EADPP european association of data protection professionals

11.02.2021

To the European Data Protection Board
Brussels

Dear Sirs,

Re: Feedback of the European Association Data Protection Professionals (EADPP) on the Guidelines 10/2020 on restrictions under Article 23 of the GDPR

The European Association of Data Protection Professionals (EADPP) hereby provides its feedback pursuant to the above published initiative.

For any information or clarification, please contact Ms. Maria Raphael, Chair of EADPP at the email address chair@eadpp.eu.

Guidelines 10/2020 on restrictions under Article 23 GDPR, Version 1.0, Adopted on 15 December 2020		
Section 2- The meaning of Restrictions		
1	Clause 8	The definition of "restriction" shall be amended as follows: " Any lawful and temporary limitation of scope of the obligations and rights provided for in Articles 12 to 22 and 34 of the GPDR as well as corresponding provisions of Article 5 in accordance with Article 23 of the GDPR , provided that the limitation co-exists with the necessity that warranted its imposition and does not lead to the derogation or destruction of these rights and obligations or at their limitation to a greater extent than this is provided for in the European Convention on Human Rights ("ECHR").
2	Clause 9	The lawfulness of the restrictions is also associated with the requirement that the legislative measure providing for the restriction shall be accessible to the individuals and consequences for them to be foreseeable.[1]

Section 3-Requirements of Article 23(1) GDPR		
3	Clause 14	EADPP invites the EADPP to provide examples of restrictions that respect the essence of the restricted right and examples of

[1] Leander v. Sweden (1987) E.H.R.R. 433

		restrictions that adversely affect the essential content of the restricted right.
4	Clause 17	It may be indicated that the level of foreseeability may be different depending on the context of the field of the restriction.
5	Clause 18	Whereas we agree that some restrictions may not be linked to a specific timeframe such as in the case of fulfilling a continuing objective in a democratic society (for instance, for safeguarding the protection of judicial independence and judicial proceedings), it shall be clarified that the norm is for restrictions to be temporary and in the exceptional cases that they are not, legislative measures shall justify the necessity and proportionality of the continuous limitation. The compartmentalization of restrictions to restrictions not in themselves limited in time and restrictions in themselves limited in time does not coincide with **the principle and rule that restrictions of rights shall be temporary in nature.** Further, reference should be made to the duty of the Legislature to repeal or amend a law limitative of the rights and obligations under the said provisions when the necessity/objective that led to its introduction ceases to exist or disappears. Consequently, it should be required for the necessity and proportionality test to be performed several times during the application of the restriction in order to ensure that the limitation still serves the objectives outlined in article 23(1) of the GDPR, is in accordance with the law and is necessary in a democratic society and proportionate to the objective.
6	Clause 27	We consider the "general public interest" referred to in article 23(1)3 to be an abstract notion that invites the EDPB to enrich the guidelines with paradigms and examples of situations that may or may not trigger the "general public interest" objective.

7	Clause 44	• We invite the EDPB to provide guidance and paradigms of cases where restrictions contributing to safeguarding public health in a state of emergency may constitute permissible restrictions of data subject rights and of cases where they may constitute impermissible restrictions or derogations. • Furthermore, we recommend EDPB to additionally provide examples of permissible restrictions or impermissible restrictions or derogations in other, non-related to health, emergency situations. • We also note that art.15 (derogation in time of emergency) of the ECHR affords to the governments of the States parties, in exceptional circumstances (in time of war or other public emergency threatening the life of the nation), the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rules and freedoms under the Convention. During the pandemic, many member states submitted their notices of derogation from the ECHR under art. 15 of the ECHR. The European Parliament with its briefing of September 2020 stated that the coronavirus outbreak seems to satisfy the conditions of the art. 15 of the ECHR. The Council of Europe had issued guidance to member states contemplating derogation from the ECHR during the coronavirus pandemic, entitled '; Respecting democracy, rule of law and human rights in the framework of the covid-19 sanitary crisis: A Toolkit for Member States (SG/Ing (2020). With this guidance, the Council of Europe recognized that the new technologies of access to-and the processing of - personal data have the potential to contain and remedy the pandemic and that the ECHR allows for exception to the ordinary data-protection rules, for a limited period of time and with appropriate safeguards (e.g. anonymization) and an effective oversight framework to make sure that these data are collected, analysed, stores and share in legitimate and responsible ways. In light of the above, we invite the EDPB to advise whether the obligations and rights, for which restriction is permissible under article 23 of the GDPR, may be also subject to derogation under article 15 of the ECHR.

Section 5-Requirements of Article 23(1) GDPR		
8	Clauses 66 and 67	• In order for the controller to be in compliance with the accountability principle, we recommend EDPB to also require for the controller, throughout the restriction period, at appropriate and regular intervals, to communicate to the data subjects information on the context (legal and factual) and the status of the restriction. • We also recommend the EDPB to require from the controller, in compliance with the accountability principle, to incorporate requirements for documenting and recording information in relation to the processing of the personal data during the restriction period which may become available to the data subjects after the lifting of the restriction.

Section 7- Exercise of Data Subjects' Rights after the lifting of the restrictions		
9	Clause 73	We invite EDPB to advise whether the restriction will only be permissible if, following the lifting of the restriction, it allows the data subjects to fully exercise their rights in relation to personal data processed by the controller during the duration of the restriction in cases. For example, in cases where the restriction led in restricting the right of the data subject to have access to the personal data concerning her or him, is the restriction only permissible if, following the lifting of the restriction, the data is granted the right to regain access to the personal data processed during the restricted period? Our recommendation is that such restriction would be permissible only if such right is granted following the lifting of the restriction. From another perspective, would a restriction be permissible if it involved the processing of personal data during the restriction period and did not require, in order to allow the exercise of data subject rights following the lifting of the restriction, the retainment of the personal data processed during and after the retention period and of full records in relation to the processing performed during the restriction period? Our recommendation is that such restriction should be not be permissible. If the requirements differ, depending on the scope and context of the restriction, we invite EDPB to provide guidance and paradigms.

		In this regard, we recommend the EDPB to extend the requirements set out in clauses 66 and 67 of the guidelines in relation to the accountability principle and incorporate requirements for documenting and recording information in relation to the processing of the personal data during the restriction period in order for this information to become available to the data subjects following the lifting of the restriction.
10	Clause 74	• The EDPB clarifies with this clause that during the application of a restriction, data subject may be allowed to exercise **certain rights,** if not all their rights need to be restricted. Reference to "certain rights" may be construed as if it is possible to deprive the data subject even from rights other than those expressly restricted by the law. We recommend that the wording of the clarification is replaced as follows: *"During the application of a restriction, data subjects may be allowed to exercise all data subject rights that are not expressly restricted by law".* • The EDPB states that in order to assess when the restriction can be partially or integrally lifted, a necessity and proportionality test ~~**may be performed**~~ several times during the application of a restriction. The periodic assessment of the necessity and proportionality of a restriction, however, shall not be left to the discretion of the Legislature. The Legislature shall be periodically and in appropriate intervals assess whether the limitation of the rights and obligations are still necessary and proportionate to the objective.

Yours Sincerely,

Maria Raphael
Chair of the Board
On behalf of the EADPP Board

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