



European Commission's Initiative: Further specifying procedural rules relating to the enforcement of the General Data Protection Regulation

Publishers

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1 Key Messages

1.1 It is strongly recommended to extend the understanding of enforcement by integrating complementing tools, such as Codes of Conduct, into the evaluation by the European Commission.

- Codes of Conduct strongly support harmonization across Europe, by allowing for particularizing ambiguous interpretations in sector-specific manners.
- The enforcement of Codes of Conduct complements the public actions via data protection supervisory authorities and may significantly increase GDPR compliant yet practical implementations.
- Compulsory oversight by independent Monitoring Bodies allows for additional robust enforcement.
- Required continuous communication between Monitoring Bodies and data protection supervisory authorities may establish exchange of first-hand experiences, fostering consistent, robust yet practical application of the law.

1.2 It is strongly recommended to review the procedural requirements in receiving a Code of Conduct's approval and a Monitoring Body's accreditation.

- Generally, the legal framework and EDPB's guidelines are considered suitable, if applied consistently.
- Specifically for transnational Codes of Conduct, harmonized interpretation is appreciated, because projects suffer delays, e.g., by means of consistently and mutually determining the competent data protection supervisory authorities.
- Periods as indicated by GDPR are not yet met in practice. So, it is recommended to adapt such periods to more realistic timelines and to clarify that in case data protection supervisory authorities cannot unanimously determine undisputable conflicts with GDPR, Codes of Conduct shall be deemed in accordance with GDPR.
- It is recommended to limit deviations in regards of the accreditation criteria for Monitoring Bodies to the minimum needed, e.g., by different administrative member state laws. Any material deviation creates unnecessary obstacles to Monitoring Bodies, which seek to provide their services in several member states, limiting the scalability of their services, which is a key element in ensuring that adherence to Codes of Conduct remains accessible to micro, small and medium sized enterprises.

1.3 In regards of third country transfers, a general validity by implementing act is required. It is strongly recommended to ensure that procedural efforts will be streamlined preventing any unreasonable delays in operationalizing such projects.

- Safeguarding third country transfers is one of the key elements subject to legal, political and operational discussions.
- Codes of Conduct may act as a safeguard provide that, next to the formalities to be met for transnational Codes of Conduct in any case, general validity will be granted.
- Considering the procedural steps of deciding on an implementing act, it is strongly recommended to allow for a material assessment by the European Commission and the EDPB in parallel.

2 About the Authors (Short)

Selbstregulierung Informationswirtschaft e.V. (SRIW) is a non-profit association supporting the self-regulation of the information economy. It acts as a think tank to discuss and debate key issues in digital policy and provides an umbrella organisation supporting credible and effective self- and co-regulation of the information economy.

*SCOPE Europe srl (**SCOPE Europe**) is a subsidiary of SRIW. Located in Brussels, it continues and complement the portfolio of SRIW in Europe. SCOPE Europe gathered expertise in levelling industry and data subject needs and interests to credible but also rigorous provisions and controls. SCOPE Europe has been the first accredited Monitoring Body under the European General Data Protection Regulation (**GDPR**) since May 2021 related to a transnational Code of Conduct, i.e., EU Data Protection Code of Conduct for Cloud Service Providers. Since February 2023 SCOPE Europe is the first ever Monitoring Body under GDPR which has been accredited for more than one Code of Conduct and by more than one data protection supervisory authorities.*

SRIW and SCOPE Europe are calling for suitable regulatory methods to foster innovation and drive the digital transition while promoting corporate responsibility, particularly in the fields of data and consumer protection. To achieve this overarching objective, SRIW and SCOPE Europe work to enhance transparency and strengthen best practices in data protection by mobilizing and supporting the industry to engage in voluntary, yet binding commitments underpinned by appropriate remedies and sanctions.

