

The Consumer Voice in Europe

BEUC'S RECOMMENDATIONS ON HARMONISING CROSS-BORDER PROCEDURAL MATTERS IN THE GDPR



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Why it matters to consumers

The EU's General Data Protection Regulation (GDPR) seeks to guarantee people's fundamental right to the protection of their personal data in an effective way. However, the disparity, complexity, imbalance between parties and inefficiency of some national legal procedures is making it very hard for consumers, and the organisations defending them, to exercise their rights under the GDPR in an effective way and get companies to comply with the law. This is leaving consumers exposed to Big Tech companies that are profiting from exploiting people's personal data all across Europe.

Summary

BEUC welcomes the Commission's intention to propose a regulation that harmonises procedural rules on cross-border cases under the General Data Protection Regulation (GDPR). BEUC has three main recommendations for this initiative to be a success:

- 1. Mutual recognition of admissibility of complaints and data subject representation.*
- 2. Equal procedural rights for all parties involved in a procedure. Data subjects and organisations representing them should have the same right to be heard and same access to the file that defendants do.*
- 3. Efficient and close cross-border cooperation between Data Protection Authorities (DPAs).*

Introduction

BEUC welcomes and supports the European Commission's initiative to harmonise some procedural rules on cross-border cases under the GDPR. This echoes BEUC's recommendations in our 2020 report ['The Long and Winding Road - Two years of the GDPR: A cross-border data protection enforcement case from a consumer perspective'](#)¹. In our report we made recommendations about the hurdles BEUC and our member organisations have experienced in our joint action against Google's location tracking practices.²

We commend the European Data Protection Board (EDPB) for its efforts to foster greater cooperation and create more efficient cross-border enforcement via their guidelines, internal documents, their 2021-2023 Strategy, Work Programme or the 'Vienna Declaration'.³ We also commend the efforts of the European Data Protection Supervisor (EDPS) to trigger a deeper discussion on how to improve enforcement.⁴ However, there is

¹ The Long and Winding Road - Two years of the GDPR: A cross-border data protection enforcement case from a consumer perspective, BEUC-X-2020-074, https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-074_two_years_of_the_gdpr_a_cross-border_data_protection_enforcement_case_from_a_consumer_perspective.pdf

² <https://www.beuc.eu/every-step-you-take>

³ https://edpb.europa.eu/system/files/2022-04/edpb_statement_20220428_on_enforcement_cooperation_en.pdf

⁴ See, for example, EDPS Conference Report 2022 - The future of data protection: effective enforcement in the digital world, https://edps.europa.eu/data-protection/our-work/publications/brochures/2022-11-10-edps-conference-report-2022-future-data-protection-effective-enforcement-digital-world_en

a clear need for binding rules to streamline cross-border enforcement, as evidenced by the EDPB's wish list on GDPR procedural aspects⁵ sent to the European Commission.

Procedural harmonisation is an essential aspect of GDPR application and enforcement. Some national procedures and DPA practices have a major, negative impact on the rights of data subjects. The upcoming regulation should ensure all procedures, policies and practices relating to data protection are consistent, coherent and standardised to the maximum extent possible, keeping in mind the best interests of data subjects. Effective law enforcement is essential not only to protect the rights of those affected and to maintain public confidence in the GDPR, but also to ensure a level playing field for all responsible parties and to prevent forum shopping. As such, it is in the interest of both data subjects and all companies that comply with the GDPR.

The upcoming proposal should ensure that data subjects can exercise their rights in a fair, effective and affordable way. The upcoming regulation should not constitute a race to the bottom in terms of data subjects' rights. The Commission and the co-legislators must not risk lowering the level of protection of data subjects. BEUC therefore recommends the European Commission to build on **best practices** amongst EU countries' national procedural rules that allow data subjects, and the organisations representing them, the effective exercise of data protection rights. While inspiration could also be taken from other fields of law, it is important to underline the GDPR is a fundamental rights instrument under article 16 of the Treaty on the Functioning of the European Union (TFEU). The GDPR is not an internal market instrument and the rights of data subjects and organisations representing them should be effectively exercised and preserved in line with articles 8 and 41 of the Charter of Fundamental Rights of the European Union.

1. Mutual recognition of admissibility of complaints and data subject representation

The **principle of mutual recognition** should apply to both the representation of data subjects and the admissibility of complaints.

