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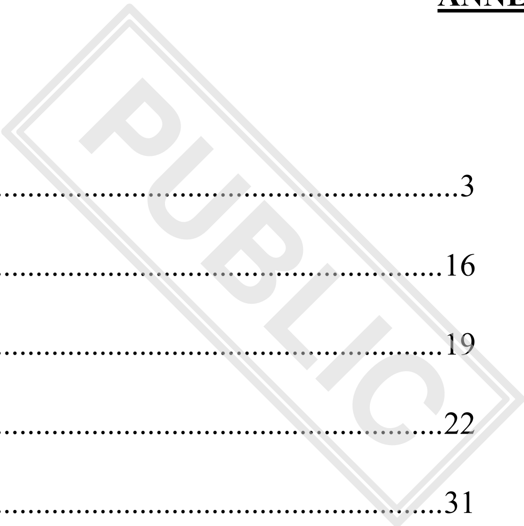
NOTE

From:	General Secretariat of the Council
To:	Delegations
No. Cion doc.:	11657/23 + ADD1
Subject:	Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 - Comments from Member States

Delegations will find in annex the comments from EE, LV, LU, PT, FI, SE on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679.



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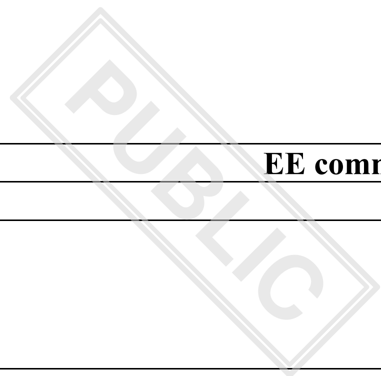
I. ESTONIA



The regulation and EE proposals	EE comments
Article 1 Subject matter	
This Regulation lays down procedural rules for the handling of complaints and the conduct of investigations in complaint-based and ex officio cases by supervisory authorities in the crossborder enforcement of Regulation (EU) 2016/679.	
Article 2 Definitions	
For the purposes of this Regulation the definitions in Article 4 of Regulation (EU) 2016/679 shall apply. The following definitions shall also apply:	We need to add a definition of confidential information. It is also necessary to clarify to whom the information is confidential – the applicant, the person subject to the proceedings, the public?
(1) ‘parties under investigation’ means the controller(s) and/or processor(s) investigated for alleged infringement of Regulation (EU) 2016/679 related to cross-border processing;	
~~(2) ‘summary of key issues’ means the summary to be provided by the lead supervisory authority to supervisory authorities concerned identifying the main relevant facts and the lead supervisory authority’s views on the case;~~ Proposal: (2) ‘summary of key issues and preliminary findings’ document provided by the lead supervisory authority to supervisory authorities and to the parties under investigation concerned identifying the relevant facts, supporting evidence, legal analysis, and, where applicable, proposed corrective measures.	At present, information on the preliminary facts of the procedure is provided in any case at the stage of the identification of the Leading supervisory authorities (GDPR art. 56 process), this summery of key issues would simply place an obligation on the SA to provide additional information – or will it replace it? The new obligation will only be imposed on the SA conducting the procedure, while no obligation to provide feedback to other SA´s. Providing ‘summary of key issues’ at an early stage of the procedure is not fit for purpose, as the lead supervisory authority who should create the document does not have the necessary information at that stage. Information may also be misleading.

	Our proposal is to bring together a 'summary of key issues' and 'preliminary findings' in a single document, which will be provided to the supervisory authorities and the complainant and the person subject to the proceedings. At a slightly later stage than the start of the proceedings. Once the document has been submitted, the parties can exercise their right to be heard. There is no need to draw up two different documents. Also, in such a case, all parties would be in a single information room. At present article 14 does not refer to the possibility to submit this document to concerned supervisory authorities for expressing their views but it is included in the list of documents to be shared with CSA-s in art 8(2)(g). For clarity, this should be additionally covered in article 14.
~~(3) 'preliminary findings' means the document provided by the lead supervisory authority to the parties under investigation setting out the allegations, the relevant facts, supporting evidence, legal analysis, and, where applicable, proposed corrective measures;~~	
(4) 'retained relevant and reasoned objections' means the objections which have been determined by the Board to be relevant and reasoned within the meaning of Article 4(24) of Regulation (EU) 2016/679.	
Article 3 Cross-border complaints	
1. A complaint on the basis of Regulation (EU) 2016/679 that relates to cross-border processing shall provide the information required in the Form, as set out in the Annex. No additional information shall be required in order for the complaint to be admissible. <u>Proposal</u>: 1. A complaint on the basis of Regulation (EU) 2016/679 that relates to cross-border processing shall provide the at least following	More flexibility has to be left for SA´s in harmonizing the forms. Is the form in annex mandatory? Copy of ID- cardis not necessary. We use digital signature, for identifying a person. The form should include more information in order to resolve the case – the claim which the applicant seeks to obtain. We are of the opinion that there is no need for an annex to the form. The necessary requirements should be included in the regulation.

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information: (a) identification of person or entity filing the complaint (b) contact details (c) entity whose processing of your personal data infringes Regulation (EU) 2016/679 (d) subject of complaint (e) applicant's claim ~~required in the Form, as set out in the Annex.~~ No additional information shall be required in order for the complaint to be admissible.	It needs to be clarified if it turns out to be a cross-border case, is it necessary for the complainant to submit a new complaint in accordance with the form set out in the Regulation. In addition, as regards the admissibility of a complaint, it could be stressed that other admissibility criteria should remain within the scope of national law and should not be harmonized, otherwise there may be problems e.g. by signing (if the Commission decides that a signature should not be required, while it is crucial for us to identify a person by means of a digital signature). It should be up to the Member State to decide how it will identify the person.
2. The supervisory authority with which the complaint was lodged shall establish whether the complaint relates to cross-border processing.	
3. The supervisory authority with which the complaint was lodged shall determine the completeness of the information required by the Form within one month.	
4. Upon assessment of the completeness of the information required by the Form, the supervisory authority with which the complaint was lodged shall transmit the complaint to the lead supervisory authority.	
5. Where the complainant claims confidentiality when submitting a complaint, the complainant shall also submit a non-confidential version of the complaint.	Please explain why there is a need for duplicate versions, for whom the non-confidential version is intended and for whom the confidential version is available. Alternatively, complainant should be enable to submit one form and indicate within this form the information they deem to be confidential.
6. The supervisory authority with which a complaint was lodged shall acknowledge receipt of the complaint within one week. This acknowledgement shall be without prejudice to the assessment of admissibility of the complaint pursuant to paragraph 3.	It is excessive to require the supervisory authority with which the complaint was lodged to acknowledge receipt of the complaint within one week, as the workload and organization within the authorities may vary. In addition, it is not always clear whether a cross-border procedure may be involved.

