bitkom

Position Paper

Proposal for a Regulation for a better enforcement of the GDPR

Bitkom Position Paper

At a glance

Regulation for additional procedural rules for GDPR enforcement

Status quo

Following a public consultation in January 2023, the European Commission (EC) has published its proposal for a Regulation for additional procedural rules for GDPR enforcement in July 2023.

Bitkom evaluation

We welcome the proposal and its intention to streamline cooperation between DPAs when enforcing the GDPR in cross-border cases, and to harmonize certain procedural aspects applied by Data Protection Authorities (DPAs) in cross-border cases. We also see this process as an opportunity for a broader conversation on how to improve harmonization. In our view, it is overdue for the EC to address the fact that there is not yet enough harmonization when it comes to GDPR interpretation. The current enforcement practice and missing harmonization results in competitive disadvantages for companies located in EU member states where data protection infringements are enforced on a more restrictive interpretation of the rules.

Key Aspects

Establishing more dialogue, making a push for more harmonization and legal certainty

The GDPR is a complex legal instrument with a very broad scope, covering all European companies as well as international providers. To streamline interpretation and opinions while taking regulatory changes, technological advancements, and a myriad of court cases throughout the EU into account, the establishment of a structured dialogue with industry and technology experts is necessary.

Regarding the proposal, maintaining confidentiality of proceedings, once cases are brought, is essential. On a procedural level, a swift completion is important. However, due to the varying complexity of the cases, deadlines should be implemented carefully and not on all stages of the procedure. The right to be heard must be granted to the respondents during all relevant phases. We welcome that the current Proposal includes such rights.

Bitkom number

60 percent
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1 General Remarks

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 European Commission's Proposal intended to streamline cooperation between Data Protection Authorities (DPA) when enforcing the GDPR, 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 harmonization of GDPR interpretation. We believe that the following points could have a significant positive impact on how fundamental privacy rights of Europeans are preserved while ensuring legal certainty:

In our view, it is overdue to address the fact that interpretations of the GDPR have differed vastly in the EU and the consistency mechanism does not function sufficiently in practice.

Some cases have taken years until consensus was 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 result in competitive disadvantages for companies located in EU member states where data protection infringements are enforced based on 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 a key priority for the broader GDPR review in 2024.

To stay competitive, the EU should make a comprehensive assessment of all data-related Regulation and take the need for advanced data processing (e.g. for AI training) into account. As stated above, companies are currently often put in a position where they must choose between the legal uncertainties and restrictions in Europe or the relocation of technology development to other regions of the world.

To streamline the opinions of the national DPAs, the European Data Protection Board (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. On a procedural level, deadlines for the interaction of the DPAs can facilitate the swift completion of the dispute resolution procedure and speed up the dialogue. However, due to the varying complexity of the cases, deadlines should be implemented carefully and not on all stages of the procedure.

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 in some EU countries has led to serious disadvantages. 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 the industry need to find a new approach for consensus and dialogue to advance the Data Economy, while preserving fundamental rights.

Improving cooperation between national DPAs when enforcing GDPR in cross-border cases is essential to ensure a harmonized and thus efficient and effective enforcement. New cooperation methods need to be found that will improve the exchange of opinions, but not prolong the process or unduly burden the Lead Supervisory Authority (LSA) and the other involved authorities.

Furthermore, 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.

GDPR is in large parts a law that foresees an appropriate balance between informational self-determination and other fundamental rights. The interpretation in practice often leads to a difficult balancing process of data protection and other fundamental rights and societal concerns, which need to be sufficiently taken into account. This balancing of interests is not yet done in a harmonized way in the EU.

In the absence of a fundamental rights balancing, innovation can be severely hampered, and considerable global competitive disadvantages can arise for European companies. The past years have shown societal disadvantages due to this lack of balancing of interests (e.g. ban of videoconferencing tools in the context of school closures during the pandemic).

Both at national level and through the EDPB, it is paramount that the DPA takes into account other fundamental rights while paying attention to the general interest of society.

Although legal action can be pursued, court cases are usually very time-consuming and this time is lost for Europe in the development of technology. In the meantime, too many risks accumulate regarding fines and reputation. It is also worth noting that, when suing the authorities, companies must proceed against a body that practically combines prosecutor and judge and thus run considerable risks for the future if the relationship with this body is strained. Therefore, companies are often put in a position where they must choose between the uncertainties and these risks or the relocation of technology development to other regions of the world.