Article 77 GDPR provides a right to lodge a complaint with a supervisory authority for an alleged infringement of the law. Article 80(1) GDPR establishes criteria for organisations to represent data subjects receiving a mandate from them. Article 80(2) leaves it to Member States to allow complaints without a data subject's mandate.

In practice, consumer organisations and other NGOs defending the rights of data subjects have faced unnecessary burdens and delays in the resolution of complaints. For example, in our [coordinated action against Google's location tracking practices](#), no DPA that received a complaint questioned our members' legal standing to represent data subjects or the admissibility of their complaints. However, the lead authority reviewed our members' standing and the acceptability of the complaints (again) under its own national law a long time after the complaints were originally filed. This led to unnecessary delays in the procedure and added additional burdens to complainants.

For example, our member Forbrukerrådet lodged a formal complaint before the Norwegian DPA in November 2018. A year later, the Irish DPA, which was designated as the lead authority to address the complaints, requested data about our Norwegian member to establish that it fits the criteria laid out in article 80 GDPR. Our members were also asked

⁵ https://edpb.europa.eu/system/files/2022-10/edpb_letter_out2022-0069_to_the_eu_commission_on_procedural_aspects_en_0.pdf

to provide additional information about the complainants they represented and how the alleged infringements affected them, such as information about their Google accounts and requests for evidence such as screenshots that documented they experienced the issues raised in the complaints.

Similarly, if a Member State allows NGOs to lodge complaints without a mandate from a data subject pursuant to article 80(2) GDPR, the lead authority should not disregard the complaint because under its Member State law this possibility does not exist. For example, Danish law provides for this possibility. BEUC's Danish member Forbrugerrådet Tænk brought a complaint against Google's handling of location data under article 80(2) GDPR in March 2018. Afterwards, the Irish Data Protection Commission (DPC) asked our Danish member to re-submit their complaint, but this time on behalf of a data subject because Ireland did not implement article 80(2) GDPR. This created a further impasse and uncertainty. The principle of mutual recognition should apply. Representation and complaint admissibility should not be assessed twice.

BEUC's recommendations:

- **the standing of consumer organisations or other NGOs representing data subjects should only be reviewed once, and by the DPA receiving the complaint.**
- **the admissibility of a complaint should only be assessed once, and by the DPA receiving the complaint.**

2. Equal procedural rights for the parties to the procedure.

In most cases it is practically impossible for data subjects alone to document a violation of the GDPR, either because doing so requires vast legal and technical knowledge and resources, or because the violation happens *invisibly*, for example after personal data is being collected by the data controller. Data subjects cannot be expected to file complaints concerning major structural issues or against *hidden* violations. The GDPR requires the data controller to prove that they are in compliance with the law (art. 5(2) GDPR), not that the data subject or organisations representing them prove that the data controller is breaching provisions.

Currently, in some jurisdictions there is an asymmetry in procedural rights between, on the one side, data subjects and representing organisations and, on the other, data controllers subject to a complaint. In addition, a DPA sometimes launches statutory inquiries after receiving complaints on the very topic of the complaint. This has resulted in data subjects or representing organisations not being considered parties in the procedure. Therefore, they do not have the same rights they would have had if the complaint was directly handled. Their rights to be heard and access to the file are therefore not guaranteed, nor are their right to appeal any eventual decision on the own volition inquiry.

An own-volition enquiry does not have a complaint, so it is logical that there are no procedural rights for complainants associated to it. However, the issue appears when a DPA launches an own-volition inquiry instead of a complaint-based procedure when receiving a complaint.

The independence of DPAs is essential, as is their ability to exercise their discretionary powers. Opening own-volition inquiries can be positive and beneficial for data subjects, for example to address other potential issues beyond those raised in a complaint. Yet, in some cases, DPAs' discretionary powers have been used to reduce the scope of investigations

without reasonable justification. This also has had the consequence of reducing complainants' procedural rights.

For example, following a complaint-based inquiry by the Irish DPC against Facebook, Noyb was considered a party to the procedure and was given the opportunity to comment on the DPA's draft Inquiry report, the (revised) Inquiry report and the preliminary draft decision.⁶ In contrast, following complaints against Google's location tracking by BEUC members coordinated by BEUC, the Irish DPC, as the lead DPA, decided to open an own-volition inquiry informed by the complaints. Our member organisations do not have procedural rights in the own-volition inquiry and depend on the good will of the DPC, which is not fair and balanced, and has led to very complicated exchanges with the DPC which clearly show our members and thus consumers are in a deprived position in this procedure compared to the subject of the own-volition inquiry.

