

# A visual presentation of the newly proposed rules to strengthen GDPR enforcement in cross-border cases

## SUMMARY

After years of pressure from civil society organisations and the European Parliament, in July 2023 the Commission tabled a proposal to improve the GDPR cross-border enforcement procedure. The proposal consists of rules that are detailed and innovative, yet also quite complex, especially when dealing with the various phases of the GDPR cooperation and consistency mechanism.

To help convey an in-depth understanding and facilitate a critical discussion, this briefing tabulates the envisaged procedure. In doing so, it shows that a granular approach to promoting harmonisation is possible and that the Commission's approach is worth considering.

Nevertheless, the briefing also highlights various shortcomings of the proposal. These and other aspects are analysed more extensively in two other EPRS publications: an analysis of the newly proposed rules to strengthen GDPR enforcement in cross-border cases, and a legislative briefing on the Commission proposal laying out these rules.



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## Introduction

For years, the European Parliament and civil society organisations have been [flagging](#) General Data Protection Regulation (GDPR) enforcement deficits and pushing for better cross-border enforcement. Their criticism is levelled, in part, at the following aspects:

- supervisory authorities (SAs) do not build consensus at an early stage and thereby increase the likelihood of entering into (otherwise avoidable) dispute resolution procedures;
- certain regionally responsible SAs intentionally obstruct the adoption or execution of an enforcement decision by misusing their procedural role and functions (e.g. they act as bottlenecks to defend their own legal convictions or shield businesses);
- SAs do not involve parties in the procedure sufficiently (early) and thereby: a) miss the opportunity to correct and calibrate investigations; b) [fail](#) to duly afford procedural rights (such as the right to be heard); and c) render outcomes vulnerable to legal challenges;
- the decentralised enforcement mechanism is complex and cumbersome relative to centralised enforcement; it takes longer to deliver remedies to individuals.

In July 2023, just over 5 years after the GDPR became applicable, the Commission tabled a proposal (GDPR-PR-COM) to accelerate and improve the GDPR's decentralised enforcement procedure in cases of cross-border processing. It recommends promoting early and incremental consensus building and regulating parties' right to be heard at a granular level. The diagrams and tables below show how the Commission proposes to modify and streamline current [GDPR practices](#).

Figure 1 – Proposed features of the GDPR enforcement procedure

<b>Phase 0</b>	<b>Initiating the inquiry and determining which SA is lead authority</b>
<ul style="list-style-type: none"> <li>• Streamlining the filing and initial handling of complaints, including by means of a complaint form (Article 3, Chapter II, and Annex)</li> </ul>	
<b>Phase I</b>	<b>Exchanging relevant information and investigating</b>
<ul style="list-style-type: none"> <li>• Introducing a scoping exercise at an early stage, during which SAs exchange their views and partially co-determine the investigation strategy and provisional assessments (Chapter III, Section 1). The scoping exercise mandates consultation, (enhanced) cooperation and, for specific types of disagreements, dispute resolution by the European Data Protection Board (EDPB).</li> </ul>	
<b>Phase II</b>	<b>Reaching a final decision</b>
<ul style="list-style-type: none"> <li>• 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)</li> <li>• Explicitly affording parties the right to be heard before authorities take decisions that may indirectly affect them adversely or otherwise concern them. These rights would be regulated separately for parties under investigation and complainants, depending on whether the authority intends to reject a complaint (Chapter III, Section 2, and Chapter V) or find an infringement (Chapter III, Section 3, and Chapter V) in its decision.</li> <li>• Explicitly granting the parties a right of access to (parts of) the file and safeguarding confidentiality where this is deemed appropriate (Chapter IV)</li> <li>• Explicitly affording parties the right to be heard by the EDPB before it adopts a binding decision as a dispute resolution under Article 65(1)(a) GDPR (Article 24, Chapter V)</li> </ul>	
<b>Phase III</b>	<b>Adopting the final decision</b>
<ul style="list-style-type: none"> <li>• No significant changes</li> </ul>	
<b>Other</b>	<b>Urgency procedure</b>
<ul style="list-style-type: none"> <li>• Restricting the territorial and personal effect of urgent opinions and urgent binding decisions under Article 66(2) GDPR (Chapter VI)</li> </ul>	

