**Proposal for a Regulation laying down additional procedural rules relating to the enforcement of GDPR**

|  |  |
| --- | --- |
| **FEDMA’S RECOMMENDATION** | ***DRAFT AMENDMENT*** |
| **Further the information shared between the LSA and the parties under investigation**  Following the European Data Protection Supervisor’s (EDPS) contribution[[1]](#footnote-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. | ***Article 8(3)***  ***The lead supervisory authority shall inform the parties under investigation about the receipt by the other supervisory authorities of the relevant information within the meaning of Article 60(1) and (3) of Regulation (EU) 2016/679.*** |
| **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 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. | Article 19(3)  The right of access to the administrative file shall ***include a summary of the ~~not extend to~~*** correspondence and exchange of views between the lead supervisory authority and supervisory authorities concerned. ***~~The information exchanged between the supervisory authorities for the purpose of the investigation of an individual case are internal documents and shall not be accessible to the parties under investigation or the complainant.~~*** |
| **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. | Article 17  1. ***~~Where the lead supervisory authority considers that the revised draft decision within the meaning of Article 60(5) of Regulation (EU) 2016/679 raises elements on which the parties under investigation should have the opportunity to make their views known~~*~~, t~~T**he lead supervisory authority shall, prior to the submission of the revised draft decision under Article 60(5) of Regulation (EU) 2016/679, provide the parties under investigation with the possibility to make their views known on **~~such~~** ***the*** new elements ***of the revised draft***.  2. The lead supervisory authority shall set a time-limit ***of minimum one month*** within which the parties under investigation may make known their views.  Article 14(4)  The lead supervisory authority shall, when notifying the preliminary findings to the parties under investigation, set a time-limit ***of minimum one month*** within which these parties may provide their views in writing. The lead supervisory authority shall not be obliged to take into account written views received after the expiry of that time-limit. |
| **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]](#footnote-2). FEDMA therefore calls for an amendment of this provision. | Article 21(2) Any information collected or obtained by a supervisory authority in cross-border cases under Regulation (EU) 2016/679, including any document containing such information, is excluded from access requests under laws on public access to official documents ***~~as long as the proceedings are ongoing~~***. |
| **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. | ***Article 21(7)***  ***The lead supervisory authority must assess fines for the disclosure of confidential information identified and submitted by the parties under investigation. For the decision of what level of penalty can be assessed, the lead supervisory authority shall consider***   * ***Whether the information was intentionally disclosed*** * ***The value of the disclosed information determined by the party under investigation which submitted such information*** * ***The actual damages resulting from the breach determined by the party under investigation which submitted such information*** |

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)