

## Additional input on the initiative on procedural aspects of the GDPR

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*Publication date:*  
2023

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*Document Version:*  
Final published version

[Link to publication](#)

*Citation for published version (APA):*  
Gonzalez Fuster, G. (2023). Additional input on the initiative on procedural aspects of the GDPR.

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## Additional input on the initiative on procedural aspects of the GDPR

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28 April 2023

Following the meeting of 21 April 2023, I would like to provide additional information to further illustrate current concerns regarding the way in which ‘amicable settlements’ are being used in the context of Article 60 GDPR. Ongoing developments **fundamentally distort the One-Stop-Shop (OSS) mechanism as conceived by the EU legislator**, to the detriment of data subjects, and seriously affecting the enforcement of the GDPR.

It is thus crucial that the upcoming initiative of the European Commission clarifies which are the obligations of DPAs in this regard.

In a nutshell, this is the proto-typical situation as foreseen by the GDPR:

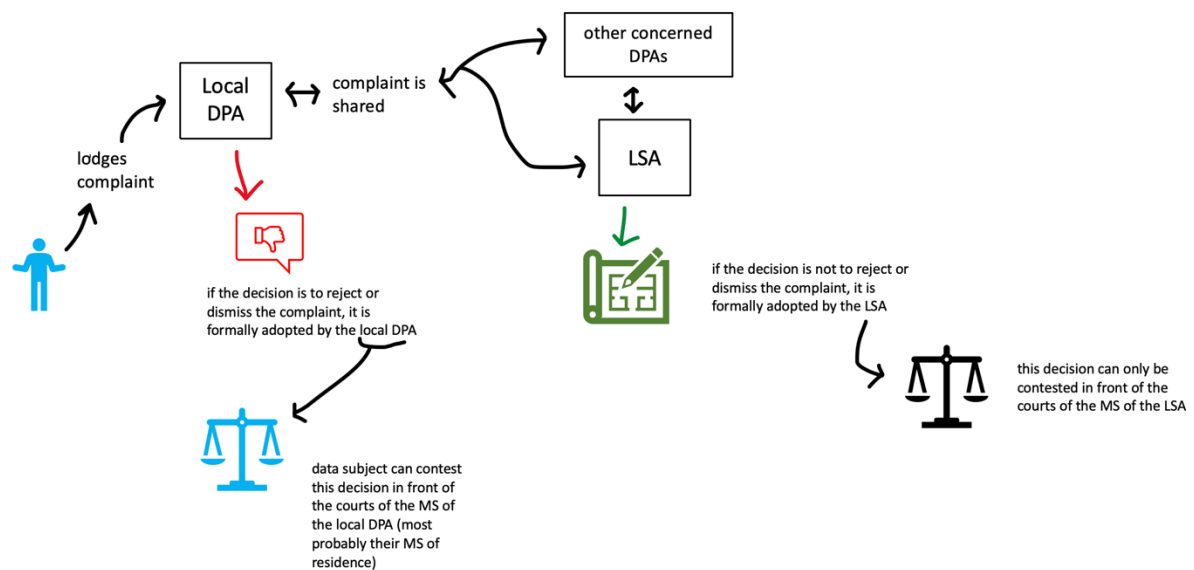


Figure 1 - The OSS in the GDPR

The OSS system benefits data controllers by allowing them to have to deal with only one DPA, while ensuring a fair procedure for data subjects because, if the final decision is that their complaint is ‘dismissed or rejected’, such a decision shall be formally taken by the DPA with which they lodged such complaint (Art. 60(8) GDPR). This allows data subjects to exercise their ‘right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them’ (Art. 78 GPDR) without having to deal with the judicial system of another MS.

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The GDPR explicitly foresees, as an exception to the general rules applicable to the OSS, that **the local DPA** shall try to solve the issues at stake in a complaint (or issues reported to them by other means) by seeking ‘*an amicable settlement with the controller*’. There is no provision detailing the exact conditions for this to happen, beyond a Recital that notes this would be pertinent particularly for **local cases**.<sup>2</sup> Art. 77(2) must in any case be respected, and thus the DPA with which the complaint has been lodged shall inform the complainant of ‘*the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78*’.