## The envisaged procedure in diagrams and tables

Figure 2 – Phase 0: Initiating the inquiry and deciding which is the lead supervisory authority (LSA)

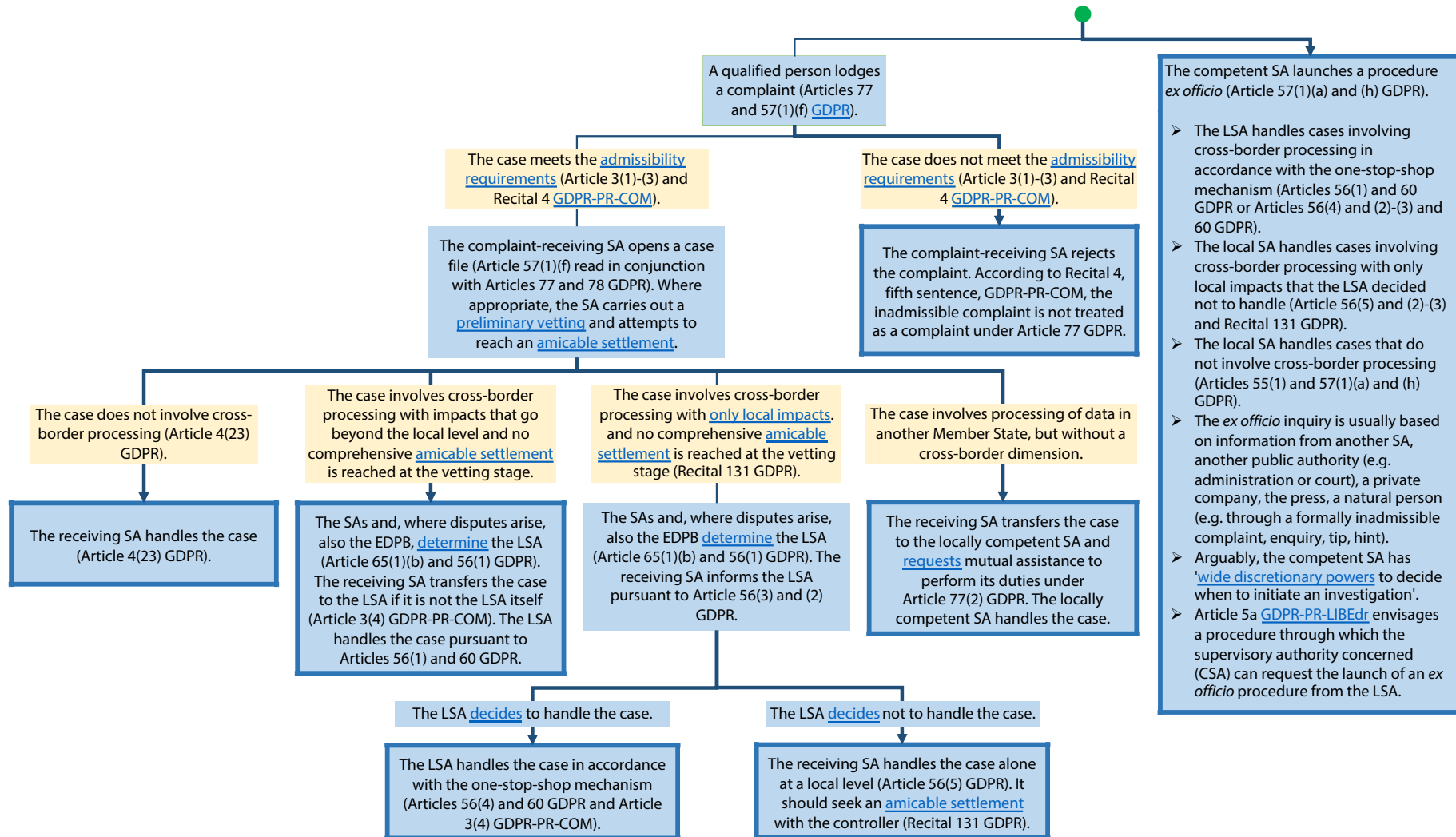




Figure 4 – Phase II: Reaching a final decision

**Step 1:** The LSA or, in the case provided for in Article 11(5) GDPR-PR-COM, the complaint-receiving CSA, draws up the 'draft decision', taking into account investigation results, the views of the parties and any follow-up assessments. Where the LSA finds an infringement, the draft decision is limited to addressing allegations on which the investigated parties have been given the opportunity to comment and to relying on documents cited in 'preliminary findings' or those presented to the parties for their input (Articles 14(6) and 20(3) GDPR-PR-COM). According to the EDPB, the LSA must submit a draft decision in a number of cases, including where 'the complaint is withdrawn ...; there is an amicable settlement; the infringement ceased; the case is to be closed; no action against the controller or processor is envisaged; or where the LSA is not issuing the final decision ...' and 'where no material (final) decision is issued according to national law' or 'when cases are (only) deemed to be withdrawn, e.g. following national law'.

**Step 2:** The LSA consults the CSAs on its 'draft decision' (Article 60(3) GDPR and Articles 11(5) and 14(1) GDPR-PR-COM).

