RESPONSE TO EC CONSULTATION ON GDPR ENFORCEMENT RULES

Enhancing the Effectiveness and Credibility of GDPR Enforcement

23 March 2023

Executive summary

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to share our views on the European Commission's plan to introduce new procedural rules to improve the enforcement of cross-border data protection cases.

Since the last GDPR implementation report,[1] we have observed several procedural shortcomings in cross-border cases which undermine the rights of the defendants and the consistent enforcement of the GDPR across the EU. CCIA Europe invites the European Commission to consider addressing the following deficiencies as a matter of priority, in close cooperation with relevant stakeholders including businesses:

1. EDPB decisions must be subject to judicial oversight;
2. The defendant's right to be heard should be given utmost consideration at national and EDPB levels;
3. New rules should oblige authorities to cooperate with one another in GDPR cases initiated by authorities other than data protection Supervisory Authorities (SAs);
4. To prioritise faster cooperation procedure, the EDPB should have an obligation to assess whether the objections raised by Concerned Supervisory Authorities (CSAs) are 'relevant' and 'reasoned';
5. Swift fixes to ensure faster case-handling, including: (a) mandatory exhaustion of company's internal processes before complaints can be made to SAs, (b) new rules specifying to what extent a Supervisory Authority can initiate proceedings with a controller whose main establishment is situated in another Member State, (c) fair and consistent admissibility threshold, and (d) automatic closure of cross-border complaints past a given period of inactivity.

We would also like to share some observations and concerns related to the European Data Protection Board's (EDPB) wish list, published on 10 October 2022,[2] insofar as the European Commission is considering some or all of those options to improve cooperation between Supervisory Authorities (SAs) in cross-border cases.

In addition, CCIA Europe invites the European Commission to explicitly extend the scope of the One-Stop-Shop and Consistency mechanisms in GDPR, to all laws where SAs have been assigned data protection enforcement competencies, including for instance the AI Act or the Platform Work Directive. This would help streamline enforcement, clarity, legal certainty and consistency across the board.

[1] COM(2020) 264 final, 24 June 2020 available on https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0264

[2] EDPB Letter to the EU Commission on procedural aspects that could be harmonised at EU level, 10 October 2022;

Last but not least, we are concerned that enforcement, including the sheer number of cases, the speed of case-handling, and the sanctions imposed on high profile companies, has become the main metric of success of the GDPR. This trend is creating significant legal and commercial uncertainty for businesses, and risks having lasting impacts on confidence in the digital economy on innovation and investments in the EU.

In our view, fair application and consistent levels of compliance should be a more holistic way to measure the success of GDPR, or any regulation for that matter. While CCIA Europe welcomes a review of cross-border enforcement, we invite the European Commission to encourage SAs to rebalance enforcement with greater investment in aiding companies' compliance efforts, including via sectoral engagement and sector-specific, practical guidance where needed, and in enabling timely resolutions for consumers and educating citizens about data-driven services.

1. EDPB decisions must be subject to judicial oversight

Controllers and processors must have a right to appeal an EDPB binding decision following the Article 65 GDPR dispute resolution procedure.

An EDPB decision "concerning" a specific company in a dispute resolution procedure necessarily affects the company's legal position insofar as the Lead Supervisory Authority (LSA) has no discretion to depart from the EDPB's findings in its final decision, consistent with Article 65(2) GDPR.

However, the EU General Court recently ruled otherwise[3] and effectively rescinded the right of any company subject to a cross-border dispute resolution procedure from contesting an EDPB decision on procedural grounds. As such, the EDPB is *de facto* unaccountable for any alleged procedural violations which may affect the fundamental rights of the defence, including among others the right to good administration, the right to access relevant documents in the proceedings, the right to be heard, and the presumption of innocence.

Further, we note that companies have currently no guarantee to be able to challenge the very substance of an EDPB decision directly affecting them. Although Recital 143 GDPR states that a national court *must* refer the question of validity of an EDPB decision to the EU Court of Justice, in practice however, the national court has sole discretion to decide whether the complaint it receives pertains to the validity of the LSA decision, or the underlying EDPB decision.

