BRIEFING
EU Legislation in Progress

European Parliament

Newly proposed rules to strengthen GDPR enforcement in cross-border cases

OVERVIEW

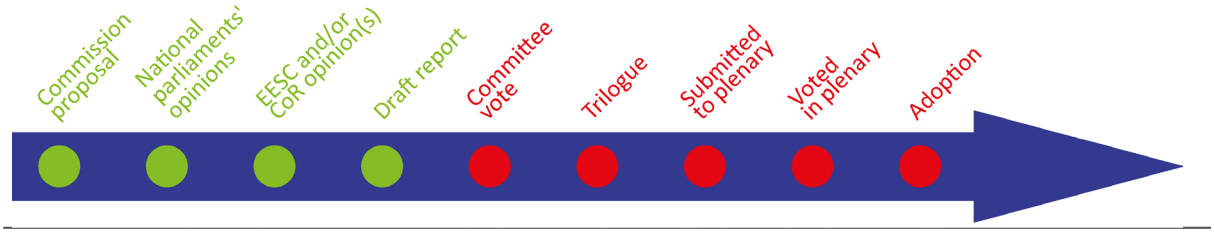
Ever since the General Data Protection Regulation (GDPR) became applicable in May 2018, the European Parliament and civil society organisations have been flagging deficits in its enforcement and pushing for better implementation, but little has changed. To address the situation, in July 2023 the Commission tabled a proposal aimed at improving GDPR enforcement.

The proposal seeks to support the smooth functioning and timely completion of enforcement procedures in cases of cross-border processing. To this end, the Commission suggests harmonising parties' procedural rights, streamlining and frontloading cooperation among supervisory authorities, and detailing the GDPR's dispute resolution mechanism.

Views on the Commission proposal diverge. Digital rights organisations advocate for enhanced complainant rights, an equal say for the lead supervisory authority and the supervisory authorities concerned on the substance of enforcement decisions, a stronger role for the European Data Protection Board (EDPB), new mechanisms to facilitate cross-country enforcement, and stricter deadlines. Industry and allied organisations favour increased transparency for the parties under investigation, a stronger role for the lead supervisory authority and lesser roles for the supervisory authorities concerned and the EDPB.

The Parliament and the Council are in the process of assessing whether the Commission's proposal presents an adequate response and are working on their respective positions.

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		
Committee responsible:	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2023) 348 4.7.2023
Rapporteur:	Sergey Lagodinsky (Greens/EFA, Germany)	2023/0202(COD)
Shadow rapporteurs:	Axel Voss (EPP, Germany) Petar Vitanov (S&D, Bulgaria) Yana Toom (Renew, Estonia) Beata Kempa (ECR, Poland) Clare Daly (The Left, Ireland)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Committee vote	



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Author: Hendrik Mildebrath
Members' Research Service
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Introduction

While the GDPR strengthened the powers of supervisory authorities (SAs), also known as data protection authorities (DPAs), their enforcement actions do not appear to be delivering on the promise of stronger data protection. According to reports from **civil society organisations**, including the Irish Council of Civil Liberties (ICCL), the European Center for Digital Rights (NOYB), Access Now, and the European Consumer Organisation (BEUC), the GDPR is suffering from serious enforcement deficits. Large tech companies are said to apply the letter but not the spirit of the law, and some regionally competent SAs are said to endorse or shield their behaviour. Reportedly, this is particularly the case with Luxembourg's Commission Nationale pour la Protection des Données, and Ireland's Data Protection Commission (DPC), which oversee the personal data processing of the world's top four technology firms in terms of market capitalisation. **Other SAs** and the **European Parliament** have also criticised the DPC's enforcement practices.

In response, the **DPC** has firmly rejected such narratives, stating that it 'is undertaking by far the biggest number of large-scale cross-border investigations and is holding the relevant controllers to account in that connection'. A 2023 DPC report reveals that 75 % of all cross-border complaints principally handled by the DPC had been concluded by 30 April 2023. Nevertheless, **civil society organisations**, such as ICCL and NOYB, insist that no one should be 'fooled' by record fines (on Amazon and Meta) and high conclusion rates: a record penalty of €1.2 billion is of little consequence for a company making a net profit of more than €21.5 billion (US$23 billion) in 2022. Proceedings to implement this fine took 10 years and cost an estimated €10 million. Moreover, many decisions amount to mere reprimands (83 % of the cases concluded in 2022), and appeals prevent the DPC from collecting fines. **Advocate General Michal Bobek** considers that the assumption of under-enforcement is 'hypothetical and unsubstantiated', but says that if fears were to materialise, the system would be ripe for a 'major revision'.

Background: The GPDR's public enforcement mechanism

The GDPR provides for both **private** and **public** GDPR enforcement mechanisms, and the Member States national laws duly reflect this setup. The proposal aims to improve the latter. According to the decentralised public enforcement system, Member States have set up data protection authorities to supervise and monitor the application of data protection laws in their territories (Article 57 GDPR). These SAs may launch compliance investigations *ex officio* or upon receiving a complaint. According to Article 58 GDPR, SAs have investigative, corrective, authorisation and advisory powers. For severe violations listed in Article 83(5) GDPR, SAs can impose fines of up to €20 million, or 4 % of the total worldwide turnover of the party at fault, whichever is higher. They can also impose temporary or definitive limitations, including a ban on data processing, or initiate legal proceedings. Adversely affected parties can launch judicial proceedings against an SA's decision, and complainants can litigate against SAs for failing to act.