This situation needs to be solved, and it needs to be solved quickly. One promising approach could be the establishment of the European Data Innovation Board (Art. 29 Data Governance Act), where a more diverse group of experts comes together to advise and assist the development of harmonized interpretation and application. This approach has two distinct advantages: a more diverse group of experts, securing more balanced interpretation and thinking, and harmonization through European bodies. It is our view that, to truly enable all EU Regulations for the Digital Single Market, the EU should move toward more European supervisory bodies and competences.

We suggest including references to the European Data Innovation Board into the new Regulation for Harmonization of Enforcement of the GDPR.

2 Comments on Chapter III – Cooperation under Article 60 of the GDPR

Cooperation

It is important to maintain the Article 56 competence of the lead supervisory authority (LSA) in its cooperation with Competent Supervisory Authorities (CSAs) as the principal investigator into cross-border processing activities of a controller and the sole interlocutor of the controller for its cross-border processing. Maintaining the competence of the LSA is the most effective method for ensuring the efficient handling of complaints and reducing potential hurdles and confusion. This implies the following:

CSAs should not be able to originally co-determine the delineation of the scope of the original investigation, even in complaint-based investigations. It is sufficient that the LSA is bound to the principles established by the European Courts on the DPAs obligations and discretion in how to treat complaints and what to investigate.

The final Regulation should not expand into what is and should remain at the sole discretion of the LSA, particularly fact finding and determination of sanctions.

The Article 65 dispute resolution procedure is and should remain a mechanism to solve legal disputes between CSAs as to whether there is a GDPR infringement or whether the envisaged action by the LSA complies with the GDPR. RROs (relevant and reasoned objections in the meaning of Art. 65 GDPR) should not be allowed to intervene into LSA matters, particularly fact-finding and sanctions.

The final Regulation should not go beyond the original Proposal which provides that the RROs may be based exclusively on factual elements included in the draft decision, and not more broadly on elements included in the administrative file and on which the parties had the opportunity to make their views known as provided in an advanced copy of the Proposal, or on an even broader category of documents.

The Regulation should maintain that RROs may not change the scope of the allegations by raising points amounting to new GDPR infringements or changing the intrinsic nature of the allegations raised. That restriction should not only concern infringements not investigated by the LSA, but also those which the LSA investigated but where it found no infringement.

3 Comments on Chapter IV – Access to the administrative file and treatment of confidential information

Article 20 – Access to the administrative file and use of documents

Procedural rights of complainants should – like in competition or state aid cases – remain restricted. In particular, complainants should not have a generalized access to the file (as in Recital 26 of the Proposal). In cases where the LSA intends to reject a complaint, and upon request, complainants should have access to documents which should remain limited to the non-confidential version of the documents on which the proposed rejection of the complaint is based.

In cases where the LSA issues preliminary findings, the complainant should receive only a non-confidential version of those findings. In line with competition cases, this should not extend to other supporting documents, as it currently is provided in Article 15(3) of the Proposal.

4 Comments on Chapter V – Dispute resolution

Dispute Resolution

The Proposal is designing the dispute resolution procedure as a European administrative procedure which leads to an effective exercise of fundamental rights to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the EU [and Article 6 of the European Convention of Human Rights] by the investigated controller/processor. As the dispute resolution procedure leads to a binding EDPB decision, the Regulation should recognize an effective right to be heard before the EDPB (not only before the LSA).

In order to grant an effective right to be heard, the EDPB must disclose its files to the investigated party, which should include the RROs and further correspondence and

exchange of views between the LSA and CSAs; provide its preliminary factual and legal position (in a kind of statement of objections), and afford the investigated party sufficient time (more than 8 days as currently provided) to make submissions before adopting its decision. This should be decided on a case-by-case basis, depending on the complexity of the issues under consideration.

This is in particular warranted if the EDPB intends (i) to take a position on factual or legal issues that have not been discussed in the national procedure before the LSA or (ii) not to follow the view of the LSA's draft decision.

Should the EDPB be allowed to order the imposition of a fine (or another sanction) or give instructions to the LSA relating to the amount of the fine – which we believe Article 65 does not cover – the right to be heard must include an oral hearing as well as with written submissions.

5 Comments on Chapter VII – General and final provisions

General and final Provisions

The Proposal should incorporate a provision to grant individuals or organizations the right to appeal the binding decisions made by the EDPB within the context of the One-Stop-Shop mechanism.

The Proposal should also not become an impediment to a wholesale review of the GDPR, especially in light of new technological developments such as AI.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

Published by
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