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From:	Presidency
To:	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
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Ahead of the meeting of the JHA Counsellors (Data Protection) of 11 March 2025, delegations will find in the Annex a Presidency discussion paper on the above-mentioned file.

## JHA counsellors meeting (data protection) 11.03.2025

### Discussion paper

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#### 1. Debrief from the ITM on 6.03

The Presidency will make an oral debrief from the Interinstitutional Technical Meeting held on 6.03. The debrief may continue during the Data Protection Working Party on the 14.03.

#### 2. Articles 2a(3), 2b and 4(1a) (EP)

In preparation for the negotiations with the Parliament, the Presidency would like to ask delegations for their comments on Articles 2a(3) and 2b, introduced by the Parliament, with a view of achieving a compromise. Paragraph 3 of Article 2s as well as Article 2b, introduced by the Parliament, contain various horizontal and more detailed principles, that should be discussed with delegations. Another such horizontal principle is introduced in Article 4(1a) EP, which has already been preliminarily discussed with the delegations.

In Presidency's assessment, it is important that any such article with reference to horizontal standards and principle adequately represents the content of the final text of the regulation and does not lead to any new or further obligation or procedure. Therefore, many adjustments and redrafting would be needed to align the content of such article to the preliminarily agreed text on the right to be heard and the joint case file, among others. Possibly, a shorter, more general article could be envisaged, referring for example to key principle already enshrined in EU primary law or in the GDPR, without reference to specific rules concerning right to be heard and the joint case file, in order to avoid overlap with other provisions.

The Presidency would like to draw delegations' attention to the fact that these provisions have been repeatedly highlighted by Parliament during technical discussions as a key proposal in their mandate, which they intend to consider in any possible overall agreement.

Below, the Presidency provides a line by line overview of the three provisions, followed by a potential compromise proposal.

#### Article 2a(3) (EP)

**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.**

*Presidency's comment: this proposed principle is in line with the general division of responsibilities under the GDPR. The wording may however need to be adapted in order to avoid referring to a "right to communicate" in this context. Delegations are asked for their views on the possible codification of such rule through the Regulation.*

## **Article 2b (EP)**

### **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").**

*Presidency's comment: the content of the three principles would need to be verified taking into consideration the text of the regulation tentatively agreed so far. However, some reference to the three principles (fair procedure (or due process), right to be heard, transparency) in a more general manner and in line with wording from EU primary or secondary law could be envisaged. Member States are asked for their confirmation on the possible flexibilities in that regard.*

**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.**

*Presidency's comment: the content of this paragraph could be covered by a recital leaving the possibility for the LSA to hear the complainant further if necessary. Feedback from Parliament is expected on such a proposal following the discussion held on Article 15.*

**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.**

*Presidency's comment: paragraphs 3-6 seem redundant in light of the text already preliminarily agreed in articles 19 and 20.*

**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.**

*Presidency's comment: Member States are asked for their views on the proposal that the supervisory authorities limit the length of submission by the party under investigation and the complainant to not more than 50 pages.*

**8. The lead supervisory authority may join and separate cases in accordance with national procedural law, insofar as this does not undermine the rights of the parties.**

*Presidency's comment: Member States are asked for their views on the possibility of referring to such general principle.*

#### **Article 4(1a) EP**

**1a. The handling of a complaint shall always lead to a legally binding decision that is subject to an effective legal remedy under Article 78 of Regulation (EU) 2016/679.**

*Presidency's comment: Following preliminary discussions at Working Party level, delegations expressed flexibility to include such a principle, provided that it does not explicitly refer to "a legally binding decision". After a first exchange at ITM level, the Parliament expressed flexibility in considering alternative wording.*

#### **Compromise proposal from the Presidency**

Based on the above, a tentative compromise may be envisioned provided that it only refers to general principles in a more general manner and in line with wording from EU primary or secondary law. To illustrate such tentative compromise, delegation will find below a draft text for their preliminary consideration. This first draft text has been prepared by the Presidency and has not been shared with the Parliament.

- The principle laid down in paragraph 1(a) replicates the wording of recital (129) GDPR and Article 41 of the Charter (Right to good administration)
- The principle laid down in paragraph 2, mirrors the Parliament proposal under Article 4(1a) (line 72a), with exception of the reference to "legally binding decision", which delegations preferred to remove, and the deletion of the reference to Article 78 GDPR. The Presidency suggests referring instead more broadly to a "a [measure] that is subject to an effective legal remedy". The Presidency indeed considers that the removal of the reference to "legally

binding decision” implies also the removal of the reference to Article 78 GDPR which directly refers to “legally binding decision”.

