Proposed additional GDPR enforcement rules (LIBE Report): compatibility with the Charter of Fundamental Rights and consistency with the GDPR

15 February 2024 (updated)

Mikołaj Barczentewicz
Associate Professor of Law, University of Surrey

This legal analysis was commissioned by the Computer & Communications Industry Association (CCIA Europe). The opinions offered herein are purely those of the author, and do not necessarily represent the views of CCIA Europe.

I. Summary

The European Commission submitted a proposal for a regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/6791 (the 'Proposal'). The Proposal aims to specify procedural rules for certain stages of the investigation process in cross-border cases, thereby supporting the smooth functioning of the GDPR cooperation and dispute resolution mechanisms. The Committee on Civil Liberties, Justice and Home Affairs ('LIBE') published its amendments on the Proposal. This short legal analysis focuses on the amendments proposed in the LIBE Committee and their compatibility with the Charter of Fundamental Rights and consistency with the basic structure of the Regulation 2016/679 (the GDPR).

Contrary to the original intent of the Commission's Proposal, the LIBE Report **undermines the key pillars of the GDPR's structure** — notably **the 'one-stop-shop' mechanism** as well as the GDPR's balance of **discretion and independence** of supervisory authorities.

Even though the requirement of independence of data protection authorities under the Charter of Fundamental Rights is not absolute, the EU legislator must respect it.

The Report arguably goes too far and **disproportionately restricts the independence of supervisory authorities** (especially the lead supervisory authority).

Insufficient provision for procedural rights of the party under investigation also raises doubts as to compatibility with the Charter. This applies in particular to the way the Report weakens the right to be heard compared to the Commission's Proposal by removing more specific provisions, which carries lower risk of arbitrary application.

II. Undue restrictions of discretion and independence of supervisory authorities

The Commission's Proposal recognised that *discretion* of supervisory authorities in exercising their powers is an important feature of the GDPR's enforcement structure.[1] The LIBE amendments consistently sought to remove all mentions of 'discretion.'[2] This is symptomatic of a broader approach in the Report of reforming the role of supervisory authorities—and the LSA in particular—that not only significantly departs from the GDPR's basic structure, but also raises doubts in the light of the Charter of Fundamental Rights.

First, let us establish why the Commission was right to highlight discretion of supervisory authorities. Advocate General Pikamäe summarised the issue in the following way:

> Although the supervisory authority, as guarantor of compliance with the provisions of the GDPR, is required to handle complaints lodged with it, several factors militate in favour of an interpretation to the effect that it enjoys a *margin of assessment in examining those complaints* and a *degree of latitude in the choice of the appropriate means* to carry out its tasks. Advocate General Saugmandsgaard Øe has noted that Article 58(1) of the GDPR 'confers on the supervisory authorities … significant investigative powers' and that they have, under Article 58(2) of that regulation, 'a wide

[1] For example, the Commission's Recital 6 included: 'It falls within the discretion of each competent authority to decide the extent to which a complaint should be investigated.' Similarly, Recital 12 stated: 'Cooperation between supervisory authorities should be based on open dialogue which allows concerned supervisory authorities to meaningfully impact the course of the investigation by sharing their experiences and views with the lead supervisory authority, *with due regard for the margin of discretion enjoyed by each supervisory authority, including in the assessment of the extent appropriate to investigate a case, and for the varying traditions of the Member States*' (emphasis added). Finally, Recital 34: 'The binding decision of the Board under Article 65(1), point (a), of Regulation (EU) 2016/679 should concern exclusively matters which led to the triggering of the dispute resolution and be drafted in a way which allows the lead supervisory authority to adopt its final decision on the basis of the decision of the Board *while maintaining its discretion*' (emphasis added).

[2] LIBE amendments 12, 17, 37, 227, 229, 230 and JURI amendment 11.

> range of means … of carrying out the task entrusted to [them]', referring in this connection to the various powers to adopt corrective measures listed in that provision. It was then stated that, although the competent supervisory authority 'is required to carry out in full the supervisory task entrusted to it', 'the choice of the most effective means is a matter for [its] discretion … having regard to all the circumstances … at issue'. I can only concur with this interpretation.[3]

This is also true in cross-border contexts. Contrary to what was implied in the Rapporteur's amendments,[4] just because EDPB decisions bind supervisory authorities, it does not follow that the authorities do not have discretion. That supervisory authorities indeed have discretion even after receiving a binding EDPB decision was among the main arguments that the General Court relied on to rule that WhatsApp's action for annulment of an EDPB decision was inadmissible (the Court's order is currently under appeal).[5]

Discretion of supervisory authorities has its justification not just in pragmatic considerations, national procedural autonomy, or even general subsidiarity concerns—even though they are all relevant. Discretion is also connected with the independence of supervisory authorities.

