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WORKING DOCUMENT

From: To:	Presidency Delegations
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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 - Discussion paper: preparation of interinstitutional negotiations with the European Parliament

In view of the Working Party meeting of 24th October 2024, delegations will find in the annexe a discussion paper on the preparation of interinstitutional negotiations with the European Parliament.

Discussion paper

In anticipation of interinstitutional negotiations with the European Parliament, the Presidency invites delegations to reflect and provide feedback on the new provisions introduced by the Parliament, which were not part of the initial Commission's proposal.

The aim of this oral exchange of view within the Working Party aims at gathering further input from delegations, in particular concerning the legal and practical impact of the provisions introduced by the European Parliament, as well as possible interactions and/or challenges with their national procedural law where applicable. In assessing the new provisions introduced by the European Parliament, the Presidency draws delegations' attention to the fact that, as part of its proposed definitions, the European Parliament considers a party as "the party or parties under investigation, the complainant(s) and any third party involved in the proceedings as defined under national law".

The Presidency invites delegations to use this discussion as an opportunity to share any relevant element they would deem relevant ahead of further discussions with the European Parliament on the provisions concerned. At this stage, the Presidency does not intend to discuss any possible area for compromise in relation to the concerned provisions, but would instead very much value delegations' concrete feedback in order to further engage with the European Parliament.

Applicable procedural law

The European Parliament introduces a new Article 2a on "applicable procedural law" as worded below. This Article provides that:

- national procedural rules continue to apply, provided they are not in conflict with this regulation;
- this regulation and the GDPR govern the interaction between supervisory authorities;
- a complainant has the right to communicate exclusively with the DPA with which the complaint was lodged.

Article 2a - Applicable Procedural Law

1. *In addition to this Regulation, and provided that it is not in conflict with this Regulation, the procedural law applicable before a supervisory authority shall govern all direct interactions*

between that supervisory authority and the parties before it. This Regulation shall not preclude Member States from specifying procedural matters not regulated by this Regulation or Regulation (EU) 2016/679.

2. *This Regulation and Regulation (EU) 2016/679 govern the interaction between supervisory authorities of different Member States that falls within the scope of this Regulation.*
3. *A complainant shall have the right to communicate exclusively with the supervisory authority with which the complaint has been lodged pursuant to Article 77 of Regulation (EU) 2016/679.*

→ Delegations are invited to share their views with the proposed new Article, in particular with regard to its impacts on national procedural laws.

→ What are delegations' views regarding the determination of applicable procedural law based on the distinction by the type of "interactions"?

<u>Set of common procedural standards</u>

The European Parliament introduces a set of common procedural standards, with a new Article 2b as worded below. The Article provides each "party" with to the right to "fair procedure", "to be heard" and to "procedural transparency", without prejudice to additional rights under national procedural law. The LSA must inform and hear the parties "at appropriate stages of the procedure."

Article 2b - Common procedural standards

1. *Without prejudice to additional rights under national procedural law, each party shall have at least the following rights:*

   (a) to have their case handled impartially and fairly, and to be treated equally, even if they are before different supervisory authorities in different jurisdictions ("fair procedure");

   (b) to be heard before any measure is taken that would adversely affect them, including before the decision to uphold, or to fully or partially reject a complaint is adopted ("right to be heard");

   (c) to have access to the joint case file, except to any internal deliberations of the supervisory authority or deliberations between those authorities ("procedural transparency").

2. *The lead supervisory authority shall inform and hear the parties at appropriate stages of the procedure, in order to allow them to effectively express their views on all factual findings and legal conclusions made by the lead supervisory authority.*

(…)

The common standards and rights, as proposed by the European Parliament, seem to be broadly framed in the manner of rights under the Charter and allow Member States to grant additional procedural rights beyond those provided in the regulation. As such, the European Parliament position does not seem to fully harmonise procedural rights in cross-border cases. Furthermore, the European Parliament seems to extend procedural rights to the parties under investigation, the complainant(s) and any third party involved in the proceedings as defined under national law. As per its proposed definition of "party", the European Parliament does not differentiate between the complainant and the parties under investigation (PUIs). In contrast, the Council general approach considers that the right to defend oneself and to access the file is provided where the decision of the supervisory authority would adversely affect the interests of the party under investigation or the complainant, while always allowing the investigating supervisory to get the view of the complainant on any document it sees fit.