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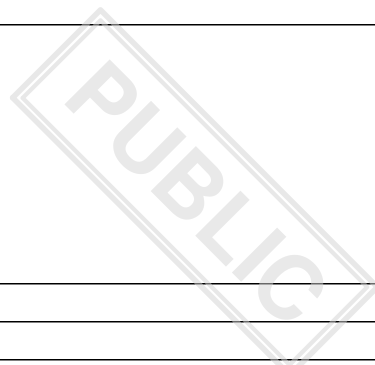
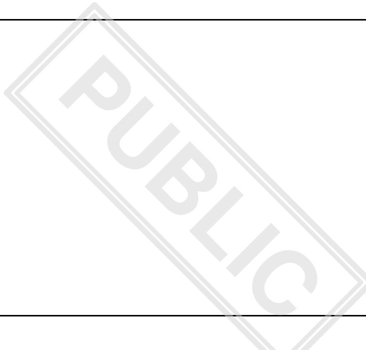
	Please add to the recital that an automatic email reply is also allowed.
Additional note: It is not apparent from the Regulation that the consequences of a supervisory authority exceeding the time limits laid down in Article 3(3) and (6) of the Regulation. We would like to ask for clarification, clarification in the Regulation.	
Article 4 Investigation of complaints	
While assessing the extent appropriate to which a complaint should be investigated in each case the supervisory authority shall take into account all relevant circumstances, including all of the following: a) the expediency of delivering an effective and timely remedy to the complainant; (b) the gravity of the alleged infringement; (c) the systemic or repetitive nature of the alleged infringement.	Does Article 4 mean simply delineating the form of order sought in the complaint or does it mean that, in the light of, inter alia, Article 4(a) to (c) above, it is established to what extent the (supervisory) procedure should not be opened and the proceedings refused? In other words, is there any 'interchange' between inadmissibility (rejection on formal grounds) and rejection (on substantive grounds) in which proceedings are refused on substantive grounds, and are those grounds exhaustively listed in Article 4? Are the grounds for that purpose listed exhaustively in Article 4 (there is a need for further clarity as to the judicial review of the legality of such a decision? The intensity of judicial review (the list in Article 4 contains a wide margin of discretion); is only the interference with the applicant's subjective rights to be taken into account (e.g. point (c) may have significant public interest implications, but judicial standing is primarily central to subjective rights in Estonia)? Please add an explanation to the recital.
Article 5 Amicable settlement	
A complaint may be resolved by amicable settlement between the complainant and the parties under investigation. Where the supervisory authority considers that an amicable settlement to the complaint has been found, it shall communicate the proposed settlement to the complainant. If the complainant does not object to	If an amicable settlement is reached, either the procedure ends with a decision or with the withdrawal of the complaint. If the appeal is withdrawn, it is necessary to add to the text of the regulation that no further appeal can be lodged in the same case.



the amicable settlement proposed by the supervisory authority within one month, the complaint shall be deemed withdrawn. <u>Proposal</u>: (2) The complainant can no longer lodge a new complaint in the same case.	
Article 6 Translations	
1. The supervisory authority with which the complaint was lodged shall be responsible for: (a) translation of complaints and the views of complainants into the language used by the lead supervisory authority for the purposes of the investigation; (b) translation of documents provided by the lead supervisory authority into the language used for communication with the complainant, where it is necessary to provide such documents to the complainant pursuant to this Regulation or Regulation (EU) 2016/679 <u>Proposal</u>: 2. The supervisory authorities may agree to use one language for handling the case. 3. The translations may be informal.	Can only official translations from the Translation Office be suitable or can the SA itself translate? SA-s should have the possibility to agree on a common language of the procedure.
2. In its rules of procedure, the Board shall determine the procedure for the translation of comments or relevant and reasoned objections expressed by supervisory authorities concerned in a language other than the language used by the lead supervisory authority for the purposes of the investigation.	Who will then provide the translations? Alternatively, it could be suggested that translations should not be regulated at all in the regulation and leave this issue within the scope of national law; in that regard, the regulation could only contain confirmation of the adequacy of unofficial translations.
Article 7 Cooperation between supervisory authorities	



While cooperating in an endeavour to reach a consensus, as provided for in Article 60(1) of Regulation (EU) 2016/679, supervisory authorities shall use all the means provided for in Regulation (EU) 2016/679, including mutual assistance pursuant to Article 61 and joint operations pursuant to Article 62 of Regulation (EU) 2016/679. The provisions in this section concern the relations between supervisory authorities and are not intended to confer rights on individuals or the parties under investigation.	
Article 8 Relevant information within the meaning of Article 60(1) and (3) of Regulation (EU) 2016/679	
1. The lead supervisory authority shall regularly update the other supervisory authorities concerned about the investigation and provide the other supervisory EN 22 EN authorities concerned, at the earliest convenience, with all relevant information once available	
2. Relevant information within the meaning of Article 60(1) and (3) of Regulation (EU) 2016/679 shall include, where applicable: (a) information on the opening of an investigation of an alleged infringement of Regulation (EU) 2016/679; (b) requests for information pursuant to Article 58(1), point (e) of Regulation (EU) 2016/679; (c) information of the use of other investigative powers referred to in Article 58(1) of Regulation (EU) 2016/679; (d) in the case of envisaged rejection of complaint, the lead supervisory authority's reasons for rejection of the complaint; (e) summary of key issues in an investigation in accordance with Article 9; (f) information concerning steps aiming to establish an infringement of Regulation (EU) 2016/679 prior to the preparation of preliminary findings; (g) preliminary findings; (h) the response of the parties under investigation to the preliminary findings; (i) the views of the complainant on the preliminary findings;	2 (a) – Excessive and unnecessary to provide information on the initiation of an investigation into an alleged infringement In the current process, the LSA confirms that it is a LSA, whether we can interpret it as a notice of initiation or whether it is a separate notification. If there is a separate notification, we do not see any sense in this notification, as the process of inclusion starts after providing the 'summary of key issues and preliminary findings, this notice does not provide any extra value in terms of effective cooperation and consensus building. This provision forms in essence an obligation of passive submission of the type of information that does not create the need to react by the concerned supervisory authorities, thereby making this an unnecessary step. 2 (i) – It is also unnecessary and unnecessarily delaying the procedure to communicate the applicant's position on the preliminary findings or to seek such a view from the complainant at all.. the parties have the right to be heard after they have been provided the 'summary of key issues and preliminary findings' document.

