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SENSITIVE*

Commission reply to the European Ombudsman

Complaint ref. 97/2022

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Comments of the Commission on a request for information from the European Ombudsman
- Complaint by the Irish Council for Civil Liberties (ICCL), ref. 97/2022/PB

I. BACKGROUND

The Ombudsman opened an inquiry on 10 February 2022 regarding the collection of information by the Commission to inform itself on the application of the GDPR in Ireland. The Commission replied on 21 June 2022 providing explanations on the information used for monitoring the GDPR. The Ombudsman sent a new request to the Commission on 19 July 2022 with additional questions.

II. COMMISSION'S REPLIES TO THE OMBUDSMAN'S ADDITIONAL QUESTIONS

On the data collected by the Commission

The Commission confirms that the Commission uses the sources listed in the annex of the Ombudsman's letter to monitor the implementation by the Member States of their obligations under the GDPR, including about the independence and resources of their data protection supervisory authorities, and whether there would be a systemic failure to act in enforcing the GDPR by those authorities. They complement the information collected through the detailed Commission's questionnaire sent to data protection supervisory authorities in the context of the preparation of the GDPR report issued in 2020¹. The EU legislator stipulated that the Commission should engage in such exercise after two years of application of the GDPR and every four years thereafter. The Commission complied with this obligation and, as explained in the first reply, collected data from the data protection supervisory authorities and other sources.

The Commission considers that the data produced by the EDPB are pertinent and one of the most relevant sources of information. The EDPB is the best placed to produce such statistics on the basis of the data coming directly from the data protection supervisory authorities themselves, i.e. from the independent authorities in charge of enforcing the GDPR. The fact that they have to be interpreted in relation to the purpose for which they have been collected does not mean that they are not pertinent (as also mentioned in the Commission's correspondence with the complainant²).

The EDPB is also the best forum for developing further the gathering and quality of data, especially by making progress on the harmonisation of the methodology (e.g. on the notion of 'complaints'). This work is on-going in the EDPB and the Commission contributes to it. It would not be appropriate for the Commission to duplicate this complex exercise, also taking into account the need to treat all Member States equally. Other EDPB work strands are relevant in this context, notably the guidelines on amicable settlements issued in June 2022³.

¹ See questions and replies under:

https://edpb.europa.eu/sites/default/files/files/file1/edpb_contributiongdprevaluation_20200218.pdf.

² Letter from Director General A. Gallego to Mr J. Ryan dated 10 May 2022, shared with the Ombudsman services.

³ https://edpb.europa.eu/system/files/2022-06/edpb_guidelines_202206_on_the_practical_implementation_of_amicable_settlements_en.pdf.

Moreover, the Commission believes that its task of the monitoring of the compliance of Member States with the GDPR must not be based only on a mechanical examination of statistics but requires moreover a qualitative assessment. Statistics are not sufficient to capture the diversity of situations of the work of data protection supervisory authorities, in particular when dealing with large scale complex cases (e.g. a relatively straightforward enforcement case versus a complex case touching on the business model of multinational companies). Updates by data protection authorities, notably in the context of the regular EDPB meetings and in bilateral contacts, are important to have such a qualitative assessment on how strategic cases progress.

On whether the Commission had made prior requests, for its monitoring work, to the Irish DPC regarding precisely what data should be contained in the DPC large scale statutory inquiries overview and in the document entitled One-stop-shop Cross-border Complaints Statistics, and how that data should be presented

The Commission has requested information from the DPC and receives, on a confidential basis and roughly every two months, an overview of the large scale statutory inquiries. The Commission considers that this is a detailed overview of the state-of-play of the on-going individual investigations, allowing to understand their content and to measure the procedural steps at national level, their progress and timetable for the submission to the procedures under Article 60 and, possibly, Article 65 of the GDPR.

It is important to note that, through the abovementioned overview document, the Commission has in fact at its disposal more information about the Irish DPC actions against big multinational tech companies than it would have through statistics.

As regards the document “One-Stop-Shop Cross-Border Complaints Statistics”, the Commission did not stipulate to the Irish DPC how to present that document. The Commission recalls it has constantly urged the data protection supervisory authorities and the EDPB to be transparent and to communicate more to the general public on their enforcement action. The DPC document entitled ‘One-Stop-Shop Cross-border Complaints Statistics’⁴ goes in this direction and is therefore to be welcomed.

On the possibility of the Commission requesting the data deemed relevant by the complainant directly from the Irish DPC

The Commission sent a questionnaire in 2020 to data protection supervisory authorities which also covered issues relating to their enforcement action under the GDPR. As explained above, the Commission also asked questions specifically to the DPC on its large-scale statutory inquiries.

⁴ Issued on top of the required annual activity report that data protection supervisory authorities have to provide to the Commission (Article 59 GDPR).

As regards the possibility to ask additional questions to the DPC, the Commission does not consider that the level of details of the questions proposed by the complainant (e.g. which investigatory or corrective powers the DPC used in any cases concerning “big tech”) is relevant for the Commission to assess whether there is a systemic failure to act by the data protection supervisory authorities

III. ADDITIONAL INFORMATION

As a more general point, and to put its replies to the Ombudsman’s question in the broader context, the Commission would like to reiterate that it attaches utmost importance to the GDPR implementation and enforcement.

The governance system put in place by the GDPR is based on independent data protection supervisory authorities with strong and harmonised enforcement powers. When monitoring the implementation of the GDPR, a key task of the Commission is to make sure that Member States take the necessary measures so that these authorities are truly independent (hence the infringement proceeding against Belgium), are equipped with the necessary powers (hence the on-going infringement proceeding against Slovenia) and that their actions or omissions are subject to effective judicial remedies⁵ (hence the ongoing infringement proceedings against Finland and Sweden).

The Commission takes and will continue to take all necessary actions against Member States if they do not provide the required independence and powers to their data protection supervisory authorities. Also, the Commission will act against any Member State in case of a systemic failure to act by its independent authorities.

Currently the Commission and the EPDB are focusing on improving the way data protection supervisory authorities cooperate on so-called ‘cross-border cases of strategic importance’ in particular, in order to speed-up the proceedings in cross-border cases and to reduce procedural hindrances of smooth functioning of the cooperation mechanism. This has been the focus of the EDPB meeting in Vienna on 27-28 April 2022, to which the Commission actively contributed⁶. Since then, progress has been made on two issues: identifying criteria for such cases and identifying a list of administrative procedural aspects that could be further harmonised at EU level. Indeed, dealing with these procedural aspects has been widely considered as the issue to be addressed in priority by all interested parties.

The EDPB is currently working on a list of administrative procedural aspects leading to different approaches on dealing with cross-border cases to be transmitted to the Commission. The Commission has indicated that it looks forward to receiving this contribution that will feed into its reflection on how to support data protection authorities in dealing with such cross-border cases concerning notably big tech multinationals. This will be the focus of the Commission’s work on supporting the enforcement of the GDPR in the coming years.

⁵ If an individual is not satisfied with the way a data protection supervisory authority handles a complaint, Article 78 of the GDPR provides that the natural course of action for this individual is to seek judicial remedy.

⁶ https://edpb.europa.eu/news/news/2022/dpas-decide-closer-cooperation-strategic-files_en.

Finally, the Commission plans to issue a new questionnaire to data protection authorities in the context of the preparation of the next GDPR report due in 2024 (in line with Article 97 GDPR). The on-going work within EDPB on statistics will support this exercise.

For the Commission

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