22 March 2023

Access Now's feedback to the European Commission Consultation on "Further specifying procedural rules relating to the enforcement of the General Data Protection Regulation"

Introduction

Access Now supports the initiative launched by the European Commission aimed at strengthening and improving the application and enforcement of the General Data Protection Regulation (GDPR).[1]

Since the GDPR became applicable in May 2018, Data Protection Authorities (DPAs) across the European Economic Area (EEA) have levied a total of 1,538 fines for € 2,760,480,432.[2] Yet despite these results, alarm bells over the unequal and slow enforcement of the GDPR have been ringing in Brussels and across Member States for a few years now.[3]

The resolution of complaints, in particular cross-border ones, is often facing hurdles due to discrepancies and difficulties in the way national DPAs work together. While the GDPR has established a cooperation mechanism for DPAs to resolve cases together, most of them rely on their national administrative procedure to operate within this European system. A 2022 study conducted by the Data Protection Law Scholars Network for Access Now shows that, in practice, data subjects across the European Union do not have an equal right to lodge a complaint under the GDPR as DPAs apply different and sometimes contradictory practices to handle complaints.[4] This happens despite the principle of primacy of EU law and the existence of guidance from the European Data Protection Board (EDPB) on how to apply the GDPR which indicates that "an interpretation of a given provision must not undermine the effectiveness of EU law".[5] [6]

Faced with difficulties in filing cases with DPAs or obtaining a decision, people and NGOs have been considering directly turning to courts to enforce the GDPR. When the European Commission proposed the GDPR in 2012, it specifically sought to address the difficulties people had in getting remedy in relation to data protection violations via the courts.[7] The European Commission therefore

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[1] Access Now is an international NGO that defends and extends the digital rights of users at risk around the world. https://www.accessnow.org/issue/data-protection/
We are a member of the European Commission multistakeholder expert group to support the application of Regulation (EU) 2016/679 (E03537).
https://ec.europa.eu/transparency/expert-groups-register/screen/members/consult?memberId=67585&memberTypeId=3&lang=en&fromExpertGroups=true

[2] Data from https://www.enforcementtracker.com/?insights as of 21 March 2023.

[3] WIRED, Matt Burgess, *How GDPR Is Failing*, 23 May 2022. https://www.wired.co.uk/article/gdpr-2022

[4] Data Protection Law Scholars Network (DPSN), *The right to lodge a data protection complaint: OK, but then what? An empirical study of current practices under the GDPR*, June 2022.
https://www.accessnow.org/cms/assets/uploads/2022/07/GDPR-Complaint-study.pdf

[5] See from EUR-Lex: "The principle of the primacy (also referred to as 'precedence' or 'supremacy') of European Union (EU) law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable. The principle of the primacy of EU law has developed over time by means of the case law (jurisprudence) of the Court of Justice of the European Union."
The main rulings of the Court of Justice of the EU establishing this principle are *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) and *Costa v ENEL* (Case 6/64).
https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html

[6] European Data Protection Board, *Guidelines 02/2022 on the application of Article 60 GDPR, Version 1.0*, March 2022.
https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-022022-application-article-60-gdpr_en

[7] The Impact Assessment accompanying the proposal for the GDPR pointed out that: *"(d)espite the fact that many cases where an individual is affected by an infringement of data protection rules also affect a considerable number of other individuals in a similar situation, in many Member States judicial remedies, while available, are very rarely pursued in practice"*.
European Commission, *Impact Assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of*

proposed a new enforcement model under the GDPR, which was further developed and then adopted by the co-legislators: the so-called one-stop-shop mechanism. Under this mechanism, the DPAs should cooperate, investigate, and work together to address GDPR complaints. This system should have simplified and harmonised the resolutions of complaints through coordinated actions of the data protection authorities.

Going back to courts for data protection violation may offer some resolutions for complainants, but there is a high risk of lack of harmonisation in the protection of rights as national courts do not have to cooperate with each other. What is more, courts across the EEA may not have the necessary expertise in the area of data protection. It is therefore critical for the European Union to ensure that the enforcement and application of the GDPR by DPAs works efficiently to provide equal rights and protection to data subjects.

We therefore commend the Commission's plan to introduce a new Regulation to "harmonise some aspects of the administrative procedure" and "streamline cooperation between national data protection authorities when enforcing the General Data Protection Regulation in cross-border cases".[8] This represents an opportunity to clarify core aspects of the consistency and cooperation mechanisms developed under the GDPR. We particularly support the targeted effort to address the identified shortcomings with the enforcement of the law while leaving the GDPR itself untouched as its principles, rights, and obligations remain critical achievements for the protection of personal data and for the free flow of information.