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<td>(j) in the case of rejection of a complaint, the written submissions of the complainant;
(k) any relevant steps taken by the lead supervisory authority after receiving the response of the parties under investigation to the preliminary findings and prior to submission of a draft decision in the sense of Article 60(3) of Regulation (EU) 2016/679.

<u>Proposal:</u>
Remove (a) and (i) from the Regulation.</td>
<td>This information will be already included in the draft decision and does not consider it necessary to make further notifications at this stage.

The complainant should have the option to be heard but the right to be heard should not be executed by default during this step for each and every case without considering the complainant´s preferences. This would benefit complainants who do not wish to express any additional information during specific stages and would opt for a shorter procedure instead.

Proposal to remove the items from the list or clarify their purpose/necessity.</td>
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<tr>
<td colspan="2">Article 9 Summary of key issues</td>
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<tr>
<td>1. Once the lead supervisory authority has formed a preliminary view on the main issues in an investigation, it shall draft a summary of key issues for the purpose of cooperation under Article 60(1) of Regulation (EU) 2016/679</td>
<td>The need to draw up a summary of key issues remains incomprehensible. In essence, a completely separate document, which is neither an injunction nor a decision.

Summary of key issues: The requirement to draw up this document creates an unnecessary additional burden for the supervisory authority, since it is necessary to provide additional information to other supervisory authorities, but it is not guaranteed that the production of such an additional document would bring any added value. This is because it is unlikely that countries will systematically change their practice and work on additional documents and provide their feedback at an earlier stage of the procedure, if this is often not the case for the submission of a draft decision at the end of the procedure.

The new obligation will only be imposed on the supervisory authority</td>
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	conducting the procedure, while no obligation to provide feedback to other countries arises directly. Moreover, it is left to the discretion of the MS to reflect the facts of the procedure in detail in the summary of key questions, which means that these documents may remain very concise and that, on the basis of that information, it is in any event difficult for other MS to communicate any relevant and meaningful comments. In addition: At present, information on the preliminary facts of the procedure is provided in any event at the stage of the identification of the LSA (Art. 56 process), this article would simply place an obligation on the LSA to provide additional information, the need to include which is not justified (e.g. paragraph 2(c)- the scope of the assessment of complex legal and technological circumstances: what are the "complex legal and technological circumstances", why is such an analysis needed at an early stage?) Our proposal is to bring together a 'summary of key issues' and 'preliminary findings' in a single document, which will be provided to the supervisory authorities and the complainant and the person subject to the proceedings at a slightly more advanced stage of the procedure where there is more information on the facts of the case which allows for the sharing of more substantive feedback (see art 2).
2. The summary of key issues shall include all of the following elements: (a) the main relevant facts; (b) a preliminary identification of the scope of the investigation, in particular the provisions of Regulation (EU) 2016/679 concerned by the alleged infringement which will be investigated; (c) identification of complex legal and technological assessments which are relevant for preliminary orientation of their assessment; (d) preliminary identification of potential corrective measure(s).	
3. The supervisory authorities concerned may provide comments on	

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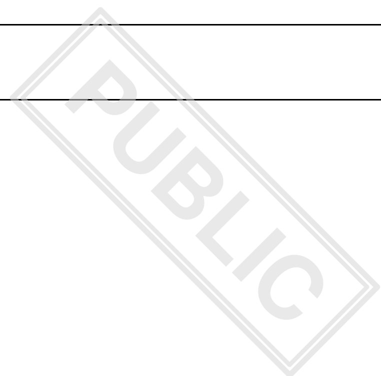

the summary of key issues. Such comments must be provided within four weeks of receipt of the summary of key issues.	
4. Comments provided pursuant to paragraph 3 shall meet the following requirements: (a) language used is sufficiently clear and contains precise terms to enable the lead supervisory authority, and, as the case may be, supervisory authorities concerned, to prepare their positions; (b) legal arguments are set out succinctly and grouped by reference to the part of the summary of key issues to which they relate; (c) the comments of the supervisory authority concerned may be supported by documents, which may supplement the comments on specific points.	
5. The Board may specify in its rules of procedure restrictions on the maximum length of comments submitted by supervisory authorities concerned on the summary of key issues.	
6. Cases where none of the supervisory authorities concerned provided comments under paragraph 3 of this Article shall be considered non-contentious cases. In such cases, the preliminary findings referred to in Article 14 shall be communicated to the parties under investigation within 9 months of the expiry of the deadline provided for in paragraph 3 of this Article.	Please explain why there is such a long deadline for notification in a case where there is no dispute.
Article 10 Use of means to reach consensus	
1. A supervisory authority concerned shall make a request to the lead supervisory authority under Article 61 of Regulation (EU) 2016/679, Article 62 of Regulation (EU) 2016/679, or both, where, following the comments of supervisory authorities concerned pursuant to Article 9(3), a supervisory authority concerned disagrees with the assessment of the lead supervisory authority on: (a) the scope of the investigation in complaint-based cases, including the provisions of Regulation (EU) 2016/679 concerned by the alleged infringement which will be investigated;	Recital 6 in the preamble to the Regulation states that it is for each competent authority to decide on the extent to which a complaint should be investigated, while other supervisory authorities must also be asked for a binding decision (Article 10 of the Regulation) if no consensus is reached. In such a case, it is not for the supervisory authority itself to decide, in essence, on the scope of the examination of the complaint. Please provide clarification about which authority is in the position of