3 Introduction

SCOPE Europe and SRIW (together “We”) would like to thank the European Commission for granting stakeholders the opportunity to provide their feedback as we consider that for the consistent and robust implementation of GDPR and to provide quicker and more effective remedies to data subjects, it is essential to further harmonize certain aspects of the administrative procedures and enforcement. Given the specific background of both commenting entities, our comments have been drafted from the standpoint of organizations that develop and monitor, among others, Codes of Conduct pursuant to Articles 40 and 41 GDPR.

4 Complementary enforcement tools

While we consider that improving cooperation between national data protection supervisory authorities when enforcing GDPR in cross-border cases is essential to ensure a harmonized and thus efficient and effective enforcement, we would like to draw the attention of the European Commission to the importance of considering other dimensions of GDPR enforcement mechanism in addition to Article 63 GDPR.

It is essential to underline the added value of complementary enforcement mechanisms, such as those established by Codes of Conduct and Monitoring Bodies in the context of Articles 40 and 41 GDPR. Codes of Conduct, especially when those bear a transnational scope, i.e., covering processing activities across several member states, can effectively support addressing pressing challenges such as the uniform application of GDPR requirements and consistent enforcement.

4.1 Sector-Specific Particularization; collecting good and widely adopted practices

As GDPR is written in a sector-agnostic manner in terms of processing activities, GDPR requires particularization. It is expected that such particularization of general legal terms, such as “appropriate” to name likely the most common example, will be addressed by guidelines of the European Data Protection Board, court proceedings, industry good practices, academia, etc. Whilst data protection supervisory authorities have progressed in reaching harmonization, there are still opportunities in regards of further improvements. This applies both to sectoral implementation but also specific processing activities of the same stakeholder. Against this background, we want to stress that transnational Codes of Conduct are by definition sector specific and are translating general GDPR obligations into specific means of implementation. Consequently, Codes of Conduct perfectly match the current needs. Additionally, as transnational Codes of Conduct have passed a substantial process of scrutiny before the data protection supervisory authorities, including the EDPB, it is ensured that Codes of Conduct will not conflict with GDPR’s requirements and that Codes of Conduct provide an added

value. This potential of harmonization inherent to the mechanisms, such as Codes of Conduct, specifically benefits code members which are micro, small and medium-sized businesses (“SMEs”). Such SMEs may not have the inhouse resources or scale to liaise with multiple data protection supervisory authorities across multiple member states.

Alongside, the approval procedure supports data protection supervisory authorities to understand the specificities of the affected sector and thus contributes to GDPR’s enforcement in its entirety, as the take-aways of the approval of a Code of Conduct can be leveraged in any future actions by the data protection supervisory authorities.

4.2 Inherent enforcement and remediation next to authoritative actions

4.2.1 General Oversight

Given that data protection supervisory authorities face challenges in being provided with sufficient resources to monitor and perform their enforcement on all sections of the market, the added value of the compulsory monitoring including effective complaint mechanisms offered by Codes of Conduct must be considered a value itself. In accordance with GDPR, a Code of Conduct must be subject to independent monitoring. Such monitoring must include procedures and structures for both, continuous oversight and dealing with complaints addressing potential non-conformities with a Code of Conduct’s requirements. Requirements of a code as well as the mechanisms regarding oversight and complaints must be transparent to relevant stakeholders, such as data subjects.

In case of a non-conformity, the Monitoring Body must take appropriate measures against a processor or controller and decide on sanctions, which include at least suspension or exclusion from the code. The Monitoring Body must then notify the competent data protection supervisory authority of any action against the controller or processor. It is therefore important to emphasize that this is a mechanism that strengthens the remedy protecting the rights and freedoms of data subjects, as such monitoring complements the general oversight performed by data protection supervisory authorities.

4.2.2 Additional Oversight and Complaint Channel

Next to the general oversight, the monitoring of Codes of Conduct adds another safeguard for conformity. The obligatory element of integrating complaint mechanism makes available to relevant stakeholders, such as data subjects, an additional leeway to report potential infringements. In case such reports prove justified, the Monitoring Bodies will adopt appropriate sanctions and remedies.

