

# Comments by the Centre for Information Policy Leadership on the European Data Protection Board's Draft Guidelines 03/2021 on the application of Article 65(1)(a) GDPR

On 13 April 2021, the European Data Protection Board (EDPB) issued its Draft Guidelines 03/2021 on the application of Article 65(1)(a) GDPR (Guidelines). The EDPB invited public comments on this document by 28 May 2021. The Centre for Information Policy Leadership (CIPL) appreciates the opportunity to submit the comments below as input for the final Guidelines.

CIPL notes that the Guidelines cover three topics:

- The processes and procedures to be followed by Lead Supervisory Authorities (LSAs), Concerned Supervisory Authorities (CSAs) (collectively Supervisory Authorities (SAs)), and the EDPB leading to the adoption of binding decisions;
- The competence of the EDPB in respect of binding decisions; and
- The right of those concerned to be heard and to appeal such decisions.

In responding to the consultation, CIPL has focused on a number of important matters of principle. CIPL has not commented on matters of detail in respect of practice and procedure.

In general CIPL welcomes the guidance on the processes and procedures to be followed when adopting binding decisions, subject to the points of clarification below.

CIPL expresses strong concerns in respect of the assertion that the EDPB would be competent to use binding decisions to issue instructions to LSAs, particularly instructions in respect of the investigation of cases. CIPL considers this to be in direct contradiction to the first part of the Guidelines on the proper process and procedures. CIPL considers that following this approach may undermine the cooperative nature of the One Stop Shop mechanism, result in serious legal challenges to the EDPB decisions and undermine the integrity of the supervisory regime of the GDPR. In addition, this approach ignores that the LSA investigation is subject to procedural rules to ensure the LSA gathers the appropriate factual evidence

<sup>&</sup>lt;sup>1</sup> Guidelines 03/2021 on the application of Article 65(1)(a) GDPR

<sup>&</sup>lt;sup>2</sup> CIPL is a global data privacy and cybersecurity think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and over 80 member companies that are leaders in key sectors of the global economy. CIPL's mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL's work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world. For more information, please see CIPL's website at <a href="http://www.informationpolicycentre.com/">http://www.informationpolicycentre.com/</a>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.





and preserves the right to be heard of the investigated organisation. The LSA decision also needs to be properly motivated to be successfully defended in case of judicial appeal.

CIPL also expresses concern at the approach taken to the rights of parties to be heard and to appeal decisions promulgated by SAs as a result of binding decisions adopted by the EDPB. In relation to rights of appeal, the wording of the Guidelines suggests that rights of appeal to national courts on facts, law and merits would not be possible, whereas this is not the case.

Overall, CIPL submits that the Guidelines should recognize that the role of the EDPB in dispute resolution is limited to its role and powers as set out in Section 2 of Chapter VII GDPR. The EDPB has no investigative powers itself, nor can it order SAs to conduct specific investigations into matters. The EDPB, as a body created by and under EU law, has those powers entrusted to it under the GDPR and is reasonably required to effectively exercise those powers, to the exclusion of other powers.

# 1. Legal framework and rules of procedure

Overall CIPL welcomes the approach taken in this section of the Guidelines. In carrying out its tasks under Chapter VII of the GDPR, the role of the EDPB is to adopt a final and binding decision for the SAs on the matter of dispute referred to it.

However CIPL notes the following:

- The Guidelines state, in paragraph 11, that, in case of a dispute, regard must also be had to Article 60 GDPR which concerns cooperation between SAs. CIPL points out that Article 60 sets out the procedure to be followed in case the SAs cannot agree on a decision. It does not involve the EDPB. The EDPB has no role in, or supervisory remit in respect of, the Article 60 procedure, or in respect of any element of the Cooperation provisions in Section 1 of Chapter VII.
- Under Examples 1 and 2, it appears that the EDPB considers that it is open to the EDPB to review and make findings of fact on the evidence and to call for further evidence from the LSA. As such the EDPB would not be making a decision based only on the facts as found by the LSA. This would be out of the EDPB's remit according to the GDPR and would not respect the guarantees of a due process. In particular, this would by-pass the rights of the investigated organisation on the fact-finding evidence which is subject to the LSA's independent assessment subject to the limits set forth by the local laws of the LSA.
- In paragraph 34, the Guidelines state that, where it has not been possible to reach a decision in the extended period and the further period of two weeks is used, modifications can be made to the draft binding decision. It should be made explicit that such modifications can only be made in accord with the draft decision or the relevant and reasoned objections. The EDPB has no power to re-write the decision. The EDPB's powers are limited to accepting the decision or the objections. It cannot otherwise amend the decision.

CIPL welcomes and supports the clarity of the statements in paragraphs 47 to 50 which make explicit that the decision made by the EDPB is final and binding and the purpose of the powers is to settle the disputes





between CSAs and the LSA. The implementation of the binding decision must be such as to ensure that the parties affected can understand the nature and import of the decision and, where appropriate, appeal against it.