(b) preliminary orientation in relation to complex legal assessments identified by the lead supervisory authority pursuant to Article 9(2), point (c); (c) preliminary orientation in relation to complex technological assessments identified by the lead supervisory authority pursuant to Article 9(2), point (c).	making a final decision in this matter.
2. The request under paragraph 1 shall be made within two months of the expiry of the period referred to in Article 9(3).	
3. The lead supervisory authority shall engage with the supervisory authorities concerned on the basis of their comments on the summary of key issues, and, where applicable, in response to requests under Article 61 and 62 of Regulation (EU) 2016/679, in an endeavour to reach a consensus. The consensus shall be used as a basis for the lead supervisory authority to continue the investigation and draft the preliminary findings or, where applicable, provide the supervisory authority with which the complaint was lodged with its reasoning for the purposes of Article 11(2)	
4. Where, in a complaint-based investigation, there is no consensus between the lead supervisory authority and one or more concerned supervisory authorities on the matter referred to in Article 9(2), point (b), of this Regulation, the lead supervisory authority shall request an urgent binding decision of the Board under Article 66(3) of Regulation (EU) 2016/679. In that case, the conditions for requesting an urgent binding decision under Article 66(3) of Regulation (EU) 2016/679 shall be presumed to be met.	
5. When requesting an urgent binding decision of the Board pursuant to paragraph 4 of this Article, the lead supervisory authority shall provide all of the following: (a) the documents referred to in Article 9(2), points (a) and (b); (b) the comments of the supervisory authority concerned that disagrees with the lead supervisory authority's preliminary identification of the scope of the investigation.	

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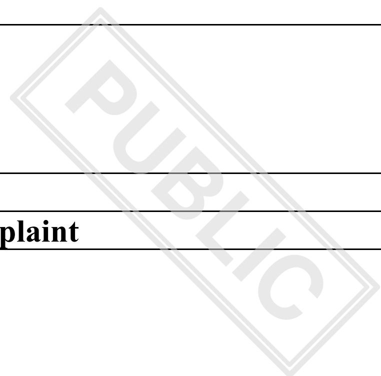
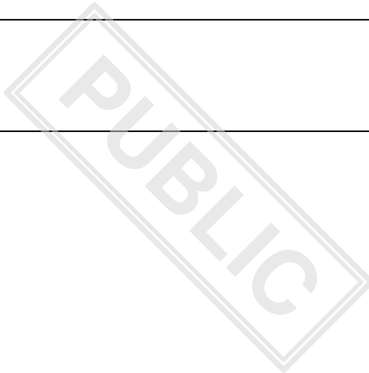


6. The Board shall adopt an urgent binding decision on the scope of the investigation on the basis of the comments of the supervisory authorities concerned and the position of the lead supervisory authority on those comments	
Article 11 Hearing of complainant prior to full or partial rejection of a complaint	
1. Following the procedure provided for in Article 9 and 10, the lead supervisory authority shall provide the supervisory authority with which the complaint was lodged with the reasons for its preliminary view that the complaint should be fully or partially rejected.	
2. The supervisory authority with which the complaint was lodged shall inform the complainant of the reasons for the intended full or partial rejection of the complaint and set a time-limit within which the complainant may make known her or his views in writing. The time-limit shall be no less than three weeks. The supervisory authority with which the complaint was lodged shall inform the complainant of the consequences of the failure to make her or his views known.	In a situation where the complaint is partially or totally rejected, the complainant also requires a hearing. The above again extends the time needed to deal with a complaint in a situation where the infringement has already ceased or has not existed. If the complainant does not agree to the rejection of the complaint, the Regulation does not provide for further steps to be taken by the LSA. Therefore, asking the complainant for an opinion is incomprehensible and does not bring significant added value in the conduct of cross-border proceedings. In the event of disagreement with the supervisory authority’s decision, the complainant shall be able to present his objections and observations in the administrative and judicial proceedings. The complainant´s right to be heard should not be executed by default during several steps of the procedure for each and every case without considering the complainant´s preferences. This would benefit complainants who do not wish to express any additional information during specific stages and would opt for a shorter procedure instead.
3. If the complainant fails to make known her or his views within the time-limit set by the supervisory authority with which the complaint was lodged, the complaint shall be deemed to have been withdrawn.	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4. The complainant may request access to the non-confidential version of the documents on which the proposed rejection of the complaint is based.	
5. If the complainant makes known her or his views within the time-limit set by the supervisory authority with which the complaint was lodged and the views do not lead to a change in the preliminary view that the complaint should be fully or partially rejected, the supervisory authority with which the complaint was lodged shall prepare the draft decision under Article 60(3) of Regulation (EU) 2016/679 which shall be submitted to the other supervisory authorities concerned by the lead supervisory authority pursuant to Article 60(3) of Regulation (EU) 2016/679.	
Article 12 Revised draft decision fully or partially rejecting a complaint	
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 complainant should have the opportunity to make her or his views known, the supervisory authority with which the complaint was lodged shall, prior to the submission of the revised draft decision under Article 60(5) of Regulation (EU) 2016/679, provide the complainant with the possibility to make her or his views known on such new elements.	As indicated previously, in our view the complainant´s right to be heard should not be executed by default during several steps of the procedure for each and every case without considering the complainant´s preferences. This more flexible approach would benefit complainants who do not wish to express any additional information during specific stages and would opt for a shorter procedure instead.
2. The supervisory authority with which the complaint was lodged shall set a time-limit within which the complainant may make known her or his views.	
Article 13 Decision fully or partially rejecting a complaint	

When adopting a decision fully or partially rejecting a complaint in accordance with Article 60(8) of Regulation (EU) 2016/679, the supervisory authority with which the complaint was lodged shall inform the complainant of the judicial remedy available to him or her in accordance with Article 78 of Regulation (EU) 2016/679	Please explain the relationship between Articles 4 and 11-13 and judicial review. In order to avoid imposing a burden on the Court of Justice of the European Union for a preliminary ruling, the proposal needs to be clarified or clarified accordingly.

