



Centre for Information Policy Leadership
— HUNTON ANDREWS KURTH —

Comments on

**Proposal for a Regulation laying down additional procedural
rules relating to the enforcement of Regulation (EU)
2016/679**

Centre for Information Policy Leadership (CIPL)

The Centre for Information Policy Leadership (CIPL)¹ welcomes the opportunity to provide comments on the proposal for a Regulation laying down additional procedural rules relating to the enforcement of the GDPR issued by the European Commission on July 7, 2023. We commend the Commission's efforts to further streamline and harmonise the GDPR enforcement process, and we are encouraged to see that a number of our suggestions raised during the initial call for evidence² have been considered and integrated into the proposal text, especially where it comes to the right defence and to be heard.

In the context of this proposal, CIPL emphasises that any initiative must not introduce rules that increase procedural complexity but must aim to further strengthen the harmonised approach as envisaged in the GDPR. With this in mind, we provide the comments below on the proposal.

I. COOPERATION MECHANISM

CIPL is a strong advocate for the One-Stop-Shop (OSS) as a vital instrument for the consistent implementation of the GDPR, establishing legal certainty for both organisations and individuals.³ We recognise the OSS's role in facilitating cooperation and efficiency in enforcement, and we emphasise that any amendments to the legal framework must maintain the overall functioning of the OSS and, specifically, preserve the unique role and authority of the Lead Supervisory Authority (LSA). **In particular, CIPL would like to emphasise again that cooperation between LSAs and concerned supervisory authorities (CSAs), also prior to the submission of any draft decision, must be sincere, respectful and in the spirit of mutual trust.**

While CIPL certainly welcomes the proposals for enhanced coordination, we caution against the procedure prescribed in Articles 9 and 10 (*Summary of key issues and Use of means to reach consensus*), where they have the potential to undermine the role of the LSAs as intended by the GDPR. The unique position of the LSA allows it to develop a body of

¹ CIPL is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 85+ member companies that are leaders in key sectors of the global economy. CIPL's mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL's work facilitates constructive engagement between business leaders, privacy and security professionals, regulators, and policymakers around the world. For more information, please see CIPL's website at <http://www.informationpolicycentre.com/>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

² Centre for Information Policy Leadership, Response to the European Commission's Call for Evidence on further specifying procedural rules relating to the enforcement of the General Data Protection Regulation, available at: https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_response_to_ec_call_for_evidence_-_gdpr_procedural_rules_harmonisation_23_march_2023.pdf.

³ Centre for Information Policy Leadership, *GDPR Enforcement Cooperation and the One-Stop-Shop – Learnings from the First Three Years*, available at: https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_discussion_paper_-_gdpr_enforcement_cooperation_and_the_one-stop-shop_23_sept_2021.pdf.

knowledge with respect to the organisations it oversees and expertise in their operations to facilitate more effective enforcement. Advocate General Bobek also stressed the elevated role of the LSAs when he noted that “*vis-à-vis cross-border processing, the competence of the LSA is the rule, and the competence of other supervisory authorities is the exception*”.⁴

To that extent, where Articles 9 and 10 are frontloading the cooperation process through the consensus on the “Summary of key issues”, this process must be undertaken in the spirit of mutual trust, including in the OSS and the specific role of the LSA, to be effective. Mutual trust is supported by developing a common understanding of best practices in regulation, exchanging information, rules around the accuracy of sharing information regarding investigations, and shared training. Such increased trust would foster mutual respect between SAs and a common understanding that objections on the “summary of key issues” should be used by CSAs only in exceptional cases.

In the alternative, Article 10(4) would only lead back to an urgent binding decision of the Board where the LSA and CSA cannot reach a consensus at the “Summary of key issues” stage. This could have the Board potentially decide on the scope of an investigation, for instance, and as a result, would dilute the OSS mechanism.

As opposed to the LSA, the EDPB has no investigative powers itself, nor can it order SAs to conduct specific investigations into matters. The LSA, on the other hand, does have the discretion to conduct fact-finding and to make determinations regarding a fine. It is important to highlight that the EDPB, as a body created by and under EU law, has the power to monitor the application of the GDPR but *without prejudice to the tasks of SAs*.⁵ In this context, CIPL would like to point out again that Recital 129 GDPR makes clear that: “*The adoption of a legally binding decision implies that it may give rise to judicial review in the Member State of the supervisory authority.*”⁶ Recital 143 GDPR refers to the procedure for a direct challenge by a party to a decision of the EDPB under Article 263 of the Treaty on the Functioning of the European Union (TFEU), where: “The act is addressed to that person, and it is either of direct and individual concern to them or is a regulatory act which is of direct concern to them.” This is a limited right that applies only in cases where the decision of the institution is legally invalid; it is not an appeal on the facts, law or merits of a case. It should, therefore, also not limit the right of a party to mount a challenge to the national court on the facts, law or merits of a case, or a national court from hearing such an appeal, and, in an appropriate case, referring the matter to the Court of Justice in cases of EDPB binding decisions.⁷

⁴ Opinion of Advocate General Bobek in Case C-645/19, para 47.