The general rule is that SAs are competent on the territory of their own Member State, but where data controllers or processors are established or process data in more than one Member State, SAs should cooperate and adopt shared decisions (**'one-stop-shop mechanism'**). Pursuant to Articles 56 and 60 GDPR, the SA of the Member State where an operator's main establishment is located is responsible for coordinating the supervisory efforts and is called the 'lead supervisory authority' or LSA. The LSA is obliged to cooperate with the 'supervisory authorities concerned' (CSAs) within the meaning of Article 4(22) GDPR. Article 60(1) GDPR obliges the LSA and the CSAs to exchange '**relevant information**' throughout the entire one-stop-shop cooperation procedure. European Data Protection Board (EDPB) guidance stipulates that this must occur 'in a timely manner, i.e. as soon as reasonably possible'. The LSA must draft a decision that takes into account the early views expressed by the CSAs, and then submit it to the CSAs for their opinion 'without delay'. This '**draft decision**' corresponds in form and content to the final decision and would, in principle, aim to act on a complaint or own-initiative inquiry, to dismiss or reject a complaint, or to (where

appropriate) close a case without a final decision. While the latter objective is arguable, the EDPB explains that, including where the LSA intends to close the case, the draft decision serves as a final coordination between all SAs involved. Ultimately, this 'one-stop-shop mechanism' allows operators to deal with a single SA in cross-border data protection cases, whereas individuals can contact their local SA for answers.

The CSAs can challenge the draft decision by raising a 'relevant and reasoned objection'. Depending on whether the LSA intends to follow, reject or contravene the objection, it may need to take additional steps to find consensus and resolve persisting disputes before the competent SA can adopt the final decision. Where the **CSAs do not raise any objections**, the draft decision becomes binding and the competent SA adopts the final decision pursuant to Articles 60(7)-(9) GDPR. If the **LSA rejects a CSA's objection** as not being 'relevant or reasoned' or decides to contravene its substance, the LSA is obliged to initiate a formal dispute resolution mechanism pursuant to Articles 60(4) and 65(1)(a) GDPR. Finally, if the **LSA sustains an objection**, it needs to revise the draft accordingly and (re)consult the CSAs like before, with a 2-week, instead of a 4-week consultation period (Article 60(5) and (4) GDPR).

As in the first consultation, depending on whether the CSAs raise objections and how the LSA decides to address these, the competent SA must transpose the revised draft decision in a final decision or the LSA must initiate the dispute resolution procedure or submit a newly revised draft to the CSAs for consultation. Such additional consultations should remain exceptional, not least because 'it can be argued that it was not the intention of the legislator to promote an indefinite loop of revised draft decisions'. Ultimately, this phase ends with a draft decision becoming binding absent objections ('consensus') or with the EDPB taking a binding decision under the dispute resolution mechanism.

If the LSA decides to reject or contravene the objections raised by one or more CSAs, or if there are conflicting views about who is the lead authority, the matter must be subjected to the dispute resolution procedure, which is part of the **consistency mechanism** (Article 63 GDPR). The **dispute resolution procedure** is primarily a 'conflict-solving mechanism, to avoid problems where the views of the SAs in a specific case diverge'. In its dispute resolution decision, the EDPB will only take a stance on issues raised by objections that are 'relevant and reasoned'. In principle, the EDPB must adopt a decision by a two-thirds majority of its members, regardless of whether they are present or not, within 1 month following the referral (save extension). If the EDPB is unable to adopt a decision within the extended timeframe, it has an additional 2 weeks to adopt it by a simple majority of its members. This decision must be addressed to the relevant SAs and is binding on them. The LSA and/or CSAs must adopt a final decision based on the EDPB binding decision.

The LSA is exclusively responsible for closing the case or for adopting the **final decision**, except where a complaint is fully or partially 'rejected' or 'dismissed' (Article 60(8) GDPR). The complaint-receiving SA is responsible for adopting a decision that rejects or dismisses the complaint in its entirety or aspects thereof (Article 60(8) and (9) GDPR). Where the LSA adopts a decision to act, it needs to 'notify' the decision to the main or single establishment of the adversely affected party (the controller or the processor). Additionally, in complaint-based procedures, the complaint-receiving SA must 'inform' the complainant. Where the complaint-receiving SA rejects or dismisses a complaint, it must 'notify' the complainant (the adversely affected party) and 'inform' the controller.

The **urgency procedure** under Article 66 GDPR allows CSAs to derogate from the one-stop-shop cooperation procedure and the consistency mechanism, if they consider that there is an urgent need to act in order to protect the rights and freedoms of data subjects. Under this procedure, CSAs can adopt provisional measures that produce a legal effect for up to 3 months and are limited to their own jurisdiction. Where the CSA considers that a final measure is necessary, it may, in a second stage, request the EDPB to give an urgent opinion or an urgent binding decision. Alternatively, any SA can directly request the EDPB to do so under Article 66(3) GDPR. The competent SA would have

to adopt its final decision (Article 60(7)-(9) GDPR) taking into account the EDPB's urgent opinion or urgent binding decision 'within a very limited timeframe set by the EDPB on [a] case-by-case basis'.

