

## Regulation laying down additional procedural rules relating to the enforcement of Regulation 2016/679

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### POSITION PAPER November 2023

#### Key messages

The French Association of Large Companies (AFEP) welcomes the publication by the European Commission of a **proposal for a Regulation to facilitate cooperation between national supervisory authorities in the implementation of Regulation No. 2016/679** on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter the "GDPR") in cross-border situations in order to ensure its consistent interpretation and application.

This Regulation has long been awaited by businesses to **facilitate the handling of cases involving the cross-border processing of personal data**. However, businesses consider that the draft submitted for consultation is a source of imbalance between the parties, which needs to be corrected.

To improve this proposal, AFEP supports the following measures:

- **Specify the preliminary elements** that must be communicated by the complainant to the supervisory authority;
- **Inform the entity that is the subject of the complaint** from the first stage of the investigation, and afterwards at each stage, so that it can fully exercise its rights of defence;
- **Specify the conditions under which the parties may agree to an out-of-court settlement**;
- **Systematically introduce deadlines** by which the supervisory authority must make a decision, initiate a new stage in the procedure, or inform the parties, in order to speed up the handling of complaints and ensure that the parties to the procedure are fully informed;

Finally, AFEP recalls the need to **specify the role of each supervisory authority throughout the proposal**, indicating in particular when it is the lead supervisory authority, to improve the text's comprehensibility.

## AFEP's position on the draft Regulation

### 1. Cross border complaints - Article 3

Large companies are surprised by the ease with which a complaint can be lodged without providing the supervisory authority with a certain minimum amount of information on the nature of the processing in question, and in particular the exchanges that have taken place between the complainant and the parties under investigation. These details and exchanges are essential for the supervisory authority to fully understand the circumstances that gave rise to the referred complaint.

This is why AFEP supports the introduction of several clarifications in Article 3:

- Point 4 of the **form annexed to the draft Regulation** should include a request for the complainant **to specify the cross-border nature of the processing in question;**
- A new point 5 should be added to the same to ask the complainant **to describe all exchanges with the entity that is the subject of the complaint,** and to attach a copy of these exchanges to the complaint.

The rights of all parties to the procedure, and in particular the rights of defence of the parties under investigation, must also be guaranteed from the first stage of the procedure. **The supervisory authority should therefore systematically inform the entity that is the subject of the complaint as soon as it receives it.**

Furthermore, in view of the information requested in the form annexed to the draft Regulation, the period of one month to allow the supervisory authority to check the completeness of the information requested is too long and should be reduced to two weeks.

### 2. Investigation of complaints – Article 4

To assess the extent to which a complaint should be investigated, the supervisory authority should systematically hear the parties under investigation beforehand in order to ensure the rights of defence and the adversarial principle.

To assess whether it is appropriate to open an investigation, **the Commission proposes a list of criteria which should be supplemented by the likelihood and/or severity of the infringement of the fundamental rights and freedoms of the persons concerned.**

The appropriateness of offering a remedy to the complainant can only be assessed after analysing the possible infringement of the complainant's rights, the seriousness of the infringement and the systemic or repetitive nature of the alleged infringement.

### 3. Amicable settlement – Article 5

AFEP welcomes the encouragement of an amicable settlement of the dispute between the parties. It proposes to **clarify the envisaged procedure** in order to specify the role of each party in this amicable settlement, by specifying the following points:

- The complainant and the parties under investigation may agree on an out-of-court settlement;
- If an amicable settlement is reached within two months, the complaint is deemed to have been withdrawn;
- The parties communicate the conclusions of their discussions to the supervisory authority.

### 4. Cooperation between supervisory authorities – Article 7

The rights of defence of the parties under investigation must be ensured from the beginning of the investigation. This is why **AFEP asks for the parties under investigation to be informed of the start of the cooperation procedure as soon as it is initiated**, and that they are able to ask to be heard by any relevant authority taking part in the cooperation procedure within a period of fifteen days.

### 5. Summary of key issues – Article 9

The rights of defence of the parties under investigation must be ensured from the start of the investigation and before the supervisory authority draws up a summary of the key issues. Accordingly, Article 9.1 should be amended to specify that **the summary of key issues should only be drawn up after the written observations of the parties under investigation have been heard or received**.

Similarly, in order to ensure the rights of defence throughout the procedure, **the comments of the supervisory authorities concerned on the summary of key issues must be sent to the parties without delay (Article 9.3)**.

Finally, in the absence of comments by the supervisory authorities concerned on the summary of key issues, **the nine-month period provided for in Article 9.6 for communicating the preliminary conclusions seems disproportionate and should be reduced to one month**.

### 6. Rejection of complaints – Article 11

AFEP member companies consider that, in application of the right to a fair trial, **the parties under investigation must be heard in the same way as the person submitting the claim**. The entire article should therefore be amended, starting with its title, to mention the right of the parties concerned to be heard before a claim is rejected in whole or in part.