To start this harmonisation process, we must examine the national rules on administrative procedures across Europe. First, we note that a majority of EEA countries have adopted some kind of administrative legislation, which includes 24 out of the 27 member States of the EU.[9] According to Professor of Administrative Law, Giacinto della Cananea: "the existence of general legislation concerning administrative procedure has become the rule rather than the exception" in the EU.[10] Professor della Cananea notes the heterogeneous nature of these legislations in terms of size and format but points to important common standards. He indeed found that "an inquiry into the contents of administrative procedure law reveals that, at least from a legislative viewpoint, there are some common and connecting elements: namely, the concept of administration, the right to be heard, and the duty to give reasons." Those commonalities would ease the work of the European Commission and the co-legislators in harmonising some aspects of administrative procedures for the smooth and effective enforcement of the GDPR.

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such data (General Data Protection Regulation), January 2012.
https://www.europarl.europa.eu/cmsdata/59702/att_20130508ATT65856-1873079025799224642.pdf

[8] See Recommendations in:
Access Now, *Four Years Under the EU GDPR, How to fix its enforcement*, July 2022.
https://www.accessnow.org/cms/assets/uploads/2022/07/GDPR-4-year-report-2022.pdf
Access Now, *Three Years Under the EU GDPR, An implementation Report,* May 2021.
https://www.accessnow.org/cms/assets/uploads/2021/05/Three-Years-Under-GDPR-report.pdf
EDRi Network, *Civil society call and recommendations for concrete solutions to GDPR enforcement shortcomings*, 16 March 2022.
https://edri.org/wp-content/uploads/2022/03/EDRi-recommendations-for-better-GDPR-enforcement.pdf

[9] See, Common Core of European Administrative Law, list of Administrative laws in Europe, Last consulted in March 2023. http://www.coceal.it/second-page.html#

[10] Giacinto della Cananea, Administrative Procedure in Europe, 31 October 2022.
https://www.theregreview.org/2022/10/31/della-cananea-administrative-procedure-in-europe/

As the Commission works to determine which aspects of administrative procedures shall be harmonised and what elements of the cooperation mechanism between DPAs needs further clarification, Access Now presents the following list of six recommendations:

1. **The Regulation should apply to national and cross-border cases (Scope of the law)**

2. **The Regulation should set rules for the application of the following procedurals rules for data protection complaints:**
    - **a.** Right to lodge a complaint: Data subjects will be provided with clear information on how to exercise their right to lodge a complaint in their own language
    - **b.** Admissibility and scope of complaints: DPAs shall review admissibility of complaints only once based on criteria detailed in this Regulation
    - **c.** Guarantee the Fundamental Right to Good Administration:
        - **i.** Right to be heard and party: Both the complainant and defendant are parties and have a right to be heard by the Lead Supervisory Authority (LSA) and the EDPB
        - **ii.** Access to documents: Both parties will have access to document related to the case; as well as all EDPB members
        - **iii.** Decision: The LSA will always issue a reasoned decision

3. **The Regulation should established a detailed process and timeline for cooperation in cases under mechanisms detailed by Article 60 and 65 of the GDPR**

4. **The Regulation could introduce a "fast-track" process for the resolution of selected cases**

5. **The Regulation could requires all members of the EDPB to appoint an EU Commissioner or point person tasked with cooperation**

6. **The Regulation should mandate the creation of a new IT system for case monitoring, cooperation, and reporting**

The recommendations come from analysis of EU jurisprudence, and results of research and studies conducted by Access Now into the application and the enforcement of the GDPR for the past five years.[11] We have analysed the current practices of DPAs when dealing with GDPR complaints and identified differences and similarities.

For each recommendation, we provide below a description of the identified shortcomings with the current practices and, when relevant, an analysis of case law that supports the proposed recommendation.

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[11] Access Now, *One Year Under the EU GDPR, An implementation Report,* May 2019. https://www.accessnow.org/cms/assets/uploads/2019/07/One-Year-Under-GDPR-report.pdf
Access Now, *Two Years Under the EU GDPR, An implementation Report,* May 2020. https://www.accessnow.org/cms/assets/uploads/2020/05/Two-Years-Under-GDPR.pdf
Access Now, *Three Years Under the EU GDPR, An implementation Report,* May 2021. https://www.accessnow.org/cms/assets/uploads/2021/05/Three-Years-Under-GDPR-report.pdf
Access Now, *Four Years Under the EU GDPR, How to fix its enforcement*, July 2022. https://www.accessnow.org/cms/assets/uploads/2022/07/GDPR-4-year-report-2022.pdf

To achieve the proposed recommendations, we detail specific measures that the future Regulation could introduce, when relevant. For ease of reading, those measures are presented in a box at the end of each section.