4.2.3 Enabling focus of resources and continuous expert's exchange

Monitoring bodies enable data protection authorities to focus their resources as needed, as the robust oversight of Monitoring Bodies required by GDPR support the enforcement for a certain sector. To remain efficient and effective authorities may, as needed, adapt their focus in respect of enforcement actions. Given that a monitoring body acts as a liaison between the industry and the data protection authorities by several communication channels, such as informing the authorities of an infringement of a Code of Conduct or regular evaluation reports, expertise and first-hand experience can be exchanged to the benefit of any parties involved. Against the background of a sector specific nature of Codes of Conduct, Monitoring Bodies will develop distinct expertise in a specific sector, allowing to adopt sophisticated and tailored decision in regards of remedies, when needed. Understanding and acknowledging Monitoring Bodies' independence, Monitoring Bodies and related practices of imposed remedies and sanctions might become a trusted reference for data protection supervisory authorities, too. At a minimum, Monitoring Bodies can act as expert stakeholders for data protection supervisory authorities, likewise as a multiplier, practical translator but also reasonable challenger of data protection supervisory authorities' guidelines. This helps establishing a mechanism that streamlines information and supports the appropriate cross-border enforcement of GDPR by data protection supervisory authorities, particularly in the context of transnational Codes of Conduct.

5 Streamlining of procedures under Article 40 and 41 GDPR

Given that those tools provide a significant added value when it comes to supporting GDPR enforcement, we would like to emphasize that the operationalization of such tools is still facing procedural obstacles. Further streamlining of approval and accreditation procedures under Article 40 and 41 GDPR is highly welcomed in that area.

5.1 Competent data protection authorities for transnational Codes of Conduct, streamline of procedural elements

Further clarification on how to determine the competent data protection supervisory authority is required when it comes to the approval process of transnational Codes of Conduct in accordance with Article 40.5 GDPR. As organizations involved in the approval process of several Codes of Conduct, we have encountered varying interpretations by data protection supervisory authorities when it comes to factors that determine their competence. As a result, approval processes for Codes of Conduct have been delayed, and in some cases suspended, because data protection authorities could not mutually resolve their competence. As a result of these procedural obstacles, the complementary enforcement potential that these Codes of Conduct have to offer has not been realised.

We highly appreciate the guidelines developed and published by the data protection supervisory authorities, and generally do not request any clarifications that go beyond such guidelines. Nonetheless, a closer or rather harmonized application, though, would benefit the development of Codes of Conduct, significantly. Especially in cases of transnational Codes of Conduct, that will apply to any of the member states, the competency should not be considered an obstacle. A harmonized interpretation of GDPR is sufficiently safeguarded by the EDPB's mandatory involvement.

5.2 Periods of authoritative actions and potentially prohibitive administrative fees

5.2.1 Periods of processing requests

Where GDPR provides for distinct periods of action, it would be beneficial to either define such periods more realistically, allowing data protection supervisory authorities to adequately conclude in such periods. We acknowledge that Codes of Conduct, in particular, in cases of transnational Codes of Conduct, may address highly complex matters and may require extensive alignment. Likewise, it might help the adoption of Codes of Conduct that, in cases such deadlines are not met, a positive decision shall be considered as taken. If authorities cannot unanimously or by majority determine that a Code of Conduct – or any other self- or co-regulatory measure – conflicts with GDPR, a Code of Conduct must be considered rather in accordance with GDPR.

In this context, we also want to raise awareness that GDPR's ambiguities and limited foreseeability of its enforcement industry may result in ostrich tactics. Low adoption rates of most sophisticated interpretations appear less beneficial than high adoption rates of ambitious but still practical approaches. Especially in economically tense times, investments are used to be strictly evaluated. Therefore, rigorousness of enforcement of GDPR's interpretation must be aligned and balanced with actual enforcement actions. If the level playing field becomes out of balance, this might cause industry to choose carefully its investments given that competitors might do the same. Whilst it is appreciated that there is and that there shall be a striving for the best protection of data subjects, GDPR clearly does not understand the protection of personal data without considering the individual contexts. GDPR rather positions the protection of personal data amidst several interests, freedoms, rights, and obligations by numerous stakeholders. Further adoptions of Codes of Conduct might build the bridge between stakeholders, allowing for higher implementation rates.