CCIA Europe expects the dispute resolution procedure to become the main procedural avenue to handle cross-border cases, not least because the EDPB has shown little appetite to thoroughly scrutinise whether the objections it receives from Concerned Supervisory Authorities (CSAs) are in fact "reasoned" and "relevant."

It is therefore essential that anyone affected by an EDPB binding decision "concerning" him or her has a meaningful right to judicial redress. Incidentally, it would seem contradictory if anyone in the EU were to be deprived of their right to an effective redress while the EU

[3] Order of the General Court in Case T-709/21 (WhatsApp Ireland v European Data Protection Board), 7 December 2022;

(rightfully) expects third countries to observe this right in order to be recognised as providing a level of protection which is "essentially equivalent" to the EU.

For all those reasons, CCIA Europe strongly encourages the European Commission to explicitly clarify that any controller or processor subject to a case escalated at EDPB level pursuant to the Article 65 GDPR procedure may appeal an EDPB decision before the EU General Court, pursuant to Article 263 TFEU.

2. Strengthening the right to be heard at national and EDPB levels

CCIA Europe calls on the European Commission to ensure that a party subject to an investigation has an opportunity to be heard before any decision which adversely affects him or her is taken.

The right to be heard is a general principle of EU law enshrined in Article 41 of the Charter of Fundamental Rights (CFR), and must therefore be applied broadly, even where no specific legislative provision provides for it.[4]

As such, the right to be heard must fully apply in cross-border proceedings conducted by the competent national SA and by the EDPB when it is tasked to settle disputes between the LSA and CSAs in the context of a dispute resolution procedure.

At national level, CCIA Europe observes that the right to be heard is applied differently from one Member State to another. We therefore call on the European Commission to harmonise at Article 60 and 65 GDPR level the right to a fair hearing and the corresponding right to obtain pertinent records. This will guarantee that a party subject to an inquiry has the chance to provide their perspective on the supposed facts presented to the competent supervisory authority, the legal interpretation of such facts, and the initial legal stance of the LSA, as well as any objections proposed by CSAs - including the facts and evidence on which they have based such objections..

While we support the European Commission's stated intention to harmonise national regulations with respect to the right to be heard, it is imperative to establish equivalent responsibilities for the EDPB in the context of dispute resolution procedures. In reality, we have observed that the EDPB's consistency in adhering to the right to a fair hearing and related rights can fluctuate. CCIA Europe is deeply concerned regarding situations in which the EDPB presents new evidence (in the form of purportedly incriminating facts and innovative interpretations of the law) during an investigation, without affording the investigated party the opportunity to respond.

Specifically, we call on the European Commission to introduce new rules to ensure that the party subject to an inquiry in a dispute resolution procedure first have an opportunity to make its views known, verbally and in writing, directly before the EDPB in relation to the EDPB's own assessment of the factual and legal elements contained in CSAs' objections. This would minimise the risk of the EDPB adopting binding decisions on the basis of an inaccurate or incomplete appreciation of the facts, and give the party the opportunity to correct the record.

[4] Case C-650/19P, para. 122

In addition, the EDPB must afford the party subject to the investigation the opportunity to comment on the EDPB's preliminary legal position, before a binding decision is adopted. This is all the more important as the EDPB may sometimes adopt an entirely novel interpretation of the law and/or legal characterisation of the facts which have never been brought up in the proceedings before, and for which the party has never had an opportunity to comment on.

In order to ensure a fair and impartial hearing, and consistent with Article 41(2) CFR, the EDPB should be required to proactively disclose all relevant materials to the party under investigation. This should include the EDPB's assessment of facts, the EDPB's legal characterisation of those facts, any new evidence on which the EDPB relies which the party subject to the investigation has not had an opportunity to comment on before, and the EDPB's preliminary position.

