



Call for evidence - Further specifying procedural rules relating to the enforcement of the General Data Protection Regulation

Contribution of Alliance Digitale

Opening remarks

- Alliance Digitale welcomes the opportunity to answer to the consultation of the Commission on further specifying procedural rules relating to the enforcement of the General Data Protection Regulation ('GDPR').
- We support the greater objective of the Commission to harmonize aspects of procedural law for a better cooperation/coordination between Data Protection Authorities ('DPA') on cross border cases. We believe that further harmonization of procedural rules between national DPAs will not only provide for a consistent application of the GDPR across the EU, but also provide greater certainty to DPAs, companies and data subjects alike. It will also avoid creating unfair competition between companies that may be subject to different standards of GDPR implementation depending on the country where their European headquarters are located.
- Despite efforts to ramp up effectiveness and enforcement in recent years, the GDPR has not reached its full potential due to structural problems. This is mainly due to difficulties in enforcing the text with regards to cross-border cooperation, lack of clear deadlines and specification of procedural steps in cross-border cases and diverging national procedures ultimately hampering cooperation between DPAs. We therefore welcome the upcoming complementary regulation to ensure that the GDPR is properly enforced in the EU in a harmonized and coherent manner.
- As the Commission will assess which aspects of procedural laws to harmonize and which tools to use in order to promote cooperation between national authorities, Alliance Digitale suggests that the following aspects should be examined.

Harmonizing essential aspects of procedural law to streamline diverging national procedure as to complaints handling and lessen delay in procedure

- Alliance Digitale fully supports the aim of the Commission to harmonize some aspects of national procedural laws such as setting specific deadlines for cooperation between DPAs, fostering access to information for stakeholders, or streamlining the way the parties under investigation are heard during the procedure.
- The fact that DPAs rely on fully national administrative procedural laws is adding in complexity and often leads to critical issues for stakeholders such as significant delay in procedures, diverging complaints procedure (form or handling of complaints) or contrasting interpretation

of key principles of law such as the right to be heard. **We believe that the fragmentation in essential elements of procedural law undermines the very spirit of the GDPR and creates a difficult environment for companies to navigate with, but also erodes the confidence of European citizens in the GDPR.**

- With regards to delays in procedure, Alliance Digitale believes that the upcoming regulation could further specify procedures with regards to cross-border cooperation between national authorities. While the GDPR sets cooperation between DPAs for the consistent application of the GDPR (article 63) or for dispute resolution between DPAs in cross-border cases (article 65), the GDPR does not set specific deadlines for certain procedural steps, leading in delay, inefficiency and undermining the credibility of enforcement as the EDPB already reported¹.
- Under Article 63 of the GDPR, national authorities are obliged to cooperate in order to ensure the consistent application of the GDPR in the EU. However, when multiple DPAs are involved, they do not necessarily reach a consensus. Article 65 allows the Board then to adopt a binding decision when there is for example conflicting views on which authority is competent or when a supervisory authority concerned has raised a relevant and reasoned objection to a draft decision of the lead supervisory authority and the lead supervisory authority has not followed the objection or has rejected such an objection as being not relevant or reasoned.
- However, no deadlines are set for such a procedure. As cross-border cooperation is increasingly relevant in a digital environment with multiple DPAs involved, we believe the Commission should specifically set deadlines for the various procedural steps necessary to foster cross-border cooperation and for the lead supervisory authority to take a decision.
- Similarly, deadlines could also be specified with regards to various procedural steps regarding the handling of a complaint. Setting up a deadline for determining whether a complaint is admissible or to establish the competence of the lead supervisory authority are essential to give certainty to all parties involved.
- In that vein, we believe that procedural deadlines for the communication of information on the case, the drafting, revision, and adoption of a draft decision should also be specified.
- It is also of crucial importance that stakeholders have a better access to information. Currently, stakeholders are not informed of the opening of a specific case and do not have access to essential information on the conduct of proceedings. Access to information could allow stakeholders to better understand and anticipate investigation or proceedings stage or deadlines regarding the advancement of a case.
- Finally, we call on data protection authorities to make greater use of soft law procedures as amicable settlement or warning notices as opposed to enforcement actions. This would certainly allow for a fruitful dialogue with all stakeholders and a quicker and more efficient settlement.

