bitkom

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Update

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) published its proposal for a Regulation for additional procedural rules for GDPR enforcement in July 2023. On 9 November 2023, the EU Parliament's (EP) Committees on Civil Liberties, Justice and Home Affairs (LIBE) and on Legal Affairs published its draft report. An amended draft report was adopted on 15 February 2024 but no qualified majority could be found among members of the LIBE Committee. The draft position will now be tabled for a future plenary of the European Parliament.

Bitkom evaluation

Our assessment of the proposed legislation is mixed. On the one hand, we welcome the EC's intention to streamline cooperation between data protection authorities when enforcing the GDPR in cross-border cases and to harmonize certain procedural aspects applied by data protection authorities in cross-border cases. In our view, it is overdue to address the lack of harmonization in the interpretation of the GDPR, which leads to competitive disadvantages for companies based in Member States with a more restrictive interpretation of the rules. The proposal of the EC is a significant step in the right direction towards a more cohesive regulatory environment.

On the other hand, we believe that the EP proposal has some significant shortcomings. It's focus on simplifying procedural safeguards raises concerns about limiting defendants' submissions and allowing national procedural laws to influence the right to be heard, potentially leading to legal inefficiency and conflicts with fundamental rights. In addition, the extension of procedural rights for complainants under Article 2b is seen as a potential flaw, creating an imbalance that could lead to abusive complaints and mass civil actions, undermining the objective of a balanced approach to investigations, particularly with regard to privacy rights.

Key Aspects

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, deadlines should be implemented carefully and not on all stages of the procedure. The rights of

60%

of companies in Germany have already stopped plans for innovations or new technologies because of data protection rules or uncertainties about them. (according to a study by Bitkom Research)

defendants, especially their right to be heard, must granted to remain a fair ground in comparison to the complainants during all relevant phases also in front of the EDPB.

Bitkom number

60 percent

of companies in Germany have already stopped plans for innovations or new technologies because of data protection rules or uncertainties about them.

Content

1 General Remarks

In mid-2023 we welcomed the EC'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. With the EP's proposal from this year, we see the necessity to update our position on the regulation for additional procedural rules for GDPR enforcement.

The legislative proposal provides an opportunity to address the need for better harmonization of GDPR interpretation, recognizing the current significant differences across the EU. The existing consistency mechanism has proven to be inadequate, with protracted disputes and added complexity due to referrals from other authorities. This lack of harmony and uneven enforcement puts companies in EU member states at a competitive disadvantage, forcing them to navigate legal uncertainty or move technology development elsewhere. A new approach to harmonized interpretation is urgently needed to promote the functioning of the internal market and technological progress, and to support the EC's Data Spaces objective. This approach should prioritize coherence and harmonization based on a progressive, innovation-friendly interpretation of the GDPR rules, in line with upcoming regulations such as the EU Data Act. In addition, we urge the EC to consider broader dimensions of the GDPR enforcement mechanism beyond Article 63, emphasizing the importance of balancing data protection with other fundamental rights and societal concerns. This balanced approach is crucial to avoid stifling innovation and maintaining the global competitiveness of European companies. Societal drawbacks, such as the ban on videoconferencing tools during the pandemic, highlight the need to consider fundamental rights at both national and EDPS level.

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 and not undermining the LSA. 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 and at all stages.

With the new proposals of the EP, we shift the attention of this updated position paper towards suggested changes in procedural rules, specifically focusing on the effective right to be heard as a foundational principle in EU law. This right is crucial during key stages of investigations, requiring access to all relevant materials for a proper defense. The EC proposed procedural protections akin to criminal proceedings for parties under investigation. However, there is concern about the EP aiming to simplify these provisions, limiting investigated parties ' submissions in GDPR enforcement proceedings. Article 2b in I proposal suggests imposing page limits and restricting the right to be heard in certain situations, allowing national procedural laws to influence this right. This departure from the EC's approach risks legal inefficiency and conflicts

with fundamental rights and legal certainty principles. Additionally, the EP proposals under Article 2b, which aim to extend the procedural rights of complainants, may create an imbalance in favor of complainants at the expense of parties under investigation, potentially impacting due process, confidentiality breaches and independence of investigating authorities. To address these concerns, the GDPR Enforcement Regulation should refrain from extending complainant rights beyond those proposed by the Commission's proposal, such as providing access to a joint case file, and prioritize maintaining a balanced approach in investigations, especially where due process rights are at stake.

