FEDMA
Federation of European Data and Marketing

Position Paper

EU Regulation laying down additional procedural rules relating to the enforcement of GDPR

The Federation of European Data and Marketing (FEDMA) strongly supports the general objective of the Regulation laying down additional procedural rules relating to the enforcement of GDPR to streamline cooperation between data protection authorities (DPAs) when enforcing the General Data Protection Regulation (GDPR) in cross-border cases. We welcome the proposal's emphasis (i) on the reliance of amicable settlements, (ii) on the different procedural situation between complainants and parties under investigation, and (iii) the possibilities for the defendants to submit their views prior to the adoption of the final decision.

There remain nevertheless some areas of improvements, specifically about the information provided to the parties under investigation and their right to be heard. Additionally, it is fundamental that this proposal remains an instrument to deal with all cross-border cases involving any kind of organization. EU policymakers should **avoid turning the proposed Regulation into a tool to exclusively address cross-border cases involving large online platforms and only one regulator as the lead authority**. Finally, we regard this proposal as a steppingstone to engage in a more comprehensive dialogue on how to enhance GDPR implementation on other key elements of the EU data protection framework in view of the upcoming review of the GDPR by the European Commission.

RECOMMENDATIONS

1. Support the clarification of the legal framework for the amicable settlement of complaints;
2. Preserve the spelling out in Recital 25 of the essential nature of an investigation by a supervisory authority;
3. Enhance the extension of the right to be heard by the parties before the EDPB;
4. Further the information shared between the LSA and the parties under investigation;
5. Strike a balance in achieving transparency on how decisions are taken via Article 65 dispute resolutions;
6. Streamline the way parties under investigation are heard during the procedure;
7. Prevent a misuse of the right of access to administrative documents in Article 21(2);
8. Provide for a harmonized system of sanctions for non-compliance with the confidentiality agreement.

1. Support the clarification of the legal framework for the amicable settlement of complaints

In its wording, Article 5 could facilitate the use of amicable settlement by DPAs, while clearing up the legal implications of amicable settlement for complainants and DPAs. This would enable a more expeditious resolution of cases that do not pose important threats to the rights of freedoms of individuals which would enable to free up DPAs' time and resources (1) to focus on the most dangerous cases for the rights and freedoms of individuals (2) to allocate more resources to accompany companies in their compliance efforts. Nonetheless, **it is essential to ensure that the framework's clarification does not impose excessive coordination obligations on the Lead Supervisory Authorities (LSAs).** Such an outcome

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might unjustly divest the LSA of its privileges and potentially transform resolutions – initially meant to be swift and uncomplicated resolutions benefiting both data subjects and controllers/processors – into protracted and complex proceedings. Additionally, this may discourage the amicable resolution of disputes.

2. Preserve the spelling out in Recital 25 of the essential nature of an investigation by a supervisory authority

FEDMA believes that it is important to emphasize that this investigation is not a confrontational process between the complainant and the parties under investigation but rather an administrative procedure initiated by the supervisory authority in line with its mandated responsibilities under Article 57(1) GDPR. By underscoring the distinction in procedural positions between the parties:

- sets clear and proportionate limits to the complainants' access to the defendants' confidential information;
- grants the complainants' right to a fair hearing exclusively where the decision directly impacts their legal position negatively.

This distinction is essential to ensure a clear understanding on the differences between on the one hand the GDPR administrative procedure and on the other hand the litigations that complainants can file before competent courts and where they can benefit from wider access to information subject to the applicable civil and criminal procedural rules.

3. Enhance the extension of the right to be heard by the parties before the EDPB

FEDMA welcomes the expansion of the right to be heard to encompass the EDPB's involvement in cross-border cases (Article 24), particularly when disputes are being resolved among different DPAs and when the cooperation mechanism, as stipulated by Article 60(ff) of the GDPR, has been activated. In the context of cross-border investigations, where the EDPB possesses the authority to settle disputes between SAs, it is indeed implausible that the party under investigation would not be granted the opportunity to be directly heard by the EDPB. **This right to be heard should also be extended to all cross-border cases and not just those cases leading to a dispute resolution by the EDPB as per article 65.** Parties under investigations should be entitled to request to be heard by the concerned DPAs to present them the facts, their defense and answer their questions as the concerned authorities will also shape the final administrative decision taken by the LSA.

4. Further the information shared between the LSA and the parties under investigation

Following the European Data Protection Supervisor's (EDPS) contribution[1], FEDMA believes that the Regulation should explicitly provide for the obligation for the LSA to **inform the defendant that the file has been transferred to the other authorities**. The LSA's sharing of relevant information regarding the investigation with the other CSAs marks the beginning of a key phase in the decision-making procedure: as part of their right to transparency, the parties under investigation should be made aware of each new step.