The idea is to favour a quicker resolution of cases, and to avoid unnecessarily burdening other DPAs. A simplified visual representation would be:

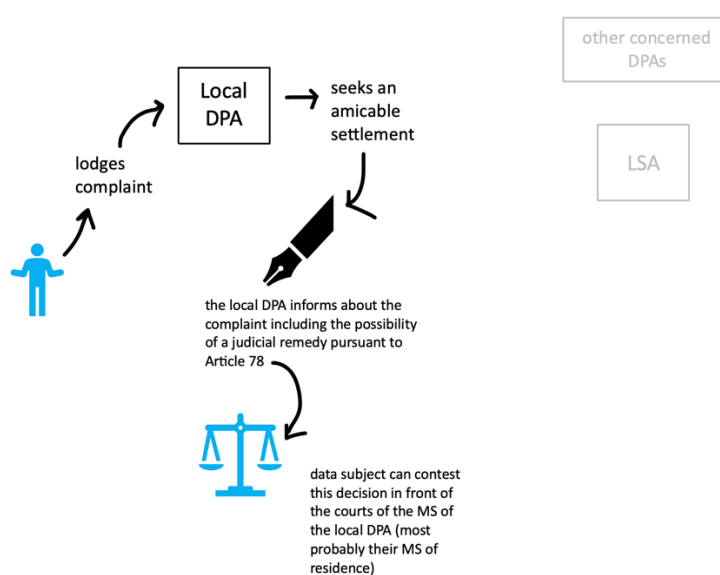


Figure 2 - Amicable settlements and the OSS as foreseen in the GDPR

Currently, however, **DPAs are using amicable settlements differently**, as documented by extensive evidence now available in the online Register of Final One Stop Shop Decisions of the EDPB.<sup>3</sup> All cases of amicable settlements accessible through the Register concern cases in which **the LSA is the Irish DPA** (that is, the DPC). In the vast majority of cases, they follow a path that can be visualised as follows:

<sup>2</sup> Recital 131 GDPR: “Where another supervisory authority should act as a lead supervisory authority for the processing activities of the controller or processor but the concrete subject matter of a complaint or the possible infringement concerns only processing activities of the controller or processor in the Member State where the complaint has been lodged or the possible infringement detected and the matter does not substantially affect or is not likely to substantially affect data subjects in other Member States, the supervisory authority receiving a complaint or detecting or being informed otherwise of situations that entail possible infringements of this Regulation should seek an amicable settlement with the controller and, if this proves unsuccessful, exercise its full range of powers”.

<sup>3</sup> Available here: [https://edpb.europa.eu/our-work-tools/consistency-findings/register-for-article-60-final-decisions\\_en](https://edpb.europa.eu/our-work-tools/consistency-findings/register-for-article-60-final-decisions_en). Decisions are apparently only uploaded by the EDPB once they cannot be contested before the courts, which would explain at least in part the apparent persistent delays regarding publication (in April 2023 the most recent published decisions date back from November 2022).

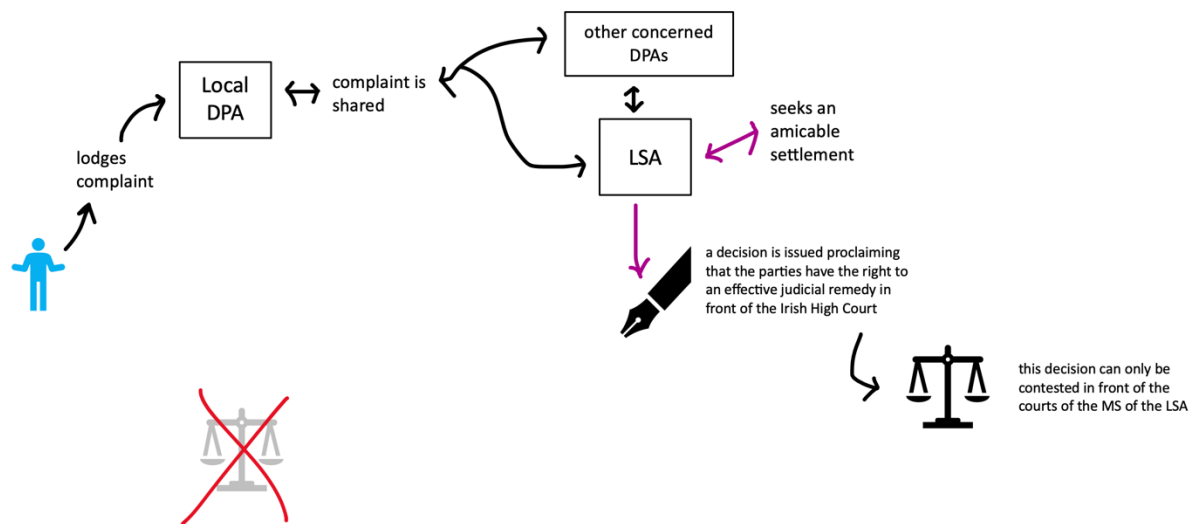


Figure 3 – The practice of amicable settlements in the OSS as reinterpreted by (some) DPAs