Existing situation

A review of contributions by stakeholders and academics reveals functional flaws in the multi-level cooperation and consistency procedures of the GDPR. Below is a (non-exhaustive) list of these flaws.

- SAs give individuals limited information on the lodging, handling and contesting of complaints, thereby making it more difficult for them to claim their right to data protection.
- Compared to centralised enforcement, the GDPR decentralised enforcement mechanism is complex and cumbersome, and thus remedies for individuals take longer to materialise.
- An LSA may intentionally obstruct the adoption or execution of contestable administrative decisions by misusing its procedural role and functions (e.g., it may act as a bottleneck to defend its own legal convictions or shield businesses).
- SAs may fail to perform their cooperation duties and functions due to insufficient resources.
- SAs may dodge deadlines and peer pressure through informal cooperation.
- SAs do not build consensus at an early stage and thereby increase the likelihood of entering into (an otherwise avoidable) dispute resolution procedure.
- When businesses move their main establishment mid-procedure, the jurisdiction changes and the pending procedure is transferred to the newly competent SA.
- SAs do not involve the parties sufficiently and early enough, and thereby: a) miss the opportunity to correct and calibrate investigations, b) fail to duly afford the parties their procedural rights (in particular, the right to be heard) and c) render outcomes vulnerable to legal challenges.
- SAs experience difficulties in seizing assets located in other Member States and some SAs reject opening investigations whenever such assets are involved.
- The majority of SAs may favour and assert a suboptimal enforcement strategy (arguably, SAs do not sufficiently prioritise 'constructive engagement' and joint problem solving with industry players as opposed to imposing sanctions).

These flaws interfere, in different ways, with GDPR policy objectives (e.g. 'strong enforcement'), the right to good administration, the principle of sincere cooperation, the right to be heard and, where national law significantly complicates effective cooperation, the principles of effectiveness.

Parliament's starting position

In a March 2021 resolution on the Commission's 2-year GDPR implementation report, Parliament urged 'the Commission to assess whether national administrative procedures hinder the full effectiveness of cooperation as per Article 60 of the GDPR as well as its effective implementation'. It expressed concern about 'the length of case investigations by some SAs', the functioning of the one-stop-shop mechanism (particularly the role of the Irish and Luxembourgian SAs), and about many SAs being 'understaffed, under-resourced and lack a sufficient number of information technology experts'. In a May 2021 resolution on the *Schrems II* ruling, Parliament called on the Commission to start infringement procedures against Ireland for failing to enforce the GDPR properly.

Preparation of the proposal

The proposal draws on the Commission's 2020 GDPR implementation report, the EDPB's 'wish list' of procedural aspects, insights from two GDPR-related expert groups, and feedback the Commission received during its public consultations. The Commission did not carry out an impact assessment, arguably because '[t]he proposal does not affect the rights of data subjects, the obligations of data controllers and processors, nor the lawful grounds for processing personal data ...'.

The changes the proposal would bring

Justice Commissioner Didier Reynders indicated that the proposal aims to 'better protect Europeans' right to privacy, provide legal certainty to businesses, and streamline cooperation between data protection authorities'. The Commission added that '[t]he rules will ... bring swifter resolution of cases, meaning quicker remedies for individuals' and that the proposal would harmonise the procedural rights of both the complainants and the parties under investigation. On a technical level, the Commission clarifies in the proposal's explanatory memorandum that 'the impact of the proposal will be limited to enhancing the functioning of the cross-border enforcement procedure laid down by the GDPR'. Consequently, it relies on the scope and basic functioning of the cooperation and consistency mechanism. Like the current system, the modified system would depend on the means and will of SAs to enforce the GDPR and to intervene against flawed enforcement approaches of fellow SAs. The proposal does not address issues such as substantive GDPR ambiguities, lack of SA funding, cases without a cross-border dimension, or other enforcement obstacles unrelated to the designated administrative procedure. It is worth noting that the proposal is not a tool for rectifying the flaws listed above and delivering more effective and convenient data protection in practice. On the contrary, according to a critical reading, it would empower LSAs to disregard CSA interventions, which may enhance procedural efficiency at the cost of the rule of the SA majority and, possibly, substantive accuracy of enforcement decisions.

In its proposal (GDPR-PR), the Commission recommends:

- streamlining the filing and initial handling of complaints (Chapter II);
- introducing a scoping exercise at an early stage in the cooperation procedure, during which SAs would exchange views and partially co-determine the investigation strategy and provisional assessments (Chapter III, Section 1);
- narrowly defining what qualifies as 'relevant and reasoned objections' and thereby limiting the range of disagreements warranting dispute resolutions, not least to exclude points raised in the early scoping exercise (Chapter III, Section 4);
- explicitly affording parties the right to be heard before authorities take decisions that may adversely affect them indirectly or otherwise concern them. These rights would be regulated separately for parties under investigation and for complainants, depending on whether the authority intends to consult CSAs on a draft decision rejecting a complaint (Chapter III, Section 2, and Chapter V) or finding an infringement (Chapter III, Section 3, and Chapter V);
- explicitly granting the parties access to certain documents and safeguarding confidentiality where appropriate (Chapter IV);
- (arguably) restricting the territorial and personal scope of urgent opinions and urgent binding decisions under Article 66(2) GDPR (Chapter VI).