Although legal action can always be pursued, court cases are usually very time-consuming and result in lost time for Europe's technology development, accumulating risks in terms of fines and reputation. Notably, companies face challenges when suing authorities, as they must proceed against a body that practically combines the roles of prosecutor and judge, exposing them to significant risks if the relationship with this body becomes strained. To address this situation swiftly, one promising approach would be the establishment of the European Data Innovation Board (Art. 29 Data Governance Act). This EDIB could bring together a more diverse group of experts to advise, decide, and assist in developing harmonized interpretations and applications, specifically for cross-border cases. It offers two distinct advantages: a more diverse group of experts ensuring balanced interpretation and thinking, and harmonization through European bodies. In our view, to truly enable all EU Regulations for the Digital Single Market, the EU should transition towards more European supervisory bodies and competences.

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

Cooperation and the one-stop-shop mechanism

In their respective proposals, the EC and the LIBE Committee of the EU Parliament present different approaches to the One-Stop-Shop (OSS) mechanism. Given the importance of the OSS in context of the GDPR, it is imperative for us to highlight the significance of a capable mechanism that would have a positive impact on both organizations and individuals within the EU.

A well-functioning OSS brings clear benefits, reducing the administrative burden for organizations and – as emphasized by the EDPB - simplifying the process for individuals to exercise their privacy rights and "assert their rights, no matter where they live in Europe. The OSS not only streamlines these processes, but also ensures regulatory consistency and legal certainty for organizations operating across the EU.

Additionally, it helps organizations to predict and meet compliance obligations, and thus potentially prevents putting Europe at a competitive disadvantage. Efficient procedures and rapid decision-making are essential to address these issues. As a coherent and cost-effective regulatory framework, the OSS additionally reduces administrative costs for all organizations, including NGOs and SMEs.

However, it is of great importance to eliminate identified weaknesses and foster accelerated and trustworthy procedures. In this regard, it is crucial for the OSS to create a framework which prevents complex issues from impeding the system in itself and creating a reliable working ground which provides realistic deadlines and foreseeable conclusions of procedures. All of this supports the GDPR's overarching goal of fostering a business-friendly environment.

Therefore, the new Regulation needs to consider general rules on the procedural level and within the OSS mechanism, especially ensuring confidentiality of the administrative file, establishing an effective sanctions regime for confidentiality breaches, providing the right to be heard, stipulating reasonable and proportionate timelines for input, enabling amicable settlements at all stages of cross-border procedures, and promoting outcome-based enforcement by requiring complainants to exhaust industry complaint mechanisms. Consideration should be given to the introduction of deadlines for the acceleration of the procedure pursuant to Art. 60(3)(2) GDPR for the submission of draft decisions to the other supervisory authorities concerned. The lack of binding deadlines in the past has led to long delays and a lack of follow up - solving this problem would be a key prerequisite for creating a level playing field for all European companies.

The ultimate goal is a strong OSS providing a straightforward process for individuals to exercise their privacy rights, while ensuring unwavering regulatory consistency for organizations operating across the EU. We urge policymakers from all institutions to cooperate with the industry towards a robust and coherent framework for the OSS. It is essential to balance regulatory consistency, enhance the efficiency of cross-border procedures, and simplify the process for individuals to protect their privacy rights. Only through that we can achieve a harmonized approach that benefits both organizations and individuals across the EU.

Right to be heard for parties under investigation

An effective right to be heard is a fundamental principle of European Union law as reflected in Article 41 of the Charter of Fundamental Rights. For the right to be effective, it must ensure:

- timely access to key information on the case (especially where such information is being generally shared), and
- an opportunity to respond, where errors of fact or law are made which could materially impact the case.

Therefore, parties under investigation (PuI) should have the right to be heard at key stages in the process, especially when the scope and issues in an investigation are being determined, in relation to preliminary findings and the draft decision. This includes access to all relevant material collected by the LSA; the material considered by

the decision-maker; and all submissions made to the LSA and/or EDPB to be able to mount a proper defense. In its proposal, the EC concluded that parties under investigation should be afforded a level of procedural protection similar to that in criminal proceedings. This decision was based on the recognition that the negative impact on them of an investigation procedure under the GDPR could be serious, particularly where the supervisory authority imposes sanctions. Subsequently, the Proposal ensures that the right to be heard is provided to parties under investigation at every relevant stage of a cross-border investigation.