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II. LATVIA

The Proposal (Article 3(1)) and Annex provide what information needs to be included in the complaint. Latvia (hereafter- LV) supports that it is useful to establish a uniform practice regarding the requirements for filing a complaint, at the same time it should not affect the national requirements regarding the legal force of documents. It is understood that the complaint must include information about the complainant's identity and how to contact him. We are concerned that the Annex asks for different information that is not currently requested when submitting a national complaint, for example, in complaint needs to submit e-mail address, but in LV, as a main source of communication has been introduced an e-address, if it is activated, alike Annex asks submit a form of identification (unlike for national complaints, it is acceptable that a person proves his identity with a signature or a secure electronic signature). Submitting telephone number is optional by national complaint. It also arises the question whether requesting such information like at Annex is appropriate by principle of data minimization.

We would like to draw attention to that the form of national complaints and the form of proposal with the information to be included in it, could differ, which could create a burden for the data subject. We would appreciate that the submission of the information in the Annex would be recommended, not mandatory. It would also prevent problems if a complaint was filed as national but later turned out to be cross-border.

Part B of Annex provides subbmitting of Supplementary information. We would like to draw attention, that it is important that the person demonstrates that he has tried to exercise his rights by initially contacting the controller, because the national case-law has strengthened the recognition that the supervisory authority should not act as an intermediary between the controller and the data subject in cases where the data subject is able to exercise his or her own rights against the controller.

Regarding Article 5 (Amicable settlement), we inform that currently in the administrative process of LV, no Amicable settlement is foreseen between private persons. In accordance with national rules of administrative process this is only possible between an institution and an individual. We are concerned that Article 5 of Proposal will raise difficulties in linking the Proposal to national administrative rules.

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About Article 6 (Translations) subparagraph a) of paragraph 1 – the requirement to translate documents into the language used by the leading supervisory authority is critically assessed. In LV opinion, translation into a language unknown to the supervisory authority to which the complaint was submitted creates risks that the content of the complaint and the description of the actual circumstances do not reach the leading supervisory authority in a sufficiently objective and fully reflected manner. In addition, the supervisory authority does not have the opportunity to verify the quality of the translation itself if the language into which the documents are translated is not known. The LV national supervisory authority believes that translations should be provided in a language that all supervisory authorities know equally well – for example, english, as is currently the case in practice. Similarly, if a machine translator will be used in the translation of documents, there are concerns about how compliance with the principle of data accuracy will be ensured and whether the machine translator used itself should not meet any criteria so that the data or documents entered in it do not become available to third parties. In our view, Article 6 should provide for the possibility for the supervisory authority to agree with the lead supervisory authority on the translation of documents into a language that both parties know. It means, the lead supervisory authority and the national supervisory authority would exchange information with each other using a language that both parties know equally well. The lead supervisory authority would then translate the relevant documents into its national language so as not to affect the rights of the parties under investigation.

About Article 8 - there are concerns about the role of the complainant in handling the complaint. The data subject should not have the subjective right to demand the punishment of the controller or the performance of specific monitoring actions against to controller. According to LV legislation, cross-border cooperation can take place either in an administrative process or within the framework of an administrative offence proceedings. If the complainant is also recognized as a victim in the process of an administrative offence proceedings, he/she is provided with the right, for example, to be heard and to participate in the consideration of the case. On the other hand, if the complaint is examined in the administrative process, the process/investigation against the controller in administrative proceedings is separate from the complainant. The complainant does not become a party to the proceedings initiated by the supervisory authority against the controller.

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Complainant rights by Proposal will raise difficulties in linking the Proposal to national rules of administrative process. Preference should be given to a regulation that provides for the data subject's right to receive information about the progress of the complaint. In our opinion, when the complainant submits a complaint, he trusts that the supervisory authority will take all the necessary actions, it is doubtful whether the complainant would always want to take an active part in the process.

LV would appreciate if at the proposal would find and include deadlines for other procedural actions as well, creating more clearer regulation as possible.

LV joins opinion of MS, that we need the proposal that respect national procedural arrangements as far as possible (or to entrust specific elements to national law) and to set only a minimum common standard.

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III. LUXEMBOURG

LU generally supports and welcomes the new proposal tabled by the Commission. We believe it is a way forward to harmonize and enhance cooperation between DPAs, especially when it comes to cross border cases. As per request, below our preliminary comments on Art 1 - 4.

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Art.1 (Scope)

LU is in favor of keeping the scope of the Regulation to all cross border cases.

1. The notion of "strategic" cases is only a recent internal construction of the EDPB – the definition of strategic cases is not stated in the recitals or Art. of the GDPR and thus, relies on flexible criteria open to interpretation. As a consequence, inserting this notion into this Regulation could lead to discussions and disputes for each case in order to determine if they are "strategic" or not, which would cause supplementary burden and slowing down the process for the handling of cases.

2. According to our DPA, there are currently around 3-4 strategic cases within 6 months, which would make an estimate of 6-8 cases per year - if narrowing down the scope, this Regulation would only apply to a very small amount of cases, making the Regulation rather inutile.

3. **Art. 5 (amicable settlements)**: narrowing down the scope would diminish the benefits of this Art. as this legal tool is most useful for less complex and smaller cases.

4. **Art. 11 (hearing of complainant prior to full or partial rejection of complaints)**: the ability of LSAs to partially reject small and less complex complaints would also not apply if narrowing down the scope – again making redundant the parts of the Regulation that would reduce the burden on DPAs.

Art.2 (Definitions)

LU currently does not have any major remarks on this Art. However, we would like to suggest a definition for amicable settlements and adding a clear statement that the summary of key issues' ('SKI') purpose is to identify the scope of the investigation (as it is done in Art. 10(5) point b). It would also be beneficial to add this clear statement in Art. 9.

Proposed definition for amicable settlements:

'amicable settlement' means the resolution of a complaint by achieving satisfaction of the data subject in a specific case in relation to specific issues raised by the complaint or by obtaining the proof submitted by the party under investigation to the supervisory authority that it has met the data subject's requests and complied with the applicable GDPR requirements.

Art.3 (Submission and handling of Cross-border complaints)

General comments:

- Templates for complaint form and the acknowledgement of receipt have recently been developed and adopted by the EDPB (June 2023). We would like to suggest to replace the form attached to this proposal with the EDPB template, or to redraft the form based on this template.

- Admissibility: we believe that the LSA should also have a say on admissibility, not just the CSA. In case we keep as is, the CSA should have at least received guidelines or mandatory checklist to decide for admissibility.

