishment in the EU does not relieve them of their responsibilities under the GDPR.

Promoting global convergence

While the GDPR has already emerged as a key reference point at international level and acted as a catalyst for many countries around the world to consider introducing modern privacy rules, the Commission has intensified its dialogue in a number of bilateral, regional and multilateral frameworks to foster a global culture of respect for privacy. This includes, for instance, further exploration of synergies between trade and data protection instruments to ensure free and safe international data flows.

Way forward

The Report stresses the importance of continuing the work towards a common European culture of data protection. However, the Commission considers it too soon to draw definitive conclusions on the existing level of fragmentation after two years of application of the GDPR given the ongoing assessment of national legislation and the fact that sector-specific legislation is still being revised in many Member States. Relevant

case law of national courts and the Court of Justice of the European Union will help to create a consistent interpretation of the data protection rules.

At the end of the Report, the Commission lists the actions needed to support the GDPR's application, which will be monitored in view of the forthcoming evaluation report in 2024. In addition to certain recommendations already highlighted, Member States should, for instance, consider limiting the use of specification clauses that might create fragmentation and jeopardise the free flow of data within the EU. The Commission will encourage cooperation between regulators, in particular in fields such as competition, electronic communications, security of network and information systems and consumer policy. The European Data Protection Board (**EDPB**) is invited to take action as well, for instance, on issuing guidelines on the application of the GDPR in the area of scientific research, artificial intelligence, blockchain and other technological developments and to further clarify the interplay between the rules on international data transfers with the GDPR's territorial scope of application.

The Commission's full report can be consulted [here](#).