Chapter II proposes rules on the **submission and handling of complaints**, including admissibility criteria for complaints and their initial handling; factors that SAs must consider when deciding to what extent a complaint should be investigated; a basic procedure for amicable settlements; and responsibilities for the translation of documents. For cross-border cases, SAs would have to seek certain mandatory and supplementary information through a dedicated complaint form. Pursuant to Recital 4 GDPR-PR, the SA should only treat a complaint as a complaint within the meaning of Article 77 GDPR if it meets the admissibility criteria. No additional information should be required to deem a complaint admissible. It is worth considering whether there is a need to clarify how these admissibility criteria would interplay with the national admissibility criteria or whether the admissibility criteria should be harmonised.

According to the EDPB, 'individuals hold the right to have every complaint (if admissible) handled and investigated to the extent necessary to reach an outcome appropriate to the nature and circumstances of that complaint'. Both the EDPB and the Commission consider that '[i]t falls within the discretion of each competent authority to decide the extent to which a complaint should be investigated' (Recital 6 GDPR-PR). Article 4 GDPR-PR prescribes a set of factors that SAs must

consider when determining the extent and depth of their investigations. According to Recital 6 GDPR-PR, 'reaching an effective and quick remedy, may not require exhaustively investigating all possible legal and factual elements arising from the complaint'. While this is true and SAs lack the resources to investigate every complaint exhaustively, it is worth considering a more nuanced formulation to prevent unjustified reliance on this clause.

Chapter III proposes rules that aim to enhance the one-stop-shop (OSS) cooperation mechanism in a way that a) fosters early information sharing and consensus building among SAs; b) gives adversely affected parties the opportunity to express their views prior to the submission of a draft decision and/or revised draft decision; and c) makes the processing of 'relevant and reasoned objections' more feasible for SAs (as it requires less resources) and more efficient overall. The Commission proposes introducing an early scoping exercise among SAs (**Section 1**), separately regulating the adversely affected parties' right to be heard depending on the enforcement procedures' trajectory – towards rejecting a complaint (**Section 2**) or towards establishing an infringement (**Section 3**) – and narrowly defining what qualifies as 'relevant and reasoned objections' (**Section 4**).

In **Section 1** of **Chapter III**, the Commission proposes a procedure that encourages early and repeated exchanges of views and documents to promote (incremental) consensus building. As mentioned earlier, Article 60(1) GDPR provides that the LSA and the CSAs are mutually obliged to exchange 'relevant information' throughout the entire OSS cooperation procedure. Once the LSA has formed a 'preliminary view' on the main issues of an investigation, it would have to draft a **'summary of key issues'** consisting of its preliminary findings and views (Article 9(1) and (2) GDPR-PR) and share the document as part of the 'relevant information' with the SAs concerned (Article 8(2)(e) GDPR-PR). The CSAs can 'comment' on these points and must engage in enhanced cooperation where disagreements arise on qualified key issues (Article 10(1)-(3) GDPR-PR). Where in a complaint-based investigation no consensus is reached on the preliminarily identified scope of the investigation, Article 10(4)-(6) GDPR-PR provides that the LSA would have to request the EDPB to take an urgent binding decision under Article 66(3) GDPR. This mechanism aims to resolve disagreements on the scope swiftly and effectively, without pre-empting the outcome of the LSA's investigation (Recital 16 GDPR-PR).

In **Section 2**, the Commission proposes to regulate the complainant's right to be heard for cases in which the LSA intends to **fully or partially reject the complaint**. If the LSA forms the 'preliminary view' to fully or partially reject the complaint, it would have to share its 'reasoning' with the complaint-receiving SA (Article 11(1) GDPR-PR). The complaint-receiving SA would have to inform the complainant of the LSA's intention to reject the complaint and the underlying reasoning and give the complainant at least 3 weeks' time to express its views (Article 11(2) GDPR-PR). The complainant may also request access to the non-confidential version of the supporting documents (Article 11(4) GDPR-PR). If the complainant does not share its views within the given time limit, the SAs would have to treat the complaint as withdrawn (Article 11(3) GDPR-PR). If the complainant expresses its views but these do not overturn the SA's preliminary view, then the complaint-receiving SA would have to prepare the draft decision, which the LSA would have to submit to the CSAs under Article 60(3) GDPR (Article 11(5) and Recital 19 GDPR-PR).

Under **Section 3**, when an LSA intends to submit a 'draft decision' that contains **findings of one or more infringements of the GDPR**, it would first have to draft 'preliminary findings' and submit them to the **parties under investigation** and (in complaint-based procedures) to the **complainants** so they can express their views (Articles 14 and 15 GDPR-PR). After an adequately set time limit expires, the LSA may disregard any written contributions from the parties under investigation. The Commission considers that an investigation by an SA does not constitute an adversarial procedure, so the **parties under investigation** and the **complainant** are 'not in the same procedural situation when the decision does not adversely affect her or his legal position' and the complainant should not have access to confidential information (Recitals 25 and 26 GDPR-PR). Consequently, the complainant would receive a non-confidential version of the 'preliminary findings' and would have to commit formally to confidentiality.