Under the old Directive 95/46, the Court of Justice emphasised that 'the supervisory authorities responsible for supervising the processing of personal data must enjoy an independence allowing them to perform their duties free from external influence.'[6] This remains true under the GDPR, which retained the reference to 'complete independence' of supervisory authorities (Article 52(1) GDPR). As the Court of Justice noted, this requirement does not come merely from secondary EU law but is derived from Article 8(3) of the Charter and Article 16(2) TFEU.[7]

Given that independence of supervisory authorities is grounded in primary EU law, this limits what the EU legislator can do on the level of secondary law (including through regulations). However, the independence of supervisory authorities can be restricted, the question is under what conditions. For example, as Advocate General Bobek noted, under Directive 95/46 the sphere of independence of supervisory authorities was broader than under the GDPR.[8]

---

[3] Opinion of Advocate General Pikamäe in Joined Cases C-26/22 and C-64/22, *SCHUFA*, ECLI:EU:C:2023:222, para 41 (references omitted to the Opinion of Advocate General Øe in Case C-311/18, *Facebook Ireland and Schrems*, EU:C:2019:1145, paras 146-148).

[4] See the justification to LIBE amendment 37.

[5] Case T-709/21, *WhatsApp Ireland v EDPB*, ECLI:EU:T:2022:783, paras 51-60.

[6] Case C-288/1, *Commission v* Hungary, ECLI:EU:C:2014:237, para 51 (citing *Commission* v *Germany* EU:C:2010:125, para 30, and *Commission* v *Austria* EU:C:2012:631, para 41 and 43).

[7] Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para 40.

[8] 'In *Wirtschaftsakademie Schleswig-Holstein*, the Court ruled that, in the case of cross-border processing, each data protection authority could exercise its powers with respect to an entity established in its territory, independently of the views and actions of the data protection

Unlike the Directive 95/46, the GDPR in its Chapter VII provides procedures for cooperation and for achieving consistency among supervisory authorities. Through the consistency procedure, a majority of the EDPB can impose their view, give binding instructions to the minority. AG Bobek suggested that this limitation of the independence of supervisory authorities is justified because the consistency mechanism 'should contribute towards a stronger emphasis on the promotion and safeguarding of the rights enshrined, inter alia, in Articles 7 and 8 of the Charter' '[b]y permitting a more coherent, effective and transparent approach on the matter.'[9]

However, when it comes to those aspects of the Report which limit the independence of the lead supervisory authority, it can be doubted whether they can be justified under Articles 7 and 8 of the Charter as promoting a more coherent, effective, and transparent approach.

The original Proposal's provision for reaching consensus (Article 10) was intended to ensure that '[s]upervisory authorities should avail of all means necessary to achieve a consensus in a spirit of sincere and effective cooperation' (Recital 15). Arguably, this is an appropriate aim to justify the limitation of the independence of the competent authority. However, the Report undermines this goal by empowering concerned authorities to seek forcefully to impose their views, without engaging in sincere and effective collaboration and likely without regard to the margin of discretion enjoyed by the lead supervisory authority.[10] The Report does so by enabling even a single concerned authority to request a 'procedural determination' from the EDPB in each case where as little as four weeks elapses from the moment the concerned authority informed the lead authority of their disagreement on some issue,[11] and in relation to 'any dispute arising during a cooperation procedure.'[12]

Reading all relevant amendments together, the LIBE Report deprioritises cooperation, while promoting micro-management of investigations through EDPB's procedural determinations.[13] Those rules are likely to result in the EDPB fully taking over investigations in anything but name, thoroughly overturning the one-stop-shop principle. Given the EDPB's non-transparent internal workings and unclear level of effective influence of its staff relative to that of supervisory authorities, such an increase of the EDPB's role would be unlikely to contribute to a 'transparent' approach advocated by AG Bobek and thus to meeting the standard from Articles 7 and 8 of the Charter.

---

authority of the Member State where the entity responsible for that processing has its seat.' Opinion of Advocate General Bobek in Case C-645/19, *Facebook*, ECLI:EU:C:2021:5, para 78.

[9] Id. para 96.

[10] On the margin of discretion see Recital 12 of the original Proposal and the discussion at the beginning of this section.

[11] LIBE amendments 344-346, see also JURI amendment 70.

[12] LIBE amendments 196, 424.