→ Delegations are invited to reflect on the proposed standards, and provide feedback on their relevance within the proposed regulation, as well as on their possible practical impact on the currently existing procedures.

→ What are Member States' views on Article 2b as proposed by EP, in light of the minimum harmonisation and national procedural autonomy sought in Council's general approach?

<u>Joint case file and provision on access to the file and confidentiality</u>

Throughout its position, the European Parliament introduces the concept of a "joint case file", defined as "*a dedicated electronic file for any case falling under the scope of this Regulation, that is managed by the lead supervisory authority and in which all relevant information, in particular documents, submissions, memos and other information regarding a case, are stored and made remotely accessible to supervisory authorities concerned and parties to the case.*"

The newly proposed Article 2b in the European Parliament position further expands on procedural standards by laying down horizontal provisions in relation to the proposed joint case file, as well as on access to the file and confidentiality. The European Parliament's position provides that the lead supervisory authority (LSA) shall provide concerned supervisory authorities (CSA) and the "parties" (i.e. the PUI and the complainant) with "instant, unrestricted and continuous remote access to the full joint case file," excluding internal deliberations of supervisory authorities. A supervisory authority may limit access to the file on the basis of "legally recognised rights or to protect the rights of others". The decision to restrict access to information in the joint case file is made on the basis of the national procedural law applicable to the supervisory authority that receives the request.

Article 2b - Common procedural standards

(...)

3. *The joint case file shall include all evidence, inculpatory and exculpatory, including documents and other evidence provided by the parties under investigation.*
4. *On the request of a party to protect their legally recognised rights or to protect the rights of others, or when it is in the public interest or in order to protect operational security and cybersecurity a supervisory authority may limit the rights referred to in paragraph 1, point (c). Any such limitation shall be carried out in accordance with the national procedural law applicable under Article 2a(1) to any direct interaction between a supervisory authority and the party receiving limited information, and must be proportionate in light of the respective recognised rights of others or the public interest pursued. The party claiming confidentiality shall provide a confidential version of any information, as well as a suggested non-confidential version.*
5. *The non-confidential version of documents that were provided by a party shall be determined by the supervisory authority making a determination pursuant to first sentence of paragraph 4, applying only strictly proportionate measures, such as redacting specific parts of documents.*
6. *Supervisory authorities concerned shall always have access to the confidential version of all documents, and may object to redactions that they consider not strictly proportionate. Supervisory authorities pursuant to first sentence of paragraph 4 shall immediately inform the parties about the fact that information is withheld. The lead supervisory authority shall keep records of each access to the joint case file.*
7. *In the interest of efficiency of procedures, supervisory authorities shall limit the length of submissions by the parties to not more than 50 pages. Those authorities shall set reasonable and appropriate time limits not shorter than three weeks and not longer than six weeks, unless exceptional circumstances require a reasonable extension. The supervisory*

authorities shall not be obliged to take into account written views received after the expiry of that time-limit.

The Presidency draws delegations' attention to the fact that supervisory authorities currently cooperate on cross-border cases through the Internal Market Information (IMI) System. Data protection-specific modules in the IMI system allow supervisory authorities to undertake all actions necessary to cooperate under the GDPR, including to identify the LSA, share and request information and documents relevant for the investigation/proceedings, provide mutual assistance, arrange joint operations, and request an opinion or decision of the European Data Protection Board (EDPB).

While the positions of the European Parliament and the Council on confidentiality do not seem to differ widely, the Council general approach establishes a clear process for confidentiality claims, while the European Parliament position appears rather vague in several respects (no clear reference to confidentiality or trade secrets; unclear to which supervisory authority can requests be made; unclear whether the assessment is binding on other supervisory authorities). The Council general approach clearly specifies that the supervisory authority to whom information is submitted shall assess any confidentiality claim on the basis of Union and national law, and that decision must be respected by all supervisory authorities.

→ Delegations are invited to share their views on the proposed joint case file read in conjunction with the European Parliament's positions on access to the file and confidentiality of information. In particular, delegations are invited to address the legal, technical and financial implications entailed by the establishment of a joint case file as proposed by the European Parliament.

→ Delegations are invited to share any example and experience on means currently available at national level to ensure access to the file for parties under investigations and for complainants where applicable.