These recommendations are developed with the aim to serve the Commission's objective to ensure that the rights of data subjects across the EU are harmonised and the benefits of the GDPR are delivered in practice.

1. The Regulation should apply to national and cross-border cases (Scope of the law)

The European Union has the power to legislate in the area of data protection pursuant Article 16 of the Treaty on the Functioning of the European Union. This includes the ability for the EU to set forth rules for the consistent application of data protection measures across the EU. This means that in the area of data protection, the European Union has the right to clarify how specific procedural rules will apply to guarantee the application of EU law and EU fundamental rights.

If the scope of the future Regulation were to be limited to cross-border procedures, it would effectively create two different procedures for the application of the same EU law and could potentially lead to an unequal right to remedy, good administration, and data protection for people in the EU.

A focus on cross-border procedures could be beneficial for the smooth and rapid advancement of some of the largest cases filed with DPAs. However, without a complete harmonisation of procedures for national and cross-border data protection complaints, discrepancies may continue to exist on how DPAs deal with similar national GDPR cases based on the differences between their respective national procedural laws. A full harmonisation of procedures in the area of data protection would prove beneficial to ensure that data subjects across the Union effectively enjoy the same right to data protection.

Measure on Scope of the Regulation:

The Regulation applies the resolution of national and cross-border complaints, cases, and investigations under the GDPR.

This Regulation should have EEA relevance, to align with the GDPR.

2. The Regulation will harmonise the following procedurals rules for data protection complaints

a. <u>Right to lodge a complaint:</u> Data subjects will be provided with clear information on how to exercise their right to lodge a complaint in their chosen official language

Under Article 77 of the GDPR, individuals have the right to lodge a complaint with a data protection authority. They can lodge a complaint at the Member State of their habitual residence, of their place of work, or of the Member State of the place of the alleged data protection infringement.

National DPAs, as independent authorities, are entrusted with the consistent application of the GDPR both in the resolution of national and cross-border cases. As part of their tasks detailed in Article 57 of the GDPR, DPAs have to, among others, *"facilitate the submission of complaints (...) by measures such as a complaint submission form which can also be completed electronically, without excluding other means of communication."*[12]

The 2022 study conducted by the Data Protection Law Scholars Network for Access Now, on the right to lodge a complaint, analysed current DPA practices related to their obligation to facilitate the submission of complaints. This empirical research *"shows discrepancies that concern very fundamental aspects of the submission and handling of complaints, with potentially serious implications on the level of data protection in the EU."*[13]

In particular, the study found issues related to the fact that:

> *"The notion of complaint is not defined in the GDPR, which also does not elaborate on the meaning of the obligation 'to facilitate' the submission of complaints. The exact meaning of 'to handle a complaint' is equally not explicitly delimited by the GDPR – although by reference to Article 78 of the GDPR it emerges that complaints shall result in an 'outcome'."*

As a result, individuals and NGOs filing complaints with DPAs experience discrepancies on the use of language, the amount of information required to file said complaints, or even the level of information and accessibility of filing mechanisms. To date, only a minority of DPAs have a complaint form available or easily accessible to people. When this form exists, this form varies from one country to another. This, in turn, may lead to discrepancies in the way DPAs review the admissibility of a complaint.

Measures on the right to lodge a complaint, further specifying DPAs tasks under Article 77 of the GDPR:

The Regulation should provide a definition of what constitutes a "complaint".

The Regulation should mandate the provision of a common complaint form for complaint filing. The form should be developed by the EDPB and be available in all EEA official languages. DPAs shall be able to receive complaints in other formats including letter and electronic mail and provide clear information on their site to individuals regarding the different filing options.

