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WORKING DOCUMENT

From: General Secretariat of the Council
To: Delegations

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
- Presentation by the presidency

Following the meeting of the Working Party on Data Protection of 10 September 2024, delegations will find in annex the presentation by the Presidency concerning the position of the European Parliament (as adopted at its Plenary on 10 April 2024).



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PROVISIONS IN THE EP REPORT THAT CONFLICT WITH OR AMEND THE GDPR

10 September 2024

It should be underlined that neither the Commission and the Council proposal aims at **creating a procedural regulation to harmonise national procedures of data protection authorities**. Therefore it does not amend the GDPR but merely complements it. It concerns three main areas:

- (1) the position of the complainant (and other parties) in the procedure;
- (2) procedural issues related to the use of the instruments already available under the GDPR for cooperation between authorities;
- (3) harmonized rules on the hearing of parties, the scope of information to be provided in the context of a complaint (and access).

It should also be emphasized that the proposal also **does not affect the one-stop-shop mechanism** provided for by the GDPR; its aim is to ensure greater harmonisation and consistency of the national procedures of the Member States.

In our view – which was already supported by the WPDP in the previous meeting – this approach should be maintained, as the aim of the Proposal is not to amend or to rewrite the provisions of the GDPR, but to create complementary rules to ensure its swift and harmonised implementation.

In this short presentation, we would like to point out the most significant provisions in the EP proposal that are not in line with this approach.

ARTICLE 1 (1A) SUBJECTS MATTER AND SCOPE



(1a) Article 26b of this Regulation also applies to cases before a supervisory authority of a single Member State, pursuant to Article 56(2) of Regulation (EU) 2016/679.

- Extends the scope of the Proposal

It conflicts with national procedural autonomy as the scope of the Proposal cannot be broadened to national cases.

REC (2A) SUBJECTS MATTER AND SCOPE

(2a) (...) *This Regulation does not apply when a party lodges a complaint directly with a lead supervisory authority in another Member State.*

- **This recital contradicts the GDPR 4(23) which defines „cross-border processing”**

- data processing may be cross-border even if a complaint is lodged directly with the (supposed) lead authority

(23) 'cross-border processing' means either:

(a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or

(b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

ARTICLE 2 (2) (1A) COMPLAINANT

(1a) 'complainant' means the data subject or non-for-profit body, organisation or association that has lodged a complaint under Article 77 of Regulation (EU) 2016/679 and is therefore considered as a party to the proceedings;

An unnecessary addition to the GDPR

- In case the concept proposed by the EP were to be retained as a result of a majority decision of the Member States, it would only be acceptable to the Council if **it is in line with the provisions of the GDPR.**
- The Council mandate only contains a recital for clarification (to distinguish "complaint" from a mere "reporting of alleged infringements").

ARTICLE 2 (2) (1A) COMPLAINANT

GDPR Article 77

(1) Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

GDPR Article 80

(1) The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

ARTICLE 2 (2) (1E) - EX OFFICIO

(1e) 'ex officio procedure' means an investigation into the activities of a natural or legal person, public authority, agency or other body initiated on a supervisory authority's initiative under Article 57(1), point (a), of Regulation (EU) 2016/679;

ARTICLE 5 (1B) (B) - EX OFFICIO

(1b) Within one month after the communication of the amicable settlement under paragraph 1a, a draft decision pursuant to Article 56(4) of Regulation (EU) 2016/679 shall be submitted, indicating:

(b) whether to open an ex officio investigation under paragraph 1d.

ARTICLE 5 (1D) - EX OFFICIO

(1d) An amicable settlement does not prevent the lead supervisory authority from conducting an ex officio investigation in the same matter. It may open an ex officio investigation instead, in particular where:

- (a) the party under investigation is a repeat offender;*
- (b) the party under investigation has been the subject of a large number of other amicable settlements;*
- (c) the broad subject matter of the complaint concerns a large number of data subjects other than the complainant, is of long duration, or is of serious nature; or*
- (d) the exercise of powers is otherwise required to ensure effective, proportionate and dissuasive enforcement of Regulation (EU) 2016/679.*

ARTICLE 5A – EX OFFICIO



(1) Where it considers that Regulation (EU) 2016/679 may be violated and data subjects in the territory of its Member State are affected, any supervisory authority concerned may request an ex officio procedure by submitting a written request for a discretionary action pursuant to paragraph 2 to the lead supervisory authority. Such a request shall contain at least:

- (a) a declaration to be a supervisory authority concerned, and
- (b) a summary of key issues pursuant to Article 9.

