

## Taking GDPR enforcement really seriously: What to expect from the GDPR Procedural Regulation?

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## Taking GDPR enforcement *really* seriously: What to expect from the GDPR Procedural Regulation? (12 December 2023)

By Michaël Van den Poel<sup>1</sup>

On 12 December 2023, the Brussels Privacy Hub hosted a webinar covering the proposed GDPR Procedural Regulation.<sup>2</sup> The event was moderated by **prof. Sophie Stalla-Bourdillon**, co-director of the Brussels Privacy Hub, and featured several experienced speakers. **MEP Sergey Lagodinsky**, rapporteur for the LIBE committee spoke on the [Draft Report](#) he authored for the European Parliament. The event also featured **Max Schrems** from noyb, **Alberto Di Felice** from DigitalEurope and prof. **Gloria González Fuster**, co-director of the Law, Science, Technology and Society (LSTS) Research Group at the Vrije Universiteit Brussel (VUB).

**MEP Sergey Lagodinsky** started by contextualizing the Proposal in an environment of increasing criticism of GDPR enforcement, noting that lengthy and complex cross-border procedures could ‘produce an adverse effect on citizens trust’. He repeated the Parliament’s call for a common administrative procedure for cross-border cases in the GDPR to improve enforcement. The Proposal faces two main challenges and challengers according to him. First, the industry has challenged the Proposal due to it not amending the content of the GDPR, which it sees as cumbersome to comply with. Second, from the point of view of individuals, the Proposal would harm the rights of complainants, as it creates an asymmetry of arms benefitting controllers and processors at the detriment of complainants’ procedural rights. This approach mirrors criminal law procedures, with a focus on the rights of defendants, whereas he believes that a civil law approach with equality of arms between parties would be more suitable. Whilst retaining national procedural standards, the Proposal should be amended to include procedural safeguards such as the right to be heard and the right to translation for all parties. The Draft Report also includes a joint case file, which

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<sup>2</sup> Commission, ‘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 (General Data Protection Regulation) COM(2023) 348 Final’ (‘Proposal’).

differs from the administrative file in article 19-21 of the Proposal in that it would be accessible for all parties, including the complainant.

**Max Schrems** criticized the ‘ivory tower’ approach taken by the European Commission. Practitioners from noyb have to face widely diverging procedures throughout, for example having to take pictures of a physical file in Poland in order to get access to access. These differences also impact the dispute resolution mechanism in the EDPB, with the Irish Data Protection Commissioner (‘DPC’) withholding certain information from its peers, breaching the principle of procedural fairness.

Commenting on the Proposal, Max Schrems pointed to four significant flaws. First, the Proposal does not adequately address the differences between complain-based and ex officio cases, and between procedures resulting in potential penalties and those that do not. Second, the Proposal changes the institutional balance in the GDPR from co-decision making between supervisory authorities to more power granted to the lead supervisory authority. Third, the Proposal has not fulfilled its promises, as it was originally intended to harmonize most procedural aspects, but has since seen reduced ambitions. This raises quality issues, as national law would still apply, but the Proposal does not include a conflict of laws approach to settle disputes between different Member States laws. Fourth, the approach to confidentiality is overly restrictive. According to Max Schrems, public criticism is the only remaining source of public accountability for supervisory authorities, in the absence of effective accountability to the three classical branches of government.

The Draft Report would improve on many of these issues, by bringing the Proposal more in line with existing procedural standards and introducing conflict of laws procedures. Specifically on article 18 of the Proposal which would remove the possibility to issue relevant and reasoned objections on the scope, he did not raise any concern with the approach adopted in the Draft Report, which contrary to the opinion of the EDPB and EDPS does not just delete Article 18 of the Proposal. The Draft Report instead aims to address the concerns by the EDPB and EDPS by widening the scope of relevant and reasoned objections to factual elements in the draft decision and the joint case file, instead of just the draft decision, whilst also deleting the limitation to three pages contained in article 18(2)(a) Proposal.

Max Schrems agrees with the European Commission’s introduction of a summary of key issues, which should enable supervisory authorities to comment on the scope of the case at an earlier stage. Supervisory authorities should however retain the possibility to shape the different aspects of the scope later on, in order to avoid manipulation of the case by the lead supervisory authority.

**Alberto Di Felice** states that the Proposal is modest, expanding on the GDPR without reopening it. He disagrees with Max Schrems and the Draft Report on institutional aspects. As administrative procedures, similar to competition law, procedures before a supervisory authority should not be based on civil or penal law. The implementation of an adversarial process would thus not be desirable. He also disagrees on the perceived ineffectiveness of GDPR enforcement, as supervisory authorities today have many powers and are using these to enforce the GDPR. Whilst some high-profile cases are taking a long time and are

currently being scrutinized before the courts, many cases are handled in a smooth fashion. On confidentiality, he disagrees with the position of Max Schrems, noting that access to case information is solely meant to be able to argue before the supervisory authority, and not to leak documents to the press.