BEUC's recommendations:

- **DPAs should be rigorous in requiring information and evidence from data controllers including at the technical level.**
- **complainants should be considered parties to the procedure and have the same right to be heard and access to the file as the defendants.**
- **DPAs must ensure that the exercise of their discretionary powers to carry out own-initiative investigations does not in any way undermine the rights of the complainants and/or result in delays.** This should apply in particular when an own-initiative investigation is opened alongside a complaint procedure in the frame of article 60 GDPR.
- the upcoming proposal should include **criteria for when an own-volition inquiry should be launched if complaints have also been received on the same or similar subject matter. The relationship between own-volition inquiries and complaints should be clarified procedurally** so that they do not have a negative impact on complaints.
- **the parties to the procedure should be informed when a draft decision is sent to the other DPAs under article 60 GDPR.**

3. Efficient and close cross-border cooperation between DPAs

3.1. Swift appointment of lead DPA

In our joint action against Google's location tracking practices, our members lodged complaints between November and December 2018. The appointment of the Irish DPA as the lead authority only occurred in July 2019.

BEUC's recommendation:

- **the upcoming regulation should establish a concrete and short deadline for designating the lead supervisory authority, and a clear process and criteria to verify whether the data controller takes its main decisions where its main establishment in the EU is located.**

⁶ See https://edpb.europa.eu/system/files/2023-01/facebook-18-5-5_final_decision_redacted_en.pdf, notably paras. 1.8 and 1.37, schedule 1.

3.2. Reasonable timeframe to reach decisions on a complaint

We launched our coordinated action against Google's location tracking practices on 27 November 2018. In February 2020, the Irish DPA announced⁷ the opening of an own-volition statutory inquiry. More than four years have passed since complaints were lodged against Google and there is no final decision yet. In June 2022, our members filed another batch of complaints against Google regarding its account registration process.⁸ Almost nine months later, the process is extremely slow and the case has barely progressed.

BEUC's recommendations:

- **DPA decisions should be adopted within concrete, reasonable deadlines which are set under the upcoming regulation. When authorities fail to meet these deadlines, complainants should be able to seek remedies for inaction or partial action by DPAs.**
- while DPAs must have a duty to take decisions on all complaints, **DPAs should be allowed to prioritise cases of strategic importance** in line with the criteria set forth under the EDPB's 'Vienna Declaration'⁹.

3.3. Early and proactive cross-border cooperation

Some BEUC members receive, via their DPA, information about the progress of cases, access to relevant documents and arguments from the data controller, and have the right to plead their case during the case handling. However, other BEUC members do not have these possibilities and just receive progress updates, as required under article 77(2) GDPR, which often lack substance and are channelled through by the concerned DPA. On some occasions, this may be due to the lead authority not providing much information to them. In our experience, concerned supervisory authorities are sometimes less informed about the progress of a case than the defendant and complainants.

BEUC's recommendations:

- **DPAs must cooperate regularly and closely from the beginning of the process** following the principles of sincere cooperation, good administration and mutual assistance.
- **The upcoming regulation should establish concrete obligations regarding the timing and substance of information-sharing between DPAs and establish concrete cooperation duties for DPAs under the GDPR.** These should at least include the following:
 - **lead supervisory authorities must be obliged to actively involve concerned DPAs from the start of an investigation and maintain regular contact with them to inform them of their progress**, so they can provide meaningful updates to data subjects and organisations representing them.
 - **concerned supervisory authorities should have the obligation to be proactively involved** in the investigations carried out by the lead authority, offering support to the lead supervisory authority and regularly following up on the state of play of the complaints. Lead supervisory authorities should encourage concerned DPAs to fulfil this task.

⁷ <https://www.dataprotection.ie/index.php/en/news-media/latest-news/data-protection-commission-launches-statutory-inquiry-googles-processing>

⁸ <https://www.beuc.eu/fast-track-surveillance>

⁹ https://edpb.europa.eu/system/files/2022-04/edpb_statement_20220428_on_enforcement_cooperation_en.pdf

- **concerned supervisory authorities should have full access to the file** throughout the procedure, not just a draft final decision submitted by the lead authority under article 60 GPDR.
- **concerned supervisory authorities should have the obligation to offer assistance to complainants** proactively, regularly advising and communicating with them on procedural matters and assisting them in their dealings with the lead DPA throughout the procedure.

END

