

IAB Europe Position on the Draft GDPR Procedural Regulation

IAB Europe has a diverse membership that comprises a variety of digital marketing, digital advertising and media companies.

IAB Europe welcomes the European Commission's ambition to make GDPR enforcement "simpler and faster" in cross-border cases. We appreciate the opportunity to share recommendations on how the draft regulation can be further clarified to both enhance defendants' rights and improve GDPR enforcement in cross-border cases.

Since the Commission is expected to launch a full review of the GDPR next year, we see the draft GDPR procedural regulation as a first step. We believe that the ambition to develop a set of rules that is simpler and more effective - as highlighted by the draft GDPR procedural regulation - should continue to guide the Commission approach to the GDPR review.

Executive summary and key recommendations

There are a number of areas in which we believe the draft regulation can be amended. At a high level, we recommend:

- **The one-stop-shop system should remain the foundation of GDPR governance.** The co-legislators should maintain the fine balance between national and European competences and in particular ensure that article 10(6) does not excessively interfere with LSA investigative powers.
- **Early resolutions, such as amicable settlements, should be encouraged.** The proposal should also facilitate the use of other resolution mechanisms, such as internal complaint systems. The co-legislators should avoid unnecessary measures which would discourage the involved parties to consider an amicable settlement.
- **Supervisory authorities must show good faith and cooperation.** The co-legislators should introduce an obligation on supervisory authorities to adhere to the principles of utmost good faith, sincere cooperation and deference to the LSA in reaching consensus. This would ensure the proposal meets its goal of ensuring as many complaints as possible are resolved quickly and early.
- **Increased transparency is key to ensure that supervisory authorities are accountable to their decisions.** The co-legislators should explore how to include the correspondence between supervisory authorities in the administrative file, with a view to balancing confidentiality against accountability.

- **Measures to preserve business information confidentiality should be effectively enforced.** IAB Europe welcomes the Commission's ambition to prohibit the complainants from disclosing confidential information about the case. However, the draft regulation should ensure, as far as possible, the effectiveness and consistency of sanction mechanisms across Europe in case of confidentiality breaches.
- **Defendants' right to be heard should be strengthened to ensure a fair procedure.** IAB Europe welcomes measures that would allow defendants to submit comments at certain key stages in the process (LSA preliminary findings and revised draft decision). However, IAB Europe proposes to allow defendants to exercise the right to be heard at other stages of the procedure.
- **Defendants should be able to effectively exercise their right to be heard.** The proposal would allow defendants to provide their views under a time limit that will be determined by the Lead Supervisory Authority (LSA). IAB Europe recommends that these time limits are reasonable and proportionate taking into account the nature and complexity of each case.

Preliminary remarks

IAB Europe welcomes that the proposal recognises that defendants and complainants are not in the same procedural situation (recital 25). The enforcement procedure of the GDPR should remain an administrative procedure and not be turned into an adversarial procedure. This is key to ensure that supervisory authorities remain fully independent as required by the GDPR.

IAB Europe also wants to stress the importance of respecting the fundamental right of defence of the investigated organisation throughout the entire procedure both at the national and cooperation stages.

Recommendations

1. The one-stop-shop system should remain the foundation of GDPR governance

IAB Europe welcomes the fact that the One-Stop-Shop (OSS) system - by which the authorities in the country in which a company is registered would automatically have jurisdiction over the investigation - is untouched in the Commission proposal. The latter would preserve the prerogatives of national supervisory authorities while harmonising some aspects of national procedures in cross-border cases.

The co-legislators should maintain this fine balance between national and European competences, in particular in article 10(6). The latter would offer the EDPB the possibility to potentially decide on the scope of an investigation in complaint-based cases when the LSA and concerned supervisory authorities (CSAs) disagree. This would excessively interfere with national prerogatives, and in particular LSA investigative powers. As opposed to the LSA, the EDPB has no investigative powers itself. The Board is responsible for monitoring the

application of the GDPR but, as per article 70(1)(a) of the GDPR, has to do so “without prejudice to the tasks of supervisory authorities”. IAB Europe, therefore, suggests amending article 10(6) as follows: *“The Board shall adopt an urgent binding decision on the scope of the investigation on the basis of the comments of the supervisory authorities concerned and the position of the lead supervisory authority on those comments. The Board shall not extend the scope of the investigation on its own initiative.”*

2. Early resolutions, such as amicable settlements, should be encouraged

IAB Europe supports a strengthening of the accountability principle and the addition of opportunities for defendants to resolve cases under their internal complaints handling processes or via amicable resolution. IAB therefore welcomes the Commission proposal to give legal force to the concept of amicable settlements (article 5), while supporting strong enforcement in case of severe violations of the GDPR. The latter represents an effective tool to resolve cases that do not pose any severe threats to EU citizens’ fundamental rights. This would lessen the workload of the respective supervisory authorities, as it would free up time and capacity needed to focus on more pressing cases with adverse effects on fundamental rights.

The co-legislators should require LSAs to ensure complaints are considered first by a defendant’s complaint handling system. Unresolved or more complex cases should be referred to amicable settlement, facilitated by the LSA. The co-legislators should also avoid unnecessary measures which would discourage the involved parties to consider an amicable settlement. For example, the legislation should not impose excessive coordination obligations on LSAs. This would increase administrative burden, slow down the process and ultimately deter involved parties from using this mechanism.

Generally, the proposal should facilitate the use of alternative resolution mechanisms - such as internal complaint systems - to avoid as much as possible lengthy investigations on matters that pose very little risk to citizens’ rights. Increased transparency is key to achieve this. IAB Europe supports any amendment that would require the supervisory authorities to inform the concerned party about the original complaint before any decision to launch an investigation.

