Comments on the draft Guidelines 10/2020 of the European Data Protection Board

This paper exclusively reflects the views of its author.

On 7 September 2020, the European Data Protection Board published its draft Guidelines 17/2020[1] *"on restrictions under Article 23 GDPR"* (hereinafter referred to as Draft Guidelines or Draft).

The Draft Guidelines *"seek to provide guidance as to the application of Article 23 GDPR"* (paragraph 1) but—in addition to their little added value—it is not clear who are (can be) the addressee(s) of such guidelines.

1. Has the EDPB authority to issue such guidelines?

According to Article 70(1)(e)—on which these Guidelines are based—the EDPB *"shall ensure the consistent application of this Regulation. To that end, the Board shall … in particular: (e) examine … any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation" (emphasises added).*

In my view, the addressee of Article 23 is the legislator [the Union and/or Member States legislator(s)], and Article 23 concerns the *enactment* of (necessarily *to-be*) rules (that derogate from the rules of the GDPR) rather than the *application* of the *existing* rules of the GDPR.

Further, Article 23 contains provisions that normally should be in the "constitutional basis" of the GDPR, i.e. in the Charter of Fundamental Rights of the European Union. In other words, Article 23 is about constitutional requirements that legislators must take into account when regulating data processing (cf. *"Union or Member State law … may restrict by way of a legislative measure"*). Therefore, assessing compliance with Article 23 is reserved for the bodies that have the authority to check the legality (in this context: constitutionality) of the legislative measures that fall under Article 23, namely the Court of Justice of the European Union and the constitutional courts (or other constitutional bodies) of the Member States, but not the EDPB. The said bodies are not bound by the guidelines of the EDPB and may take divergent positions on the interpretation of Article 23; this fundamentally questions the right of the EDPB to issue such guidelines.

The EDPB is not an advisor of any Member State legislator, this right is reserved for the respective supervisory authorities as clearly declared in Article 57(1)(c) together with that this task is to be carried out in accordance with Member State law: the supervisory authority *"advise[s], in accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing"*. Similar task cannot be found in the GDPR for the EDPB.

[1] See at the following link
https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202010_article23_en.pdf

Another thing that is also worrying form the perspective of national constitutional systems is paragraph 78 of the draft Guidelines: *"Furthermore, where the legislatives measures imposing restrictions under Article 23 GDPR do not comply with the GDPR, in accordance with Article 58(5) GDPR and where appropriate, SAs shall have the power to bring infringements of this Regulation to the attention of the judicial authorities to commence or engage otherwise in legal proceedings, in order to enforce the provisions of the GDPR."* Since the "measures" mentioned in this paragraph are *legislative* measures [cf. Article 23(1)], reference to Article 58(5) means that the EDPB effectively creates authority for supervisory authorities to challenge the *constitutionality* of legislative measures of the Member State legislator even in cases where a supervisory authority is not vested with such authority "in accordance with Member State law".

The national provisions on codification hardly get on with the requirements that the EDPB imposed in paragraphs 43, 45, 46, 60 or 61, for example. The EDPB cannot oblige the national legislator in any way.

Therefore, as a first step, the EDPB should thoroughly reconsider if it really has authority to issue such guidelines under Article 70(1)(e).

2. Other remarks

Even if we set aside the aforementioned concerns, there are lot of conceptual problems in the draft Guidelines.

a) In some paragraphs, the Guidelines, seemingly, forget that the restrictions based on Article 23 are *legislative* measures, i.e. legal provisions in the applicable (sectoral) law. It is unrealistic to oblige the data controller to *"document the restrictions … includ[ing] the applicable reasons for the restrictions, which grounds among those listed in Article 23(1) GDPR apply"* (paragraph 66). It is enough if the data controller can denote the applied national legal provision.

b) Further, it should be the DPO that should be aware of the current legal situation (and any change thereto) and the DPO should inform the personnel of the data controller of any changes [cf. Article 37(5), Article 39(1)(a) and (b)] instead of the opposite as described in paragraph 67.

c) Since legal provisions, normally, do not have retrospective effect, it is quite difficult to understand what the EDPB thinks how the implementation of paragraph 73 would be: is the controller obliged to inform each and every data subject of the change of the legislation or is it enough if the controller makes public an updated privacy notice? Which point in Article 13 or 14 obliges the controller to do so? It is also unrealistic that data controllers should periodically review a given decision on restrictions (paragraph 55): data subject rights (Articles 15 to 22) can be exercised upon the data subject's request not *ex officio*, therefore – until the legal provision is in force – the controller is not obliged to reconsider its decision if that is final.

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In sum, the Draft Guidelines have serious deficiencies, and should be thoroughly reconsidered.

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