

## Comments regarding Guidelines 10/2020 on restrictions under Article 23 GDPR, Version 1.0, adopted on 15 December 2020

\*\*\*\*\*

### Introduction

Floreani Studio Legale Associato welcomes the opportunity to provide a response to the European Data Protection Board's consultation on the drafts Guidelines 10/2020 on restrictions under Article 23 and invites the EDPB to evaluate the following proposals as well as to clarify the problems highlighted below.

### 3 REQUIREMENTS OF ARTICLE 23(1) GDPR

#### 3.1 Respect of the essence of the fundamental rights and freedoms

**Para. 14:** *“One of the main objectives of data protection law is to enhance data subjects’ control over personal data concerning them. Any restriction shall respect the essence of the right that is being restricted”.*

**Comment:** It is suggested to the EDPB to specify through another practical cases the prediction according to which *“Any restriction shall respect the essence of the right that is being restricted”.*

#### 3.2 Legislative measures laying down restrictions and the need to be foreseeable (Rec. 41 and CJEU case law)

**Para. 16:** *“(…) Recital 41 GDPR states that “[w]here this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union [...] and the European Court of Human Rights”*

**Comment:** It is suggested to the EDPB to specify through practical examples the concept of “Foreseeability” for the purposes of compliance with the aforementioned criterion.

**Para. 18: “While any legislative measure must in any case be adapted to the objective pursued and meet the foreseeability criterion, a legislative measure laying down the provisions for the application of restrictions under Article 23 GDPR does not always have to be limited in time or linked to a specific period”.**

**Comment:** The first subparagraph of section 18 stipulates that “In some cases, the restriction is not specifically linked to a timeframe because the ground for the restriction to be safeguarded by the legislative measure is not in itself limited in time”. We would like to request the EDPB to confirm that the restrictions without clear time limitations meet the predictability criterion taking into account what is represented by the EDPB on 3 June 2020 (“response to NGOs on Hungarian Decrees and statement on Article 23 GDPR”).

### **3.3.3 Other important objectives of general public interest**

**Para. 27: “Article 23(1)(e) GDPR mentions as other important objectives of general public interest of the Union or of a Member-State important economic or financial interest, including monetary, budgetary and taxation matters, public health and social security. It may concern for instance the keeping of public registers kept for reasons of general public interest or the further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes. On the other hand, the costs incurred as a consequence of providing information and thus the financial burden on public budgets are not sufficient to justify a public interest in restricting the rights of the data subjects”.**

**Comment:** With reference to “Other important objectives of general public interest” to article 23 (1)(e) GDPR, we suggest the EDPB to mention some examples in the Guidelines.

### **3.5 Necessity and proportionality test**

**Para. 38: “Restrictions are only lawful when they are a necessary and proportionate measure in a democratic society, as stated in Article 23(1) GDPR. This means that restrictions need to pass a necessity and proportionality test in order to be compliant with the GDPR”.**

**Comment:** We ask the EDPB to specify more that the necessity and proportionality test should be carried out before the decision-making of applying a restriction by the legislator in light of provision of paragraph 86 of the Guidelines.

## 4 REQUIREMENTS OF ARTICLE 23 (2) GDPR

### 4.5 Storage periods

Para. 57: **“Article 23(2)(f) GDPR establishes that the legislative measure must include a specific provision regarding the storage periods and applicable safeguards taking into account the nature, scope and purposes of the processing/categories of processing. For instance, the retention period could be calculated as the duration of the processing operation plus additional time for potential litigation”.**

**Comment:** We ask the EDPB to clarify whether, if it is not possible to identify the storage periods, the controller may recall the criteria used to determine this period.

### 4.6 Risks to data subjects’ rights and freedoms

Para. 61: **“When such assessment is provided, the EDPB considers necessary to include it in the recitals or explanatory memorandum of the legislation or in the impact assessment”.**

**Comment:** With respect to the provision in question, it may be appropriate for the EDPB to specify the concept of “*explanatory memorandum of the legislation*”.