The Regulation should further clarify that, upon filing a complaint, the complainant shall be notified of receipt by the filing DPAs. At this stage, a case number and case handler shall be attributed to each complaint.
All communications with the complainant shall be done by the authorities where the complaint was filed and in the official language of the filing country that the individual chose to use.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) https://eur-lex.europa.eu/eli/reg/2016/679/oj
[13] Data Protection Law Scholars Network (DPSN), *The right to lodge a data protection complaint: OK, but then what? An empirical study of current practices under the GDPR*, June 2022.
https://www.accessnow.org/cms/assets/uploads/2022/07/GDPR-Complaint-study.pdf

b. Admissibility and scope of complaints: DPAs shall review admissibility of complaints only once and based on criteria detailed in this Regulation

The GDPR does not explicitly detail admissibility criteria for complaints while different admissibility requirements exist in national laws. The EDPB Internal Document 06/2020 observes that such national requirements may come from a variety of sources, including:

- '*internal rule of the supervisory authority based upon respective legal provisions'*,
- *administrative procedure requirements of the relevant Member State'*, or even
- *'constitutional obligation'*. [14]

The GDPR also does not establish which supervisory authority should determine the admissibility of a cross-border case. This means that the admissibility of a complaint could be examined twice: by the filing supervisory authority and by the lead supervisory authority. In practice, this has led to contradictory findings by DPAs where a filing authority admitted a complaint which was then declared inadmissible by a LSA.

The same 2022 study found that, in the absence of clear rules and criteria on the admissibility of a complaint:

> *"some Member States have expanded the possibilities for DPAs to reject complaints on grounds not foreseen under the GDPR. The Hellenic DPA, for example, may, according to national law, not only reject complaints which are manifestly unfounded, but also those that are manifestly vague, and those that 'shall be misused'.*[15] *Italian law foresees the restriction of the right of the data subject to lodge a complaint under Article 77 of the GDPR in a variety of cases, such as if the exercise of the rights may prove factually, effectively detrimental to the interests safeguarded by anti-money laundering provisions, or to the interests safeguarded by the provisions aimed to support victims of extortion."*[16][17]

Similarly, Article 57 1 (f) of the GDPR requires that DPAs "*investigate, to the extent appropriate, the subject matter of the complaint*". In practice, we note different approaches in defining the scope and length of investigations conducted by DPAs. This may also vary from the scope of violations identified in the filed complaints and lead to disagreement between EDPB members during the dispute resolution process and beyond.[18]

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[14] European Data Protection Board, *Internal EDPB Document 02/2021 on SAs duties in relation to alleged GDPR infringements*, p. 14. https://edpb.europa.eu/system/files/2022-07/internal_edpb_document_022021_on_sas_duties_in_relation_to_alleged_gdpr_infringements_en.pdf

[15] See Article 13(2) of Greece Data Protection Law No. 4624/2019. https://www.dpa.gr/sites/default/files/2020-08/LAW%204624_2019_EN_TRANSLATED%20BY%20THE%20HDPA.PDF

[16] See Article 2-undecies (Limitazioni ai diritti dell'interessato), Capo III, Codice in materia di protezione dei dati personali. https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-06-30;196!vig=

[17] Data Protection Law Scholars Network (DPSN), *The right to lodge a data protection complaint: OK, but then what? An empirical study of current practices under the GDPR*, June 2022. https://www.accessnow.org/cms/assets/uploads/2022/07/GDPR-Complaint-study.pdf

[18] Irish Data Protection Commission notes "the EDPB does not have a general supervision role akin to national courts in respect of national independent authorities and it is not open to the EDPB to instruct and direct an authority to engage in open-ended and speculative investigation. The direction is then problematic in jurisdictional terms, and does not appear

The future Regulation can mitigate risks of disagreements between DPAs and ensure that complaints are adequately addressed and assessed by developing definitions and clear cooperation procedures.

Measures on admissibility and scope of complaints:

The Regulation should establish criteria for DPAs to take into account to determine the admissibility of a complaint.

The admissibility check shall be conducted only once; ideally jointly between the filing supervisory authority and the lead supervisory authority.

The Regulation should include a close list of justification for DPAs to reject a complaint.

The complainant shall be notified of this decision regarding the admissibility of its complaint. If information or elements are missing for a complaint to be declared admissible, the complainant shall be notified by the filing supervisory authority and be given a deadline of 15 days to provide the missing information before a final decision on admissibility is taken.

The Regulation shall mandate the LSA and CSAs to agree on the scope of a complaint and extent of investigation to be conducted. The complainant shall be notified of the decision on the scope of the complaint and be given 15 days to challenge it in case of disagreement.
This process should also include an effective check of the designation of a lead authority pursuant the criteria for a “main establishment” detailed in the GDPR and EDPB guidelines.

c. Guarantee the Fundamental Right to Good Administration

Article 41 of the EU Charter of Fundamental Rights guarantees the right to good administration.[19] It establishes that (emphasis added):

