

Position Paper

Bitkom Position Paper on the EU Consultation “Further specifying procedural rules relating to the enforcement of the General Data Protection Regulation”

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Summary

The European Commission (EC) recently launched a public consultation on the enforcement of the General Data Protection Regulation (GDPR) and started its initiative to further procedural rules relating to the enforcement of the GDPR.

This initiative is aimed at streamlining cooperation between national data protection authorities when enforcing the GDPR in cross-border cases. To this end, it is supposed to harmonize some aspects of the administrative procedure the national data protection authorities (DPAs) apply in cross-border cases. The initiative and procedural changes are aiming at supporting a smooth functioning of the GDPR cooperation and dispute resolution mechanism.

Bitkom is thankful for the opportunity to contribute to the consultation and welcomes future occasions to offer its expertise in open discussions.

We welcome the EC’s initiative intended to streamline cooperation between DPAs when enforcing the GDPR in cross-border cases, and to harmonize certain procedural aspects applied by DPAs in cross-border cases. We view this an opportunity for a broader conversation on how to improve GDPR enforcement. We believe that the following points could have a significant positive impact in how fundamental privacy rights of Europeans are preserved while ensuring legal certainty:

In our view, it is overdue for the EC to address the fact that the consistency mechanism does not function sufficiently in practice. It should have already done so - also due to the "voices" from the EDPB - in the context of the evaluation of the GDPR.

Some cases have been taken years until consensus is reached and referrals from other authorities (e.g. the Federal Cartel Office) are making the regulatory landscape even more complex.

The current enforcement practice and missing harmonization results in competitive disadvantages for companies located in those EU member states where data protection infringements are enforced on the basis of a more restrictive interpretation of the rules.

Coherence and harmonization on the basis of a progressive, innovation-friendly and data-use-friendly interpretation of the GDPR rules in line with new Regulation (e.g. the EU Data Act) should therefore be the main priority for the current review.

To streamline the opinions of the national DPAs, the EDPB should establish more dialogue between the DPAs, especially when it comes to highly complex cases – while at the same time maintaining confidentiality of the proceedings. This would also lead to the much needed acceleration of proceedings. However, strict deadlines should not be implemented as cases can be very complex in practice and due process needs to be maintained. The right to be heard for the respondents and a constructive regulatory dialogue needs to be established for all proceedings.

Harmonized interpretation (and therefore enforcement) is especially needed in the context of special categories of data where the lack of harmonization and a very restrictive understanding has led to serious disadvantages in some countries. In the interest of a functioning internal market, technological advancements, much needed research (esp. when it comes to health data) and the goal of the EC to support Data Spaces, DPAs, regulators and Industry need to find a new approach for consensus and dialogue to advance the Data Economy while preserving fundamental rights.

And while we consider that improving cooperation between national DPAs when enforcing GDPR in cross-border cases is essential to ensure a harmonized and thus efficient and effective enforcement, we would like to also draw the attention of the EC to the importance of considering other dimensions of the GDPR enforcement mechanism in addition to Article 63 GDPR.

Right to be heard

We support proposals that give increased power to the respondent to be heard during proceedings. The right to be heard in the context of a DPA's investigation varies depending on Member States' national rules. In some Member States, the parties under investigation can only make submissions on factual points. We submit that to give full effect to the right to be heard enshrined in Article 41 of the Charter of Fundamental Rights of the EU, it is necessary that this right covers both the factual

and legal elements raised in the investigation and provides parties with the opportunity to make written and/or oral submissions, as appropriate.

Current procedural rules in certain Member States allow parties under investigation to make submissions to the lead DPA before its draft position is finalized. This right should be extended to include the EDPB in cross-border cases, when disputes are being resolved between different concerned DPAs' relevant and reasoned objections and when the cooperation mechanism has been triggered. The EDPB should not adopt a position, often entirely different from that of the lead DPA, without any representations by the relevant parties.