In order to allow the complainant and the parties under investigation to make their observations, the minimum period of three weeks provided for in Article 11.2 must be extended to four weeks.

### 7. Revised draft decision rejecting a complaint – Article 12

In order to reduce the time taken to examine complaints and make the cooperation procedure more fluid, **AFEP considers that Article 12.2 should specify the period within which the**

**complainant may make known its point of view on a revised draft decision.** This period should not exceed four weeks.

#### 8. Preliminary findings and reply – Article 14

The **rights of defence of the parties under investigation must be ensured from the start of the investigation** and in particular before the lead supervisory authority draws up preliminary findings. Accordingly, Article 14 should be amended to specify that:

- The preliminary conclusions shall be prepared in accordance with the provisions of Article 4 (Article 14.2);
- Where the supervisory authority intends to impose a fine, it must give reasons for its decision and list all the factors (and not just the relevant factors) on which it relies (Article 14.2);
- The parties under investigation must be given at least four weeks to comment in response (Article 14.4).

#### 9. Transmission of preliminary findings to the complainant – Article 15

AFEP member companies question the **appropriateness of forwarding preliminary findings to the complainant, given that this is an administrative sanction procedure** brought against the parties under investigation and **not an adversarial procedure between the complainant and the parties under investigation** aimed at repairing any damage. Under these conditions, AFEP suggests deleting Article 15 in its entirety.

If the principle of communicating preliminary findings to the complainant were to be retained, AFEP sees no reason to communicate a non-confidential version of the administrative file to the complainant. At the very least, the complainant's access to the administrative file should be deleted.

#### 10. Right to be heard on the revised draft decision – Article 17

The rights of defence of the parties under investigation must be ensured throughout the cooperation procedure. In this respect, AFEP member companies consider that **the lead supervisory authority should systematically give the parties the opportunity to make their views known** in the event of a revised draft decision (Article 17.1).

In order to allow the parties under investigation to communicate their observations in reply, Article 17.2 should provide for a **minimum period of four weeks** to respond to the revised draft decision.

#### 11. Relevant and reasoned objections – Article 18

The rights of defence of the parties under investigation must be ensured throughout the cooperation procedure, including when the supervisory authorities transmit relevant and reasoned objections to the lead supervisory authority. In this respect, AFEP member companies consider that **these relevant and reasoned objections should systematically be communicated to the parties under investigation**. Article 18 should therefore be amended accordingly.

## 12. Content of the administrative file – Article 19

AFEP member companies do not share the view that the information exchanged between the supervisory authorities are internal documents that are not accessible to the parties under investigation. On the contrary, they note that the decision adopted at the end of the cooperation procedure is a decision jointly reached by all the authorities and that **it is therefore essential that the parties under investigation have access to all these exchanges**. AFEP therefore proposes that Article 19.3 be amended to include all correspondence and exchanges of views between the supervisory authorities in the right of access to the administrative file.

## 13. Referral to dispute resolution – Article 22

The rights of defence of the parties under investigation must be guaranteed throughout the cooperation procedure, including when the case is referred to the dispute settlement mechanism. In this respect, AFEP companies consider that **the parties under investigation should be informed as soon as possible of the implementation of the dispute resolution procedure**. Article 24.1 should therefore be amended accordingly.

## 14. Adoption of a decision by the EDPB – Article 24

The rights of defence of the parties under investigation must be ensured throughout the cooperation procedure, **including during the analysis of the case by the dispute settlement mechanism**.

Consequently, Article 24 must be amended to specify that :

- The Committee shall accompany its statement of reasons with objections deemed relevant and reasoned in order to enable the parties under investigation to prepare their defence in a useful manner (Article 24.1);
- The parties under investigation have at least four weeks to submit their observations in response to the statement of reasons adopted by the Committee (article 24.2).

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## ABOUT AFEP

Since 1982, AFEP gathers the largest companies operating in France. The Association, based in Paris and Brussels, aims to foster a favourable environment for businesses and to present the vision of its members to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve sustainable growth and employment in Europe and meet the challenges of globalisation is AFEP's priority. AFEP has 117 members. More than 8 million people are employed by AFEP member companies and their cumulative annual turnover amounts to 2,600 billion euros.

### Contacts:

Emmanuelle Flament-Mascaret – Director for Economic Law – [concurrence@afep.com](mailto:concurrence@afep.com)

Jocelyn Goubet – Economic Law Direction - [j.goubet@afep.com](mailto:j.goubet@afep.com)

Alix Fontaine – European Affairs Advisor – [a.fontaine@afep.com](mailto:a.fontaine@afep.com)

Transparency Register identification number: 953933297-85