The CSAs could challenge 'draft decisions' with '**relevant and reasoned objections**' within 4 weeks of being consulted (Article 60(4) GDPR). The newly proposed Article 18 GDPR-PR in **Section 4** suggests (*e contrario*) excluding certain points of contention from qualifying as 'relevant and reasoned objections'. More specifically, the proposal would exclude points that change or expand the scope of allegations, as well as points not 'based exclusively on factual elements included in the draft decision'. In the spirit of procedural efficiency, the investigation's scope and the relevant facts should be determined in the early scoping exercise (Recital 28, fourth sentence, GDPR-PR). This would narrow the chances of an EDPB dispute resolution compared with current practices. The early scoping exercise would not compensate for this loss of CSA power. Empowering the LSA to disregard CSA concerns without entering into EDPB dispute governance would curtail the rule of the SA majority and possibly challenge the substantive accuracy of enforcement decisions.

The proposal would also afford the adversely affected parties a **right to be heard** both before the **LSA submits a revised draft decision** (incorporating the objections) to the CSAs and before the **EDPB resolves a dispute** resulting from the LSA's rejection or contravention of the CSA's objections (Articles 12(1), 17 and 24 and Recital 18 GDPR-PR). Unlike in the preceding step relating to hearings prior to consulting on draft decisions (Articles 14 and 15 GDPR-PR), the proposal does not grant the **complainant** a right to be heard concerning new elements in cases where the LSA intends to submit a revised 'draft decision' that contains **findings of one or more infringements of the GDPR** (Article 17 GDPR-PR). Contrary to the EDPB guidelines, the proposal's Article 24 mandates that the EDPB should systematically hear the parties under investigation and, when intending to reject a complaint, the complainant before adopting a dispute resolution pursuant to Article 65(1)(a) GDPR.

Chapter VI proposes rules for the second phase of the two-stage urgency procedure (Article 66(1) and (2) GDPR) and separately addresses the procedures of seeking an **urgent opinion** (Article 27 GDPR-PR) and seeking an **urgent binding decision** (Article 28 GDPR-PR). The proposal appears to suggest restricting the territorial and personal scope of urgent opinions and urgent decisions to the requesting SA and its territory (Articles 27(1)(c) and (2) and 28(1)(d), (2) and (3) GDPR-PR). This is worth reconsidering. Moreover, further clarity is needed as regards under what conditions and for what purpose SAs could use the urgency procedure throughout the administrative procedures laid out in the proposal, and as regards the legal effect of urgent opinions (Article 26(1)(c) GDPR-PR).

Advisory committees

The **European Economic and Social Committee** opinion raised concerns over the filing and initial handling of complaints, procedural rights and sparse deadlines. The European Committee of the Regions decided not to produce an opinion.

National parliaments

The deadline for national parliaments to complete their subsidiarity checks was 6 October 2023. The **Swedish Parliament (Riksdag)** does not question the need for better regulation at Union level as regards cross-border GDPR procedures but considers that the proposal is not, in all its parts, compatible with the principle of subsidiarity. It highlights that certain parts of the provisions on access to official documents are difficult to reconcile with Swedish constitutional and administrative law. The **German Federal Parliament's upper house (Bundesrat)** welcomes the efforts to improve cross-border GDPR enforcement but stresses that the proposed regulation would interfere with Member States' procedural autonomy. The Bundesrat would therefore prefer a directive instead of a regulation. It also calls on the Commission to investigate whether the scope of the legislative act could be limited to 'large' cases, making it possible to resolve regular cases flexibly without having to adhere to static procedural rules. It also cautions of the risk that the proposal may not achieve its objective, given that it does not set any persuasive duties and deadlines for the LSAs despite the fact that they are often perceived to be the bottlenecks, yet burdens CSAs with additional tasks (such as translations) and restricts their possibilities to intervene. Finally, the Bundesrat rejects certain

limitations on the complainants' rights, including a) that a complaint would be deemed withdrawn absent a timely reaction by the complainants; b) the obligation to reveal their identity; and c) complainants' weaker position compared to parties under investigation.

Stakeholder views

Digital rights advocacy organisations such as the European Center for Digital Rights (NOYB), the European Digital Rights network (EDRi) and AccessNow advocate for enhanced complainant rights, equal say of the LSA and CSAs on the substance of enforcement decisions (LSA as primus inter pares), a stronger role for the EDPB, mechanisms to facilitate cross-country enforcement and stricter deadlines. **Industry and allied organisations**, such as the Information Technology Industry Council (ITI), DigitalEurope and the Centre for Information Policy Leadership (CIPL), favour increased transparency for parties under investigation, a stronger role for the LSA and less significant roles for CSAs and the EDPB.

Filing a complaint: **NOYB** advocates a lenient interpretation and harmonisation of complaint admissibility criteria allowing complainants to lodge complaints more easily and with the same prospects across the EU. **ITI** considers that enforcement action should only be taken as a last resort and favours a 'hierarchy of resolution mechanisms'. Specifically, complainants should be required to exhaust the reasonable internal processes of an organisation ('company complaint mechanisms') before being able to submit the matter to an amicable resolution processes and, finally, to an SA.