### 4.7 Right to be informed about the restriction, unless prejudicial to the purpose of the restriction

Para. 62: **“Article 23(2)(h) GDPR states that, unless it may be prejudicial to the purpose of the restriction, data subjects shall be informed of the restriction. This means that data subjects should be informed about the restriction to their right to information as a rule. To that purpose, a general data protection notice may be sufficient”.**

**Comment:** With reference to the highlighted paragraph and, specifically, in relation to the to the right of data subjects to be informed about the restriction, it is proposed to the EDPB to identify some examples in the Guidelines on the ways in which the information shall be made available to the data subjects.

## 5 ACCOUNTABILITY PRINCIPLE

Para. 66: **“In light of the accountability principle (Article 5(2) GDPR), the controller should document the application of restrictions on concrete cases by keeping a record of their application. This record should include the applicable reasons for the restrictions, which grounds among those listed in Article 23(1) GDPR apply (where the legislative measure allows for restrictions on different grounds), its timing and the outcome of the necessity**

**and proportionality test. The records should be made available on request to the data protection supervisory authority (SA)”.**

**Comment:** We ask the EDPB to specify that the keeping of the record must be the subject of a specific assessment made by the controller and not an obligation as it is not governed by the Regulation.

## **6 CONSULTATION WITH THE SAS (ARTICLES 36(4) AND 57(1)(C) GDPR)**

**Para. 72 “In addition, data protection legislation at national level may set out specific procedures regarding the adoption of legislative measures that aim at restricting the rights afforded by Articles 12 to 22 and Article 34 GDPR, in line with Article 23 GDPR. This could be the case only if in line with the GDPR”.**

**Comment:** With regard to the possibility of the data protection legislation at national level to “*may set out specific procedures regarding the adoption of legislative measures that aim at restricting the rights afforded by Articles 12 to 22 and Article 34 GDPR, in line with Article 23 GDPR*”, it is suggested to the EDPB to specify the application profiles of the specific procedures in question.

## **7 EXERCISE OF DATA SUBJECTS’ RIGHTS AFTER THE LIFTING OF THE RESTRICTION**

**Para. 73: “The controller should lift the restrictions as soon as the circumstances that justify them no longer apply. If the data subjects have not yet been informed of the restrictions before that moment, they should be at the latest when the restriction is lifted”.**

**Comment:** With reference to the highlighted paragraph and, specifically, in relation to the obligation of the controller to inform the data subjects on the lifting of the restriction, it is proposed to the EDPB to identify some examples in the Guidelines on the methods and terms of adequate and timely information.

## **8 INFRINGEMENTS OF ARTICLE 23 GDPR**

### **8.2 Non-observation of a legislative measure imposing such restrictions by a controller**

**Para. 80: “Where the legislative measures imposing restrictions under Article 23 GDPR comply with the GDPR but are infringed by a controller, SAs can make use of their advisory, investigative, corrective and powers against it, as in any other case of non-observation of GDPR rules”.**

**Comment:** With respect to the provision in question, it may be appropriate for the EDPB to clarify whether the failure to keep the record mentioned in point 5 (an obligation not governed by the Regulation) is a conduct that can be sanctioned by the SAs.

## 9 CONCLUSIONS

**Para. 86:** *“The proportionality test should be carried out before the decision-making of applying a restriction by the legislator”.*

**Comment:** We would like to the EDPB to clarify whether the execution of the proportionality test before applying a limitation constitutes a faculty or an obligation.

**Para 87:** *“SAs should be consulted before the adoption of the legislative measures setting the restrictions and have the powers to enforce its compliance with the GDPR”.*

**Comment:** We ask the EDPB to clarify whether that the prior consultation of the SAs before the adoption of the legislative measures setting the restrictions constitutes a or an obligation.

We would be grateful for your consideration of our comments and proposals and remain available for any clarification and further information.

Sincerely.

9 february 2021