Comments on the draft Guidelines 3/2021 of the European Data Protection Board

This paper only reflects the views of its author.

On 16 April 2021, the European Data Protection Board published its draft Guidelines 3/2021[1] *"on the application of Article 65(1)(a) GDPR"* (hereinafter referred to as Draft Guidelines or Draft).

Although the Draft Guidelines begin to resemble a real interpretative document of legal value, there are some issues in which the legal position of the EDPB should be reconsidered (to a greater or lesser extent).

1. The nature of the draft decision of the Lead Supervisory Authority in the light of the right to access to documents and of the right to be heard

According to Article 60(3) of GDPR, the lead supervisory authority (LSA) *"submit[s] a draft decision to the other supervisory authorities concerned for their opinion".* So, the draft decision of the LSA is still a draft (i.e. it is not final and can be amended, sometimes significantly, cf. Subchapter 4.2 of the Draft Guidelines).

Although it is understandable why the Draft Guidelines would like to make a distinction between "*the right of access to the file of the EDPB* [during the procedure under Article 65(1)(a) of the GDPR by the parties concerned by the case before the EDPB]" and *"the general right of access to documents held by the European institutions, bodies, offices and agencies pursuant to Regulation (EC) No 1049/2001, Article 15(3) TFEU or Article 42 of the Charter"*,[2] the EDPB fails to clearly explain this distinction (i.e. access by the client vs. access by anyone, or—in other words—client's procedural rights vs. freedom of information).

Further, the ***EDPB should create appropriate rules*** for the right of access to the file of the EDPB ***in its Rules of Procedure*** (i.e. in the previous case above), it is not enough if the EDPB inserts a sentence in these Draft Guidelines (namely that *"the right of access to the file extends to the documents shared with the EDPB to resolve the dispute in accordance with Article 65(1)(a) procedure, save where they involve business secrets of other undertakings, confidential information, as assessed by the EDPB on a case by case basis*"[3]), provided that the EDPB has authorisation to regulate such aspects of its procedure.[4]

In addition, such rules should apply only to those documents that the EDPB prepared during the procedure in Article 65(1)(a), because, in my view, the ***national public administration***

[1] See at the following link https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_032021_article65-1-a_en.pdf

[2] See paragraph 111 of the Draft Guidelines

[3] See paragraph 112 of the Draft Guidelines

[4] See in this regard Article 4(5) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents that reads as follows: *"A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement."*

procedure laws of the LSA and DSA(s) apply to those documents that either the LSA or the supervisory authorities concerned (CSA) provided the EDPB with (and therefore, paragraph 112 of the Draft Guidelines is legally erroneous).

I have not conducted a comparative study on the right to *access to draft decisions* of public administration bodies across EU Member States (but the EDPB Secretariat could have done that), so it is possible (but I do not give it too much chance) that there are countries where the public administration bodies may share their draft decision with the client, but I am sure that there are many countries where the draft decisions constitute *absolute exemption* to the right to access to the file by the client (i.e. controller or other parties in the public administration process). In other words: in those countries a draft decision can *never* be disclosed to the client in the public administration process,[5] irrespective of the fact that a new actor (i.e. the EDPB) steps in the procedure before the finalisation of the decision: ***the draft decision is (and remains) draft—from the perspective of the national public administration procedure law—until the final decision issued after adoption (and upon) the EDPB's binding decision based on Article 65(1)(a) GDPR. The same is true regarding the CSAs' objections as well.*** So, while the Draft Guidelines correctly cite the opinion of Advocate General Bobek,[6] they make a wrong conclusion: *"information on which the authorities intend to base their decision"* does not include the draft decision itself.

It might, therefore, happen that different and confronting national laws need to be applied. The EDPB should regulate these situations as well.

It follows from the above that ***the right to be heard cannot be exercised either in such way*** that the client can be familiar with the draft decisions and objections and can make statements on those. So, when the EDPB grants hearing to the client of the basic procedure, the discussion cannot be about the draft decision and objection(s) but just about the clarification of the fact that the data protection authorities established (cf. paragraph 105).

All paragraphs concerned with this issue (e.g. 9., 25., 39., 55., 59., 62., 74., Chapter 5 etc.) should be revised.

2. On the text of the Article 65(1)(a)

Funnily enough, Article 65(1)(a) of the GDPR was rectified in each and every (i.e. 24) official language versions[7] by adding an extra condition to the first limb (namely "and the lead supervisory authority has not followed the objection"[8]). Since all language versions were rectified, it is quite difficult to identify what was *really* the original text of the said article that

[5] This is the case, for example, in Hungary, where the Act CL of 2016 on General Public Administration Procedures (Article 34) categorically excludes the right to access to the draft decision. The reasoning behind this ban is that the decision is not final, it can be changed until it is signed by the competent person having authority to exercise the public administration power, and the knowledge of the draft decision could give an opportunity to the client to make an attempt to influence the content of the decision (in the client's favour, of course).

[6] See paragraph 110 of the Draft Guidelines

[7] See Official Journal of the European Union, L 127, 23 May 2018 (in all language versions)

[8] In the English version (but the addition is similar in all other versions).

was adopted in 2016 by the legislators. Since this extra condition changes the meaning of the text, validity of the "corrigendum" and of the rectified text can be challenged.

3. Other remarks

(a) In my view, the EDPB Secretariat does not have authority to *"assess whether each of those persons [who would possibly be adversely affected by the EDPB decision] was offered the opportunity to exercise its right to be heard"*. This is the authority of the national bodies (court or other body having authority to supervise the decisions of the data protection supervisory authorities).

(b) Although it is theoretically right that "*an action for annulment before the Court of Justice does not suspend the effects of the decision of the EDPB*"[9] but national public administration laws may regulate differently.

(c) It is out of the topic of the Draft Guidelines, but it is worth mentioning that national deadlines to lodge an appeal against the final decision of the national data protection authority may conflict with deadlines to bring an action for annulment of decisions of the Board before the Court of Justice. National public administration procedure laws have to manage this potential conflict.

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In my view, while the Draft Guidelines have considerable positive values, they should pay more attention to their interaction with the national public administration laws to which the LSA and the CSA(s) are subject.

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[9] See paragraph 124