AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation Response

Input for European Commission initiative further specifying procedural rules related to the enforcement of the General Data Protection Regulation (GDPR)

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Executive summary

The European Commission's initiative aims to identify and harmonise procedural aspects of cooperation between national data protection supervisory authorities in cross-border cases. To this end, this consultation response presents recommendations that would support the robust enforcement of the GDPR across the European Union, including: specify procedural deadlines for cooperation between data processing agreement (DPAs) on cross-border cases; provide tools to DPAs to promote cooperation early in the investigation process; clarify the position of complainants in the procedural steps; streamline the way parties under investigation are heard during the procedure; and clarify how information is to be shared between the investigating DPA and the concerned supervisory authorities (CSAs).

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) has closely followed and participated in discussions on the General Data Protection Regulation (GDPR) throughout its legislative adoption and implementation. With the adoption of the GDPR, the EU recognised the importance of harmonising European data protection laws to facilitate cross-border commerce, which is key for American companies operating across different sectors and value chains.

Further harmonisation of the GDPR at the EU level would bolster the regulation's cooperation and dispute resolution mechanisms. Below are specific recommendations organised by: I) preliminary points; II) specifying procedural deadlines for cooperation between data processing agreement (DPAs) on cross-border cases; III) providing tools to DPAs to promote cooperation early in the investigation process; IV) clarifying the position of complainants in the procedural steps; V) streamlining the way parties under investigation are heard during the procedure; and VI) clarifying how information is to be shared between the investigating DPA and the concerned supervisory authorities (CSAs), including in the steps leading to a binding opinion from the European Data Protection Board (EDPB).

I. Preliminary points

a) Equality of rights

The GDPR provides for a comprehensive regulatory framework for the public enforcement of data subjects' rights by independent supervisory authorities (SAs) (Chapter VI GDPR) with specific competences, tasks and powers (Section 2).

The GDPR also created a comprehensive system of cooperation and consistency (Chapter VII). This system is organised according to the 'one-stop-shop' (OSS) principle, under which the Lead Supervisory Authority (LSA) of the controller's main establishment is the primary point of contact competent for this controller's cross-border processing operations (Article 56(1) GDPR).

In this context, the LSA must cooperate effectively with other SAs (Article 61 GDPR). This harmonised regulatory framework, like the GDPR's substantive provisions, serves to achieve two goals: the same high level of protection of natural persons and the removal of obstacles to personal data flows within

the EU; and an adequate balance of data subjects' and controllers' fundamental rights,[1] and where applicable, those of third parties in the EU at the administrative and procedural level, presumably where the interests of a significant number of data subjects throughout the Member States may be affected.

The European Commission's proposals must not jeopardise the balanced system established by the GDPR for the benefit of both data subjects and controllers.

b) Procedural clarification

The below concerns are based on the list published by the EDPB on 10 October 2022 identifying procedural aspects of the cooperation between SAs in cross-border cases that could benefit from further harmonisation at EU level.

c) Other

Because of the wording of the call for evidence document and the scope of the proposals, it is assumed that the Commission intends to follow the ordinary legislative procedure under Article 16 Treaty on the Functioning of the European Union. However, further clarification would be appreciated.

II. Specifying procedural deadlines for cooperation between data processing agreements (DPAs) on cross-border cases

Because the EDPB is concerned that the absence of deadlines in the GDPR may cause undue delay and/or disparity in finalising cases, it suggests introducing deadlines for a number of procedural steps, both at national level and in the context of cross-border cooperation. It believes deadlines would avoid undermining the credibility of enforcement and help alleviate public concern from complainants about cases being handled too slowly.

The EDPB considers that deadlines should be specific – eg to start an investigation, to issue a draft decision or to prepare a revised draft decision after relevant and reasoned objections are sent – but recognises that such deadlines should consider the complexity of each case. The LSA would then have to provide justifications where it is not possible to meet these procedural deadlines and would face consequences for failing to meet them.

If implemented, procedural deadlines should account for the complexity of the cases, safeguard due process and allow the parties to exercise their procedural rights. Cross-border investigations are, by their nature, complex and may involve a large body of evidence. Organisations should have access to all the evidence to be considered at each phase of a case and furthermore, the rights of the parties should be considered when setting procedural deadlines. Providing for arbitrary and fixed deadlines for procedural steps that apply to all inquiries without discrimination would likely be detrimental to the party under investigation and undermine the GDPR's fair, appropriate, efficient and consistent application.

