Feedback for the European Data Protection Board (EDPB)
in response to the public consultation on
'Guidelines 10/2020 on restrictions under Article 23 GDPR
Version 1.0 Adopted on 15 December 2020'

Prof. Dr. Gloria González Fuster, Law, Science, Technology & Society (LSTS) / Vrije Universiteit Brussel (VUB)[1]
Laura Drechsler, Research Foundation Flanders (FWO) and LSTS/VUB[2]
René Mahieu, LSTS/VUB[3]
Michalina Nadolna Peeters, LSTS/VUB[4]

Submitted on 12 February 2021

1) The *Guidelines 10/2020 on restrictions under Article 23 GDPR* appear to be generally addressed to the European Union (EU) and Member States' legislators, by providing guidance on permissible restrictions of data subject rights and data processing principles under Art. 23 GDPR. The Guidelines, however, also incorporate guidance directly addressed to data controllers (e.g., para 73 and ff.). It is recommended that the EDPB avoids diluting guidance for controllers and processors amidst other guidance, and thus identifies **more visibly** which parts or sections or the document are particularly relevant for **which actors**.

2) According to the Guidelines' introduction, one of its key objectives is to clarify '*how **data subjects** can exercise their rights once the restriction is lifted'* (para. 1). In practice, however, very limited consideration is given to the challenges faced by data subjects in exercising their rights whenever restrictions are or have been applied, as well as, more broadly, in even being aware of the permissible restrictions to their rights that might actually potentially apply, as well as the safeguards accompanying such restrictions. This is problematic, as the Guidelines thus fail to address some of the most acute problems related to the implementation of Art. 23 GDPR.

3) The **fragmentation enabled by Art. 23 GDPR** and the current **lack of comprehensive information on its implementation leads to legal uncertainty for data subjects** when data about them are processed, **especially when data processing operations have a 'cross-border' element.** Data subjects might not be aware of which restrictions adopted on the basis of Art. 23 GDPR apply to the processing of data about them in certain circumstances; if a processing operation involves more than one Member State, the data subject might be oblivious to the legislative measures allowing for restrictions in other Member States, and it might also not be clear to them which national law and which national restrictions are actually applicable. This can have detrimental consequences for data subjects, who could be confronted to data processing operations which have triggered certain restrictions of their rights without them even knowing about the existence of a legislative measure allowing for it, or about how to learn about such legislative measure and its accompanying safeguards, and this even in cases in

[1] Gloria.Gonzalez.Fuster@vub.be.
[2] Laura.Drechsler@vub.be.
[3] Rene.Mahieu@vub.be.
[4] Michalina.Nadolna.Peeters@vub.be.

which the legal framework of their place of residence, for instance, does not allow for such a restriction.

4) As a matter of fact, the Guidelines do not refer to the fact that this might happen, but they also do not openly state that this cannot happen. They just leave this issue unattended. In line with the key task of the EDPB, which is to **ensure the consistent application of the GDPR**, it seems an absolute necessity that the Guidelines explicitly elucidate **how to deal with situations with 'cross-border' elements** in which, for instance, a data subject is in a Member State different from the one of the main establishment of the data controller. In such cases, the Member State of the data controller's main establishment might allow for a restriction that is not permitted under the Member State of the data subject's residence, but such residence might however be the decisive factor to determine the applicability of the national laws restricting data subjects' rights in line with the national laws of the latter Member State.[5] We stress that:

- If in such cases the permissible restrictions would be those adopted in the legal framework of the main establishment of the data controller, the EDPB should give special attention to mitigating the limited awareness of data subjects about the rules adopted under Art. 23 GDPR in other Member States.

- If in such cases, on the contrary, the permissible restrictions would not necessarily be those of the Member States in which the data controller has its main establishment, but perhaps those of the data subject's residence, or those determined under other criteria, this should be clearly explained in the Guidelines.

In any case, the EDPB should clearly detail which criteria govern the mentioned possible conflicts of law insofar as restrictions of data subject rights are concerned, if necessary detailing the interaction of Art. 23 GDPR with the EU private international law framework. Absent such clarification, the challenges linked to the determination of the applicable law in 'cross-border' situations will not only seriously limit the effectiveness of data subjects' rights, but could also affect the consistent application of the GDPR.

5) In practice, currently it is not only difficult to find information on which restrictions might apply in cases with 'cross-border' elements, but it is also extremely difficult for data subjects to find information on which restrictions are permissible in any Member State, including for instance their own - the one in which they live, study or work, for instance. We believe **the EDPB and its members have a key role to play** in addressing this problematic situation.

6) As established by Art. 57(1)(b), it is the task of all Supervisory Authorities (SAs) **to promote in their own territory public awareness and understanding of data subject rights**. In this sense, numerous SAs include in their websites a section with general information on such rights. It is very rare, however, to find on SAs websites detailed **information on permissible restrictions on data subject rights** – be it, at least, a mere list of the legislative measures that detail such permissible restrictions and their accompanying safeguards. The result is ultimately confusing, as data subjects might be induced to believe they can indeed exercise certain rights also in situations where actually those rights have been, or might be, lawfully restricted. It appears therefore necessary that SAs make available to the general public information on the relevant legislative measures on which the lawful restriction of their rights might be based.

[5] See for example Art. 3(II) of Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000886460/.