## **Article XX**

### ***Principles relating to the procedures in the enforcement of Regulation (EU) 2016/679***

*1. Without prejudice to additional rights under national procedural law, the following principles shall apply to the handling of cases by supervisory authorities in the enforcement of Regulation (EU) 2016/679 for cross-border processing:*

*a) Any case related to the enforcement of Regulation (EU) 2016/679 for cross-border processing shall be handled impartially, fairly and within a reasonable time (“fair procedure”)*

*b) 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 (“proximity”)*

*c) Any party under investigation or complainant shall have a right to be heard before any decision liable to affect them adversely is taken, including before the decision to uphold, or to fully or partially reject a complaint is adopted (“right to be heard”)*

*2. The handling of a complaint shall always lead to a [measure] that is subject to an effective legal remedy.*

*3. A supervisory authority may join and separate cases in accordance with national procedural law, insofar as this does not undermine the rights of the parties.*

➔ **Question 1: Delegations are asked for their views on the possible flexibilities with regards to Article 2a(3), elements of Article 2b (EP) (, in particular a reference to general principles included in its paragraph 1) and Article 4(1a) EP. Delegation are also invited to provide their preliminary feedback on the tentative compromise for an Article XX as drafted by the Presidency.**

### **3. Article 5a (EP)**

Discussion continued on Article 5a proposed by the EP. The Presidency and the EP are moving towards a compromise solution which will be more closely linked to the already existing possibility of asking for a mutual assistance in the form of requesting out to carry out an investigation under Article 61 GDPR.

The EP clarified that the added value of an additional Article 5a could be to spell out a deadline for the requested authority to open an investigation, in case it does not have grounds to refuse to comply with the request pursuant to Article 61(4) GDPR. Currently, Article 61 GDPR only provides for a deadline to reply to a request and to provide relevant information within one month from receiving a request (see Article 61(2) GDPR), however, it does not include a deadline for the final rejection of a request or for opening an investigation.

➔ **Question 2: Delegations are asked for their views on the possibility to include a deadline for rejecting a request for investigation under Article 61 GDPR or opening an investigation following such request, as well as a suitable length of such deadline.**

#### 4. Deadlines

Based on the feedback received during the Data Protection Working Party on 19.02.2025, the Presidency wishes to continue the discussion on consequences of missing the procedural deadlines established in the procedural regulation, as well as the mechanism of extension of certain deadlines.

In summary, the Presidency draws the following main conclusions from the WP of 19.02:

- The authorities need flexibility in the length of the procedure, as they will ultimately be responsible for defending a decision;
- Likewise, the authorities need a level of discretion in extension of the deadlines;
- As for the consequences of missing the deadlines, MSs point to the fact that the LSA does not bear the full responsibility for the duration of the procedure – the responsibility is shared with the concerned authorities – and that the GDPR already provides some relevant mechanisms (urgency procedure, judicial remedies).

The Presidency will put great emphasis on explaining this rationale during the negotiations. At the same time, the Presidency wishes to continue the discussion on possible mechanisms that would clarify the legal aspects of the procedural regulation and possible improvements in their efficiency – also with a view to achieving a compromise solution.

Under the Hungarian Presidency, delegations were already consulted on the possibility to indicate that missing a deadline to present a draft decision could result in a presumption of urgency for the purposes of Article 66(1) GDPR, mirroring the logic already enshrined in Article 61(8) GDPR. In their feedback, some delegations have suggested that such solution could be acceptable, but not as a first step – rather, it could be envisaged as a part of a broader mechanism.

In response to these comments, the Presidency puts for discussion a proposal for the following mechanism, addressing both the issues of extension of a deadline and consequences of missing a deadline:

- When the LSA extends the deadline for delivering a draft decision, a concerned authority might raise a reasoned opposition to the extension, if they consider that the extension of a deadline might lead to the need for urgent need to act in order to protect the rights and freedoms of data subjects or if an extension is not justified considering the characteristics of a case. The LSA can extend the deadline despite this opposition;
- If, following an extension, the LSA misses the extended deadline and a concerned authority has previously objected to the extension of a deadline, this should lead to a presumption of urgency under Article 66(1) GDPR.

This solution introduces an element of non-binding peer control over the extension of a deadline. It also provides for a reference to a presumption of urgency under Article 66(1) GDPR but only as a third step, after the extension of a deadline and after a reasoned opposition to an extension has been made by a concerned authority.

In addition, the EDPD could be empowered to gather statistics on the use of extension mechanisms by the supervisory authorities.

➔ **Question 3: The delegations are asked for their views on the proposed mechanism for reference to a presumption of urgency under Article 66(1) GDPR.**