Comments on the Form (Annex):

1. We would like to suggest that the main essential elements such as evidences, correspondences, etc. should not be considered as "supplementary" information, but as mandatory ones. According to our DPA, it seems as if it would be impossible to conclude on an infringement by the data controller, if it is not possible to assess the proof that the data subject rights (access, erasure, objection, etc.) have been exercised (on a specific date).

PUBLIC

2. We question the requirement of having to provide ID document to lodge a complaint as the principle of data minimization also applies to supervisory authorities;

3. The postal address/location is currently not set as mandatory in case of complaints submitted by email; however, considering that the location of the complainant could be a crucial element to assess application of the GDPR and the competence of SAs, it would be beneficial to add this information as mandatory.

4. Point 3 of part A would benefit of more detail when it comes to requested information about the entity, which is the subject of the complaint.

Furthermore, the wording of this point could be adapted:

   a. To include persons, considering that the definition of the notion of "controller" and "processor" pursuant to article 4 of the GDPR is not limited to "entities", but refer to "*natural or legal person, public authority, agency or other body*";

   b. The title of this point could be adapted in order to not presume an infringement before the complaint has been investigated (*Entity whose processing of your personal data infringes Regulation (EU) 2016/679)*).

Art.4 (Investigation of complaints)

LU supports this Art., however, we believe that the text could specify that it is the <u>lead supervisory authority</u> who should make the assessment.

PUBLIC

IV. PORTUGAL

Portugal welcomes the European Commission's initiative in presenting the Proposal for a Regulation establishing additional procedural rules on the application of the GDPR, as it believes that by addressing the effective need for greater harmonisation of cooperation procedures between national data protection authorities in the processing of cross-border cases, it responds to the request made by data protection authorities.

PUBLIC

Portugal also broadly agrees with the proposal presented, but considers that there is room for improvement, as can be seen from the comments below.

These comments are mostly the result of the experience passed on to us by the Portuguese supervisory authority, and also reveal a concern about the adoption of solutions that could impose an increase in costs or other excessive administrative burdens on supervisory authorities.

Article 3 - Cross-border complaints

The existence of a specific form for complaints involving cross-border processing can give rise to some doubts, both among complainants and about the procedures to be adopted in some situations (namely when, for example, there is no specific form for submitting a complaint or when the data protection authority has already defined a separate form for submitting a complaint). For example, what happens when the complainant, out of confusion or unawareness that the situation they are presenting is a cross-border situation (a relatively common situation), does not use the form provided? And what impact do these circumstances have on the deadlines for replying to the complainant and for determining the nature of the case?

In addition, to determine whether the complaint is related to cross-border processing, it may be necessary to request additional information from the complainant, if the information provided is not sufficient to make this determination, or even to carry out prior steps that are essential to ascertain the cross-border nature of the case.

Paragraph 4 presumes that it is clear to the supervisory authority where the complaint was lodged (CSA) which is the lead supervisory authority (LSA), which is not always the case, and it may also be necessary to use the procedure provided for in Article 56 of the GDPR to determine which authority is competent - how can these situations be reconciled with the one-month deadline provided for in paragraph 3?

Article 5 - Amicable settlement

The Portuguese legislation does not provide for this, so its provision in this context, covering only cross-border cases, will give rise to some challenges - namely unequal treatment between national and cross-border cases, with national cases expected to take longer and have more significant consequences, to the detriment of those responsible for smaller cases (i.e., of an exclusively national nature). These difficulties will only be overcome if and when the national system provides for this type of solution.

We believe, however, that Article 5 would benefit from greater clarification of some aspects of the definitions and their procedures:

1) Can amicable settlement apply to all situations of infringement or only to those in which the action of the controller (or processor) fulfils a request from the data subject?

2) It should be made clear that the absence of a response from the complainant is considered acceptance of the settlement, and the complainant should be informed of this when the proposal for amicable settlement is communicated to him.

3) The rule leaves open which authority takes the initiative for amicable settlement. It is considered that any of them can do so, and it would be useful if the authority to which the complaint was lodged could also attempt amicable settlement, at the preliminary screening stage, and if there is an establishment in its territory. In this way, it could attempt an amicable resolution and avoid having to send the case to the LSA. In any case, we believe that the role of the LSA and the CSAs in this area should be clarified.

PUBLIC

To allow for better harmonisation with national legislation, we also suggest that, in cases where the complainant does not oppose the amicable settlement, the complaint should be considered "terminated" (or a similar term), rather than "withdrawn".

Article 6 – Translations

The solution provided for in Article 6(1)(a) (it is the responsibility of the supervisory authority to which the complaint was lodged to translate the complaint and the opinions of the complainants into the language used by the LSA), will mean an increase in costs and time.

Firstly, because it's not just a matter of translating the complaint, but all the documents that accompany the complaint.

Secondly, and more importantly, because these translations are currently made into English and can be easily revised internally. A translation into any official EU language will require specialised translation services since it won't even be possible to review machine translations. On the other hand, the time taken to transmit the complaint to the LSA will certainly be much longer. In addition, the other CSAs will not be able to immediately understand the content of the complaint unless it is additionally translated into English.

On the other hand, the Proposal, while indicating that the documents to be shared by the LSA with the CSAs, as well as all the comments and points of view of the CSAs, must be understood by all the other CSAs (cf. articles 8 and 10 of the Proposal), says nothing about the language(s) in which this should occur, with only a reference in article 6(2) for the EDPB to decide on the language to be used for relevant and well-founded comments and objections.

We therefore believe that the Proposal should more clearly regulate the issue of translations and how communication between authorities should operate, in an expeditious and low-cost manner.

PUBLIC

Article 8 - Relevant information within the meaning of Article 60(1) and (3) of Regulation (EU) 2016/679

Emphasising the importance of clarifying the concept of "relevant information", we propose the inclusion, as a point in paragraph 2, of the "(preliminary) scope of the investigation", an element that is determined by the LSA at an early stage of the procedure and which naturally relates to the scope of the complaint itself, although it is not to be confused with it.