Procedural rights: Drawing on Article 41 of the EU Charter of Fundamental Rights, **NOYB** suggests adopting a set of clear procedural minimum standards that SAs would have to grant parties in cross-border procedures. These would include the right to access (a non-confidential version) of all documents, the right to be heard before any measure that adversely affects the party is taken, and the right to appeal any decision. For cases where complainants and data controllers enjoy substantially different procedural rights under their respective national laws (with standards exceeding the envisioned minimum standard), NOYB suggests applying the more protective standard to both parties (across jurisdictions and, presumably, across procedural roles).

ITI considers it necessary that the **parties under investigation** be given the opportunity to provide their views on the summary of key issues so they may provide the relevant background information for determining the scope and approach. Additionally, **ITI**, **CIPL** and **DigitalEurope** contend that investigated parties should be granted proportionate and reasonable time for submitting their views and the ability to make oral statements, notably under Articles 14(4), 17(2) and 21(6) GDPR-PR. **ITI** appreciates that the proposal grants parties under investigation a right to be heard before the EDPB adopts a dispute resolution (Article 24 GDPR-PR) but contends that 1 week is not sufficient to react to new points raised by the EDPB. Additionally, the EDPB should proactively disclose the documents in its files and its preliminary factual and legal position to the investigated parties.

ITI considers that the parties under investigation should be granted access to the correspondence and exchange of views between the LSA and the CSAs as well as to any 'relevant and reasoned objections' in dispute resolution procedures. Additionally, it advocates for adding sanctions for deliberate breaches of confidentiality as a deterrent, among other things to prevent strategic leaks to the media. Additionally, it recommends obliging LSAs to return documents that are irrelevant to the subject matter of the investigation. **DigitalEurope** adds that confidential files should remain excluded from access requests under laws on public access to official documents even after the case is closed (Article 21(2) GDPR-PR).

Cooperation procedure: **NOYB** considers that SAs should determine the pertinent jurisdiction and the competent LSA at an early stage in the procedure. To create legal certainty and to prevent parties under investigation from thwarting procedures by moving or merging, an SA's self-declaration as an LSA would become permanent, unless parties contest it within 2 weeks.

In the spirit of procedural efficiency, NOYB recommends promoting early cooperation and resolving disputes quickly and consistently at an early stage. The LSA should exchange views and preliminary

results with CSAs prior to consulting them on a draft decision. CSAs would be able to contest incorrect early-stage 'procedural determinations' by the LSA (e.g. errors such as adoption of an excessively narrow scope of investigations or failure to investigate) before an EDPB sub-committee.

NOYB asks for provisions specifying that CSAs can access all documents compiled by the LSA throughout the procedure and that the LSA would have to include all documents in a (joint) case file. To prevent SAs from dodging deadlines through informal or amicable cooperation, NOYB recommends obliging them to use formal cooperation methods and to use their administrative powers to the full. It further recommends accounting for different sizes of procedures through special rules that complement and adjust the standard procedures. NOYB proposes an expedited procedure for 'minor cases', whereas for 'major cases' it suggests extended deadlines and enabling the LSA to request resources from other SAs, the EDPB and the EDPB's secretariat.

ITI proposes subjecting SAs to a specific duty of cooperation but excluding CSAs from co-determining the scope of the investigation. It recommends safeguarding the LSA's independence and its discretion in how to treat complaints and what to investigate. **CIPL** elaborates that AG Bobek too has emphasised the dominant role of the LSA. However, in the cited case, both the AG and the CJEU held that the LSA cannot eschew essential dialogue and cooperation with CSAs. The AG even pointed out that the GDPR contains mechanisms to 'overcome situations of administrative *inertia*' (caused by the LSA). Additionally, an academic contribution and the EDPB guidelines raise doubts about limiting cooperation duties based on the requirement to maintain the independence of SAs.

Dispute resolution procedure: **NOYB** advocates for a broad definition of 'relevant and reasoned objections' (assumption of a 'significant risk' under Article 4(24) GDPR). This would extend the range of disagreements warranting dispute resolution compared with the proposal. On the other hand, **ITI** considers that the thresholds for raising objections against draft decisions (Article 60(4) GDPR) and for the preliminary identification of the scope (Article 10(4) GDPR-PR) are too low and thereby increase the number of referrals to the EDPB. It would exclude disagreements over the LSA's findings that no infringement occurred from qualifying as a 'relevant and reasoned objection'. In the same vein, **CIPL** considers that referring the matter to the EDPB for an urgent binding decision under Article 10(4) GDPR-PR would further dilute the one-stop-shop mechanism. Similarly, **DigitalEurope** is concerned that the EDPB would predetermine the LSA's fact-finding investigations and sanctions.

NOYB suggests that if the EDPB cannot rely on the case file for taking its binding decision, it may request the SAs to gather additional information; conduct its own investigations; or conduct an oral hearing of the parties. NOYB would also welcome empowering the EDPB to directly enforce its decisions against SAs that defy them.

NOYB proposes introducing a standing EDPB sub-committee that would decide on ('smaller') disputes between SAs and disputes on 'procedural determinations'. The EDPB could delegate certain additional tasks to this sub-committee. Besides SAs, parties too would be able to apply to the sub-committee where procedures 'get stuck' or where SAs violate the one-stop-shop cooperation mechanism or the urgency procedure to the detriment of the parties.