### 2. Competence of the EDPB

As noted in the introduction, the EDPB has been created as one of the institutions of the Union by the GDPR and its powers are set out in the GDPR. The roles of SAs and the EDPB are clearly delineated in the GDPR:

- SAs have tasks to handle complaints and investigate, to the extent appropriate, matters of complaint and powers to carry out a range of investigative functions within their area of competence, which includes the respect for the OSS mechanism, where applicable.<sup>3</sup> SAs must exercise those powers independently without taking or seeking instructions directly or indirectly.<sup>4</sup> The importance of the independence of SAs has been emphasized by the Court of Justice under Directive 95/46/EU.<sup>5</sup> SAs cannot give instructions to other SAs on the exercise of their functions or how they conduct investigations. All SAs have obligations to cooperate with other SAs under Part 1 of Chapter VII, in particular under Article 60. However, this duty entails no diminution of the independence of SAs in the duty to cooperate but requires mutual respect and trust.<sup>6</sup> Further the EDPB has no role under Section 1 of Chapter VII.
- The EDPB has no investigative powers. Its powers are set out in Article 70 GDPR. Under Article 70(1)((a) it is specifically tasked with monitoring and ensuring the correct application of the GDPR in the cases provided for by Articles 64 and 65 without prejudice to the tasks of SAs [emphasis added]. The EDPB has no power to undertake investigations of its own right and no power to direct how SAs undertake investigations or the subject matter of investigations. It may issue opinions in the cases set out in Article 64 and binding decisions in the cases set out in Article 65. These are the limits and extent of its powers to impose its decisions on SAs.

Accordingly, the statement at paragraph 79 of the Guidelines, repeated in subsequent paragraphs, that the EDPB can issue a binding decision under Article 65 specifying that an LSA must handle a matter in a particular manner and investigate specific matters is contrary to these provisions.

Further, the issue of such instructions would contradict the rights to appeal in respect of legally binding decisions. In relation to the power to issue legally binding decisions which must be adopted by SAs, recital 129 makes clear that "[t]he adoption of a legally binding decision implies that it may give rise to judicial review in the Member State of the supervisory authority." Under Article 78, each natural or legal person must have the right to an effective judicial remedy against a legally binding decision of an SA concerning them. This includes a legally binding decision adopted by the SA following a legally binding decision of the

<sup>&</sup>lt;sup>3</sup> Articles 57(1)(f) and 58(1) GDPR.

<sup>&</sup>lt;sup>4</sup> Article 52 GDPR.

<sup>&</sup>lt;sup>5</sup> See Commission v Hungary Case C -288/12 Commission v Germany Case –C518/07Schrems v Data Protection Commissioner for Ireland Case –C 498/16.

<sup>&</sup>lt;sup>6</sup> See CIPL's upcoming White Paper on the One-Stop-Shop mechanism under the GDPR.



EDPB. A decision to specify the need for an LSA to handle a matter and/or to investigate a matter of complaint is not a decision legally binding on the affected party under Article 65 or Article 78. A decision to investigate a matter cannot give rise to a right of appeal because it is not a final, binding decision on a matter of complaint or compliance. It is a step in the procedure to determine whether such a decision should be made. It is not, itself, such a decision.

In summary, CIPL believes it is <u>not</u> within the power of the EDPB to:

- Issue a binding decision specifying the need for the LSA to handle a matter further and to investigate – to the extent appropriate - the remaining subject matter of a complaint (paragraphs 79 – 81);
- Issue a binding decision specifying the need for the LSA to investigate or address a matter further with a view to obtaining sufficient factual evidence (paragraph 85);
- Issue a binding decision specifying the need for the LSA to investigate or address the matter further to ensure full compliance with the procedural requirements in the GDPR (paragraph 89);
- Instruct an LSA to re-assess a fine and remedy the fine and identified short-comings (paragraph 91);
- Instruct a LSA to re-assess an envisaged action and change the draft decision (paragraph 93); and
- Make statements regarding the main establishment of a controller in the context of the dispute resolution mechanism.<sup>7</sup>

Any of these purported instructions would breach the independence of the SA, guarantees of a due process for the investigated organisation and be outside the powers of the EDPB under the GDPR. The draft Guidelines should be comprehensively amended to reflect the limits of the powers of the EDPB.

# 3. The right to be heard and rights of appeal

CIPL agrees that the right to be heard by any party who may be adversely affected by a decision is an integral element in the exercise of supervisory powers. Its importance cannot be over-emphasised. However, CIPL considers that the proposal that further parties have some form of right to be heard before a decision is made by the EDPB is misconceived. The suggestion is made in paragraph 105, as follows:

It is not sufficient that the LSA has heard the persons who might be adversely affected in the course of the national procedure prior to the adoption of its draft decision within the meaning of Article 60(3) GDPR. Before the EDPB will be in a position to resolve the dispute, the right to be heard must also be afforded in relation to any objections raised in relation to the draft decision, in particular where the LSA chooses not to follow the objection or considers it as not being relevant or reasoned.