We acknowledge that the EDPB is required to work within a strict time frame. Nevertheless, the right of a party to a fair and impartial hearing should never be sacrificed for the sake of adhering to procedural regulations. CCIA Europe supports allocating additional resources to the EDPB to enable them to provide the right to a fair hearing in a timely manner. The inclusion at EDPB level of a verbal presentation of the facts, evidence and legal assessment by the LSA as well as a hearing of the party under investigation will facilitate the EDPB's understanding of the relevant elements to be considered when assessing the objections. We also urge the European Commission to align GDPR with other established laws that balance the requirement for authorities to act promptly and diligently with the need to ensure that all parties are heard.

3. New cooperation and consistency rules in GDPR cases initiated by authorities other than DPAs

Should the EU Court of Justice (CJEU) consider that any authority - beyond data protection SAs - can examine the compliance of a company's practices with the GDPR,[5] CCIA Europe recommends the European Commission introduce specific rules fleshing out the principle of sincere cooperation between an investigating authority responsible for enforcing other laws (e.g. consumer law, competition law) and the relevant data protection SAs.

CCIA Europe wishes to remind the European Commission that the absence of such rules would increase the risk of enforcement fragmentation to a level never seen before, not even under the 1995 Data Protection Directive. Indeed, any national competition, consumer, and telecommunications regulator (or others) would be able to enforce the GDPR without any meaningful consistency checks until each case may or may not reach the CJEU.

Moreover, without such rules, companies face the risk of having their data processing practices being "judged" multiple times by separate authorities, in direct contravention with the principle of double jeopardy or ne bis in idem. Companies would be in an unsustainable position if they have to implement incompatible injunctions from different authorities to remedy the same GDPR breaches. This could unduly increase liability exposure well beyond the 4% global annual turnover maximum fine set in the GDPR.

[5] Upcoming ruling in case C-252/21 (Meta Platforms v Bundeskartellam)

Where an authority other than a data protection SA wishes to examine, as an incidental question, the compliance of the practices under investigation with the GDPR rules, new rules should be introduced to flesh out the principle of sincere cooperation, which should include, at a minimum (and without prejudice to any additional conditions set forth by the CJEU):

Where there is (or there is doubt about) an on-going procedure taken by the LSA, or where the LSA has already taken a decision regarding the same conduct, the national investigating authority must:

- consult the LSA in case the investigating authority has doubts as to whether the conduct at hand may already be subject to an investigation initiated by the LSA and justify why this data protection assessment is required to assess the relevant matter under the competence of the national investigating authority;
- await the outcome of the LSA's investigation before commencing its own assessment on the matter under its own legal remit;
- refrain from deviating from the interpretation of the LSA if the latter has already ruled on the compliance of company's conduct with the same provision;
- comply with a decision adopted by that authority concerning the same conduct;

Where it is clear that the LSA has not commenced any investigation or proceedings for the same conduct, the national investigating authority must:

- inform the LSA early on about the need to have the LSA examining compliance of a company's conduct with GDPR;
- request from the LSA a binding opinion on the investigating authority's draft decision, only insofar as it concerns preliminary findings of a GDPR violation.

The European Commission could also envisage an obligation for the LSA to issue its binding opinion within a reasonable timeframe depending on the complexity of the case.

4. Filtering out 'irrelevant' and 'unreasoned' objections to prioritise faster cooperation procedure

CCIA Europe supports the dispute resolution procedure to become the main procedural avenue to handle future cross-border cases, but the current approach results in longer proceedings for cross-border cases.

We believe that this is in part because the EDPB may sometimes show little appetite in verifying whether some of the CSAs' objections to a LSA's draft decision are in fact "reasoned" and "relevant". In some cases, we have observed acceptance of the CSAs' objections on the basis of a legal and abstract reasoning, sometimes without a clear identification of the risks posed by a draft decision, and/or without providing any sense or quantification of the likelihood and significance of the risks posed by the draft decision of the LSA (including absence of consideration of relevant factual elements to quantify those risks).