[1] Eg rights directly benefitting controllers such as the right of defence (Article 48 of the Charter) and also rights for which controllers could be the guardians, as when ensuring the freedom of expression and information (Article 11 of the Charter).

Beginning an investigation, issuing of a draft decision and preparing revised draft decision are complex procedural steps that must be completed carefully, without artificial deadline constraints. The SAs' authority must be 'subject to appropriate safeguards, including (…) due process set out in Union and Member State law in accordance with the Charter' (Article 58(4) GDPR), as is the SAs' ability to impose administrative fines (Article 83(8) GDPR).

It is equally important that the fundamental rights of the party subject to investigation are respected, which would not be the case if arbitrary deadlines were applied to all inquiries regardless of circumstances. The EDPB has itself expressed concern and frustration about the fixed deadlines imposed by the Article 65 process. Imposing such deadlines on the SAs and the parties to an investigation would not be helpful.

Arbitrary procedural deadlines would result in rushed decisions and would likely lead to more decisions being challenged by the parties under investigation and subsequently overturned by the courts. To ensure SAs are able to complete investigations in a timely manner, they must be given the appropriate human and financial resources to perform their tasks. The legislation must ensure respect for the subject of the inquiry's right to due process and the controller's procedural safeguards. This is especially important because of the magnitude of the administrative fines which may be imposed under the GDPR.

III. Providing tools to DPAs to promote cooperation early in the investigation process

The EDPB rightly suggests clarifying that the amicable settlement achieved in the OSS context on a specific case also requires cooperation on the legal questions behind the individual case, (either by demonstrating it as an isolated case or by explaining what follow-up actions are intended to be taken regarding the breach of GDPR provisions by the controller).

It is especially important to clarify the framework for amicable settlements in Member States which currently do not have a relevant legal framework. There should be clear and precise rules for the introduction of amicable settlements in the OSS procedure, and any amicable settlements concluded in the context of the OSS mechanism must be legally binding.

However, any clarification of this framework must ensure that LSAs are not burdened by too far-reaching coordination obligations. This could unreasonably deprive the LSA of its prerogatives and could turn settlements – which are intended to be quick and simple solutions in the interests of both data subjects and controllers/processors – into long and complex processes. It could also deter the amicable settlement of disputes and undermine the GDPR's overarching objective to protect natural persons' fundamental rights and freedoms, in particular their right to the protection of personal data (Article 1(2)).

The enforcement system must not be distorted in cross-border cases established by the GDPR through procedural rules. The special position of the LSA must be maintained, and the OSS procedure should not be diluted through the introduction of amicable settlements. While ensuring efficient and harmonious enforcement between SAs in such cases is an important objective, it is essential to

preserve the LSAs' independence, prerogatives and special position in the OSS procedure, as established by the GDPR.

The LSA has sole competence to determine the scope of an investigation and to investigate (Article 56(6)). Neither the EDPB nor the CSAs are competent to engage in fact finding. Under the GDPR, the LSA is responsible for conducting an investigation with the utmost respect for the party under investigation's right to defence, while the EDPB's role in the dispute resolution process is limited to determining whether the CSA's objections are relevant and reasonable. If so, the board resolves any relevant dispute between the CSAs (Article 65(1)(a)).

IV. Clarifying the position of complainants in the procedural steps

According to the EDPB, clarifying the position of complainants in the procedural steps, including the possibility to make their views known, requires that the Commission adopt procedural rules to clarify exactly what constitutes the minimum scope of a SAs file and the scope of access that should be granted to the parties. Complainants may be appropriately involved in the procedure, and it would be useful to have harmonised rules on what constitutes the minimum scope of the file, ie the required type of documents to be included.

However, regarding the scope of potential access, any procedural rule adopted must be accompanied by strict rules on confidentiality and appropriate sanctions for any breach of those obligations. Leaks can lead to external pressure that undermines the integrity of the decision-making process. This stipulation is especially important in light of several instances where high-profile complainants leaked confidential information in on-going investigations to the media. The EDPB also recommends specifying rules on confidentiality.

Respondents in the proceedings should always have the right to identify the documents and portions of documents that should be treated as confidential, limiting the sharing of such documents with other parties in the proceedings. Given the sensitivity of cross-border investigations, it is crucial that recipients of such information be prohibited from disclosing it to anyone who is not a party to the proceedings. They must also be prohibited from using this information for any purpose other than the conduct of the inquiry. Failure to comply with this prohibition should be accompanied by deterrent sanctions.