→ Delegations are invited to reflect on the current means available to supervisory authorities for their exchange of information and the registration of information on a given cross-border cases, in particular the Internal Market Information System (IMI), and provide feedback on the newly proposed joint case file in terms of added value and practical implementation.

<u>Cooperation with other relevant authorities</u>

In a newly proposed Article 10a, the European Parliament introduces a dedicated provision on cooperation with other relevant authorities, worded as below.

Article 10a - Cooperation with other relevant authorities

> *Supervisory authorities shall strive to communicate non-personal information obtained in the context of the procedures set out in this Regulation to national and Union supervisory authorities competent in data protection and other areas, including competition, financial services, energy, telecommunications, consumer protection, digital services, or artificial intelligence supervisory authorities, where the information is deemed relevant to the tasks and duties of those authorities, in particular for opening administrative procedures and investigations into possible violations of legislation under their competences. Information can be only used for the purposes of which it was gathered. However, that does not preclude the supervisory authority to initiate other proceedings based on that information or to share it with other authorities for that purpose.*

The Presidency notes that this article does not concern the enforcement of the GDPR, but seems to relate to the enforcement of other rules. As a preliminary analysis, this article does appear as providing a legal basis to allow for all the regulators to exchange the information collected in individual investigations on the basis of their respective legislations and may raises questions, both in terms of Treaty legal basis and procedural rights for the parties under investigation. Furthermore, it is to be noted that supervisory authorities already cooperate with other competent authorities through existing frameworks and on an ad-hoc basis, such as the DMA High-Level Group or the EDPB taskforce on the interplay between data protection, competition and consumer protection.

→ Delegations are invited to share their views on the added the proposed new provision, in particular regarding its impact on and interaction with other relevant legislation at EU level.

→ Delegations are invited to provide examples or legal references how non-personal information is currently communicated to relevant authorities for the purpose of opening administrative procedures and investigations under their competences.

Procedural determination by the board (Article 26a)

In its proposed new Article 26a, the European Parliament position provides that a supervisory may request from the EDPB a "procedural determination" on any procedural dispute arising between DPAs during the investigation, including on the 'summary of key issues' (SKI). This new proposed provision would de facto give a broader power to the EDPB to adopt a binding decision on any matter during an investigation, while under the GDPR's enforcement framework, the EDPB's power to adopt decisions in individual cases is strictly limited to resolving disputes on 'relevant and reasoned objections' at the end of the investigation and where all cooperation tools have been exhausted. While the European Parliament's provision makes reference to Article 66 GDPR (urgency), there seems to be no requirement for the matter to be urgent in order for the EDPB's procedural determination to be triggered.

→ Delegations are invited to reflect on the added value of the proposed procedural determination by the Board, as well as on its compatibility with the current cooperation and consistency mechanism established by the GDPR.

→ Delegations are invited to share possible views and examples on the current experience at national level in handling disagreement between supervisory authorities.

Additional remedies (Article 26b)

The European Parliament seems to be introducing, with a new Article 26b, further remedies for parties under investigations and the complainant throughout the procedure. The new provision provides:

- that "each party shall have the right to an effective judicial remedy:
  - 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;
  - where a lead supervisory authority does not comply with deadlines as provided for in Regulation (EU) 2016/679 and this Regulation;
  - where a supervisory authority does not comply with a binding decision of the Board.

- that 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
- that 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.

In addition to a rather unclear drafting of the provision (eg. "does not use its powers", "progresses the procedure"), the Presidency notes that issue of judicial remedy is already covered by Article 78 GDPR, which provides that the right to an effective judicial remedy applies:

- against a legally binding decision of a supervisory authority
- where a supervisory authority does not handle a complaint or update the complainant as required under the GDPR.

→ Delegations are invited to provide feedback on their national framework of administrative and non-judicial remedies, in light of Article 78 of the GDPR.

→ Delegations are invited to share example and experience of remedies in the cases of inaction falling under Article 78(2) of the GDPR, including through possible Court decision on the matter if available.

<u>Enforcement statistics (Article 28b EP)</u>

Under Article 28b, the European Parliament introduces detailed provisions on the provisions of enforcement statistics by supervisory authorities.

Article 28b - 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.

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.*

→ Delegations are invited to provide feedback on the current practice at national level in terms of enforcement statistics, in particular, as to how supervisory authorities currently provide their reporting in their activity reports under Article 59 of the GDPR.