5. Strike a balance in achieving transparency on how decisions are taken via Article 65 dispute resolutions

FEDMA strongly welcomes the significant progress of this proposal in strengthening and harmonizing the rights of the parties under investigation, including the right to be heard and the confidential treatment of the information provided. Equally important, the proposed Regulation clarifies the defendants' access to

[1] https://edps.europa.eu/system/files/2023-04/23-04-25_edps-contribution-procedural-rules-gdpr-enforcement_en.pdf

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the administrative file with the only exclusion applicable to the correspondence between DPAs. In this regard, we understand that there is an ongoing discussion about the access from the parties involved in a procedural case to the correspondence between the relevant authorities which goes beyond the area of data protection. While preserving the confidentiality of these exchanges could support an open and unrestricted dialogue among authorities to reach consensus, granting access to the correspondence could instead enhance the authorities' accountability, **opening up what is sometimes perceived as a "black box" where decisions could be taken because supported only by a minority of vocal authorities next to a majority of passive regulators**. In the context of GDPR procedural cross-border cases, FEDMA thus advocates for striking a balance between these two positions.

6. Streamline the way parties under investigation are heard during the procedure

FEDMA welcomes the new provisions aimed at upholding the right to a fair hearing by providing the parties under investigation the possibility to submit their views (i) on the LSA's draft decision before it is shared with the other CSAs (Art.14), and (ii) on the EDPB's statement of reasons (Art.24). Additionally, Article 17 allows the LSA, where appropriate, to ask for the defendants' view where a revised decision raises new elements compared to the first draft. In this context, we firmly advocate that, in order to fully uphold the right to a fair hearing, as outlined in Article 41 of the Charter of Fundamental Rights of the European Union, the possibility for the parties under investigation to submit their opinion on the revised draft should not be left to the discretion of the LSA. The absence of an obligation on the LSA to request the defendants' view in Article 17 risks to jeopardize the Regulation's objective to foster harmonization in procedural rules as it could lead to divergent practices depending on the authority concerned. As such, **Article 17 should state that the LSA shall, prior to the submission of the revised draft decision, provide the parties under investigation with the possibility to make their views known on the new elements raised in the revised draft.**

Finally, though the introduction of fixed deadlines can sometimes be counterproductive in the finalization of administrative procedures as it may overlook the specificity and complexity of each case, we believe that a more nuanced approach is still possible. Specifically, in the proposed regulation, we point out the lack of precise indications on procedural deadlines in relation to the submission of views by the parties under investigation over the LSA's preliminary findings. Currently, Article 14(4) provides that the LSA shall set a time-limit within which the defendants can make their views known in writing; beyond this deadline the LSA is not obliged to take account of written opinions. In the interests of harmonization and to ensure that the defendants can effectively exercise their right to be heard, **we strongly recommend that the proposed Regulation sets a time limit of no less than one month**. The same time limit should be applied to the amended version of Article 17.

7. Prevent a misuse of the right of access to administrative documents in Article 21(2)

Article 21(2) currently denies third parties' access requests to the administrative file of the supervisory authority in a cross-border case *as long as the proceedings are ongoing*. Accordingly, a *contrario* interpretation of Article 21(2) could leave room for any third party to apply for (and potentially obtain) access to the entire administrative file, including to the parties under investigation' confidential information, once the procedure is closed. In other words, **the use of businesses' confidential information by a supervisory authority as part of an investigation should not, in itself, affect the conditions under which third parties may have access to them even after the end of the proceedings**[2]. (see). FEDMA therefore calls for an amendment of this provision.

[2] Conseil d'Etat's Anticor ruling of October 7, 2022 no. 443826

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8. Provide for a harmonized system of sanctions for non-compliance with the confidentiality agreement

FEDMA strongly welcomes the provisions of the proposed Regulation aimed at ensuring the treatment of confidential information provided by the defendants. Specifically, we support Article 21 whereby, before receiving a non-confidential version of the preliminary findings and any other documents in the administrative file identified as relevant by the lead supervisory authority to make its views on these findings known, the complainant must send a confidentiality statement to the authority in which it undertakes not to disclose any information. However, we voice concern about the lack of rules for sanctions in the event of non-compliance with this confidentiality agreement by the complainant. FEDMA believes that **this lack of precision could result in each DPA providing for a different sanction (or even none at all), thus running counter to the Regulation's objective of harmonization**. The proposed Regulation should thus introduce a common system of sanctions regarding the breach of a confidentiality agreement which should be applicable to both national and cross-border cases.

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