(2) Within three weeks, the assumed lead supervisory authority shall:

- (a) inform the supervisory authority concerned that it has opened an ex officio procedure;
- (b) inform the supervisory authority concerned that Article 56(2) of Regulation (EU) 2016/679 applies to the case and that in accordance with Article 56(3) of Regulation (EU) 2016/679 the lead supervisory authority does not intend to handle the case itself; or
- (c) reject the request, if it takes the view that it is not the lead supervisory authority or there is no *prima facie* violation of Regulation (EU) 2016/679.

In the case referred to in point (a) of this paragraph, the supervisory authority concerned may submit to the lead supervisory authority a draft decision pursuant to Article 56(4) of Regulation (EU) 2016/679.

In the cases referred to in point (b) and (c) of this paragraph, the supervisory authority concerned may resubmit an amended request for an ex officio procedure, or request a determination on the opening of the procedure by the Board in accordance with Article 26a (1).

ARTICLE 5A – EX OFFICIO

(3) Where the lead supervisory authority opens an ex officio procedure, it shall deliver a draft decision pursuant to Article 60(3) of Regulation (EU) 2016/679 without delay, but no later than nine months from the receipt of the request pursuant to paragraph 1. This deadline may exceptionally be extended by:

- (a) eight weeks when comments under Article 9(3) are submitted against a summary of key issues or an updated summary of key issues;
- (b) eight weeks where the lead supervisory authority intends to issue fines or other penalties;
- (c) the period of time between a reference under Article 26a and the decision by the Board;
- (d) the period of any prolongation permitted by the Board under Article 26a (3).

It rewrites the provisions of the GDPR, as:

- the GDPR **does not include** provisions on ex officio proceedings
- under the GDPR it is still possible to initiate ex officio proceedings

EX OFFICIO PROCEDURE – POSSIBLE SOLUTIONS



- However, we believe that – if necessary – there are some parts that we might be able to keep and/or that could be a good basis for exchange in the negotiations with the EP.
- Recital (5e) of the EP report could possibly be amended referring to mutual assistance (as it is the current practice in such cases) and/or notification that could lead – in accordance with national law – to opening an ex officio investigation.

„An amicable settlement does not prevent the lead supervisory authority from conducting an ex officio investigation in the same matter. Where it considers that Regulation (EU) 2016/679 may be violated and data subjects in the territory of its Member State are affected, any supervisory authority concerned [in the form of mutual assistance as provided for in Article 61 of Regulation (EU) 2016/679] may provide information to the competent authority on the infringement [in order to allow it to consider – in accordance with national law – opening an ex officio investigation].”

ARTICLE 2C (2) – CONCERNED SA

(2) Any supervisory authority may declare that it is concerned, setting out the reasons why it meets the definition of a supervisory authority concerned under Article 4(22) of Regulation (EU) 2016/679. The lead supervisory authority shall maintain a list of supervisory authorities concerned for each case in the joint case file. Where the lead supervisory authority considers that a supervisory authority which has made a declaration that it is concerned according to this paragraph does not meet the definition of a supervisory authority concerned, it shall inform that authority of its assessment. The supervisory authority which declared that it is concerned shall within one week of receiving that assessment either withdraw its declaration, or produce a reasoned opinion setting out the reasons why it considers the assessment of the lead supervisory authority to be incorrect. Where the diverging assessments of the lead supervisory authority and the supervisory authority which declared to be concerned cannot be resolved in a different manner, the lead supervisory authority shall request a determination of the Board under Article 26a.

ARTICLE 2C (2) – CONCERNED SA

GDPR Article 4(22)

(22) 'supervisory authority concerned' means a supervisory authority which is concerned by the processing of personal data because:

- (a) the controller or processor is established on the territory of the Member State of that supervisory authority;
- (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
- (c) a complaint has been lodged with that supervisory authority;

This provision goes beyond the GDPR

- the definition of „concerned authority“ is **already explicitly defined in Article 4(22)** of the GDPR
- this ambiguity (and procedure) could create tension as supervisory authorities who may not be concerned according to the definition under the GDPR may nevertheless be entitled to claim to be concerned

ARTICLE 3 (2C) – DETERMINATIONS OF THE BOARD



(2c) Where an objection under paragraph 2b was raised, the supervisory authority with which the complaint has been lodged may withdraw the transmission of the complaint and either assume its own competence under Article 55 or 56 of Regulation (EU) 2016/679 or transfer it to an assumed lead supervisory authority within two weeks. If none of these actions were taken, or where differing assessments of the supervisory authorities involved cannot be resolved otherwise, the supervisory authority with which the complaint has been lodged shall request a determination by the Board under Article 26a. It shall provide the Board with a description of relevant processing activities, of the company's organisation and a description of where decisions are taken.