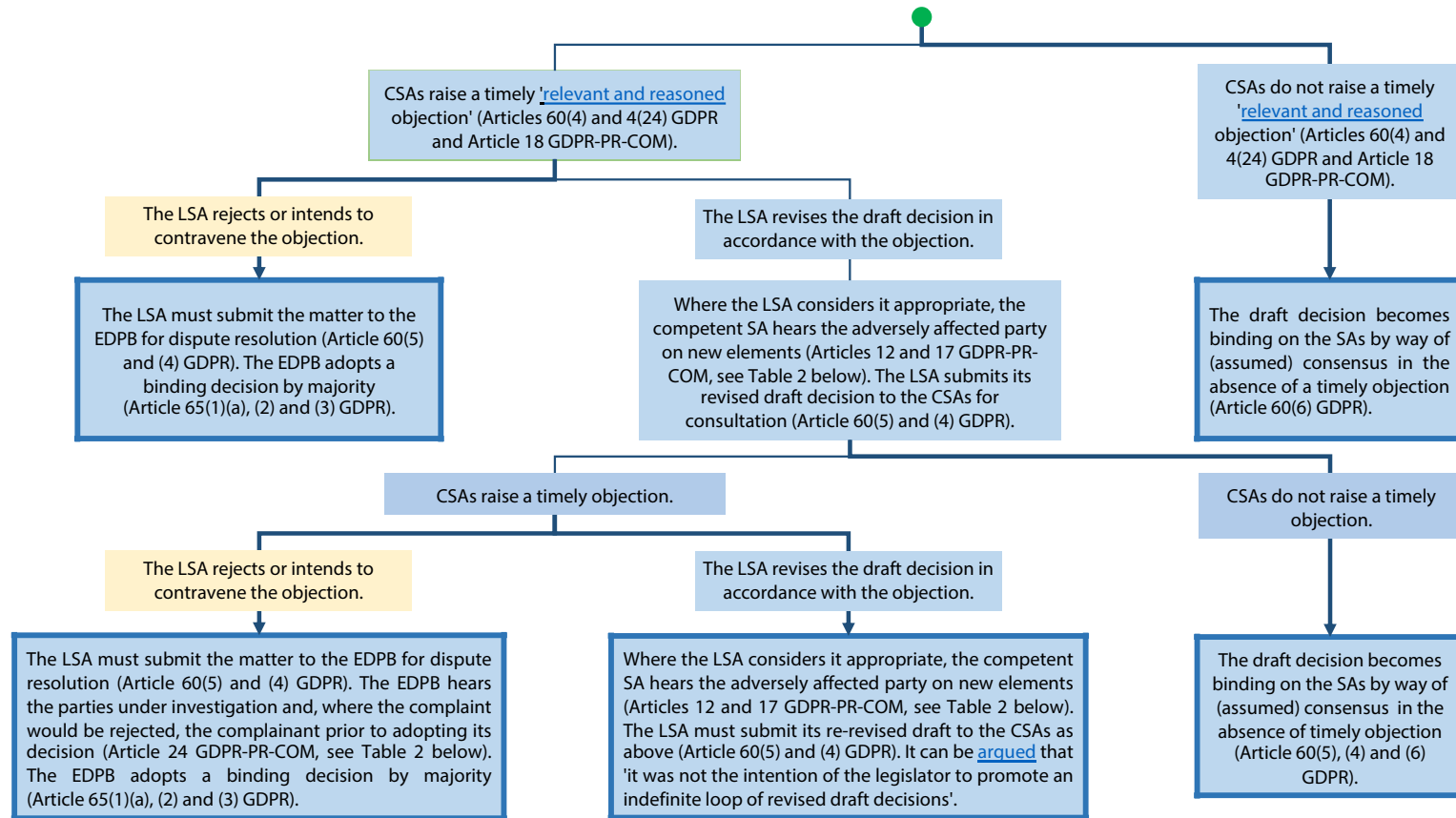