5.2.2 Potentially prohibitive administrative fees

A more streamlined process would also allow for better argumentation from interested stakeholders to invest in Codes of Conduct. Especially, where authorities request specific administrative fees for the processing of approvals and accreditations – which may to the knowledge of the author's be up to 50,000.00 EUR per procedure – interested stakeholders require foreseeability of the procedures,

especially in regards of timelines. We acknowledge that data protection supervisory authorities may impose fees to the processing of approval or accreditation requests. Nonetheless, the current situation in which such invests are lacking foreseeability and processes may take rather years than weeks, these fees might be considered rather a mean to prevent submissions that a reasonable compensation of additional efforts by such authorities. Such an impression is contraindicative to the authorities' obligation to encourage the development of Codes of Conduct.

5.3 Accreditation requirements for Monitoring Bodies

We would like to draw to the European Commission's attention to the fact that divergences have emerged in approaches that are applied by the data protection supervisory authorities when it comes to the accreditation requirements that a Monitoring Body must meet to become accredited. This is especially challenging when a Monitoring Body is to be accredited against more than one Code of Conduct in different member states and thus needs to address specific procedural elements that are similar in their goal but may vary in their actual detailed requirements. This in turn causes significant delays in the operationalization of Codes of Conduct because Monitoring Bodies must make significant efforts to adapt to different configurations that achieve in a different way the same goals for each member state. In this respect, a mechanism that will support a consistent interpretation of those accreditation requirements by data protection supervisory authorities is highly welcomed. We acknowledge that different member states may require modifications regarding their national, e.g., administrative, laws. But besides such formalities, we do not see any reason why material requirements should be different, especially referring to GDPR as being a regulation.

Any additional efforts in addressing deviations, limit the scalability of monitoring services, which negatively affects the accessibility for SMEs- which are specifically mentioned to be considered in drawing up Codes of Conduct.

5.4 General validity mechanism for Codes of Conduct as tools for transfers

Further clarifications are sought with respect to the procedural aspects relating to the general validity mechanism for Codes of Conduct acting as a transfer safeguard under Chapter V GDPR. Codes of Conduct acting as a Chapter V safeguard require, additionally to (1) the positive opinion of the EDPB

and (2) the approval by the competent data protection supervisory authority, to be granted (3) general validity by the Commission by way of implementing act.¹

We note that the general validity mechanism as an implementing act as well as its related legal effects against the specific context of Codes of Conduct remains generally unclear. Clarification is sought on what is the procedure for a Code of Conduct to be granted general validity, besides the notification of the opinion of the EDPB to the European Commission, as well as on the related timeframes. In this respect, we consider that general validity shall be granted in a timely manner to not unduly delay the process and to allow for the rapid adoption of these tools by the market. To this end, we recommend that the process between the EDPB and the European Commission be further streamlined. E.g., the substantive assessment of the code by both institutions should, to some extent, be carried out simultaneously and thus at an earlier stage than described in Annex 1 of the related EDPB guidelines. Notwithstanding and in full appreciation of the powers of the European Commission, procedures by the European Commission should not – by any means – foresee any timelines that exceed the suitable blueprint provided by Article 40 GDPR related to the processes to be performed by the EDPB, i.e., a default period of eight weeks plus an optional extension in case of need, e.g., due to complexity of the case.

¹ See Articles 40.3 and 40.9 GDPR and EDPB-Guidelines 04/2021 on Codes of Conduct as tools for transfers tools, https://edpb.europa.eu/system/files/2022-03/edpb_guidelines_codes_conduct_transfers_after_public_consultation_en_1.pdf



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