Spolek pro ochranu osobních údajů

Comments on the EDPB's draft "Guidelines 10/2020 on restriction under Article 23 GDPR"

We welcome the opportunity to present our comments to the recently published EDPB draft Guidelines 10/2020.

General comments

The problem of instructions addressed to national parliaments

In general, we very much welcome that EDPB publishes its views on the interpretation of Article 23 of the GDPR. We fully agree with most of the EDPB's conclusions presented in this proposal. It cannot be, however, overlooked that the EDPB, in addition to the EU legislators[1], mainly addresses the parliaments of individual Member States (although, as the EDPB rightly points out, Article 23 allows derogations to be adopted by national law instruments other than parliamentary laws).

National parliaments are the supreme representation bodies of citizens in the individual Member States. Although the supremacy of European law over national law is widely acknowledged and some powers of national parliaments have been transferred to the EU level (in the Czech Republic as incorporated in Article 10a of the Czech Constitution), this does not change the fact that parliaments in the Member States remain the highest legislative body adopting national law. Parliaments are empowered to adopt legislative acts in their independent discretion (of course in compliance with the obligations of the Member State under international law and treaties as well as the requirements of European law). From this point of view, it is highly arguable whether any EU (administrative) institution could issue "guidelines" binding upon the national parliaments, all the more so where a binding nature and/or legal effects of *guidelines* remain unclear and have not been yet properly established. Guidelines are still to be read only as *soft-law*. From this point of view, the chosen form of the EDPB document, i.e. guidelines within the meaning of Article 70 (1) (e) of the GDPR, appears to be a rather unsuitable legal instrument, as it can be considered as an inappropriate form of interference by EU institutions in national sovereignty.

We believe that Article 70 of the GDPR cannot be interpreted or applied in a way that would entitle the EDPB to influence the activities of national parliaments under *soft law*. If the European legislator intended to confer such a power on the EDPB, even if the Treaties allowed so, it would certainly be expressly stated in Article 70 (in the light of the doubts set out above).

[1] We leave aside the impact of the restriction according to Article 23 on legislative activity at EU level, where the GDPR as a regulation can of course be amended by another regulation (as the EDPB also focuses in its draft guidelines on exemptions provided for by national law).

The purely consultative role of the national supervisory authorities in the national legislative procedure is regulated in Article 36 (4) of the GDPR.

From this point of view, it would therefore seem more appropriate to issue the discussed document as a *recommendation* which, although enshrined in legislation only generally, clearly does not constitute a binding document in any way.

The conflict of fundamental rights

Furthermore, we would like to provide general comments to the argumentation relying on Article 52 of the EU Charter of Fundamental Rights, as stated, for example, in point 2 of the Guidelines. We believe that Article 52 (1) of the Charter cannot be applied in the sense indicated by the EDPB where there is a conflict between several equally important fundamental rights. In such circumstances, equally strong and important interests need to be balanced. This may apply to the discussed Article 23 of the GDPR, e.g. under paragraph 1 (i) or (j). This may be particularly restrictive, for example, to the requirement to comply with the notion of "strictly necessary" mentioned in point 42 of the proposal.

General public interest requirement

The guidelines seem to link the exemptions under Article 23 (1) solely with the notion of "general interest" or "general public interest" (see, for example, point 39 or 42). It should be noted that some of the exceptions under Article 23 (1) do not have to be aimed at protecting the “general interest” but rather the interest of the individual (see Article 23 (1) (i) (j) of the GDPR).

Requirements for Member States' authorities compared to the practice of the EU institutions

We generally agree with EDPB's interpretation of Article 23 (2) and the requirements set out therein. However, we must point out that it would be appropriate to align the requirements under Article 23 (2) of the GDPR with the practice of some EU institutions in limiting the rights of data subjects under Article 25 of EU Regulation 2018/1725 (as declared in the acts published in Official Journal). Decisions regarding these restrictions are in some cases formulated in a very general way and without further additional information value for data subjects. The references to the general public interest thus seem unsubstantiated.

<u>To individual points:</u>

Point 33. We do not consider the example given here to be appropriately chosen, as it rather aims at the matters regulated (except for whistleblowing) by EU Directive 2016/680. We believe that it would be more appropriate to use another example, which would better demonstrate the difference between matters regulated by the GDPR and matters regulated by EU Directive 2016/680 (as correctly stated, for example, in point 24 of the proposal by reference to rec. 19 of the GDPR).

Point 67. We consider that the broad involvement of DPOs in the Article 23 compliance process is appropriate. On the other hand, in our opinion, the requirement that the DPOs be

always informed is not justifiable and reasonable. In practice, this can lead to DPOs being unnecessarily burdened with repeated reports of the same type of severity. The DPOs should have more room for discretion, for instance, to determine that certain types of restriction shall not be individually reported to DPO, provided, of course, that the DPO can always request access to documentation in all cases (i.e. to carry out random checks). This will prevent unnecessary administrative pressure on the DPOs and at the same time allow the DPOs to focus on serious cases to which they will be able to devote more time.

We are grateful for the opportunity to provide our comments on the draft Recommendation.

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JUDr. Vladan Rámiš, Ph.D.
Chairman of the Committee
Spolek pro ochranu osobních údajů

Mgr. Alice Selby, LLM
Member of the Committee
Spolek pro ochranu osobních údajů