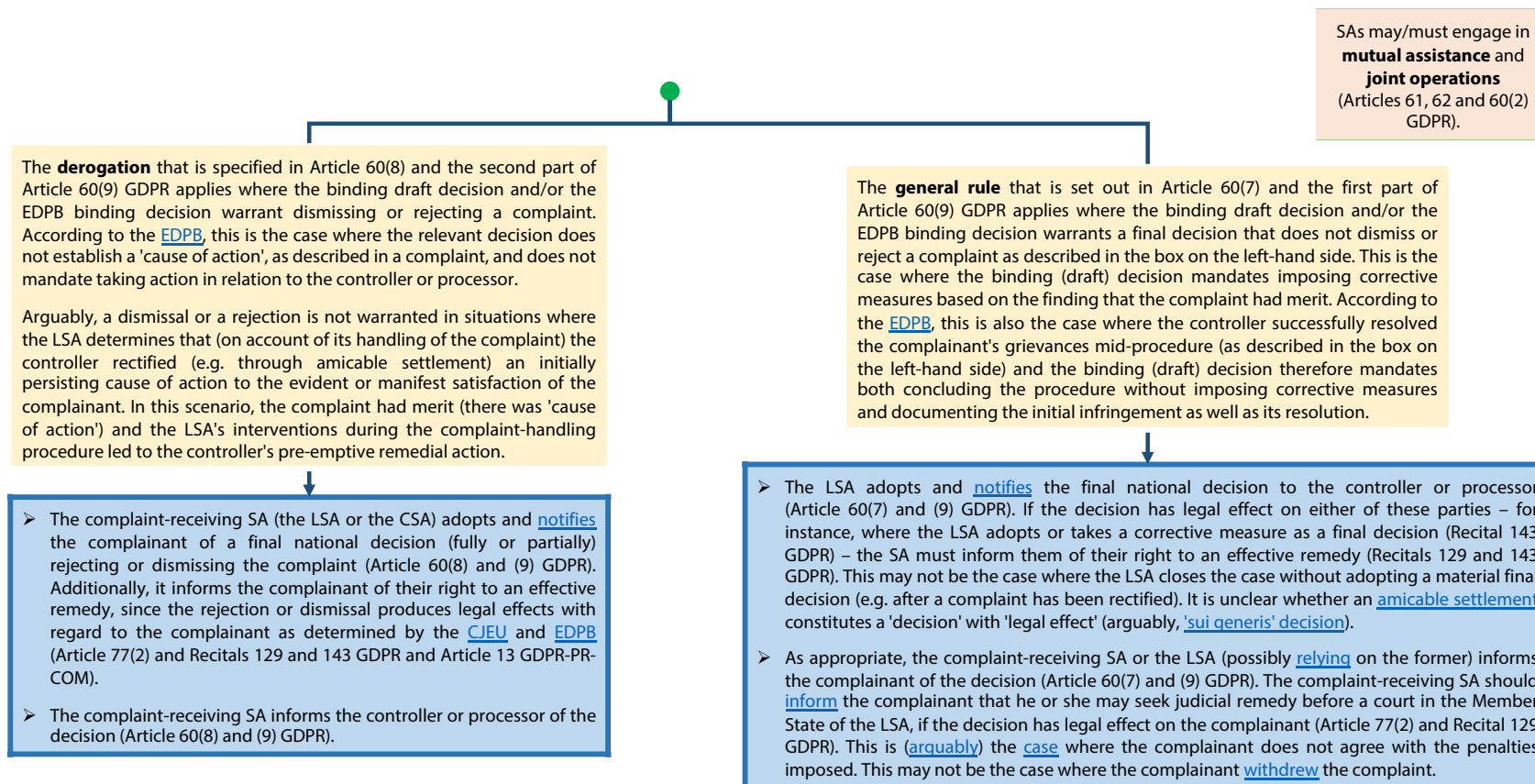