These are cases in which the data subject lodges a complaint with a DPA different from the DPC, but the DPC is the LSA.<sup>4</sup> **The DPA that received the complaint did not attempt to reach an amicable settlement**, but the DPC nevertheless decides that it should seek an amicable settlement. Once the DPC considers that the situation has been solved, it shares this assessment with the other concerned DPAs, and eventually issues a decision in which it states:

*“If dissatisfied with the outcome recorded herein, the parties have the right to an effective remedy by way of an application for judicial review, by the Irish High Court, of the process applied by the DPC in the context of the within complaint”.*<sup>5</sup>

It is unclear if, when and how the decisions of the DPC are communicated to the complainant. In any case, **the complainant is effectively deprived of their right to an effective judicial remedy pursuant to Art. 78** unless they would contest the decision in Ireland.<sup>6</sup>

In any case, it would be wrong to interpret that the data subject has voluntarily given up their right to an effective judicial remedy just because there is a DPC decision stating that the case was ‘amicably resolved’.

Decisions in which the DPC has stated that it considers complaints to have been amicably resolved between the parties concerned include:

- cases in which, despite trying to engage with the data subject in order to obtain their agreement to an amicable settlement (via the DPA with which the complaint was

<sup>4</sup> There are also several cases in which the complaint was lodged with the DPC, and the DPC simultaneously launches an OSS procedure while seeking an amicable settlement.

<sup>5</sup> Standard formulation in all published decisions of the DPC regarding amicable resolution in Art. 60 GDPR procedures.

<sup>6</sup> Incidentally, these decisions, which are accessible via the EDPB website, do not even refer to the GDPR, but are explicitly based on what the DPC refers to as EDPB Document 06/2021: this document was originally named *Internal EDPB Document 06/2021 on the practical implementation of amicable settlements* and was not accessible to the general public until it in May 2022, when it was eventually renamed *Guidelines 06/2022 on the practical implementation of amicable settlements*. It was never submitted by the EDPB to any public consultation and cannot in any case be regarded as replacing the GDPR and the will of the EU legislator.

lodged), **the complainant did not express any agreement at all**, but nevertheless the DPC unilaterally interpreted lack of response as agreement;<sup>7</sup>

- cases in which the DPC apparently contacted directly the complainant, despite the fact that they had lodged the complaint with another DPA and possibly to the surprise of the complainant, and then waited for an answer in vain;<sup>8</sup>
- cases in which **the complainant explicitly disagreed**, but the DPC replied dismissing their concerns.<sup>9</sup>

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<sup>7</sup> Cf. for instance Case [2022/494](#), in which a data subject in Italy lodged a complaint with the Italian DPA and the complaint is transferred to the DPC. The DPC engaged with both the Data Subject (via the Recipient SA) and Respondent in relation to the subject matter of the complaint. Then: “*In its correspondence to the Data Subject, the DPC requested that the Data Subject notify it, within a specified timeframe, if she was not satisfied with the actions taken by the Respondent, so that the DPC could take further action. The Recipient SA confirmed that they issued this update to the Data Subject*” ... and that “**no response had been received from the Data Subject**”. Cf. also for instance Case [2022/493](#), in which a data subject lodged a complaint with the Spanish DPA, and the DPC was the LSA: “*the DPC wrote to the Data Subject, via the AEPD, informing them that the Respondent had removed the review. In its correspondence to the Data Subject, the DPC requested that the Data Subject notify it, within a specified timeframe, if she was not satisfied with the actions taken by the Respondent, so that the DPC could take further action, (...) on 31 May 2022, the AEPD confirmed that there had been no response from the Data Subject*”. Also: Case [2022/472](#) (amicable resolution by the DPC): “**The DPC did not receive any further communication from the Data Subject and, accordingly, the complaint has been deemed to have been amicably resolved**”; [2022/463](#) (amicable resolution by the DPC): “**The DPC did not receive any further communication from the Data Subject and, accordingly, the complaint has been deemed to have been amicably resolved**”; [2022/464](#) (amicable resolution by the DPC): “**As the DPC did not receive any further communication from the Data Subject, nor was it advised by the Recipient SA of any further communication having been received, the complaint has been deemed to have been amicably resolved**”. See also for instance, also without any explicit agreement from the data subject: Case [2022/426](#), Case [2022/434](#), Case [2022/435](#), Case [2022/450](#), Case [2022/456](#), Case [2022/471](#).