> *1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
>
> *2. This right includes:*
>
> *(a) **the right of every person to be heard**, before any individual measure which would affect him or her adversely is taken;*

consistent with the structure of the cooperation and consistency arrangements laid down by the GDPR. To the extent that the direction may involve an overreach on the part of the EDPB, the DPC considers it appropriate that it would bring an action for annulment before the Court of Justice of the EU in order to seek the setting aside of the EDPB’s directions.”, DPC, *Data Protection Commission announces conclusion of two inquiries into Meta Ireland,* January 2023. https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland

[19] EU Charter of Fundamental Rights, Article 41. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

> *(b)* ***the right of every person to have access to his or her file****, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
>
> *(c) the obligation of the administration* ***to give reasons for its decisions****.*

We move to address each of these specific aspects of the right to good administration in the context of the application of this right as relation to the enforcement of the GDPR.

i. Right to be heard and party: Both the complainant and defendant are parties and have a right to be heard by the Lead Supervisory Authority and the European Data Protection Board (EDPB)

A right to be heard is granted to entities and/or individuals regarded as a party in a complaint under administrative procedures. As of 2023, all 22 EEA countries which have some form of administrative legislation recognise a right to be heard (See Annex I).

In addition, in some countries where a general procedural law may not exist, the specific data protection law implementing the GDPR provides for a right to be heard to be applied by the national supervisory authority.[20]

What is more, in a 2022 ruling, the General Court of the Court of Justice of the European Union noted that a right to be heard always exists, even when secondary legislation, regulation, or a procedure do not explicitly specify it. The General Court further added that this right cannot be "excluded nor restricted":[21]

> *"It should be noted that the Court affirmed the importance of the right to be heard and its very broad scope in the legal order of the Union, considering that this right must apply to any procedure likely to result in an act of grievance. In accordance with the Court's case-law, respect for* ***the right to be heard is required even when the applicable regulation does not expressly provide for such a process****." (translation from available version in French, emphasis added)*
>
> *"Therefore, having regard to* ***its character as a fundamental and general principle of Union law,*** *the application of the principle of the rights of the defence, which include the right to be heard,* ***can neither be excluded nor restricted*** *by a provision regulation and compliance with it must therefore be* ***ensured both in the total absence of specific regulations and in the presence of regulations which do not themselves take account of the said principle****." (translation from available version in French, emphasis added)*

The General Court has also noted the importance of the right to be heard which "pursues a dual objective" linked with the quality and accuracy of complaint resolution:

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[20] See for instance, Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel, Moniteur Belge, 30 Juillet 2018. https://www.autoriteprotectiondonnees.be/publications/loi-cadre.pdf

[21] Paragraphs 195-197, General Court of the Court of Justice of the EU, *Case T-481/17*, Ruling of 1st June 2022. https://curia.europa.eu/juris/document/document.jsf?text=&docid=260162&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=594089

> *"On the one hand, it serves to investigate the case and to establish the facts as precisely and correctly as possible and, on the other hand, it makes it possible to ensure effective protection of the person concerned. The right to be heard is intended in particular to guarantee that any adverse decision is taken with full knowledge of the facts and is intended in particular to enable the competent authority to correct an error or* ***to enable the person concerned to put forward the elements relating to their personal situation as they argue for a the decision to be taken, not taken, or for such decision to include specific content****." (translation from available version in French, emphasis added)*

It follows that a right to be heard shall always be guaranteed. We move to analyse the scope of this right under EU law.

In the area of competition law, the European Union has often conferred a right to be heard to both the complainants and defendants.[22] This practice acknowledges that both a complainant and a defendant can be affected by a measure described under the right to be heard (a measure that "*would affect him or her adversely*" .

Following this best practice which is applicable to the area of data protection, both the complainant and defendant should be considered as a party in a complaint and given a right to effectively participate in the proceedings.

Measures on the right to be heard and designation of parties:
The Regulation shall establish that complainant and defendant are both parties to filed complaints and shall be provided with equal rights to be heard in front of DPAs and the EDPB.

ii. Access to documents: Both parties, as well as all EDPB members and secretariat, will have access to documents related to the cases

As part of the right to good administration, all parties and concerned supervisory authorities shall have access to complete files and relevant documents that are part of a complaint, including documents submitted by the other party.

Article 60.1 of the GDPR refers to an obligation for the LSA and CSA to share "relevant information" about a case. The EDPB noted difficulties in the implementation of this obligation due to its vagueness:

> *"the content and modalities of information sharing and cooperation during these earlier stages could be further harmonised. For instance, the current regulatory, which refers to a duty to share "relevant information" is unclear about the scope and nature of the documents that must be shared with other Supervisory Authorities in the context of the OSS, both at*

[22] Serge Durande and Karen Williams, *The practical impact of the exercise of the right to be heard: A special focus on the effect of Oral Hearings and the role of the Hearing Officers*, 2005. https://ec.europa.eu/competition/publications/cpn/2005_2_22.pdf

the early stages of the Article 60 cooperation procedure and during the different phases, in case new evidence is collected by the LSA (or CSAs)."