ITI recommends that the regulation should provide for an appeal procedure against EDPB dispute resolution decisions, as these have direct legal effect on the party under investigation. Similarly, **CIPL** considers that the party under investigation should be able to challenge the facts, law, or merits of the case in court. It should be noted that the General Court appears to reject this notion as it dismissed an action by WhatsApp against an EDPB dispute resolution decision on the grounds that WhatsApp (unlike the SAs addressed by the dispute resolution) is not directly concerned by the binding decision in question. WhatsApp is appealing the case.

Timelines: **NOYB** advocates for a range of strict deadlines. This would grant the parties the right to receive a legally binding decision within 6 months of the opening of the procedures. SAs and the EDPB could extend deadlines for 'procedures of special relevance' and in 'exceptional cases'.

Amicable settlements: **ITI** and **CIPL** ask for more clarity on the envisioned amicable settlement process and insist on its availability at all stages of the procedure. **DigitalEurope** recommends that the possibility of amicable decisions in ex-officio cases should be specified.

Final decisions (adoption, communication and publication): To ensure a judicially contestable outcome, **NOYB** considers that the competent SA should always be required to issue a formal decision, including when rejecting, dismissing or closing a complaint. Additionally, SAs should not be able to escape adopting a formal decision or respecting a complainant's procedural rights by way of launching an ex-officio procedure instead of or next to a complaint-based procedure. In the same vein, no amicable procedure would be possible without the complainant's prior agreement. NOYB suggests obliging the competent SA to transmit a copy of the full decision and mention options for appeal. All SAs would have to publish their final decisions. Because controller assets are often in another Member State, NOYB recommends introducing cross-country enforcement mechanisms.

Academic views

Gentile and **Lynskey** argue that under-enforcement by certain SAs is a symptom of the broader deficiency of the GDPR enforcement framework and that the GDPR could do more to facilitate cross-border enforcement. Where situations cannot be resolved within the existing framework, a) the Commission could initiate infringement proceedings; b) the CJEU could interpret the cooperation and consistency mechanisms in light of the fundamental rights or assess its validity against the EU Charter of Fundamental Rights; and/or c) the co-legislators could harmonise procedural rules based on the ReNEUAL 2.0 principles on good administration. They consider that it is particularly important to enable complainants to participate in procedures and to harmonise the procedures applicable domestically when SAs engage in cooperation and consistency mechanisms. They also propose carefully considering whether to empower the EDPB to handle cross-border complaints.

Hofmann and **Mustert** propose harmonising crucial parts of the enforcement procedures and reviewing whether to grant the EDPB more direct enforcement powers in cases of significant importance. In a recent publication, they explicitly recommend strengthening the SAs' possibilities to exercise 'peer pressure' and vesting the EDPB 'with powers to initiate dispute resolution when national decisions are not taken within a particular time frame, to request information from data controllers or processors where the SAs fail to do so, and to allow the EPDB to conduct a follow-up review as to the implementation of its decisions'. They envision a 'dual approach', where enforcement in cases with an EU-wide dimension is centralised within the remit of an EU agency (e.g. an upgraded EDPB), while local cases continue to be addressed by national SAs. In the same vein, former EU Justice Commissioner Viviane Reding, the EDPS, the German SA, other scholars and EU citizens indicate that they would prefer a more centralised enforcement mechanism. Current EU Justice Commissioner Didier Reynders notes calls for centralisation but prefers strengthening the existing decentralised model, not least to avoid reopening the GDPR for revision.

Drawing on experience from other regulatory environments, **Hodges** suggests adequate 'enforcement policies' are the key to better enforcement and more compliance. Although his approach mainly focuses on best practices and regulatory strategies ('enforcement policy'), as opposed to procedural law, it opens up new perspectives and methods for improving the practical implementation of data protection rules. SAs should prioritise constructive engagement and joint problem solving over sanctions – which should remain the last resort after other options have been exhausted. Notwithstanding, Hodges recognises that SAs would need to segment organisations based on their trustworthiness and motivation and treat them accordingly. He recommends that SAs should streamline their enforcement policies and make them consistent and predictable across jurisdictions and sectoral regulations. Finally, he advocates for an industry-financed yet independent ombudsman system to process complaints under approved codes of conduct. Such a system would provide organisations with feedback and complainants with quick, cheap and effective redress. In a reaction to Hodges, **Hijmans** points out that a) strong sanctions are indispensable, not least for incentivising investment in data protection; b) regulators and regulatees

may not agree on what constitutes 'doing the right thing'; c) other stakeholders such as civil society and the government should be engaged in promoting ethical behaviour ('constructive engagement'); and d) an ombuds-system deserves more thought, not least because it would enable SAs to perform (cooperative and other) tasks in a strategic manner. As disclosed in their articles, both commentators had contributed to a thematically related discussion paper by **CIPL**. Like Hodges, the Irish **DPC** recently called into question the premise that fines present an effective enforcement measure. Contrary to Hodges, the 2023 **AWO** study on digital advertising advocates strong enforcement. Similarly, other commentators call for stricter enforcement where appropriate.