⁵ Comments by the Centre for Information Policy Leadership on the European Data Protection Board’s Draft Guidelines 03/2021 on the application of Article 65(1)(a) GDPR (https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_comments_on_edpb_article_65_draft_guidelines_28_may_2021.pdf).

⁶ Under Article 78, each natural or legal person must have the right to an effective judicial remedy against a legally binding decision of an SA concerning them. Recital 143 GDPR further sets out the right to appeal to the national courts, as provided by Article 78 GDPR.

⁷ Ibid, p. 5.

Finally, for an efficient and timely consensus process, we recommend that the Board specify rules for the consensus process itself, in addition to the restrictions on comments proposed under Article 9(5).

II. AMICABLE SETTLEMENTS

CIPL generally supports the introduction of amicable settlement provisions, providing that clear rules and commitments accompany these. The current version of Article 5 (*Amicable settlement*) should provide more precise explanations as to the envisioned process throughout the stages of an investigation. This is particularly important since not all Member States will have a legal framework for settlement proceedings. Proposed rules should be drafted sufficiently clearly to avoid ultimately disincentivising parties to enter proceedings. It must equally be made clear that amicable settlement proceedings are available at all stages of the proceedings.

Generally, measures that would limit the burden on DPAs by incentivising the parties to engage in complaint handling directly through complaint mechanisms before considering a matter for further investigation and standards for the admissibility of a complaint are to be welcomed and should be harmonised across Member States.⁸

III. CONFIDENTIALITY

CIPL welcomes the introduction of confidentiality provisions in the Proposal text. Strong confidentiality provisions ensure the integrity of the process and preserve the right of defence apart from protecting potentially sensitive material in the files, such as trade secrets, information covered by IP rights, or information carrying cybersecurity risks.

However, Article 15(5) and Article 21 (3) of the Proposal should also envision liability or sanction provisions for a breach of confidentiality rules to be truly effective. Effective sanctions are essential to deter parties from disclosing confidential documents pertaining to an ongoing case. Similar confidentiality considerations should be made for articles under Section 2 of the Proposal while the proceedings are ongoing. All **concerned** parties must respect and adhere to confidentiality obligations throughout the process to facilitate a fair process without undue influence on the decision-making.

We recommend that the Commission also look toward well-established procedures in competition and antitrust law as a framework for a balanced approach to procedural rights, including access to the file, for instance.

⁸ Centre for Information Policy Leadership, *Regulating for Results: Strategies and Priorities for Leadership and Engagement*, p. 32, available at https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_final_draft_-_regulating_for_results_-_strategies_and_priorities_for_leadership_and_engagement_2_.pdf.

IV. RIGHT TO BE HEARD

CIPL strongly supports strengthening and harmonising the procedures for parties to exercise their right to be heard, and we commend the inclusion of this in several provisions. The right to be heard by any party who may be adversely affected by a decision is an integral element in the exercise of supervisory powers.

To ensure the parties are provided with sufficient opportunity to exercise their right, we recommend adding, at a minimum, a requirement for the time limits to be set by the LSA in Article 14(4) and Article 17(2) to be “reasonable and proportionate” in relation to the complexity of each case. Similar additions should be made to Article 21(6) with respect to the time limits given to provide non-confidential versions.

Most importantly, CIPL welcomes Article 24(2) of the proposal, providing the parties a right to be heard before adopting the binding decision in the context of Article 65 GDPR. Given the habitual complexity of cross-border cases, we recommend that the deadline in Article 24(2) be established through a case-by-case assessment that factors in the complexity of the individual matter, but certainly no less than two weeks. Additionally, the provision should also specify in which form (orally or written) the parties should express their views.

V. GENERAL COMMENTS

As a general observation, CIPL welcomes the efforts to create standards of admissibility in Article 3 of the proposed Regulation. We note, however, that the Proposal is focused on form completeness and neglects a standard for substance. This carries the risk of incentivising formal complaints without merit that might otherwise be rejected by a DPAs after a more thorough assessment.

Article 3 and the accompanying Annex would deprive the DPAs of the power to request further substantiation. An assessment of the admissibility of any legal complaint - especially one pertaining to violations of fundamental rights - must also require an evaluation of substance and not be limited to procedural aspects. As is, the proposal has the potential to establish a pan-EU admissibility format, which would, however, be agnostic towards the substance of the complaint. It would be important for the Commission to clarify this further to ensure that the proposal does not inadvertently create additional burdens for DPAs.

We look forward to providing additional input as the Regulation is being finalised.

If you would like to discuss any of these comments or require additional information, please contact Natascha Gerlach, NGerlach@HuntonAK.com and Lukas Adomavicius, LAdomavicius@HuntonAK.com.