[13] LIBE amendments 20-21, 238-240 and JURI amendment 19, read in conjunction with other amendments in note 11.

It is worth noting that, influenced by the position of the EDPB and EDPS,[14] the LIBE amendments extend the scope of application of a provision on urgent binding decisions.[15] As Article 66 GDPR explicitly states, the 'urgency procedure' from that article is an exception and constitutes a derogation from more general procedures. It is a widely accepted principle of legal interpretation that exceptions ought not be interpreted broadly. Hence, the Commission adopted a logical approach only to contemplate decisions that allow a supervisory authority that adopted provisional measures pursuant to Article 66(1) to 'maintain or amend its provisional measure.'

III. Insufficient provision for procedural rights of the party under investigation

The LIBE Report replaces more specific rules of the Proposal providing for concrete opportunities for the party under investigation to exercise their right to be heard with a general article on 'procedural minimum standards.'[16] The first paragraph of the article in question states that the parties at minimum have the rights to fair procedure and equality of arms, right to be heard and procedural transparency.[17] Regarding the right to be heard, in the second paragraph, the Report provides that the lead supervisory authority shall give the parties an opportunity to be heard regarding novel issues or novel conclusions.[18]

The justification given for this change is insufficient, given the seriousness of the adverse consequences that parties under investigation may face because of an investigation covered by the proposed regulation. The justification of the Rapporteur's amendments states merely: 'Following from Article 6 ECHR and Article 41 CFR, as confirmed by CJEU in Case C- 277/11.'

The Report, also without adequate justification, purports to equate complainants with the party under investigation (facing serious, quasi-criminal adverse consequences), skirting the question of proportionality of procedural protections to the interests at stake. Notably, in the decision used as a justification of the amendment (in Case C-277/11), the Court of Justice dealt with a situation of an asylum seeker, not with inquisitorial administrative proceedings that begin with a complaint of one individual against another (or ex officio). At the very least, it requires additional justification why the situation of a complainant in cross-border

[14] EDPB-EDPS Joint Opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, para 121.

[15] LIBE amendments 209, 440, 441.

[16] LIBE amendments 58-62, 262, 269, 270, 287, 289, 378-379, 381, 385-386, 388-390, 395, 400, 404-406 and JURI amendments 44, 51, 80, 82, 84-85 and 88.

[17] LIBE amendment 59.

[18] LIBE amendments 60, 270.

GDPR investigations should be analogized with the situation of an asylum seeker, i.e. a person for whom an adverse result in administrative proceedings could have the most severe personal consequences.

The key issue with the solution to the investigated party's procedural rights adopted in the Report is that it seems to pay little attention to Article 52(1) of the Charter.[19] Arguably, such a general regulation of the right to be heard is insufficient to make sure that restrictions on that right meet the standard of being provided for by law and being clear and precise enough so that parties under investigation are protected against arbitrary interference. Using this general provision, where a more specific solution is possible as evidenced by the Commission's Proposal, raises a disproportionate risk that the right to be heard will be applied arbitrarily. The new proposed rules can be a part of a rights-preserving solution, but they perhaps ought to be accompanied with more concrete provisions like in the original Proposal.

Moreover, the Report includes a specific restriction of the right to be heard in the form of a duty of supervisory authorities to 'limit the length of submissions by the parties to not more than 50 pages and set reasonable and appropriate deadlines not shorter than three weeks and not longer than six weeks, unless exceptional circumstances require a reasonable extension' (Article 2b(5)).[20] The Rapporteur's amendment was justified by the 'approach of the CJEU where page limitations and short deadlines lead to focused submissions.' This is a failed analogy. The Court of Justice is a court of law, not a court of fact. It would be rather bold to suggest that what is proportionate in respect to submissions in top-level appellate litigation only on points of law (which also involve oral hearings) is also proportionate in inquisitorial administrative investigations that must determine complex questions of fact. The restrictions on the right to be heard should be first and foremost proportionate to the complexity of the issues and to the capacity of the parties to respond.[21] Given the potentially significant variance in complexity, it may be inappropriate to fix the maximum deadline or maximum text length that a supervisory authority can set.

[19] Article 41 and Article 52(1) of the Charter apply directly to the EDPB. The principle of good administration applies to national authorities through a general principle of EU law, not through the Charter; see C-276/12, *Sabou*, EU:C:2013:678, para 38.

[20] Quotation from the final compromise amendments. LIBE amendment 62, 270, 377, 378, 379, second part of 381, 385, 386, 395.

[21] See LIBE amendment 247.