The EDPB should therefore grant the party under investigation a right to be heard in writing and orally and an opportunity to respond to the positions the EDPB intends to adopt in the procedure leading to its binding decision. This requires that the EDPB proactively discloses the material in its files (facts, legal characterisation of those facts, and evidence on which the EDPB relies), together with its preliminary position, to the party under investigation.

The right to be heard by the EDPB must also apply to both the legal characterization of the facts by the EDPB and the legal positions the EDPB intends to adopt.

In addition, an oral hearing is necessary because EDPB decisions can lead to significant administrative fines and/or significant detrimental effects on the position or activities of the party under investigation. An oral hearing would allow the party under investigation to eliminate possible uncertainties and inaccuracies with respect to the facts and to address any concerns raised by the EDPB in respect of the legal position adopted by the party under investigation.

We believe, therefore, that the harmonization of rules on the right to be heard before DPAs would be ineffective if it were not complemented by a systematic right to be heard before the EDPB.

Procedural deadlines

Bitkom understands that there is an ongoing discussion about whether the absence of deadlines in the GDPR causes delays and/or disparity in the finalization of cases. However, the introduction of fixed deadlines can be counterproductive if they do not take into account the current workload of DPAs, the need for flexibility and the specificity and complexity of each case.

The length of time required to complete procedural steps depends, in our experience, on the specific subject matter of the inquiry in question. Fixed deadlines will most

likely be to the detriment of the party under investigation and undermine the fair, properly reasoned, efficient, and consistent application of the GDPR. Prescribing deadlines with no flexibility or allowance for a case-by-case analysis also risks undermining a respondent's right to fair procedures and the DPAs' obligation to exercise their powers with regard to due process (Article 58(4) GDPR).

Fixed deadlines would also force the DPAs to take action regardless of what other tasks need to be considered. The current DPA practice often shows that there is too little available time and staff to properly advise controllers/processors on how data protection compliance can be achieved, innovative projects can be set up properly and technology can be used in a data protection friendly way.

Seeing the current dynamic in the regulatory framework and technological advancements, especially SMEs will be even more dependent on support from the DPAs throughout the EU. Fixed deadlines will only limit the flexibility for advisory activities even more.

Balanced Measures

DPAs should consider a full range of measures available in the GDPR, such as formal warnings or correction notices. An outcome-focused approach should put administrative sanctions as a measure of last resort. Indeed, an enforcement-first approach has not proven more effective and should be targeted primarily against deliberate infringements.

The EC should support the proposal contained in the EDPB Wishlist to explicitly authorize DPAs to enter into Amicable Settlements in non-contentious ways. For serious cases that create real harm for individuals and where sanctions are appropriate, the EDPB should develop and publish a clear, predictable, consistent and proportionate model to calculate actual fines giving clear consideration for mitigation factors and independent from statutory maximums.

Constructive regulatory dialogue

The GDPR is a piece of principles-based legislation, whose practical application is highly dependent upon the specific facts and circumstances. Constructive dialogue between regulators and companies should be encouraged to help regulators better understand technical and operational impacts of GDPR prior to taking formal enforcement action. This can include the creation of industry stakeholder groups

consulted by regulators and privacy sandboxes. The EC should leverage upcoming updates on the GDPR to harmonize administrative procedures and practices, and make a regulatory dialogue between regulators and companies mandatory across Europe.

Rights of the complainant

Some of the proposals advanced in the EDPB's Wishlist would increase the procedural rights held by the complaining party to review and comment on the case file and participate directly in the proceedings as a party. Protection and adjudication of privacy interests though is a responsibility of the DPAs and inclusion of the complainant in the investigation risks injecting bias and complication into the proceeding (which may pose a risk to efficient investigation) while undermining business confidentiality.

A harmonization of complainants' procedural rights in an investigation would be desirable and many Member States already provide such rights. It is also important, however, to also grant and harmonize procedural rights of the respondent (the organization being investigated), especially the right to fair procedures including the right to be heard.

To protect all parties in such proceedings, safeguards to the procedural rights should also be granted uniformly, especially if parties are entitled to access the investigating DPA files, the right of access should be accompanied by obligations of confidentiality and sanctions for breaches of those obligations.