Legislative process

Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), in charge of the file, published its draft report on 9 November 2023, The rapporteur, Sergey Lagodinsky (Greens/EFA, Germany), suggests fundamental changes to the structure and substance of the proposal. He proposes introducing a **new general part** containing rules that would apply throughout the entire administrative procedure (new Section 2 in **Chapter 1**). It would consist of provisions on: a) the application of national procedural law (for interactions between SAs and parties); b) minimum procedural guarantees for parties; c) sincere and effective cooperation between SAs; and d) language and translation requirements. **Procedural minimum standards** would include 'fair procedure and equality of arms', 'right to be heard', and 'procedural transparency'. SAs would have to treat parties equally, give them an opportunity to express their views (including when novel issues arise) and grant them access to the joint case file (but not to any 'internal deliberations'). The **rules on cooperation between SAs** should enable any SAs to declare themselves 'concerned' and to participate in the case. These rules should also introduce an electronic 'joint case file', to be managed by the LSA, and would oblige the LSA to attempt reaching an early consensus where diverging views arise or can be expected.

Chapter 2 on **complaints and ex-officio procedures** would set out (new) rules for: a) lodging and handling complaints; b) deciding the extent appropriate to investigate a case; c) settling complaints amicably; and d) requesting the LSA to carry out an ex-officio procedure (the request would be lodged by the CSA). Certain compulsory information would have to be submitted when lodging a complaint (as opposed to using a dedicated complaint form), handling of complaints should always lead to a legally binding decision, the LSA would have to deliver a draft decision within 9 months of receiving the complaint, and an amicable settlement would not be binding on the competent SA.

In **Chapter 3** on **the one-stop-shop mechanism**, the draft report generally maintains but also modifies the rules on 'summary of key issues' and 'preliminary finding'. Generally, the LSA would have to provide SAs and the EDPB with instant, unrestricted and continuous remote access to the full joint case file. Where the LSA and CSAs do not agree on matters contained in the 'summary of key issues', they could request a 'procedural determination' from the EDPB. Following this procedure, the LSA would need to draft 'preliminary findings' and notify them to the parties, if it intends to adopt a draft decision 'finding an infringement'. The provision on informing and hearing a complainant before consulting on a draft decision seeking to reject a complaint (Article 11 GDPR-PR) would be deleted and the minimum procedural standards for hearings would apply. The draft decision may 'deal only with allegations ... in respect of which the parties have been given the opportunity to comment'. In principle, supervisory authorities would have to publish all legally binding decisions they issue without undue delay. The rapporteur recommends retaining certain restrictions on the definition of 'relevant and reasoned objections', yet gives SAs the option to request 'procedural determinations' by the EDPB in earlier stages.

The rules on **access to the administrative file in Chapter 4** would be incorporated in the new general part and confidentiality would need to be recognised as a legitimate ground to limit procedural rights. The rapporteur recommends consolidating information and registration duties relating to **dispute resolutions** in a single article in **Chapter 5**. He also proposes empowering the EDPB to: a) request further information and conduct factual investigations where necessary; b) make

'procedural determinations' on any disputes arising during a cooperation procedure; and c) appoint committees to, for instance, make 'procedural determinations'. Parties would be able to seek judicial redress against a complaint-receiving SA that does not act, an LSA that does not comply with deadlines, or an SA does that does not comply with an EDPB binding decision. As regards **urgency procedures in Chapter 6**, the rapporteur would extend the territorial and personal effect of urgent opinions and urgent binding decisions.

The Committee on Legal Affairs (JURI) published its draft opinion on 29 November 2023.

EDPB-EDPS Joint Opinion 01/2023: Under Article 42(2) Regulation (EU) 2018/1725, the Commission consulted the EDPB, following which the latter issued a detailed joint opinion together with the EDPS. Among other recommendations, the two authorities suggest that the LSA should share its 'preliminary findings' and its 'preliminary view' with CSAs before submitting them to the parties under investigation or the complainants. Additionally, regarding certain procedural steps, they recommend prescribing time limits, extendable in duly justified circumstances, to allow quick and efficient enforcement. The legislation should not restrict the CSA's power to 'raise relevant and reasoned objections' to the draft decision. The authorities also urge the co-legislators to uphold the EDPB's current approach in giving effect to the right to be heard during dispute resolution procedures only where necessary, as opposed to mandating that the EDPB must systematically notify a 'statement of reasons' to adversely affected parties so they can express their views. As regards the urgency procedure under Article 66(2) GDPR, the EDPS and EDPB recommend extending the personal and territorial scope of urgency opinions and urgent binding decisions. Finally, the future legislation should facilitate cooperation between national SAs and the EDPS, as underlined by the EDPS in its consultation feedback.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Mildebrath H., A visual presentation of the newly proposed rules to strengthen GDPR enforcement in cross-border cases, EPRS, European Parliament, January 2024.

Mildebrath H., An initial appraisal of the newly proposed rules to strengthen GDPR enforcement in cross-border cases, EPRS, European Parliament, January 2024.

OTHER SOURCES

GDPR: additional procedural rules relating to the enforcement of the Regulation, Legislative Observatory (OEIL), European Parliament.

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eprs@ep.europa.eu (contact)

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