Figure 5 – Phase III: Adopting the final decision

The competent SA(s) adopt the final national decision(s), giving effect to the binding draft decision and/or the EDPB binding decision (Articles 60(6) and 65(2), third sentence, and (1)(a) GDPR). The final decision does not need to be an exact replica of the draft decision (Recital 23, fourth sentence et seq., GDPR-PR-COM). The competent SA(s) notify the adversely affected party of the final decision and the possibility of a judicial remedy (Article 77(2) and Recital 129, seventh sentence, GDPR, and Article 13 GDPR-PR-COM).



Data sources for Figures 2-5: GDPR-PR-COM and EDPB guidance referenced in the 'Sources and further reading' section below.



Table 1 – The (weak) role of CSAs in shaping enforcement decisions under the GDPR-PR-COM

Aspects that the CSAs disapprove of	CSAs' means of influencing the investigation strategy during the scoping exercise (Phase I)	CSAs' means of influencing the final decision during the Article 60 GDPR consultation procedure (Phase II)	The proposed regulation limits CSAs' powers	Current state of play: EDPB attributes strong powers to CSAs
<b>Main relevant facts</b>	CSAs may comment and, as appropriate, (must) request (enhanced) cooperation (Articles 9(3) and 7 GDPR-PR-COM). While the LSA must engage (Article 10(3) GDPR-PR-COM), it has the final say where disagreements persist.	Insofar as CSAs rely on or raise factual elements that were not included in the draft decision and/or raise facts that would warrant a change in the scope of the allegations, their interventions would (arguably) not qualify as 'relevant and reasoned objections' (Article 18(1) and Recital 28, fourth sentence GDPR-PR-COM). In many cases, the LSA has the final say.	In many cases, the CSAs cannot insist on involving the EDPB as an arbiter and the LSA has the final say.	Contrary to the proposal, the <a href="#">EDPB considers</a> that interventions on factual and legal elements, including where they are not explicitly addressed by the LSA's original scope of inquiry and where they warrant additional investigations by the LSA, qualify as a 'relevant and reasoned objection' within the meaning of Articles 60(4) and 4(24) GDPR. The Irish SA is challenging these notions in cases <a href="#">T-70/23</a> , <a href="#">T-84/23</a> and <a href="#">T-111/23</a> (see the Annex of the analysis <a href="#">briefing</a> for details).
<b>Minor relevant facts</b>	SAs <a href="#">should</a> exchange all 'relevant information' and cooperate early, where appropriate, through enhanced means (Articles 60(1), 61(1) and 62(1) GDPR and Article 7 GDPR-PR-COM).	As above	In many cases, the CSAs cannot insist on involving the EDPB as an arbiter and the LSA has the final say.	
<b>Scope of the investigations in complaint-based procedures</b>	CSAs may comment and, as appropriate, (must) request (enhanced) cooperation (Articles 9(3), 10(1) and 7 GDPR-PR-COM). Where the SAs do not reach consensus, the LSA must request an EDPB urgent binding decision (Article 10(4) GDPR-PR-COM). The EDPB has the final say.	Insofar as CSAs raise elements that would change the intrinsic nature of the allegations or expand the scope of the allegations, their interventions would not qualify as 'relevant and reasoned objections' (Article 18(1) and Recital 28, fourth sentence GDPR-PR-COM). In many cases, the LSA has the final say.	CSAs may intervene during the early scoping exercise and insist on involving the EDPB as an arbiter. Whenever they miss this opportunity, in principle, the LSA has the final say.	
<b>Scope of the investigations in <i>ex officio</i> procedures</b>	CSAs may comment and, as appropriate, (must) request (enhanced) cooperation (Articles 9(3) and 7 GDPR-PR-COM). While the LSA must engage (Article 10(3) GDPR-PR-COM), it has the final say.	As above	In crucial cases, the CSAs cannot insist on involving the EDPB as an arbiter and enhanced cooperation is not specifically mandated. In principle, the LSA has the final say.	