7) Moreover, the EDPB should ensure that such information is accessible for data subjects also in relation to processing operations governed by the laws of other Member States, as legislative measures of other Member States might – at least presumably, as described above - also be relied upon to restrict their rights. For this purpose, the **EDPB** should **list on its own website** the links leading to information on SAs' websites on permissible restrictions on data subject rights of all Member States. In addition, the EDBP should either directly list on its own website or require the European Data Protection Supervisor (EDPS) to provide **information on permissible restrictions on GDPR data subject rights adopted in EU law.** Additionally, should be considered the possibility to offer at least a summary of relevant information in different languages, so that it is easily accessible for data subjects, controllers and processors across the Union.

8) In relation to the requirements of Art. 23 GDPR, the Guidance should **be more specific** as to whether **generic legislative measures**, as can be found in certain Member States, are allowed. In this respect, the Guidelines currently emphasise that in order for restrictions to be lawful they need to be based on a legislative measure, and that this legislative measure should '*be sufficiently clear in its terms to give citizens an adequate indication of the circumstances in and conditions under which controllers are empowered to resort to any such restrictions'*.[6] Also, they note that '*a general exclusion of all data subjects' rights with regard to all data processing operations as well as a general limitation of the rights mentioned in Article 23 GDPR of all data subjects for specific data processing operations or with regard to specific controllers would not respect the essence of the fundamental right to the protection of personal data, as enshrined in the Charter'*.[7] This begs the question of whether legislative measures that allow for restrictions not even limited to specific operations and/or to specific controllers could in any circumstance be compatible with the EU Charter of Fundamental Rights. An example of this might be found in the approach taken by the Dutch legislator, with the reproduction of Art. 23 into national law almost word by word, replacing the words '*Union or Member State law to which the data controller or processor is subject may restrict by way of legislative measure...'* with '*The controller may disregard the obligations and rights…*'.[8] This legislative measure was introduced as a reaction to the perceived problem that there would be 'a certain tension' between the fact that it is in many cases not foreseeable for the government when a restriction to data subject rights for one of the objectives mentioned in Art. 23(1) is necessary, and the fact that Art. 23(2) 'seems' to require that precise limits must be set in advance in legal regulations regarding the situations in which these interests arise.[9]

9) If the revised Guidelines do not offer unambiguous guidance on the compatibility of such approaches with Art. 23 GDPR and with the EU Charter of Fundamental Rights, **crucial questions** will be left unanswered regarding the interpretation of Art. 23 GDPR. This situation might favour the persistence of restrictions to data subject rights that are insufficiently foreseeable, and which problematically put the main responsibility of conducting a necessity and proportionality test as required by Art. 23 GDPR, which belongs in the hands of the legislator, solely in the hands of individual controllers. It seems thus necessary for the EDPB to provide clearer guidance on this point, fully dissipating existing doubts regarding the

[6] See p. 7.
[7] See p. 6.
[8] Art. 41 Uitvoeringswet Algemene verordening gegevensbescherming (UAVG) of May 16th 2018, https://wetten.overheid.nl/BWBR0040940/2020-01-01/ .
[9] Explanatory Memorandum Uitvoeringswet Algemene verordening gegevensbescherming (UAVG). This interpretation of Art. 23 GDPR has not been rejected by the Dutch SA. See: Autoriteit Persoonsgegevens (2017), *Advies wetsvoorstel Uitvoeringswet Algemene verordening gegevensbescherming,* https://www.autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/advies_uitvoeringswet_avg.pdf, p.13.

possible lawfulness of the described interpretation of Art. 23 GDPR. More concretely, we suggest the EDPB specifically considers stating in the Guidelines that the described type of legislative measure cannot be in line with the GDPR and the EU Charter of Fundamental Rights.

10) Summing up, we suggest that in the revised version of the Guidelines the EPDB:

- visibly identifies which parts or sections or the Guidelines are relevant for which actors;

- clarifies which restrictions might apply in case of data processing operations with 'cross-border' elements and divergent standards;

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- requires all of its members to **make publicly available, online, references the legislative measures adopted under Art. 23 GDPR** which are applicable under their respective legal frameworks;

- commits to offering through the EDPB website a **single point of entry** to access such lists of legislative measures adopted under Art. 23 GDPR;

- identifies a way of accessing information on **EU-level measures** that restrict GDPR data subject rights under Art. 23 GDPR;

- dispels doubts on the possible lawfulness of generic legislative measures as described.

11) On a different matter, **Section 8.1** is devoted to the '*Non-observation of Article 23 GDPR requirements by a Member State'*. There is no equivalent section on the non-observation of Art. 23 GDPR requirements by the EU legislator. The EDPB should provide equally detailed information on how it perceives its own role and the role of the European Commission in such regard.

12) In addition, we have the following more specific comments:

- **para. 52** states that when restrictions '*entail*' special categories of personal data, '*the legislative measure setting such a restriction should mention the special categories therein involved'*; this guidance should be clarified, as it is unclear when this would exactly apply: Does it apply only to the restrictions that are explicitly concerned with restricting rights related to processing of special categories of data? In that case, if they do refer to special categories of data, it seems superfluous to recommend they should 'mention' them – perhaps what the EDPB would like to put forward is that special safeguards must be detailed. Alternatively, is this guidance also supposed to apply when a general restriction might eventually restrict rights related to the processing of special categories data? In that case, it can be argued that potentially all restrictions might have such an impact, so again it is not clear which restrictions should 'mention' special categories of data, and which would not have to.

- **para. 53** refers to restrictions to '*confidentiality of communication'* – it is unclear how this relates to Art. 23 GDPR.