If a mere unjustified and irrelevant objection from a CSA to an LSA's draft decision is sufficient to kick-off a dispute resolution procedure, any cross-border service provider

subject to an investigation and a draft LSA decision would, in all likelihood, be subject to the supervision and enforcement of any Supervisory Authority, depriving those companies from the benefit of the One-Stop-Shop principle - the very principle which the European Commission portrayed as the main advancement of GDPR.[6]

CCIA Europe therefore invites the European Commission to introduce an obligation for the EDPB to verify whether an objection which the LSA has previously considered as not reasoned or relevant to "clearly demonstrate the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects", consistent with Article 4(24) GDPR. Naturally, the LSA should apply the same criteria in the context of a cooperation procedure.

5. Establishing harmonised rules before, during the initial phase, and at the conclusion of an enforcement case

a) Exhaustion of company's internal processes

At present, only a small number of SAs require complainants to exhaust a company's internal process before submitting a matter to a SA. The European Commission should require all SAs to adopt this practice to give greater prominence to the accountability principle and ensure that non-complex complaints can be addressed quickly. This would also ensure that SAs' resources are devoted to more complex and egregious complaints and would align data protection with the consumer complaint-handling norms in EU sectoral legislation, including for instance financial and communications services.

b) Clear rules determining when and how SAs can directly contact companies with a main establishment elsewhere in the EU

CCIA Europe observes that some SAs approach companies individually, even though those companies may have a main establishment elsewhere in Europe. They do so directly without referring to the LSA, arguing that the case is "local" and falls under their jurisdiction instead of the lead authority.

In other cases, we have seen situations where SAs reach out directly to companies, arguing that they are entitled to conduct extensive preliminary assessments which they will ultimately hand over to the LSA with all relevant details. Those detailed preliminary assessments undermine the purpose of the One-Stop-Shop mechanism with detailed questions addressed in different languages which companies might have previously already answered to their LSA.

In both scenarios, the lack of clear rules defining a local case under Article 56(2) and the extent to which local SAs can conduct preliminary assessments makes it challenging for companies to evaluate or resist these arguments, and puts them in an awkward position vis-a-vis their LSA. Additionally, there is always a risk that such practices impede the ability of LSAs and potential CSAs to deal with a case which would normally fall within their jurisdiction.

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[6] See Vice-President Reding's intervention at the Justice Council on the data protection reform and the one-stop shop principle, 8 October 2013; Vice-President Viviane Reding's speech on The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age Innovation Conference Digital, Life, Design Munich, 22 January 2012.

CCIA Europe invites the European Commission to clearly define scenarios when "the subject matter relates only to an establishment in [the] Member State [of the SA] or substantially affects data subjects only in its Member State" under Article 56(2) GDPR, and to clarify the extent to which SAs are permitted to conduct preliminary assessments for the LSA. We also invite the European Commission to reiterate SAs' obligation to previously notify the LSA when they seek to approach companies under LSAs' supervision and justify their position, consistent with Article 56(3) GDPR.

In addition, we invite the European Commission to introduce a register of companies' main establishments and their DPOs to facilitate communication between companies, their LSA, and inquiring SAs in the course of an investigation. In practice, several SAs may sometimes directly request companies with a main establishment elsewhere in the EU about compliance with their obligations, without verifying whether the LSA has conducted or is conducting similar assessment. Similarly, companies may fail to inform SAs of a data breach, on the assumption that the notification to the LSA is sufficient and that the LSA will inform other SAs about the breach where necessary. Lack of coordination with the LSA may sometimes be due to the fact that SAs are not aware which LSA they should be reaching out to. A register of companies' main establishments and their DPOs, maintained by the EDPB, and with input from LSAs (based on controllers and processors' notifications) could help alleviate redundant enquiries and misallocations of SAs' resources.