Aspects that the CSAs disapprove of	CSAs' means of influencing the investigation strategy during the scoping exercise (Phase I)	CSAs' means of influencing the final decision during the Article 60 GDPR consultation procedure (Phase II)	The proposed regulation limits CSAs' powers	Current state of play: EDPB attributes strong powers to CSAs
<b>Preliminary orientation of complex legal and/or technological assessments</b>	CSAs may comment and, as appropriate, (must) request (enhanced) cooperation (Articles 9(3), 10(1) and 7 GDPR-PR-COM). While the LSA must engage (Article 10(3) GDPR-PR-COM), it has the final say.	Insofar as CSAs rely on or raise non-factual elements (e.g. purely <a href="#">legal considerations</a> ), rely on or raise factual elements that were not included in the draft decision and/or raise points that would warrant a change in the scope of the allegations, their interventions would (arguably) not qualify as 'relevant and reasoned objections' under Article 18(1) GDPR-PR-COM. Oftentimes, the LSA has the final say.	In many cases, the CSAs cannot insist on involving the EDPB as an arbiter and the LSA has the final say.	As above
<b>Preliminary orientation of non-complex legal and technological assessments</b>	SAs <a href="#">should</a> exchange all 'relevant information' and cooperate early, where appropriate, through enhanced means (Articles 60(1), 61(1) and 62(1) GDPR and Article 7 GDPR-PR-COM).	As above	As above	
<b>Preliminary identification of corrective measures</b>	CSAs may comment and, as appropriate, (must) request (enhanced) cooperation (Articles 9(3) and 7 GDPR-PR-COM). While the LSA must engage (Article 10(3) GDPR-PR-COM), it has the final say.	As above (CSAs' diverging views may rely purely on legal considerations and would therefore <a href="#">arguably</a> not qualify as objections under Article 18(1))	As above	
<b>Other aspects</b>	SAs <a href="#">should</a> exchange all 'relevant information' and cooperate early, where appropriate, through enhanced means (Articles 60(1), 61(1) and 62(1) GDPR and Article 7 GDPR-PR-COM).	As above	As above	

The colour coding indicates a generalised assessment and is subject to ambiguity, not least because of the ambiguous wording of Articles 9, 10 and 18(1) GDPR-PR-COM. The assessment is based on a [critical reading](#) of these articles. Yellow = CSAs' powers are restricted (by limiting and frontloading its opportunities to intervene); orange = CSAs' powers are limited, if not very limited (absent threat of EDPB dispute resolution in many cases); red = CSAs' powers are very limited (absent threat of EDPB dispute resolution and no specific obligation for the LSA to launch an enhanced cooperation procedure). As mentioned in Figure 2 above, the standard enhanced cooperation and urgency procedures are complementarily available.