Furthermore, according to their national legislation, some supervisory authorities must notify the parties under investigation, at the start of the procedure, of the scope of the investigation they are the subject of. It therefore makes perfect sense for this element to be listed in Article 8(2), not least because the scope of the investigation is one of the most controversial issues among supervisory authorities, which generates disputes, and which in this Proposal is the specific reason for a request for an urgent binding decision by the EDPB, under the terms of Article 66(3) of the GDPR.

On the other hand, Article 8 provides for a list of information that may not always apply to all cases, as the complexity and size of the cases vary greatly, and it would be totally unnecessary, pointless and inefficient to go through all those steps. Therefore, given that the Proposal results in a significant increase in work for the supervisory authorities, and without calling into question the positive consequences that better cooperation guarantees (namely for the effectiveness of the authorities, reflected in an obvious benefit for the data subjects), but considering that procedural acts that, depending on the case in question, are unnecessary, redundant or excessive should be avoided, it is proposed that the sharing of information should be proportional to the complexity of the case and its potential level of conflict or disagreement.

PUBLIC

Article 9 - Summary of key issues

We propose that consideration be given to a phase of consultation by the LSA with the CSAs on a preliminary assessment of the case in terms of relevant facts, identification of complex technological issues (if there are any) and questions of law, as well as a preliminary identification of potential corrective measures. This phase could be key to getting to know the CSAs' points of view and seeking consensus as soon as possible, since it is in analysing the facts and interpreting the GDPR that dissent usually arises, both as regards the rules infringed and the corrective measures. It is also clear from paragraph 6 of this article that this phase will make it possible to determine non-contentious cases.

We have doubts as to whether the elements contained in points a), c) and d) of paragraph 2 of the article are essential elements not of the "summary of the key issues" provided for in point e) of paragraph 2 of article 8, but rather of the "preliminary findings" provided for in point g) of the same paragraph and developed in article 14. This is because, according to the current wording of Article 9, the "summary of key issues" includes elements obtained at different times, such as the "preliminary identification of the scope of the investigation" and the "preliminary identification of potential corrective measures".

On the other hand, the Proposal admits but does not oblige the LSA to submit preliminary findings to the CSAs before notifying them to the parties under investigation or to the complainants. Practice has shown that such prior consultation would be essential to resolving potential disputes. It follows that a large part of the elements contained in the "summary of key issues" should indeed be submitted by the LSA to the CSAs and give them the opportunity to comment, establishing (by consensus) the facts and law of the case, before formalising the charge. However, this cannot be done together with the "scope of the investigation", as is proposed, for the reasons already mentioned.

PUBLIC

Furthermore, only the "scope of the investigation" can trigger the EDPB's urgent request for a binding decision, not the other elements relating to the facts of the case and their legal interpretation (cf. Article 10(4) of the Proposal), with "the scope of the investigation" being the determining factor in classifying cases as contentious or non-contentious. Of course, the scope of the investigation is only one of the conflicting factors. Therefore, the suggestion would be for the complaint, together with some preliminarily gathered facts relevant to determining the "scope of the investigation" to be shared with the CSAs by the LSA, giving them the opportunity to comment on and agree on the scope of the investigation at the initial stage of the procedure, when the scope of the investigation is actually set and can be changed, without prejudice to the procedure. If there is no agreement between the CSAs, then the EDPB would issue a binding decision on the matter.

At a later stage, after the investigation has been carried out, another mandatory moment of consultation should be created with regard to "preliminary findings", in order to find a consensus before notifying the parties to exercise their right to a prior hearing. In fact, this would be an extremely important step to avoid disputes and recourse to Article 65(1) of the GDPR, as has been the case so far. Classifying a case as non-contentious solely on the basis of agreement on the "scope of the investigation" would be a huge mistake. Rather, it would be very useful for the LSA and the CSAs to seek consensus on the legal standards violated and the corrective measures to be adopted, before the accusation is notified to the organisation, otherwise any change in the facts or imputations will lead to a new right to a hearing or only recourse to dispute resolution.

In short, Article 9 should only regulate the determination of the "scope of the investigation" and Article 14 should provide for the CSAs to be consulted before the preliminary findings are notified to the parties under investigation.

Lastly, Article 9 is silent on the language in which the "summary of key issues" should be submitted by the LSA. If it is in the language of the LSA, this will mean that it will be up to the CSA to translate it into its own language, which will have an impact on the deadline for making comments.

PUBLIC

Article 10 - Use of means to reach consensus

Following on from the comments on the previous articles, we propose that Article 10 should apply to all the elements contained in the "summary of key issues" established in Article 9 of the Proposal, except for the element relating to the "scope of the investigation". In fact, taking all of the above into account, if the CSAs are given the opportunity to comment on the "scope of the investigation", and, on the basis of this expression of views, the LSA collaborates with the CSAs, it is understood that the space and context for the exchange of views between the CSAs have already been found, without the need to add to it the obligation to formally resort to mutual assistance or joint operations, as an intermediate step, before the LSA requests the involvement of the EDPB. In such cases, where there is an insurmountable disagreement on the "scope of the investigation", the LSA should ask the EDPB for a binding decision on the matter, without the need to submit requests under Article 61 and/or 62 of the GDPR by CSAs that have already expressed their views. On the other hand, it should be made clear that the LSA is obliged to submit the matter to the EDPB and possibly set a reasonable deadline for doing so, to avoid cases dragging on, without of course jeopardising the attempt at consensus.

Article 11 - Hearing of complainant prior to full or partial rejection of a complaint

Article 11(3), by stating that the complainant's silence means that the complaint is presumed withdrawn, seems to contradict, or at least be difficult to reconcile with, Article 60(8) of the GDPR. This is because Article 60(8) of the GDPR stipulates that a final decision must always be adopted - in this case, by the authority to which the complaint was lodged. This solution would be jeopardised if the author's silence means that the complaint is presumed withdrawn, without a decision by the authority to which the complaint was lodged.

On the other hand, the fact that the complainant does not comment in writing on the LSA's intention to reject all or part of their complaint cannot deprive the complainant of the possibility of appealing the authority's decision to the courts, in accordance with Article 78 of the GDPR (a possibility that does not seem to exist if the complaint is presumed to have been withdrawn by the author).

