



EUROPEAN DATA PROTECTION SUPERVISOR

Note to the attention of the Supervisor

From: Unit 'Supervision and Enforcement'
Contact person: Thomas Zerdick

For Approval

Brussels, 18 December 2023
CMS case number: 2023-1244

1. Revision of the review procedure in relation to complaints

This note explains the current situation of the review procedure in relation to complaints laid down in Article 18 EDPS Rules of Procedure, as well as the need and options for changes.¹

It proposes to revise the EDPS Rules of Procedure, by abolishing the existing review procedure and by introducing a requirement for the EDPS to issue preliminary assessments before adopting a final decision in cases of finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, or exercising corrective powers, or imposing an administrative fine, or where the EDPS intends to fully dismiss or partially reject a complaint in cases within the supervisory competence of the EDPS. The proposed changes include the right to be heard of the persons concerned, and the right to have access to the file, while respecting confidentiality and other interests.

2. The review procedure

2.1. The current situation

In accordance with Article 18 of the EDPS Rules of Procedure, both the complainant and the institution can request that the EDPS review a complaint decision within one month of its adoption. Such a request for review should be limited to 'new factual evidence and legal arguments' so far not known or taken into account by the EDPS. EDPS decisions on complaints (or cover letters/email with the EDPS decision) inform both parties of the possibility of requesting a review, and of the right to bring an action for annulment against the EDPS decision before the Court of Justice (CJEU).²

¹ This note is intended for its addressees only and may contain legal advice protected against disclosure under Article 4(2) second indent of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

² Article 18 - Review of complaints and judicial remedies

1. Where the EDPS issues a decision on a complaint, the complainant or institution concerned may request that the EDPS review its decision. Such a request shall be made within one month of the decision. The EDPS shall review its decision where the complainant or institution advances new factual evidence or legal arguments.
2. Upon issuing its decision on a complaint, the EDPS shall inform the complainant and the institution concerned that they have the right both to request a review of its decision and to challenge the decision before

2.2. Why are changes needed?

Article 18 in its current wording has presented several practical and legal problems in the EDPS' supervisory practice:

1. Overlap between the EDPS review and an action for annulment

The entity negatively affected by that decision (i.e. the EUI or the complainant) has the possibility to ask the EDPS for a review, within one month. However, depending on the complexity of the case, it is not always possible for the EDPS to assess the review request and, in case the review is admissible, finalise the review before the lapsing of the two month deadline for challenging the EDPS decision before the CJEU.

This can be problematic since in order to safeguard their rights, and without knowing the possible outcome of its request for review with the EDPS, the EUI or the complainant is then obliged to **launch the action before the CJEU in parallel**. This double work is not only an extra burden for the EUI or the complainant, but also puts the EDPS under considerable pressure first to assess the review request, and then finalise the review within a reasonable period.

By way of **example**:

- On 24 June 2020, the EDPS adopted his decision against the SRB in the SRB (*Deloitte*) case.³
- On 23 July 2020, the SRB requested a review of the Decision.
- On 24 July 2020, the EDPS asked the complainants to comment on the SRB's request for review of the Decision. The complainants submitted their comments on 25 and 27 July 2020, as well as on 25, 27 and 28 August 2020.
- By letter of 5 August 2020, following the assessment of the new substantial elements brought to his attention, the EDPS informed the complainants and the SRB, that he had decided to re-examine the Decision in the light of these elements, and that he would issue a revised decision that would replace the former.
- On 1 September 2020, however, the SRB lodged its application with the Court for annulment of the EDPS Decision.
- The EDPS requested additional information from the SRB on 18 September 2020. After having requested an extension of the deadline, the SRB replied to the EDPS on 2 October 2020.
- Since the SRB's reply did not cover the whole of the EDPS' request for information deemed necessary to finalise his revision, the EDPS sent an additional information request on 15 October 2020. The SRB replied to the EDPS additional request for information on 28 October 2020.

the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.

3. Where following a request that it review its decision on a complaint, the EDPS issues a new, revised decision, the EDPS shall inform the complainant and the institution concerned that they may challenge this new decision before the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.

³ In the Decision, the EDPS concluded that there had been a violation of Article 15 of the Regulation, since the SRB did not inform the complainants about the possibility of their personal data being transmitted to an external consultant, Deloitte. The EDPS consequently reprimanded the SRB for this violation under Article 58(2)(b) of the Regulation.

- On 24 November 2020, the EDPS adopted its Revised Decision, i.e. four months after the request for review.⁴

2. Lack of prior right to be heard:

In addition, when receiving the EDPS decision on a complaint, under traditional practice, this would be the first time that an EUI would be informed of any findings by the EDPS of a violation of the EUDPR or any other applicable rules, plus the exercise by the EDPS of any corrective powers.⁵ Also, the admissibility of an EDPS review depends on the fulfilment of certain criteria, since in accordance with Article 18 (1) EDPS Rules of Procedure the complainant or institution must advance new factual evidence or legal arguments. At the same time, it has not been uncommon in the recent review cases that the EDPS indeed was made aware of new factual evidence or new legal arguments which then led to a reconsideration of the EDPS position.