V. Streamlining the way parties under investigation are heard during the procedure

The scope of the right to be heard in the context of an SA's investigation varies depending on national rules. In some Member States, the parties under investigation can only make submissions on factual points. However, the right to be heard is enshrined in Article 41 of the Charter of Fundamental Rights of the EU; this includes both the factual and legal elements raised in an investigation and gives parties the right to make written and/or oral submissions.

The EDPB's recommendation regarding the parties' right to be heard in the context of cross-border investigations is limited to hearings before SAs. If that is the only context where the right to be heard is respected, it undermines the right to be heard before the EDPB. In circumstances where the EDPB

has authority in cross-border investigations to resolve disputes between the CSAs, it is inconceivable that the party under investigations cannot be heard directly by the EDPB.

It has been the experience of some AmCham EU members that in certain inquiries not being heard by the EDPB can lead to the board making binding decisions based on an inaccurate or incomplete understanding of facts that could have been clarified by hearing from the parties. For example, parties under investigation can make submissions about CSA objections to the LSA before the LSA finalises its draft decision. However, there is no opportunity to comment on the LSAs final draft decision before it goes to the EDPB and no opportunity to comment on the EDPB's analysis and assessment of those objections. It is frequently the case that the EDPB adopts an entirely new position on the applicable legal principles, which has never been put to the parties, who have not been afforded any right to be heard.

The new rules should include the right for the party under investigation to be heard in writing and orally and an opportunity to respond to the positions the EDPB intends to adopt in the procedure leading to its binding decision. This requires that the EDPB proactively disclose the material in its files (facts, legal characterisations of those facts and evidence on which the EDPB relies) together with its preliminary position to the party under investigation. While the EDPB is required to make its decision on the basis of facts as found by the LSA, the right to be heard by the EDPB must apply to both the board's legal characterisation of those facts and the legal positions the EDPB intends to adopt.

The obligation to hear the party under investigation is especially important where the EDPB adopts positions on facts or law that have not been canvassed in the procedure at the national level. For example, some EDPB binding decisions have relied on a study that it never shared with the party under investigation.

In addition, an oral hearing is necessary because EDPB decisions can lead to significant administrative fines and/or significant consequences for the position or activities of the party under investigation. An oral hearing allows the party under investigation to clarify inaccurate facts and address any concerns raised by the EDPB about its legal position.

The party under investigation's right to be heard directly by the EDPB is specified in Article 65 GDPR. Proceedings should take place before the EDPB adopts its decision, meaning that the party under investigation should have the right to know the EDPB's provisional views and have an opportunity to respond to these views before the EDPB adopts its decision.

The harmonisation of rules on the right to be heard before SAs would be ineffective if it were not complemented by a systematic right to be heard before the EDPB. Such harmonisation may necessitate a revision of the one month time-frame currently provided for in Article 65(2) for the EDPB to provide its decision. However, the example of merger control procedures under Regulation (European Commission) 139/2004 shows that it is possible to reconcile the need for authorities to act speedily and diligently with the need to provide concerned parties (in this instance, controllers) with effective rights to a fair hearing within short but sufficient time limits.

VI. Clarifying how information is to be shared between the investigating DPA and the CSAs, including in the steps leading to a binding opinion from the EDPB

The EDPB recommends that the Commission provide uniform and consistent rules for identifying cases where further investigation is not warranted, while also highlighting practical difficulties with identifying the scope of the investigation. Such rules are likely to impinge on the LSA's independence and margin of discretion to assess the elements of each case. The Commission should refrain from adopting such rules or at the very least, give due consideration to the LSA's margin of discretion and authority.

The EDPB also recommends that the Commission adopt procedural rules to ensure the harmonisation of LSAs' obligation to cooperate and share information with CSAs in the early stages of an investigation. It suggests that the Commission should prescribe the timing, contents and modalities of information sharing to a strict degree.

However, such rules could contribute to increasing the already significant pressure on LSAs. Combined with the numerous deadlines the EDPB recommends imposing, these rules could constrain LSAs and increase their workload. Any such rules would also have to preserve the confidentiality of inquiry documents to protect the integrity of the decision-making process.

Conclusion

AmCham EU has closely followed and participated in discussions on the General Data Protection Regulation (GDPR) throughout its legislative adoption and implementation processes. In this way, we welcome the opportunity to provide feedback to the European Commission's initiative further specifying procedural rules related to the enforcement of the General Data Protection Regulation (GDPR). With this paper we aim to put forward some proposals and considerations to ensure the achievement of a robust enforcement of the GDPR across the European Union. We remain at your disposal to discuss this further in the context of the feedback process and beyond.