<sup>8</sup> Cf. e.g. Case [2022/420](#) in which the complaint had been lodged with the Finnish DPA: “*In the circumstances, the DPC asked the Data Subject to notify it, within two months, if he/she was not satisfied with the outcome, so that the DPC could take further action. **The DPC did not receive any further communication from the Data Subject and, accordingly, the complaint has been deemed to have been amicably resolved***”. Cf. see also Case [2022/480](#), in which the data subject had lodged a complaint with the AEPD. The DPC is the LSA. Eventually, “*The DPC wrote to the Data Subject, via the Recipient SA, to advise her of the foregoing on 1 July 2021. The letter requested that the Data Subject respond within two months if she was not satisfied with the information provided, so the DPC could take further action. **The DPC did not receive any further communication from the Data Subject and, accordingly, the complaint has been deemed to have been amicably resolved***”.

<sup>9</sup> See [2022/473](#) concerning an amicable resolution by the DPC, for a complaint lodged with the DPC, with which the DPC decides to deal with through the Art. 60 GDPR procedure but attempting an amicable settlement. In this case the data subject tried to disagree with the proposed resolution, but their concerns were dismissed as ‘general comments’ and put aside by the DPC: “*On 26 November 2021, the DPC wrote to the Data Subject noting that, now that the Data Subject had regained access to their account and was now able to access their personal data, the dispute between the Data Subject and Respondent appeared to have been resolved. In the circumstances, the DPC asked the Data Subject to notify it, within one month, if he/she was not satisfied with the outcome, so that the DPC could take further action. On 28 November 2021, the Data Subject reverted to the DPC with general comments regarding the Respondent’s processes. On 10 December 2021, the DPC wrote to the Data Subject again, reiterating that it appeared that the subject matter of their individual complaint now appeared to be resolved. The DPC asked the Data Subject to outline any specific concerns that remain outstanding with respect to their individual complaint within two weeks. **The DPC did not receive any further communication from the Data Subject and, accordingly, the complaint has been deemed to have been amicably resolved***”.

The language of the communications sent to the complainant is generally unclear. There is generally a lack of consistency in this matter, and problematic practices also in relation to the language of the decisions adopted under Art. 60(8) GDPR.<sup>10</sup>

The current situation is thus extremely problematic.

The European Commission could remedy the current situation and promote a fair use of amicable settlement procedures by specifying that:

- **in case of amicable settlement** (where the complaint is eventually regarded as having become devoid of purpose) **it is for the DPA with which the complaint was lodged to issue the decision closing the complaint procedure**, in line with Art. 60(8) GDPR and allowing the data subject to contest such decision in the MS of the DPA with which they lodged the complaint;
- any decisions adopted under Art. 60(8) GDPR must be adopted and communicated **in the language of the complaint**, understood as a language admissible for the lodging of the complaint that was used by the complainant;
- whenever a DPA contacts the complainant in order to invite them to accept an amicable settlement such communication must also be **in the language of the complaint**,
- communication with the complainant, also in the context of an attempt to reach an amicable settlement, must be carried out by the DPA with which was lodged the complaint;
- agreement for closing a complaint via an amicable settlement shall only be deemed valid **if such agreement is explicitly given by the complainant**.<sup>11</sup>

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<sup>10</sup> For instance, in Case 2022/570 (which does not concern an amicable settlement but a normal procedure), the Norwegian DPA closed the case sending a letter to the data subject informing them of the fact that the complaint has been rejected in the sense of Art. 60(8) GDPR, noting they agreed with a draft decision taken by the LSA, the Swedish DPA. The letter states that the draft decision is attached to the decision and the attachment “*is written in English due to the international co-operation mechanism that had to be used in the handling of the case*”, before adding “*Should you wish the attachment to be translated to Norwegian, please contact us*”. The attachment, however, includes a disclaimer stating: “*This document is an unofficial translation of the Swedish Authority for Privacy Protection’s (IMY) draft decision, no. IMY-2022-3576. Only the Swedish version of the decision is deemed authentic*”. This means that if the data subject wishes to contest the decision, they would be facing the challenge of having to contest a decision the content of which is in a language different from the one of their complaint.

<sup>11</sup> This does not mean that it shall never be possible for a DPA to unilaterally close a procedure in case of lack of a necessary response from the complainant, for instance if the complainant is required to provide further information which is necessary to handle the complaint. What cannot be accepted is that a lack of response might be regarded as an agreement into accepting an amicable settlement, especially if by applying national rules (of the LSA) such amicable settlement is interpreted as a withdrawal of the complaint.