Table 2 – Comparing the duties to hear the parties to the proceedings, including the information available to them, under the GDPR-PR-COM

Procedural steps requiring the consultation of parties		The duty to hear parties under investigation	The duty to hear complainants
<b>Before an LSA consults with CSAs on a <u>draft decision</u> that would...</b>	<b>...reject a complaint</b>	<b>No.</b> However, a draft decision fully rejecting a complaint is favourable for the parties under investigation and determines the final decision where SAs reach consensus. Nevertheless, parties would <a href="#">prefer</a> SAs to hear them before consulting on key issues.	<b>Yes</b> , based on information contained in 'reasons for the intended ... rejection' and, where the 'request' is granted, a non-confidential version of supporting documents (Article 11(2) and (4) GDPR-PR-COM).
	<b>...find an infringement</b>	<b>Yes</b> , based on information contained in 'preliminary findings' and gained from <b>access to the administrative file</b> (Article 14(3) and (5) GDPR-PR-COM)	<b>Yes</b> , based on information contained in a non-confidential version of the preliminary findings and, where the LSA considers it necessary, a non-confidential version of relevant documents contained in the administrative file (Article 15(1) and (3) GDPR-PR-COM)
<b>Before an LSA consults with CSAs on a <u>revised draft decision</u> that would...</b>	<b>...reject a complaint</b>	<b>No.</b> Despite this being a favourable outcome for the parties under investigation, the substance of the draft decision is amended pursuant to the objections raised and the revised draft determines the final decision subject to consensus. The parties may seek to rebut evidence and verify full exculpation (not to mention the fact that they may gain strategic insights).	<b>Yes</b> , where the LSA considers it appropriate to hear the complainant regarding new elements (Article 12 GDPR-PR-COM) and based on the competent SA's description of new elements and other complementary information disclosed by the complaint-receiving SA and based on information supplied before the LSA consulted the CSAs on the initial draft decision (Article 11(2) and (4) GDPR-PR-COM).
	<b>...find an infringement</b>	<b>Yes</b> , where the LSA considers it appropriate to hear the complainant regarding new elements (Article 17 GDPR-PR-COM) and based on the LSA's description of new elements and complementary information disclosed by the LSA and based on information supplied before the LSA consulted the CSAs on the initial draft decision (Article 14(3) and (5) GDPR-PR-COM).	<b>No.</b> Despite this being a favourable outcome for complainants, the substance of the draft decision is amended pursuant to objections and the revised draft determines the final decision where SAs reach consensus. Complainants may seek to encourage a stricter decision and verify that SAs adequately protect their rights.

Procedural steps requiring the consultation of parties		The duty to hear parties under investigation	The duty to hear complainants
<b>Before the EDPB adopts a <u>binding decision under Article 65(1)(a) GDPR that would...</u></b>	<b>... reject a complaint</b>	<b>Yes</b> , based on information contained in the 'statement of reasons' and, where the Board intends to amend a (revised) draft decision and considers it appropriate, based on the 'relevant and reasoned objections' (Article 24(2) GDPR-PR-COM).	<b>Yes</b> , based on information contained in the 'statement of reasons' and, where the Board intends to amend a (revised) draft decision and considers it appropriate, based on the 'relevant and reasoned objections' (Article 24(2) GDPR-PR-COM).
	<b>...find an infringement</b>	<b>Yes</b> , based on information contained in the 'statement of reasons' and, where the Board intends to amend a (revised) draft decision and considers it appropriate, based on the 'relevant and reasoned objections' (article 24(2) GDPR-PR-COM).	<b>No</b> . Despite this being a favourable outcome for complainants, existing disagreements among SAs warrant a dispute resolution, and the urgent binding decision determines the final decision. Complainants may seek to encourage a stricter decision and verify that SAs adequately protect their rights.

The colour coding indicates whether the envisaged rules would (in principle) meet parties' expectations of being heard and of receiving adequate information to form their views. It does not indicate whether they satisfy the right to be heard as recognised in a [general principle of EU law](#) and Recital 129 GDPR. Restrictive features, such as the SAs' discretion regarding the hearing of parties and the provision of information, topical limitations to the SAs' information duties and confidentiality requirements, are detrimental to meeting parties' expectations. Parties would strongly expect to be heard prior to an adverse decision. Conversely, the expectation to be heard may well be less pronounced where the outcome is favourable. Green = expectations met; yellow = expectations partially met; orange = expectations barely met.

## Sources and further reading

H. Mildebrath, [Newly proposed rules to strengthen GDPR enforcement in cross-border cases](#), legislative briefing, EPRS, European Parliament, 2024.

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[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

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