

EDRi Input

to the draft EDPS Guidelines
on assessing the proportionality of measures that limit the fundamental rights
to privacy and to the protection of personal data

Section II, last paragraph (page 10):

Another factor to be considered in the assessment of proportionality of a proposed measure is the effectiveness of existing measures over and above the proposed one. *If measures for a similar or the same purpose already exist, their effectiveness should be systematically assessed as part of the proportionality assessment. Without such an assessment of the effectiveness of existing measures pursuing a similar or the same purpose, the proportionality test for a new measure cannot be considered passed.*

Section III, part 2 (page 14-15):

When assessing the effectiveness of the measure, the legislator must always first verify the effectiveness of already existing measures. In other words, before proposing and adopting new measures, the legislator should consider whether the 'existing measure' is enforced in practice, and whether broadening and/or deepening this measure would already satisfactorily address the problem identified in the Problem Analysis. **Without a systematic assessment of the effectiveness of existing measures pursuing a similar or the same purpose, the proportionality test for a new measure cannot be considered passed.**¹ In the case of a pre-existing measure, effectiveness has to be considered, during the balancing exercise, not in absolute terms but in terms of added value of the measure.

Justification: As the draft Guidelines already indicate, if a new legislative measure is proposed in order to complement or replace an existing one, the proportionality test should include an assessment of the effectiveness of the existing measure. This means that in cases in which measures for a similar or the same purpose already exist, their effectiveness needs to be assessed first. It is therefore important to expressly require such an ex-ante assessment of existing legislative measures for any new measure to pass the proportionality test.

¹ In its Opinion 01/2014 on the application of necessity and proportionality concepts and data protection within the law enforcement sector [available at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp211_en.pdf], the WP29 states: "However this assessment is done it should involve an evidence led explanation of why the existing measures are no longer sufficient for meeting that need."