Incomplete information sharing between DPAs is an impediment to cooperation and may lead to disagreement in case resolution.
We therefore support the recommendation of the EDPB to clarify how DPAs should cooperate in this aspect by including in the Regulation a list of the documents that must at minimum systematically be shared between DPAs and with the EDPB. This includes:

> *"the initial complaint and evidence submitted by the complainant insofar relevant to the case, relevant official procedural documents adopted by the concerned supervisory authority with regard to the admissibility of the complaint, all relevant documentation pertaining to investigations carried out by the lead supervisory authority including on the scoping of the investigation, and (a summary of) the written submissions by the parties to the national proceedings."*

Measures on access to documents:

The Regulation shall establish that both parties, the complainant and defendant, have access to documents related to a complaint.

The Regulation shall establish a list of minimum documents that the LSA and CSAs must share with each other and with the EDPB members and secretariat.

iii. Decision: The LSA will always issue a reasoned decision

The right to good administration requires that authorities give reasons for their decisions.

In practice, as part of the enforcement of the GDPR, DPAs have adopted several forms of "decisions" including:

- Formal decisions,
- Amicable settlement, and
- Dismissal or rejection of complaints.

Yet, the GDPR does not include a definition of what constitutes a decision, what minimum standard should apply for an act to constitute a decision, or how and when a decision should be notified. As a result, it is unclear if the different forms listed above can effectively be considered as decisions and be subject to further appeal.

Furthermore, the GDPR creates an obligation on DPAs to "handle cases" which is not always interpreted by DPA as an obligation to reach a formal decision. What is more, some cases remain unaddressed or/and complainants may have never received updates from DPAs. In the absence of

a deadline for the issuance of a decision, complainants are left waiting for a resolution or an update for years, not knowing if and when a DPA may be taken to court for a failing to take a decision.

Measures on decisions:

The Regulation shall establish a definition of what constitutes a decision and clarify that "handling cases" means reaching a decision.

The Regulation shall mandate the publication and communication of all forms of decision which should include the name of the defendant. The filing supervisory authority shall notify all parties of the decision.

The Regulation shall establish that in absence of communication from the filing supervisory authority within 6 months of filing a complaint, the complainant is entitled to bring a complaint against the authority for lack of action.

3. The Regulation should established a detailed process and timeline for cooperation in cases under mechanisms detailed by Article 60 and 65 of the GDPR

The GDPR establishes the consistency and cooperation mechanism for DPAs to work together within the EDPB and reach decisions. While the GDPR details some processes and provides for some deadlines, in particular around the responsibilities of the EDPB, several steps remain open for interpretation and without a clear timeframe.

In practice, some cross-border cases have been resolved after close cooperation between DPAs from the scoping stage to the final decisions while others were exclusively conducted by the lead supervisory authority with minimum involvement or information sharing with the CSAs and the EDPB.

A central objective of the future Regulation should be to detail what "cooperation" between DPAs and with the EDPB means by providing clear steps for complaint handling and resolution. Increased cooperation would limit procedural disagreements between DPAs and would facilitate exchanges between authorities. In turn, this may also reduce the number of objections raised by CSAs at the draft decision stage and limit the use of the dispute resolution mechanisms foreseen under Article 65 of the GDPR.

Measure for cross-border complaint handling and resolutions:

The Regulation shall establish the following processes for cross-border complaint handling and resolutions:

Within maximum one month of receiving a cross-border complaint:

1. The Supervisory Authority assigns it a case number and case handler which will be notified to the complainant.
2. The SA logs the complaint and all related documents within the EDPB IT system to define and agree on: the main establishment and Lead Supervisory Authority, the list of Concerned Supervisory Authority, the admissibility, and scope of the complaint. The decisions on these components will be notified to the complainant which shall have 15 days to object to any or all points, with the exception of the list of CSAs.
3. In case of disagreement between the LSA and the CSAs during this stage, the EDPB should decide on the matter within 15 days and present its decision to the LSA.