Responding to Alberto Di Felice, **Max Schrems** noted that most Member States already have a right to be heard before the supervisory authority for complainants. In addition, he references the two SCHUFA cases<sup>3</sup> where the Court of Justice noted that a complaint is not merely a petition. He also disagrees with the success of GDPR enforcement, pointing at many noyb cases which are taking years to be resolved by supervisory authorities.

The final speaker, prof. **Gloria González Fuster** started by placing the Proposal in the broader context of GDPR enforcement. The GDPR itself was a response to a lack of enforcement of earlier legislation. After the adoption of the GDPR, discussions shifted to insufficient funding of national supervisory authorities. After this was addressed by Member States, supervisory authorities identified yet another obstacle to effective enforcement in the form of divergent national laws inhibiting cooperation. The [EDPB 'Wish List'](#) was a response to the call for help by national supervisory authorities, which has then been followed by the European Commission's Proposal. Prof. González Fuster highlighted that from a political view, it should be ensured that this finally gets enforcement on the rails, and that no further issues pop up.

On amicable settlements, she noted that this phenomenon is relatively new in data protection. It is only referenced in a limited way in the recitals of the GDPR, but has since expanded to now being included in the Proposal. The most notable user has been the DPC, which has made extensive use of amicable settlements within the One-Stop-Shop in a manner that was not envisioned in the GDPR. Whilst the EDPB has been slowly normalising these settlements, many supervisory authorities do not use them, as they are not regulated in many Member States. It is thus surprising that neither the Draft Report, nor the Joint Opinion by the EDPB and EDPS challenge the premise of amicable settlements.

Reacting to a Dutch government submission to the European Commission, prof. González Fuster believes that the reasons for generally promoting amicable settlements are severely flawed. First, time constraints do not make a convincing argument. As following up from Article 77 GDPR and more recently the SCHUFA judgements, complaints have to be handled by supervisory authorities, and cannot be simply dismissed or settled. Second, she challenges the argument that amicable settlements provide for an expedited way to solve problems. On the basis of public information in the EDPB One-Stop-Shop transparency register, she noted that supervisory authorities (i.c. the DPC) have taken up to two years to reach amicable settlements. Whilst this argument would hold if a deadline of e.g. a month would be instituted, this is currently not the case. Third, amicable settlements are often presented as effectuating the will of the concerned individual. This is equally false in practice, as the DPC merely informs individuals of amicable settlements. Whilst individuals can in principle challenge these announced settlements, there are cases where the DPC has

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<sup>3</sup> Cases C-634/21 and C-26/22 *SCHUFA Holding* [2023].

dismissed a reaction after refusing an amicable settlement (see for example Case 2022/473 of the DPC, referenced footnote 9 of [this contribution](#) by prof. Gloria González Fuster).

The EDPB/EDPS Joint Opinion notes correctly that an amicable settlement is not the same thing as the withdrawal of a complaint, and is in itself a decision. The Draft Report is problematic in considering amicable settlements acceptable as mere agreements between complainants and controllers. This runs counter to the text of the GDPR, which contains procedures on cases before supervisory authorities (article 77 GDPR) and a right to an effective remedy before the courts (article 79 GDPR), but no provision on alternative dispute resolution between controllers and complainants.

**Max Schrems** offered a complementary perspective on amicable settlements. The definitions of amicable settlements vary between countries. He argued that individual rights are subjective rights, and can be waived in certain legal systems and under certain conditions. However, breaches of the GDPR may and should still be sanctioned by supervisory authorities. On the funding of supervisory authorities, he noted the importance of efficiency, with the DPC having the same budget as the Spanish AEPD, but outputting significantly less decisions. A comparison can be drawn with asylum applications, where thousands of cases are handled.

**Prof. Gloria González Fuster** saluted creative approaches such as those used by the Belgian supervisory authority, which can help data subjects with the exercise of data subject rights through mediation, which if successful removes the need for them to launch a complaint. Reacting to Schrems' comments, she noted that all important procedural aspects should be harmonized, in order not to create a Russian doll made of many layers, i.e., the GDPR, the Proposal and national laws. Finally, she stressed that the EDPB's register of One-Stop-Shop decisions deserves more attention. The register is functioning, serving as a database with many publicly available cross-border decisions, but currently not all supervisory authorities publish their decisions there. A potential obligation to use the register could be beneficial, but neither the Proposal nor the Draft Report include a provision on it.

**Max Schrems** agreed with Prof. Gloria González Fuster on the transparency register. He further believes that we should be careful not to overwhelm judges, as they are already having difficulties with applying the GDPR. The Proposal will create new procedural rules they are not accustomed to. Finally, he explains how the system envisioned by noyb would function. The Proposal should only apply directly upon the relationship between supervisory authorities. The relation between individuals, controllers/processors and their respective supervisory authorities would continue to be governed solely by member state law, which the proposal could strengthen through the obligation for Member States to implement minimum procedural standards.