3. Supervisory authorities must show good faith and cooperation

A key goal of the proposal is to encourage effective and early cooperation between supervisory authorities so that as many complaints as possible are resolved at an earlier stage. This requires supervisory authorities to adhere to the principles of utmost good faith, sincere cooperation and deference to the lead supervisory authority in reaching consensus. This would ensure respect for the consistency mechanism in article 63 of the GDPR.

4. Increased transparency is key to ensure that supervisory authorities are accountable to their decisions

IAB Europe welcomes the obligation on LSA to ensure that defendants have access to the administrative file (article 20). This transparency requirement is essential to allow defendants to effectively exercise their right to be heard. The proposal also establishes what information the administrative file needs to include. The draft regulation excludes the correspondence and exchange of views between the LSA and the CSAs from the administrative file. Even though IAB Europe understands that confidentiality is important to build consensus between authorities, increased transparency is essential to ensure that authorities are accountable to their decisions. Such transparency is also key to allow the party under investigation to exercise its right of defence in the most effective manner. The co-legislators should explore how to include the correspondence and exchange of views between supervisory authorities in the administrative file, with a view to balancing confidentiality against accountability. Moreover, the defendants should be allowed to access the relevant and reasoned objections submitted by CSAs.

Transparency should not be limited to access to documents. Defendants should be informed when the LSA transfers the file to CSAs. The co-legislators should introduce this new obligation to ensure a more transparent administrative procedure.

5. Measures to preserve business information confidentiality should be effectively enforced

IAB Europe welcomes the Commission's ambition to prohibit the complainants from disclosing confidential and sensitive information about the case [articles 15(5) and 21]. This is key to protect business confidentiality while reducing the risk of media leaks. The latter could influence the decisions from Lead Supervisory Authorities and therefore undermine the integrity of the administrative procedure.

However, we question whether the Commission's proposal - as currently drafted - will achieve this ambition. First, the administrative file should only include confidential documents that are relevant to the investigation. Therefore, we suggest amending article 19(2) to ensure that the LSA is required to return documents that prove to be unrelated to the subject matter of the investigation. This would reduce the potential impact of leakage of confidential documents on defendants.

Second, such measures to protect information confidentiality should be effectively enforced. The draft regulation should ensure, as far as possible, the effectiveness and consistency of sanction mechanisms across Europe in case of confidentiality breaches. This is essential to ensure that the proposal has enough teeth to deter parties from disclosing confidential or sensitive information. This can be easily done by including in article 15 (5) a duty for the LSA, inspired by a similar provision in article 21 (3), to adopt 'appropriate arrangements' to give full effect to the complainants' procedural rights while preserving defendants' right of defence.

Moreover, the co-legislators should amend article 21(2) to ensure that confidential information is excluded from access requests after the file has closed. Such information often remains confidential, though the procedure is closed.

6. Defendants' rights to be heard should be strengthened to ensure a fair procedure

IAB Europe welcomes measures that would allow defendants to comment at different stages of the administrative procedure, including:

- The 'preliminary findings' (Article 14).
- The revised draft decision from the LSA (Article 17).
- The EDPB 'statement of reasons' (Article 24).

This is key to guarantee the defendant's right to a fair hearing, as introduced in the Charter of Fundamental Rights of the European Union. We also support the fact that these articles would allow defendants to share their views on both the factual and legal elements raised in the investigation.

However, defendants' right to be heard should apply to other stages in the administrative procedure:

- The co-legislators should amend article 7 to allow defendants to request to be heard by CSAs – when the LSA launches the cooperation procedure. This would offer defendants the opportunity to inform the decision of CSAs to either raise objections or agree with the LSA draft decision.
- Defendants should be allowed to comment on the 'summary of key issues', as defined in article 9. The latter would require the LSA to send a 'summary of key issues' – that will include the main facts and its initial legal assessment - to the CSAs. This initial stage in the procedure could influence the scope of the investigation and LSA approach to key issues. Therefore, LSA should ensure that the views of all parties are heard and reflected in the 'summary of key issues'.
- IAB Europe is also concerned that article 17(1) - as currently drafted – would increase the risk of diverging procedures across member states. Under article 17(1), each LSA remains free to decide whether its revised draft decision "raises elements" on which defendants are allowed to comment. Since each LSA has full discretion to consult parties, the application of article 17(1) is likely to vary across member states - depending on the attitude of supervisory authorities. Therefore, this article should be amended to allow defendants to share views on the revised draft decision every time it raises new elements compared to the initial version.

7. Defendants should be able to effectively exercise their right to be heard

The Commission proposal would allow defendants to submit comments at different stages in the administrative procedure under a time limit that will be determined by the LSA

(articles 14, 17 and 21). It is important to ensure that defendants have enough time to share their views, especially when the case is complex. IAB Europe, therefore, recommends clarifying the time limits - that will be defined by the LSA according to articles 14 (4), 17 (2) and 21 (6) - are reasonable and proportionate depending on the nature of each case. We also suggest exploring the introduction of a minimum threshold for these time limits.

In the draft regulation, the defendants would have one week to comment (with a possibility to extend the deadline by another week) on the EDPB “statement of reasons” [article 24(2)]. This is not enough time to allow defendants to respond to new elements brought forward by the EDPB, especially in cases of complex investigations. IAB Europe recommends this time limit - which should not be inferior to 30 days - to be determined on a case-by-case basis, depending on the complexity of the issues under consideration. This is key to respect defendants’ right to be heard and ensure a fair procedure.