It rewrites the provisions of the GDPR

- **Article 65 (1) c) of the GDPR** already contains rules for handling such cases

ARTICLE 26A PROCEDURAL DETERMINATIONS BY THE BOARD



(1) Pursuant to Article 66 of Regulation (EU) 2016/679, a supervisory authority may request from the Board to take an urgent binding decision in the form of a procedural determination on any procedural dispute arising between supervisory authorities in cases foreseen by this Regulation.

(2) Where the lead supervisory authority is of the view that it cannot possibly comply with a deadline pursuant to Article 4(1b) or Article 5a(3), especially because of the need for exceptionally complex factual investigations, it shall request from the Board an urgent binding decision pursuant to paragraph 1, regarding an extension of the deadline of up to nine more months. The supervisory authority shall demonstrate that despite its compliance with Article 2c(1), the extension sought is inevitable.

ARTICLE 26A PROCEDURAL DETERMINATIONS BY THE BOARD



(3) Requests under paragraph 1 and 2 shall at least contain:

- (a) the facts relied upon and any evidence available to the authority or party;
- (b) the legal grounds for the request;
- (c) the determination pursuant to paragraph 1 or the deadline extension pursuant to paragraph 2 that the authority or party requests from the Board;

(4) Within two weeks, the Board shall determine the matter based on the information before it or it shall reject the application. Determinations are binding on the supervisory authorities.

A new type of „dispute” is introduced that is not in the GDPR, and also:

- it would **unnecessarily complicate** the procedure
- it would **impose a significant administrative burden** on the authorities and on the EDPB.

ARTICLE 26B RIGHT TO AN EFFECTIVE JUDICIAL REMEDY AGAINST A SUPERVISORY AUTHORITY



*(1) Without prejudice to existing remedies under Article 78 of Regulation (EU) 2016/679 and any other administrative or non-judicial remedy, **each party to the procedure shall have the right to an effective judicial remedy:***

(a) where the supervisory authority with which the complaint has been lodged does not use its powers to ensure that another supervisory authority progresses the procedure;

(b) where a lead supervisory authority does not comply with deadlines as provided for in Regulation (EU) 2016/679 and this Regulation; or

(c) where a supervisory authority does not comply with a binding decision of the Board.

ARTICLE 26B RIGHT TO AN EFFECTIVE JUDICIAL REMEDY AGAINST A SUPERVISORY AUTHORITY



(2) Any party to the procedure or a not-for-profit body under Article 80 of Regulation (EU) 2016/679 may bring an action under paragraph 1, point (c) if it considers that the rights of a data subject under Regulation (EU) 2016/679 have been infringed as a result of the processing.

(3) Where a court or tribunal exercising the review pursuant to paragraph 1 finds that a supervisory authority has not fulfilled its duties, it shall have the power to order that supervisory authority to take the necessary action.

A new type of dispute is introduced that is not in the GDPR

- such remedy is **not granted** in the GDPR
- would **unnecessarily complicate** the procedures
- **impose a significant administrative burden** on the authorities and also on the EDPB

ARTICLE 28 ENFORCEMENT STATISTICS

(1) *Supervisory authorities shall report the following numbers in their activity report under Article 59 of Regulation (EU) 2016/679:*

- (a) *the number of ex officio investigations initiated by the supervisory authority;*
- (b) *the number of ex officio investigations initiated by other supervisory authorities;*
- (c) *the number of complaints received, including the number that were rejected, dismissed, withdrawn, partly upheld, fully upheld or otherwise closed;*
- (d) *the number of legally binding decisions currently on appeal;*
- (e) *the number and average duration of open and decided procedures under (a) to (d) to date;*
- (f) *the number of each type of measure taken in accordance with Article 58(2) of Regulation (EU) 2016/679 or applicable national law;*
- (g) *the number and the amount of fines issued and collected under Article 83 and 84 of Regulation (EU) 2016/679 or relevant national law; and*
- (h) *the annual budget and the number of staff, by training, tasks and organizational units.*

ARTICLE 28 ENFORCEMENT STATISTICS

(2) *Supervisory authorities shall publish the activity report for the past year without undue delay, but no later than by 30 June.*

(3) *The Board shall make the information of all supervisory authorities in paragraph 1 available to the public no later than 31 July of each year for the previous year.*

It rewrites the provisions of the GDPR:

- is not a procedural rule that determines any procedural step in cross-border cases
- it is clearly a **derogation from the general provision laid down in Article 59** of the GDPR
- **EDPB has no obligations** (publishing data) in this area under the GDPR



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