

The TOOP project and the proposed Single Digital Gateway Regulation – interactions, challenges and potential improvements

Based on the analysis of needs and requirements for the TOOP piloting efforts, the finalisation and adoption of the Single Digital Gateway Regulation¹ (SDGR) will address a clear and obvious need. It will provide an unambiguous legal basis for the infrastructure required to implement the once-only principle, and act as a regulatory push that will allow and encourage public administrations to make digital evidence available to their peers, and to more easily accept and recognise such evidence for their own purposes. The benefit of the SDGR and its necessity is therefore universally understood.

Nonetheless, from the perspective of the TOOP project and at least some of the Member State organizations which will take part in the envisaged pilots, the current approach of the proposed SDGR creates certain doubts and concerns about achieving efficient flow of information between public administrations. These concerns are particularly felt when the data controller is a public register, such as the national business register or a trade register, whose mission specifically includes the publishing of information to guarantee market transparency and fairness.

Specifically, the current drafting of the SDGR proposal appears at certain points to be too detailed and analytical on the operational implementation of the once-only principle from a functional implementation perspective, in a manner that is likely to impede the user-friendliness and even the feasibility and long term sustainability of the services that will exchange data within the TOOP pilots and are expected to go into production thereafter. While the TOOP project team fully agrees with the principles behind the SDGR, the current regulatory approach will likely not allow some of the TOOP pilots to continue beyond the project's duration. Specifically:

- Article 12.2 (e) states that the technical system used for the exchange of electronic evidence “shall ensure that the user has the possibility to preview the evidence to be exchanged”.
- Article 12.4 states that competent authorities “shall, upon an explicit request of the user, request evidence directly from competent authorities issuing evidence in other Member States through the technical system”.
- Article 12.6 states that “the evidence made available by a competent authority shall be strictly limited to what has been requested and shall only be used by the receiving authority for the purpose of the procedure for which the evidence was exchanged”.

We do recognize that such functional requirements on operations might indeed be one way to support the crucial principles of lawfulness, data limitation and purpose restriction, which can also be found in the General Data Protection Regulation, and which TOOP also embraces. However, there could be other ways of respecting the same legal requirements avoiding their operationalisation as currently foreseen in the SDGR proposal, which we feel creates some serious concerns:

- The obligation of a prior request and review option in practice restricts the once-only principle to use cases which are based on individual consent. While consent is important, it is not always viable and appropriate in all cases. TOOP has use cases where information would be exchanged between administrations on the basis of a legal obligation. This is legitimate from a data protection perspective (as also recognised by the EDPS' recent Opinion on the SDGR proposal), but not possible under the SDGR, since there is no legally valid request, nor a preview option.

¹ https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-256-0_en

- Furthermore, it is not clear that the current drafting permits repeated exchanges of digital evidence on the basis of a single end user request. The same end user request should be sufficient for multiple information exchange-retrieval, in a specific context, as long as this is clear to the end user. TOOP has use cases where an end user requests a transfer once, but permits (in a revocable manner) the transfers to be repeated between the designated authorities (thus allowing authorities to remain aligned on the basis of the initial request). There is some doubt whether this would be permitted under the SDGR, which could be read as requiring a request and preview option for each transfer. If this reading is indeed applied, the SDGR reaffirms and propagates a needless administrative burden.
- In addition, it might be useful to clarify that the evidence must be limited at the document level, so that an authority must provide the document that is requested, and none more. If the data minimisation principle is interpreted in a way that requires the issuing authority to filter data from available documents prior to sending it, this will restrict the range of documents that can be exchanged. In the longer term, data minimisation obligations can be made more demanding, but in the short term it should be recognised that at least some of the exchanged information exists only in the form of predefined and standardised documents that cannot be easily reduced in scope without affecting their utility.

Finally, the SDGR proposal is limited in terms of subject matter to four Directives and an Annex II of use cases for which the technical system might be used. Cases for which a legal basis exists are still excluded from using the technical system if they don't fall within this closed list. This applies to at least one pilot within TOOP: even if it is perfectly successfully completed, it would be barred from using the SDGR technical system as it is not explicitly listed in the SDGR. To support sustainability, it might be more productive to retain these four directives and the Annex II as a first priority implementation while allowing other Directives or operational domains to also use the technical system.

In summary, while TOOP fully recognises and endorses the principles of the SDGR proposal and agrees with its necessity to ensure long term sustainability of its efforts, the improvements proposed in this document may be more suitable to achieving that goal. Rather than strictly prescribing specific functionality, it is preferable to generalise the approach of the SDGR by formulating higher level legal requirements and conditions to be met, and allowing greater margin of appreciation of how these requirements and conditions can best be satisfied in specific cases, in accordance with the SDGR principles. For example, stating that the use of the technical system must be based on a request, a legal obligation or a public task would result in the possibility of more use cases and Member State-supported public services being integrated, without necessarily creating risks to the interests of end users.

The statements above should not be misconstrued as a disapproval of the SDGR proposal, but rather as proposals to improve the current drafting SDGR while tackling concerns regarding some Member State-supported public services that will be piloted in TOOP, that may not be able to continue - after the project's termination - under the SDGR, unless some clarifications are made.

The TOOP project is willing and able to use its pilots as an opportunity to provide a testbed whereby a more abstract set of legal requirements and conditions contained in the SDGR could be operationalised in a way that enables an intuitive and functional set of end user services that would comply with the principles of the current draft SDGR and would be acceptable by the MS and the market. Such experience from the TOOP pilots could feed into secondary legislation and MS implementation efforts which are needed for putting the SDGR provisions into actual use by European administrations, citizens and businesses.