Spolek pro ochranu osobních údajů

Comments on the EDPB's proposal of "Guidelines 9/2020 on relevant and reasoned objection under Regulation 2016/679" Version 1.0

We welcome the opportunity to present our comments to the recently published EDPB draft Guidance on relevant and reasoned objection.

As a general comment we believe that the draft guidance generally accurately reflects the existing situation with regards to the consistency mechanism and concept of relevant and reasoned objection. It usefully clarifies the main principles of this objection.

In detail we hope that the following **specific comments** are helpful to further improve this important guidance:

First of all, we consider it appropriate to mention that in our opinion, relevant and reasoned objection cannot be assessed as an isolated concept. On the contrary, within the consistency mechanism it is only a partial institute used for unified decision-making.

We would like to emphasize that an objection under Article 4 (24) must satisfy the requirement that this objection is based on the existence of risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects, and eventually the free flow of personal data within the Union (for an interpretation of these requirements see below). Only such objections, which will concern these two topics, will be objections within the meaning of Article 60 (4) of the GDPR, and in the event of their non-acceptance, the matter will have to be referred to the EDPB. However, this does not mean, that other objections cannot be raised by the CSA, eg objections justified by an interference with other fundamental rights of controllers or processors (see also the broad reference to fundamental rights in Article 1 (2) and the text of rec. 4 GDPR). Although such objections do not "trigger" proceedings before EDPB within the meaning of Article 60 (4), they must be appropriately addressed according to Article 60 (3). We consider it important to emphasise that such reasoned objections cannot be considered less important or relevant than objections based on Article 4 (24). Moreover, we believe that the LSA should in the context of Article 60 (3) GDPR also take into account any objections under Article 4 (24) provided after the deadline set forth by Article 60 (4) of the GDPR (compare example in point 21 of the Guidelines).

Point 9 of the Guidelines states that: "*Whilst acknowledging that raising an objection is not the most preferable tool to remedy an insufficient degree of cooperation in the preceding stages of the OSS proceeding, the EDPB nevertheless acknowledges that it is an option open to CSAs.*" Although we generally agree that cooperation should take place (already) at all stages of the proceedings, we would like to point out that this sentence could also be interpreted as discouraging CSAs from objecting when their submission could be interpreted as a failure in previous stages of cooperation. Such an interpretation would, of course, be hardly acceptable.

Regarding paragraph 14, we would like to point out that, although we fully agree with the view that "*Raising <u>only</u> abstract or broad comments or objections cannot be considered relevant in*

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this context", adding specific reservations by taking into account a broader context may be very appropriate. We know many decisions of public bodies or court cases where the lack of a broader view of the case led to the fact that the decision, focused on a very specific case, was subsequently used for other cases, where, however, it was completely inappropriate in terms of context.

Point 30 of the Guidelines states that: "*It is possible for a relevant and reasoned objection to raise issues concerning procedural aspects to the extent that they amount to situations in which the LSA allegedly disregarded procedural requirements imposed by the GDPR and this affects the conclusion reached in the draft decision."* However, we consider that, in reality, an objection may concern all procedural aspects, including those based on the law of a Member State, if non-compliance could give rise to *risks for the fundamental rights and freedoms of data subjects* and *the free flow of personal data within the Union*. We therefore believe that an objection doesn't need to be based only on *situations in which the LSA allegedly disregarded procedural requirements imposed by the GDPR*. See also point 20 of the Guidelines.

If referred to point 44 of the opinion: *„...objection demonstrating risks posed to the free flow of personal data, but not to the rights and freedoms of data subjects, will not be considered as meeting the threshold set by Article 4(24) GDPR.*", we acknowledge that the text of the English version of the GDPR may give this impression. However, for example, the Czech text of Article 4, point 24 is far from that clear. Given that the free movement of personal data in the EU is one of the two fundamental objectives of the GDPR, we believe that the protection of the fulfilment of this objective should be given the same meaning in the context of an objection based on Article 4 (24) as infringements of rights and freedoms of data subjects. We therefore consider that, even if the word 'and' is used, it should be sufficient for the objection to be justified solely by an interest in respecting the principle of free movement of personal data or at least the necessity of infringements of rights and freedoms of data subjects shouldn't be overemphasised. After all, a breach of the principle of free flow of personal data can often be, albeit indirectly, an interference with the rights of data subjects (eg because the cross-border supply of services will be limited, etc.).

We are grateful for the opportunity to provide the above-mentioned comments on the Guidelines.

Prague, 24 November 2020

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