After completion of this process and within maximum six months of the receipt of complaint:

4. The LSA conducts and concludes investigations on the complaints within the scope defined with the CSAs. The CSAs may contribute to such investigation by providing documents and resources to the LSA. The LSA shall update the CSAs of progress at least every fortnight. The LSA shall share all documents linked to the investigation with the CSAs.
5. The LSA shall hear both parties equally at least once.
6. If the LSA fails to provide access to documents or inform the CSAs, the CSAs may bring up the matter to the EDPB who can issue decisions requiring the LSA to provide all information necessary for cooperation.

After the investigation and within maximum eight months of the receipt of the complaint:

7. The LSA shall prepare and finalise a draft decision and present it, as well as a summary of its findings to the CSAs and the EDPB. All documents shall be uploaded in the EDPB IT system.
8. The LSA can involve CSAs in the co-drafting of the draft decision and require assistance from relevant subgroups from the EDPB.

Final stages and possible dispute resolution:

9. After the presentation of the draft decision, the EDPB members have four weeks to issue reasoned objections to the LSA (as already established under the GDPR).
10. If no reasoned objections are issued the LSA has four weeks to issue a final decision.
11. Upon receipt of these objections, the LSA has one month to integrate comments to address them. Alternatively and within the same time frame, the LSA can decide to reject all or some objections by providing the EDPB secretariat with a summary of its draft decision and of the objections so that the case can move to the dispute resolution procedure foreseen under Article 65 of the GDPR.
12. The EDPB has to reach a final decision one month after receiving the case from the LSA, with a possibility to extend this process for another month or two depending on the complexity of the cae. The EDPB shall hear both parties as part of this process.
13. The LSA has three weeks to adopt the final decision communicated by the EDPB.

Publication and communication of the decision:

14. Once a final decision is adopted, the EDPB, LSA, and CSA may publish the decision and it shall be added to the EPDB register. The decisions will be public and include the name of the parties.
15. The filing SA informs the complainant of the final decision. If the decision was reached in another language than the filing language, the CSA provides a summary of the decision

upon notification in maximum 15 days after the decision was reached. A complete translation of the decision shall be provided to the complainant as soon as possible.

4. The Regulation could introduce a “fast-track” process for the resolution of selected cases

As an exemption from the process proposed in point 3 for the resolution of most cross-border cases, the Regulation could put forward a “fast-track” process where certain steps would be either skipped or shortened. This could apply to the resolution of selected cases that the EDPB would identify for which for instance sufficient decisions have already been made at EU level. Decisions in those cases could be reached within a maximum of six months, if and after the complainant has agreed to be put in this fast-track procedure.

This flexibility may allow DPAs to revolve cases faster while applying consistent findings from previous cases and free resources for the resolution of other pending cases.

A similar “slow-track” mechanism could be envisaged for selected cases that the EDPB identifies as particularly complex. In those cases, decisions could be reached within a maximum of 24 months.

5. The Regulation could requires all members of the EDPB to appoint an EU data protection Commissioner or point person tasked with cooperation

Maintaining and strengthening the independence of data protection authorities from governments and private interest is critical to ensure an effective right to remedy. DPAs have the difficult task to remain independent while being a national authority, and often being reliant on the State for funding and structure. As DPAs exist both in a national and European regulatory ecosystem, their procedures are still largely linked to national law, even when applying EU law.

A harmonisation of some aspects of the procedural rules would put the DPAs at the forefront of the development of a true European approach to enforcement of data protection. To accompany this transition and continue building a European culture of data protection, we propose that each national data protection authority member of the EDPB formally appoint a Commissioner or high-level representative tasked with EU cooperation and coordination. In the short to medium term, these European data protection Commissioners could be based in Brussels to directly represent their national DPAs at the EDPB.

6. The Regulation should mandate the creation of a new IT system for case monitoring, cooperation, and reporting

Five years after the entry into application of the GDPR, we do not have a complete picture of the number of cases, complaints, and decisions taken. This is partly due to a lack of clear definition as well as inconsistencies in statistics despite efforts from the EDPB to gather as much information as possible.

A lot of this information steem from the IMI (Internal Market Information System), the IT platform which was chosen by the EU to support cooperation and consistency procedures under the GDPR. This platform is inadequate both for statistical purposes and for the cooperation objective set under the GDPR. It was not designed for this goal and it lacks critical features to allow DPAs to work together.

There are no harmonised practices as to how the system should be used and the amount of information that can or should be included in it. This leads to uncertainty and confusion between DPAs on the status of cases.

The future Regulation is an opportunity for the EU to build a new system that fully serves and follows the logic and the structure of the GDPR and not the purposes of the internal market. The process of building this updated platform should take into account the needs of the EDPB secretariat and of its members. It should include a feature to activate automatic notifications when documents are posted or added to cases as well as possibilities to set reminders and for DPAs to discuss and comment on cases.

