Comments on EDPB Guidelines 2/2020 on articles 46(2)(a) and 46(3)(b) of the GDPR

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Introduction and scope of my comments

I submit these comments in response to the public consultation on EDPB Guidelines 2/2020[1] (the "Guidelines"). I am professor of law and co-chair of the Brussels Privacy Hub, a research centre in the faculty of law of the Vrije Universiteit Brussel (VUB). Further information about me can be found on my website www.kuner.com.

These comments are made wholly in my personal capacity as an academic who is interested in international data transfer issues, and not on behalf of any organization or outside interest. I will limit myself to commenting on a few points in the Guidelines, and in particular some that are relevant to data transfers to international organisations.

Terminology

Throughout the Guidelines, the term "international agreements" is used to refer both to legally binding instruments and to administrative arrangements between public bodies (p. 6 of the Guidelines). "International agreement" is a term of art used in the EU Treaties to refer to agreements concluded between the EU or the Member States with third countries or international organizations (see, e.g., Chapter V TFEU). The Court of Justice has found that the key factor for determining whether an agreement is an "international agreement" is whether it has binding force,[2] whereas, as explained below, administrative arrangements under Article 46(3)(b) need not always be legally binding. Referring to all the instruments as "international agreements" will thus lead to confusion, and it would be better to find some other term when the instruments under both Article 46(2)(a) and Article 46(3)(b) are being referred to together (perhaps "international arrangements").

Issues under international law

The Guidelines state that the notion of "public authority or body" is "broad enough to cover both public bodies in third countries and international organisations" (p. 5). However, they fail to recognize that these two types of bodies are subject to different legal regimes, and in particular, that international organisations are governed by public international law.[3] Indeed, the term "international law" does not appear even once in the Guidelines.

For example, they fail to mention that many international organisations enjoy privileges and immunities that protect them from the enforcement of domestic law. Thus, paras. 69-70 should state explicitly that the references to domestic law in paras. 67-68 do not apply in the case of international organisations. The Guidelines also sometimes make references only to

[1] https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/guidelines-22020-articles-46-2-and-46-3-b_nl.

[2] See Case C-327/91, *French Republic v. Commission*, para. 27.

[3] See Article 4(26) GDPR, which states this explicitly.

national public bodies, leading to confusion as to whether the same provisions also apply to international organisations.[4]

Onward transfers

Section 2.5 requires addressees of the Guidelines to implement restrictions on onward transfers of data; for example, para. 39 requires that "the receiving third parties commit to respect the same data protection principles and safeguards as included in the international agreement". This could impede international organisations from doing their work, since in many cases, other international organisations that are recipients of onward transfers may not be prepared to bind themselves to obligations under the GDPR.

The Guidelines should clarify that the provisions allowing exceptions to the requirements for onward transfers also apply to international organizations. For example, para. 41 mentions allowing the "sharing of personal data with a third party in the same country of the receiving public body" when this is necessary, but the language should clarify that it also applies to data sharing by international organisations.

Redress mechanisms

Section 2.7 should make it clear that the alternative redress mechanisms could include those implemented by international organisations. For example, the final sentence of para. 48 could be revised to read as follows: "Exceptionally, other, equally effective redress mechanisms could be put in place by the agreement, including those implemented by international organisations".

Administrative arrangements

The GDPR is less than clear regarding the use of administrative arrangements. In particular, Recital 108 states both that administrative arrangements must provide for "enforceable and effective rights for data subjects", and that such arrangements need not always be legally binding;[5] it is difficult to understand how an arrangement may provide for enforceable and effective rights if it is not legally binding. The Guidelines seem to acknowledge the possibility of some administrative arrangements not being legally binding,[6] but it would be preferable if they would state this explicitly. It could also be stated explicitly that the privileges and immunities that many international organisations enjoy may prevent them from entering into legally-binding arrangements, and that in such cases non-binding arrangements may be used.

[4] E.g., paras. 41 and 46, which refer only to public bodies in third countries.

[5] See the last phrase of Recital 108, referring to situations "when safeguards are provided for in administrative arrangements that are not legally binding".

[6] For example, in paras. 67-68.