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EACB response to the EDPB's Guidelines 01/2022 on data subject rights - Right of access

11 March 2022

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 214 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 85 million members and 749,000 employees and have a total average market share of about 20%.

For further details, please visit www.eacb.coop

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop

Introduction

The European Association of Co-operative Banks (EACB) welcomes the opportunity to provide the European Data Protection Board (EDPB) with its comments on the draft Guidelines 01/2022 on data subject rights – Right of access adopted on 18 January 2022.

General comment

Overall, we are concerned that the requirements specified in the draft Guidelines exceed the scope of the articles set out in the General Data Protection Regulation (GDPR). The EDPB's Guidelines adopted so far and the draft Guidelines now under public consultation seem to create two layers of legislation – what the GDPR requires and what the EDPB recommends and considers as measures necessary. We continue to note the EDPB interprets the GDPR requirements in an extensive and broader way without providing legal analysis or case law to back up its interpretation.

Details

The EACB's comments refer back to the more general comment outlined earlier (i.e., be the draft Guidelines producing a second layer of rules with the various recommendations suggested by the EDPB).

The draft Guidelines greatly expand the interpretation of Articles 12 and 15. We believe that the interpretations given are not based on the wording of the GDPR's articles nor its recitals. The right to access is not new, it was one of the core elements of the Data Protection Directive. The EDPB's novel interpretation would create an additional burden for all financial institutions that's not justified by the unchanged nature of the obligations.

We provide below a series of examples:

- Example (1) paragraph 9 "*The EDPB considers it necessary to provide more precise guidance on how the right of access has to be implemented in different situations.*" It clearly gives a key to understanding how the EDPB considerations/recommendations should be read by the competent authorities to implement them.

- "Supplementary information" and/or "tailored information".
  Example (2) paragraph 111, 112 and section 5.2 on appropriate measures for providing access. We believe that the **EDPB's requirements related to "supplementary information" and/or "tailored information" are critical to all banks**.
  The language used in paragraph 11 suggests that the privacy notices as well as records of processing activities – be they generally related to processing concerning all data subjects and often not tailored to the situation of a specific data subject – are not deemed to be sufficient information under Art. 15.

Paragraph 11 states: *"In the context of an access request under Art. 15, any information on the processing available to the controller may therefore have to be updated and tailored for the processing operations actually carried out with regard to the data subject making the request. Thus, referring to the wording of its privacy policy would not be a sufficient way for the controller to give information required by Art. 15(1)(a) to (h) and (2) unless the « tailored » information is the same as the « general » information."*

Paragraph 111 is strictly linked to paragraph 112 where it states that "*Information on the purposes according to Art. 15(1)(a) needs to be specific as to the precise purpose(s) in the actual case of the requesting data subject. It would not be enough to list the general purposes of the controller without clarifying which purpose(s) the controller pursues in the current case of the requesting data subject. If the processing is carried out for several purposes, the controller has to clarify which categories of data are processed for which purpose(s) […] the controller is recommended to also inform the data subject as to the applicable legal basis for each processing operation"*.
In other words, controllers must provide the data subject with tailored information based on the individual case of each data subject.

There are also other wordings that refer to a "tailored service" to each data subject. For example paragraph 20 *"Such information could be based on text taken, for example, from the privacy notice of the controller or from the controller's record of processing activities referred to in Art. 30 GDPR, but may have to be updated and tailored to the data subject making the request";* but also paragraphs 113 and 117.

It is very likely that **implementing the EDPB's requirements would imply significant changes to ICT systems and data governance procedures in all fields in the societies (public, private and third sector)**. Our assumption is that current ICT systems are not capable of maintaining information on each specific disclosure to the recipients of data. Implementing the EDPB's additional requirements would require an additional effort. We note that **the EDPB's requirement to produce "tailored" information cannot be inferred from the letter of the GDPR, and is therefore unjustified**.

- There are also other statements in the draft Guidelines which are impossible in real life:
    - Paragraph 67 stipulates that "*In this case, the additional information will be the cookie identifier stored in the terminal equipment of Mr. X.*". The sole presence of a cookie identifier is not sufficient on the part of the operator of a website to identify the advertising profile associated with the data subject, which is held by the advertising company as opposed to the operator of the website. It should be clarified that this example refers to the advertising company.

- Paragraph 108 – Provides an overly elaborate description of a theoretical possibility that a data subject may explicitly request access to backup data as opposed to current data. We believe this level of granularity is excessive and goes beyond the basic premise of the right of access, which is to allow data subjects to "be aware of, and verify, the lawfulness of the processing." For this reason, we suggest deleting the entire paragraph.

Contact:

The EACB trusts that its comments will be taken into account.

For further information or questions on this paper, please contact:

- Ms Marieke van Berkel, Head of Department (marieke.vanberkel@eacb.coop)
- Ms Chiara Dell'Oro, Senior Adviser for Digital Policies (chiara.delloro@eacb.coop)