Measures on IT system:

The Regulation shall mandate the European Commission to develop and finance the development of a new IT system for the cross-border complaint cooperation to be used by DPAs and the EDPB for case resolutions and statistical purposes.

Conclusion

Access Now thanks the European Commission for the opportunity to provide feedback on this initiative aiming to further specify procedural rules relating to the enforcement of the General Data Protection Regulation.

The future Regulation is a necessity to ensure that the GDPR is a success both on paper and in practice. The European Union became a leader in the regulation and protection of personal data when adopting the GDPR; people are expecting and waiting for these rights to materialise. We look forward to working alongside the Commission and the co-legislators to build on the existing legislative success and to equip regulators with adequate tools and procedures for the smooth application of a European right to data protection.

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Annex I : Right to be heard in Administrative laws of EEA States

Countries	Legal instrument	Reference to a Right to be heard
Austria	General Administrative Procedure Act (1991)	§ 41. Right to be heard guaranteed. Positive obligations for officers in charge.
Bulgaria	Administrative Procedure Code (2006)	Article 8. Right to participate in proceedings.
Croatia	General Administrative Procedure Act (2009)	Articles 4 and 6. Right to participate in proceedings, with exceptions (if necessary, proportionate or prescribed by law). Positive obligations for public law authorities.
Czech Republic	Code of Administrative Procedure (2004)	Section 172 (4). *"Any one person whose rights, obligations or interests may be directly affected by the general measure may submit voice oral comments during public hearings."*
Denmark	Public Administration Act (1985)	Article 21. Right to make a statement, with exceptions (including, out of statutory time limit and if provided by law).
Estonia	Administrative Procedure Act (2001)	§ 40. Right to provide opinion and objections, with exceptions (including urgency and if provided by law).
Finland	Administrative Procedure Act (2003)	Section 34. Right to express opinion and/or submit explanation, with exceptions (including if a claim is inadmissible).
France	Code of the relations between the public and the administration (2015)	Article L121-1,-2. Right to be heard, with exceptions (including urgency and likely to compromise public order).
Germany	Administrative Procedure Act (1976)	Section 28. Opportunity of commenting on facts, with exceptions (including, urgency, time limit, or against public interest).
Greece	Administrative Procedure Code (1999)	Article 6. Right to express opinions, with exceptions (including the necessity to prevent risk).

Hungary	Code of General Administrative Procedure (2016)	Section 74. Authority holds a hearing if deemed necessary, where nature of the case so permits, if necessary to hear collectively all parties.
Iceland	Administrative Procedure Act (1993)	Article 13. Right to be heard for parties, with exceptions (if clearly unnecessary or party's position on the matter already appears in the documentation).
Italy	Administrative Procedure Act (1990)	Section 9. *"Any party having either public or private interests, parties having diffuse interests and legally established as associations or committees, who may be adversely affected by a measure, shall have the right to intervene during the related procedure."* Section 10. Right to present documents and written arguments.
Latvia	Administrative Procedure Law (2003)	Section 62. Obligation for institution to clarify and evaluate opinion and/or arguments of addressee or third person, with exceptions (including urgency or in the event that it is insignificant).
Netherlands	General Administrative Law Act (2009)	Article 7:3 Opportunity to be heard for interested parties, with exceptions (including if the objection is inadmissible, or if parties do not want to be heard).
Norway	Public Administration Act (1967)	Article 16 - Individual decisions Opportunity to express opinion for parties within a time limit. Article 37 - Regulations Opportunity to express their opinions for: - public and private institutions, - organisations for enterprises, - professions, - skilled trades, - interest groups which the regulations concern or will concern, or whose interests are particularly affected.
Poland	Code of Administrative Procedure	Article 10.

	(1960)	Right to express opinion, except if urgency.
Slovakia	Administrative Code (1967)	§ 33. Opportunity for parties to express their views.
Slovenia	General Administrative Procedure Act (1999)	Article 9. Possibility for parties to be heard on facts and/or circumstances relevant for the decision.
Spain	Common Administrative Procedure of the Public Administration (2015)	Article 82. Interested parties may allege and submit justifications within a time limit, except if other arguments / evidence are not taken into account in decision.
Sweden	Administrative Procedure Act (1986)	Section 25. Opportunity for party or private person to state an opinion within a set period, with exceptions (including,urgency or if it would otherwise be more difficult to implement the decision).