However, we are very concerned about the direction taken by the EP report. The report seeks to replace these granular provisions with a simple and abstract reference to a right to be heard before measures with adverse effects are taken. For example, it proposes to significantly limit the submissions of parties in GDPR enforcement proceedings (e.g. to only 50 or even 20 pages). Parties under investigation would hardly have a fair chance to present their position on the merits and the facts in a comprehensive and convincing manner. According to the proposal of the EPDB and the EDPS, the investigated party's right to be heard would be further restricted in the context of the so-called coherence procedure. This procedure applies in cases where the LSA and the CSA cannot agree on a common position. In such cases, the case is referred to the EDPB, which takes a final and binding decision on the merits of the case. The EDPB and the EDPS consider that defendants should not be granted the right to submit observations to the EDPB before its final decision, as proposed by the EP through the deletion of article 24. In addition, the EP proposes to allow SAs to limit the right to be heard in accordance with their national procedural law. This reopens the door to divergent regimes across EU Member States, which will only lead to more legal uncertainty for companies operating across the EU.

Regulations must strike a balance between the objective of efficiency and the fundamental rights of defendants. This applies in particular to the timing, scope and length of submissions. These factors will depend on the circumstances of each case (e.g. the seriousness of the allegations in question). Therefore, there should also be a possibility for the party under investigation to comment in the proceedings before the EDPB, as provided for in the EC´s proposal. The GDPR Enforcement Regulation must provide concrete and effective safeguards to avoid undue restriction of the rights of the Defendant. By abandoning the approach of the EC, the EP report not only risks losing legal efficiency, but also creates tensions with the fundamental rights of the parties under investigation and the principle of legal certainty.

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

The proposals aim to significantly extend the procedural rights of complainants in proceedings initiated by DPAs. For example, the EP and the EDPB propose that complainants should have access to a common case file documenting the various procedural steps. Complainants should also have access to a common case file documenting the main procedural steps. While some of the proposals would limit this right of access for reasons of confidentiality and business secrets, the overall effect would be to strengthen the position of complainants to the detriment of parties under investigation, particularly with the proposed removal of key protections, such as the confidentiality declaration and the limitation that information obtained in the course of the investigation should only be used in that context. This approach is not in line with the fundamental rights of parties under investigation.

The proposals would practically invite abusive complaints issued with DPAs, including mass civil actions. To reduce these risks and imbalance, the GDPR Enforcement Regulation should refrain from extending complainant rights beyond those proposed by the Commission, e.g. implementing a joint case file. Complainants should not have a generalized access to the file as intended in Recital 26 of the EC-Proposal. In cases where the LSA intends to reject a complaint, complainants should solely be able to request non-confidential version of the documents on which the proposed rejection is based. In cases where the LSA issues preliminary findings, the complainant should only receive 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 EC-Proposal.

None of the proposals give any indication that Complainants have been treated unfairly or unequally under the current legal framework. Against this background, we consider it justifiable to further leave it to the member states to regulate – and limit – the rights of Complainants in line with proportionality considerations.

Scope of Defendant Rights

The proposals set out that the term “Complainant” should not only cover data subjects, but also non-profit organizations, bodies and associations which have lodged complaints under Art. 77 GDPR. From a constitutional point of view, this broadened definition of a Complainant would worsen the effects of the parallelism between Defendants and Complainants. Experience shows that such organizations will try to use the evidence they have obtained in the context of respective complainants’ rights in order to prepare or substantiate claims for damages and other civil proceedings against the defendant. At the same time, extending the scope of complainants’ rights as set out in the proposals would make it much more challenging for DPAs to perform their tasks efficiently. In particular, it is very likely that they would face a considerable number of complaints and procedural inquiries by complainants and non-profit organizations. However, individual complainants would be requested to act as a party with rights and obligations as in a formal proceeding. In the approach by the, the right to file a complaint under Art. 77 GDPR does not aim to facilitate (civil) claims against the defendant. To minimize such risks, complainant rights should not be extended to non-profit organizations, bodies, and associations. The proposals do not provide any indication as to why there is a practical need to extend complainant rights to these entities. Complainants already have the option – in accordance with Art. 80 GDPR – of instructing certain organizations to exercise their rights.

Scope of investigations

According to the EP Proposal, DPAs should perform a full review and investigation of all facts, circumstances and legal theories that could become relevant in the context of the pending procedure. This proposal would most likely substantially limit the resources of DPAs. The EP’s proposal would not be practical considering the DPAs overall limited capacities and resources. DPAs would particularly be required to run a comprehensive investigation even in cases of lower significance in which, for example, complaints are manifestly unfounded. We believe that DPAs should prioritize investigations where privacy rights of data subjects are substantially at stake (e.g. due to the sensitivity of the concerned personal data).

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 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.

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