Strengthening the One Stop Shop Mechanism

For organizations operating in different EU Member States, a consistent and harmonized application of the GDPR remains key. The One Stop Shop (OSS) mechanism has been key in ensuring uniformity while also protecting the Single Market, reducing legal uncertainty and, to a certain degree, the enforcement complexity. This new EC initiative should preserve and strengthen the OSS and not expand the ability of the wider DPA community to review and comment upon factual findings, draft determinations and ultimate sanctions recommended to the lead DPA during the course of the investigation.

Likewise, the role of the EDPB and the cooperation mechanism should be exceptional and not function as a general appeal body for legitimate decisions taken by the lead DPA. This is because, under the GDPR, the lead DPA is responsible for conducting an

investigation, while the EDPB's role in the dispute resolution process is limited to determining whether concerned DPAs' objections are relevant and reasoned and, if so, to resolve any dispute between the concerned DPAs in respect of the matters the subject of those objections.

Competent Data Protection Authorities for Transnational Codes of Conduct

While we consider that improving cooperation between national data protection supervisory authorities when enforcing GDPR in cross-border cases is essential to ensure a harmonized and thus efficient and effective enforcement, we would like to draw the attention of the EC to the importance of considering other dimensions of GDPR enforcement mechanism in addition to Article 63 GDPR.

It is essential to underline the added value of complementary enforcement mechanisms, such as those established by Codes of Conduct and Monitoring Bodies in the context of Articles 40 and 41 GDPR. Codes of Conduct, especially when those bear a transnational scope, i.e., covering processing activities across several member states, can effectively support addressing pressing challenges such as the uniform application of GDPR requirements and consistent enforcement.

In light of the growing regulatory landscape that DPAs will have to supervise or be consulted about when personal data is being processed (e.g. EU Data Act, Digital Services Act, AI Act etc.), such additional enforcement and oversight mechanisms will have to be strengthened to support the DPAs in their tasks and streamline processes.

Codes of Conduct have several advantages for GDPR enforcement and provide legal certainty for controllers. They also strongly support harmonization across Europe, by allowing for particularizing ambiguous interpretations in sector-specific manners. The enforcement of Codes of Conduct complements the public actions via DPAs and may significantly increase GDPR compliant yet practical implementations.

Another added value is the compulsory oversight by independent Monitoring Bodies that allows for additional robust enforcement. Required continuous communication between Monitoring Bodies and DPAs may establish exchange of first-hand experiences, fostering consistent, robust yet practical application of the law.

We see some need for clarifications and a general need for strengthening of Codes of Conduct. Further clarification on how to determine the competent DPA is required when it comes to the approval process of transnational Codes of Conduct in accordance with Article 40.5 GDPR. Experience has shown varying interpretations by DPAs when it comes to factors that determine their competence. As a result, approval processes for Codes of Conduct have been delayed, and in some cases suspended,

because DPAs could not mutually resolve their competence. As a result of these procedural obstacles, the complementary enforcement potential that these Codes of Conduct have to offer has not been realized (while the need for them has grown).

A closer or rather harmonized application of the Guidelines that have been published so far, would benefit the development of Codes of Conduct significantly. Especially in cases of transnational Codes of Conduct, that will apply to any of the member states, the competency should not be considered an obstacle. A harmonized interpretation of the GDPR is sufficiently safeguarded by the EDPB's mandatory involvement.

Bitkom represents more than 2,000 companies of the digital economy. Through IT- and communication services only, our members generate a domestic turnover of 190 billion Euros per year, including 50 billion Euros in exports. Members of Bitkom employ more than 2 million people in Germany. Among the members are more than 1,000 small and medium-sized businesses, over 500 startups and nearly all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the sectors of digital media or are in other ways affiliated to the digital economy. 80 percent of the companies' headquarters are located in Germany with an additional 8 percent each in the EU and the USA, as well as 4 percent in other regions. Bitkom supports the digital transformation of the German economy and advocates a broad participation in the digital progression of society. The aim is to establish Germany as globally leading location of the digital economy.