IAB Europe
Rond-Point Robert
Schumanplein 11
1040 Brussels
Belgium
iabeurope.eu

IAB Europe: GDPR Procedural Regulation

Outstanding Concerns Regarding the European Parliament and European Council Positions

IAB Europe, representing a diverse membership of digital marketing, digital advertising, and media companies, would like to express its strong concerns about the practical consequences of both the European Parliament's adopted text and the Council's position on the GDPR procedural regulation. As the trilogues are expected to commence at the end of the year, IAB Europe wishes to highlight the importance of enabling early resolution mechanisms, protecting business information confidentiality, and securing the right to be heard.

The legislative process has progressed quickly, with very limited discussion about the operational implementation of these new rules. In practice, they will have significant consequences for data subjects, supervisory authorities, controllers, and processors. Trilogues are likely to be complex and should consider the practical operation of the new rules, and how they will affect all parties involved.

Early Resolution Mechanisms and Complaint Admissibility:

The existing cross-border complaints process under GDPR is plagued by complexity, unclear procedures, and extended administrative delays, resulting in significant backlogs for supervisory authorities (SAs). Consequently, data subjects experience significant delays before their complaints reach the data controller/processor. The Commission's original objective in proposing this regulation was to streamline and expedite the complaint process, benefiting data subjects and conserving SAs' resources. However, both the European Parliament and the Council's positions introduce new bureaucratic hurdles in the initial stages of complaint processing. The Regulation must actively promote direct resolution between data subjects and data controllers/processors, as well as amicable resolution. It should also avoid the complex administrative process in both positions involving SAs at an early stage and giving broad discretion to investigate even resolved complaints. This additional layer is likely to exacerbate delays, increase the backlog of easily resolvable cases, and divert more resources away from high risk cases.

One-Stop-Shop Mechanism:

IAB Europe
Rond-Point Robert
Schumanplein 11
1040 Brussels
Belgium
iabeurope.eu

Both the European Parliament and the Council's texts should not undermine this principle. A cornerstone of the GDPR is the one-stop-shop mechanism, which designates the lead supervisory authority (LSA) as the lead authority in cross-border data protection cases, working in close cooperation with the supervisory authorities concerned. A shift in this procedure would risk inconsistent application of GDPR rules across different jurisdictions. Additionally, the broadening of the territorial scope, and remit of EDPB, in relation to urgent binding procedures should be avoided by maintaining the Commission's wording, which restricts the scope to the territory of the Member State of the requesting SA.

Business Information Confidentiality:

The European Parliament's position significantly weakens the confidentiality protections for business information suggested in the Commission's proposal. It proposes full access for complainants to all documents by default, with limited, vague and conditional exceptions, and removes safeguards against the misuse of information shared in the context of an investigation. These provisions heighten the risk of media leaks, potentially influencing SAs decisions and compromising their independence. Additionally, having access to internal deliberations, which is currently excluded in both positions, would give full weight to the right to be heard of all parties. While the Council clearly confirms that complainants should not have "access to business secrets or other confidential information"[1] nor "generalised access to the administrative file,"[2] the Council has not maintained the minimum safeguards as per the Commission's proposal. Although we understand the Council's position to rely on national law to ensure business confidentiality for simplicity, varying national interpretations could lead to risks. In order to mitigate this risk, the LSA should be responsible for making determinations in relation to what should be considered as protected information and that, to avoid different national approaches, there should be clear non-exhaustive criteria for making such determinations. Additionally, there should be a defined appeal route for the party under investigation in the event that it disagrees with the LSA's determination.

Thus, clear consequences for disclosing information contained in the administrative file or for using it for purposes other than that for which access has been granted should be specified by Member States in national law, such as penalties or preventative measures like non-disclosure agreements. Maintaining strict confidentiality standards is crucial to preserving the integrity of the administrative process, fostering trust during the ongoing investigation, and ensuring fair outcomes for all parties involved.

[1] General approach recital 26.
[2] Ibid.

IAB Europe
Rond-Point Robert
Schumanplein 11
1040 Brussels
Belgium
iabeurope.eu

The Right to Be Heard:

The right to be heard for defendants should be uniformly applied across Europe. The European Commission's proposal establishes clear opportunities for defendants to express their views during administrative procedures. However, the Parliament's position is ambiguous regarding the right to be heard, which is granted "before any measure is taken that would adversely affect"[3] the parties involved. It also allows national procedural laws to limit this right. Potential restrictions on the right to be heard at the national level and vague concepts, such as "adversely affect," increase legal uncertainty and the risk of diverging interpretation across Member States. The Council recognises the importance of clearly identifying the stages at which the parties under investigation and the complainant have the right to be heard. Particularly, before the EDPB adopts a binding decision. However, it is not clear why the Council has decided to limit this to only situations where the EDPB intends to adopt a binding decision requiring LSA to amend its decision, and where the adoption of such a decision relies on elements that the party under investigation and/or complainant did not have the opportunity to express their views on.

Defendants must be able to exercise their right to be heard effectively. Both positions propose reasonable time limits for providing views, with a deadline of four weeks. While reasonable time limits are beneficial, a strict deadline may not accommodate complex cases. Time limits should be proportionate to case complexity, ensuring defendants have adequate time to present their views.

Conclusion:

IAB Europe urges the European Parliament, the Council, and the Commission to carefully consider the practical implications of the draft GDPR procedural regulation during the upcoming trilogues. It is crucial to address the complexities and potential drawbacks highlighted, particularly in enabling early resolution mechanisms, protecting business information confidentiality, and ensuring the right to be heard. By ensuring a balanced and thoughtful approach, we can achieve a regulatory framework that effectively protects data subjects, facilitates efficient complaint resolution, and maintains fairness and consistency across all jurisdictions.

[3] Adopted text, amendment 28.