PUBLIC

Article 14 - Preliminary findings and reply

The last subparagraph of paragraph 2 seems to us to be difficult to apply (and as such should be deleted), since the application of the criteria set out in Article 83(2) of the GDPR for setting the amount of the fine can only be carried out after hearing the parties under investigation, since for several of the criteria it is necessary to take into account the facts and allegations that the parties under investigation present. Hence, the criteria applicable to setting the amount of the fine can only be specifically described in the final decision and not in preliminary findings.

It should be pointed out, by the way, that the parties under investigation are already aware of the need to apply those criteria, as it results from the law, and are aware of the supervisory authority's prior assessment of some of the elements contained therein (such as, for example, the nature, seriousness and duration of the offence, the universe of affected data subjects, categories of personal data, previous infractions) which result from the legal assessment of the facts, and which can be refuted when they present their view in writing.

Article 24 - Statement of reasons prior to the adoption of the decision pursuant to Article 65(1), point (a), of Regulation (EU) 2016/679

This article raises several questions, particularly regarding the EDPB's direct communication with the parties under investigation and the complainant, since they are not direct subjects of the EDPB's decision. We therefore believe that the LSA should be maintained as the sole interlocutor of the controller or processor, and that it is the LSA that should send the parties under investigation any relevant and pertinent objections from the CSAs, within the meaning of Article 4(24) of the GDPR. Moreover, the parties' comments may have an influence on the LSA's decision to accept the objections or refer the case to the EDPB.

PUBLIC

Therefore, since the EDPB's decision settles the dispute between the LSA's position expressed in its draft decision and the CSA's objections to certain aspects of that draft, it does not focus on facts, but exclusively on the legal interpretation of the GDPR in the specific case, in order to achieve uniform and consistent application, and that this decision is based on the merits of the objections considered relevant and well-founded and on the draft decision, as well as on the statement by the controller (or the processor) on the CSA's objections, it is understood that the right to be heard has already been guaranteed.

On the other hand, we fear that this legislative option opens a new front of direct litigation with the EDPB, in addition to litigation at national level, which will make it practically impossible to apply the GDPR in cross-border cases, that is, in cases involving the largest multinationals, which have almost unlimited resources to sustain legal litigation at various levels: national and European.

Form - Annex to the proposal

Some of the information requested from the complainant that is indicated as compulsory should not be:

- A copy of an identification document (passport, driving licence or national ID), rather than simply first name and surname. Such proof of identity is not necessary for the processing of complaints in general, and whenever such elements are needed, then they can be requested. This requirement places unnecessary obstacles in the way of submitting complaints
- Telephone number
- Signature, particularly when the form is lodged electronically.

PUBLIC

V. FINLAND

Finland thanks the Presidency for the opportunity to provide written comments on the Proposal for Regulation laying down additional procedural rules relating to the enforcement of the GDPR. Finland provides the following, preliminary comments on Articles 1 to 4 of this Proposal.

Article 1

In general Finland supports the scope and finds it appropriate to limit the procedural rules only to cross-border cases. In order to ensure the procedural rights of complainants and those under investigation, it is important that this regulation is applied to both complaint-based and ex officio cases.

Article 2

Finland suggests a following amendment to Article 2(3) of this Proposal, in order to clarify that the preliminary findings would only consist of preliminary legal analysis (as this is not yet the actual draft decision):

(3) 'preliminary findings' means the document provided by the lead supervisory authority to the parties under investigation setting out the allegations, the relevant facts, supporting evidence, preliminary legal analysis, and, where applicable, proposed corrective measures;

In addition Finland proposes to delete Article 3(5) of this Proposal. Article 3(5) seems unnecessary in this Article. The provisions on confidential information should be laid down in Chapter IV of this Proposal. Furthermore, Finland would like to emphasise that it is for the DPAs to assess the confidentiality of the information.

PUBLIC

Article 4

Finland finds that Article 4 would benefit from further clarification and welcomes the Precidency to take into account the clarifications proposed in the EDPB-EDPS Joint Opinion. For instance it remains unclear whether it is the lead supervisory authority (LSA) and/or the supervisory authorities concerned (CSA) that investigates the complaints. In addition, Finland welcomes clarifications on the relationship between this article and the judicial remedies pursuant to the GDPR.

PUBLIC

VI. SWEDEN

Following the meeting of the Working Party on Data Protection on 12 September, the Spanish Presidency has invited delegations to provide their preliminary comments on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, as well as any more specific comments they may have on the articles examined so far(article 1–4).

Sweden would like to thank the Spanish Presidency for this opportunity.Below, Sweden provides some preliminary and overall comments regarding the proposal. When it comes to the specific provisions of the proposal, Sweden wishes to reserve the right to come back with more detailed comments and writing suggestions in connection to the article discussions in the Working Party.

A Regulation that streamlines the cross-border enforcement of the GDPR and makes the procedure more effective and efficient is positive. However, as highlighted in the EDPB and EPDS joint opinion on the proposal, the rules in the proposed Regulation entail an increased administrative burden for the supervisory authorities. The vast majority of cross-border cases are of non-complex and non-controversial nature. In these cases, the proposed rules – especially articles 8–10 – run the risk of entailing a disproportionate administrative workload on the supervisory authorities, hence leading to prolonged rather than shortened processing times, in contrary to the main purpose of the proposal which is to make the procedure of cross-border cases more efficient. The scope of the Regulation should therefore be restricted to more complex cases, or at least a flexibility should be inserted in the Regulation that makes it possible to derogate from some of the provisions in non-complex cases.

PUBLIC

It is of most vital importance that the Regulation respects the different national procedural arrangements in the Member States, as well as other fundamental rights and the constitutions of the Member States. Some of the proposed rules entail a more limited right of access to the file for the parties, compared to Swedish administrative procedural rules (e.g. articles 15, 19 and 20). The proposal also contains rules that limit the right of public access to official documents, the freedom of speech and the freedom to communicate information, in ways that are difficult to reconcile with the Swedish constitution (e.g. articles 15, 19, 20 and 21). Sweden notices and welcomes that the potentially problematic relationship with other fundamental rights is pointed out in the EDPB and EDPS joint opinion.

Overall, the Regulation is too detailed and too far reaching in relation to what is necessary to regulate to achieve the main purpose of the proposal. The purpose of the Regulation could be achieved with more general rules at union level and supplemented with rules at national level that respects the constitutional and administrative law in each Member State.

PUBLIC