¹ https://edpb.europa.eu/system/files/2022-10/edpb_letter_out2022-0069_to_the_eu_commission_on_procedural_aspects_en_0.pdf

Specifying procedural rights of the parties

- Harmonizing key aspects of the rights of the parties to the procedure such as the right to be heard or the rights to the parties to the procedure are essential to foster certainty for stakeholders. Even though the right is enshrined in article 41 of the Charter of Fundamental Rights, key aspects of procedural rights diverge among member states creating difference of treatment and diverging application when more than one DPA is involved.
- Because the right to be heard is a cornerstone of every democratic justice system, we believe that the right of the parties should be reinforced. Under article 60 which specifies the cooperation between the lead supervisory authority and the other supervisory authorities concerned, there are currently no clear rules on the right of the parties to access to the file or specifying the scope and timing of the right to be heard. This means that DPAs apply diverging procedural rules. Furthermore, Article 65(1) on dispute resolution between authorities also does not give clear guidance when the case is dealt with at EU level.
- We would thus support better clarity as to the procedural rights of the parties in the cooperation mechanism and specification of the right of representation in the different steps leading to a decision in cross border cases.
- Specifically, we would call for the implementation of a right to be heard for the defendant before each and every concerned authority. This could start with the lead supervisory authority providing the defendant with a list of the relevant contact details in charge of the cooperation cases in each concerned DPA. This would enable the defendant to contact each concerned DPA to present and explain their case before the concerned DPA can choose to raise a relevant and reasoned opinion with the lead supervisory authority. Similarly, if a relevant and reasoned objection is raised, the defendant must have the opportunity to be heard by the concerned DPA to provide its view on said objection.

Fostering consistency and promoting the better use of codes of conduct

- Alliance Digitale welcomes the opportunity to share their views on the upcoming regulation on specifying procedural aspects for cooperation among DPA on cross-border cases.
- We believe that this process could be the start of an on-going discussion with stakeholders for the Commission to propose additional clarifications by way of legislation in order to bring certainty and consistency in the way the GDPR is applied and interpreted. This could be conducted on the basis of a progressive dialogue with a wide spectrum of stakeholders in order to make sure that the GDPR remains a cornerstone of EU law. We believe two specific aspects could be fostered by the Commission.
- First, as things currently stand, the lack of harmonization and inconsistencies between interpretation of the GDPR by DPAs can lead to competitive disadvantages for businesses

where a DPA may have a more restrictive or a more flexible interpretation with regards to GDPR violations or certain behaviours.

- We believe that the **Commission should conduct an evidence-based impact assessment in order to determine the impact on the internal market of diverging interpretations of core concepts of the GDPR by the DPAs** and how this translates into economic and legislative terms for companies when they deliver products and/or services within the EU or are established in one specific Member State and depends from a specific lead supervisory authority as opposed to another.
- Second, while the GDPR contains prominent dispositions to foster the adoption of codes of conduct (articles 40 and 41; Recital 99), we deplore that codes of conduct are an underused instrument despite them being efficient and resilient tools to be easily adapted to the digital environment. To date, five years after the entry into force of the GDPR, only 2 codes of conduct (both in the cloud sector) have been approved at the EU level.
- We believe this to be a missed opportunity as codes of conducts under the GDPR allow to consult stakeholders and data subjects to help specify the application of the GDPR in a wide range of domains such as the pseudonymisation of personal data, the information provided to the public and to data subjects or the fair and legitimate interest of the data subject to name but a few. The Commission can also decide that the approved code of conduct has general validity within the Union.
- As per recital 77 of the GDPR, codes of conduct are intended to provide guidance to organisations on the implementation of appropriate measures and on the demonstration of compliance, including the assessment of the risk of the processing and the best practices to mitigate such risk. Such codes are therefore the means to foster constructive dialogue between organisations and DPAs to assess risk and build mitigating measures together, in lieu of potential disputes or potential compliance challenges of organizations. Having more codes of conduct would significantly increase legal certainty for organisations as well as transparency for data subjects and would reduce the number of complaints of data subjects and potential non-compliance of organisations.
- Finally, we think that codes of conduct could be an effective means to adapt quickly the GDPR to new challenges while following a risk-based approach and without the need of undergoing a profound substantive reform. **We encourage therefore the Commission to conduct the same type of consultation as this one so as to consult stakeholders on why codes of conduct are so little used and what can be done to change the situation.**