c) Fair and consistent admissibility thresholds

CCIA Europe calls on the European Commission to establish clear admissibility thresholds to be applied fairly and consistently by all SAs. This would ensure that cases which a SA recommends for further investigation are assessed based on consistent criteria across the EU. Steps should also be taken to identify and assess vexatious complaints to avoid uneven enforcement between competing entities.

d) Automatic closure of cross-border complaints in case of inactivity

In practice, some cross-border complaints can remain open indefinitely, long after the company has responded e.g. over two years after the complaint has been lodged and competent SA first reached out to the controller. In practice, when SAs initially inquire directly to the controller / processor with respect to a particular conduct or data processing operations, companies may choose to err on the side of caution, and suspend such conduct or processing operation.

To ensure a timely resolution of complaints and, in some cases, to prevent the suspension of otherwise legal data processing for an indefinite period of time, CCIA Europe recommends that the European Commission require cases to be automatically closed if the originating SA fails to inform the controller or processor about the progress of the case after the controller or processor initial response within a defined period e.g. within four to six months. Such a deadline should only be limited to a duty to inform the controller or processor about the progress of a SA's inquiry, and must not bear prejudice to the integrity of the investigation, with regard to the specificity and complexity of each case.

6. Comments on the EDPB wish-list

a) Strict deadlines in cooperation procedures risks undermining the credibility of GDPR enforcement

CCIA Europe strongly cautions against the EDPB's suggestion to introduce strict deadlines when the LSA and CSAs cooperate in a cross-border case, especially with respect to deadlines for initiating investigations, issuing a draft decision, or preparing a revised draft decision after reasoned objections.

While the EDPB's concern about slow handling of cases and the need to avoid undue delays is valid, the imposition of arbitrary deadlines for all inquiries without regard to complexity is not a solution, and could in fact undermine the credibility of GDPR enforcement.

Indeed, the introduction of arbitrary and fixed deadlines for all inquiries without regard to the specificity and complexity of each case could operate to the detriment of the party under investigation and undermine the fair and consistent application of the GDPR. The imposition of arbitrary procedural deadlines could result in rushed decisions, leading to more decisions being challenged and subsequently overturned by the courts.

Instead, addressing the issue of slow case handling should be dealt with separately by the European Commission. This can be achieved by ensuring adequate resourcing for SAs and encouraging the implementation of robust and efficient case-management processes and procedures so that they can operate in a timely manner while also respecting the procedural safeguards that controllers are entitled to under the Charter, in line with Article 58(4) GDPR.

b) Clear procedural rules for amicable settlements

The EDPB has suggested that amicable settlements in the OSS context require cooperation on legal questions behind individual cases. While CCIA Europe agrees with the EDPB that there is a need to clarify the framework for amicable settlements, any initiative should avoid burdening settlements with far-reaching coordination obligations which would further lengthen the resolution of cases and make the amicable settlement process overall an unattractive option for parties.

In addition, CCIA Europe recommends that the European Commission reaffirm that LSA's independence and prerogatives established by the GDPR should be preserved in order to prevent distorting the enforcement system in cross-border cases. While harmonised enforcement between SAs is an important objective, the LSA retains sole competence to determine the scope of the investigation, and to engage in fact-finding and determine the sanctions.

Relatedly, CCIA Europe invites the European Commission to require all SAs to routinely submit all complaints, including cross-border cases, to an amicable settlement process to ensure quick resolution for consumers and avoid lengthy and costly litigation wherever possible.

c) Introduce strict confidentiality rules when complainants are involved

When considering new harmonised rules to involve the complainant in a cross-border case, CCIA Europe invites the European Commission to put in place strict rules and appropriate sanctions for any breach of those confidentiality obligations. Complainants who have access to all necessary and relevant documents pertaining to their complaint in a given case should be prohibited from disclosing such information to anyone who is not a party to the proceedings, and failure to comply with this prohibition should be accompanied by deterrent sanctions.

About CCIA Europe

- The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and Internet industry firms.
    - As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009.
    - CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.
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