<sup>&</sup>lt;sup>7</sup> See Response to Access Now on the process to identify a controller's main establishment under the GDPR





Firstly, it is not clear who might be heard under this suggestion. Any CSA has the right to submit its views, legal considerations and arguments in the dispute resolution process. It has no right to any form of additional hearing. A complainant will have already submitted any complaint and the LSA must have properly considered the position and concerns of the complainant in making the determination on the case. Therefore, the complainant or any other party has no specific right to be heard.

In relation to the matter of judicial remedies, CIPL notes that appeals against decisions adopted by SAs in implementing binding decisions issued by the EDPB to SAs raise difficult questions. The only normative provisions in the GDPR are found in Article 78. Article 78 provides that, without prejudice to any other administrative or judicial remedy, each natural or legal person shall have a right to a judicial remedy against a legally binding decision of an SA affecting them. It further provides that, where proceedings are brought in a case where an opinion or decision of the EDPB was involved, the EDPB opinion or decision must be placed before the national court by the SA. This clearly envisages that appeals to national courts may be brought in such cases. Other than those provisions there is only interpretative guidance in Recital 143. Recital 143 refers to the procedure for direct challenge to a decision of the EDPB under Article 263 of the treaty on the Functioning of the European Union (TFEU). This gives a party the right to institute proceedings against an act of a Union institution, such as the EDPB, where:

- The act is addressed to that person; and it is either of direct and individual concern to them or is a regulatory act which is of direct concern to them.

The act complained of must not include implementing measures. Actions may be brought in respect of the legality of acts intended to produce legal effects vis-à-vis third parties, lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to the Treaties or misuse of powers. This is a limited right which applies only in cases where the decision of the institution is legally invalid. It is not an appeal on the facts, law or merits of a case.

Recital 143 further sets out the right to appeal to the national courts, as provided by Article 78. It does not suggest or imply any limit to the powers of the national courts to hear cases on the facts, law or merits. The Recital further states that, where a party could have challenged the validity of a decision of the EDPB under Article 263 but chose not to do so, that party cannot use the national court to mount a challenge to the validity of the decision via the national courts. However, this restriction is limited to cases where a party could have used the Article 263 procedure to mount a challenge. Effectively it clarifies that such a party cannot have "two bites of the cherry." It does not limit the right of a party to mount a challenge to the national court on the facts, law or merits of a case, or a national court from hearing such an appeal, and, in an appropriate case, referring the matter to the Court of Justice.

It is therefore critically important that the Guidelines make clear that, other than cases where the lawfulness/validity of an EDPB decision is challenged on the narrow grounds set out in Article 263, appeals may be brought on facts, law and merits before national courts. The statement in the Guidelines in Paragraph 135, that "[t]herefore, when the directly and individually concerned person decided not to bring an action for annulment of the EDPB binding decision this will prevent them from challenging the validity of the EDPB binding decision in front of the national courts" is likely to mislead readers who are not versed





in the details of EU law to think that national courts are unable to hear cases in the usual manner and make referrals on issues of law to the Court of Justice as the national courts consider proper.

CIPL recommends that this section be clarified to distinguish clearly between challenges to validity of decisions of the EDPB on the Article 263 grounds and appeals to national courts.

# **Summary of CIPL Recommendations**

- Confirm that the powers of the SAs and the EDPB are clearly delineated in the GDPR and amend the Guidelines accordingly;
- Clarify that the EDPB has no role in the GDPR cooperation mechanism;
- > Remove the possibility for the EDPB to review and make findings of fact on the evidence and to call for further evidence from the LSA:
- > Clarify that the EDPB can only be make modifications to the draft decision in accord with the relevant and reasoned objections;
- Remove the possibility for the EDPB to instruct the LSA to investigate a matter in a particular manner or to re-assess a draft decision;
- > Remove the statement that further parties have a right to be heard before a decision is made by the EDPB;
- Clarify that the EDPB binding decision may be challenged on facts, law and merits before national courts.

CIPL is grateful for the opportunity to provide recommendations on the EDPB's Guidelines on the application of Article (65)(1)(a) GDPR. If you would like to discuss these recommendations or require additional information, contact Bojana Bellamy, <a href="mailto:bbellamy@huntonAK.com">bbellamy@huntonAK.com</a>, Markus Heyder, <a href="mailto:mheyder@huntonAK.com">mheyder@huntonAK.com</a>, or Nathalie Laneret, <a href="mailto:nlaneret@huntonAK.com">nlaneret@huntonAK.com</a>.