This can be problematic in view of Article 41 of the Charter, as interpreted by the CJEU: **Article 41 of the Charter, entitled ‘Right to good administration’, states, in paragraph 1,** that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the European Union. Furthermore, the second paragraph of that article provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting legitimate expectations as regards confidentiality and professional and business secrecy, and the obligation on the part of the administration to give reasons for its decisions. This means that the right to be heard guarantees every person the opportunity to make known their views effectively *during an administrative procedure and before the adoption* of any decision liable to affect their interests adversely.⁶ Moreover, the consideration of new factual evidence or new legal arguments (despite late introduction of facts at the stage of the review request) puts the EDPS under considerable pressure first to assess the review request, and then to finalise the review within a reasonable period.

By way of example:

- On 8 September 2022, the EDPS adopted its Decision in a complaint case against the European Union Agency for Law Enforcement Cooperation (Europol).⁷
- On 7 October 2022, the EDPS decision was subject of two requests for review, one by the complainant and one by Europol. Remarkably, Europol expressed that a “hearing of Europol *prior to issuing the decision* could have helped to alleviate the

⁴ In the Revised Decision, the EDPS upheld the finding of an infringement by the SRB of Article 15 of the Regulation, but no longer issued a reprimand.

⁵ Differently from the rules in EDPS (own-initiative based) investigations which prescribe the sending of a preliminary assessment. The preliminary assessment informs the parties of: 1) all the established facts and documents that the EDPS will rely on to reach its final decision; 2) the EDPS’ initial legal assessment of the facts, and any alleged infringements of the EUDPR; and 3) the corrective measures envisaged by the EDPS, in light of aggravating or mitigating factors. See “How the EDPS conducts investigations, Version: 2/2023”, https://edps.europa.eu/system/files/2023-02/2023-01-30-edps_investigation-public_policy_en.pdf

⁶ CJEU, judgment of 4 April 2019, OZ v EIB, C-558/17 P, ECLI:EU:C:2019:289, para. 53.

⁷ In the Decision, the EDPS found violations of the Europol Regulation, and ordered Europol, in accordance with Article 43(3)(c) of the Europol Regulation, to comply with the complainant’s request to exercise his right to access his personal data, by providing the complainant with the full set of information which he is entitled to receive under Article 36(2) of the Europol Regulation, and admonished Europol, in accordance with Article 43(3)(d) of the Europol Regulation.

handling” of the case, and pointed out that “in light of the remaining time for potential Court action by Europol”, EDPS feedback on the review request “at your earliest convenience” would be welcome.

- The belated introduction of facts by Europol at the stage of a review request, having been provided ample time and opportunity to transmit those elements to the EDPS during the course of its investigation, would not be sufficient to classify a request for a review as admissible. However, due to the legitimate interests of public order and public security at stake in this matter, and in light of information indicating that the same facts are currently pending before a Dutch court, the EDPS accepted to re-examine its Decision, without this decision in any way constituting a precedent.
- On 4 November 2022, the complainant transmitted to the EDPS, in the context of providing comments on Europol’s review request, an interim judgment from the Amsterdam District Court relating to an ongoing case before that court in which he stands as plaintiff.
- On 8 November 2022, the complainant brought an action against the EDPS before the CJEU.
- Having examined the interim judgment, and after having consulted the Dutch DPA, the EDPS determined that the scope of that case dealt partially with the same matter now under consideration by the EDPS as part of the review procedure. Further, the EDPS noted that the judgment was only an interim ruling and the case appeared to be pending a final decision from the court.
- On 30 January 2023, the EDPS decided to suspend as *sub iudice* its review of the EDPS Decision of 8 September 2022 in the light of the pending Dutch case, i.e. three months after the requests for review.

The EDPS AMP 2023 therefore solicited an assessment and review of the complaints review procedure, in the light of recent experience and court cases.

2.3. What are the options?

During 2023, several discussions with S&E unit members and the EDPS Legal Service Function were held in this respect.⁸ The possibility to request a review of the decision on complaints were assessed as to their operational utility both for the complainant and the EUI concerned (as well as for the EDPS). Also, the need for clearer procedures ensuring that the right to be heard of persons negatively affected by the EDPS decision to be ensured before the EDPS takes that final decision were discussed.

Two options have been identified during the discussions:

- **Option 1: abolish the existing review procedure**, and introduce a **requirement for the EDPS to issue preliminary assessments** before adopting a final decision in cases of **finding of an infringement** of the Regulation or of any other applicable data protection law for which the EDPS is competent, or **exercising corrective powers**, or **imposing an administrative fine**, or where the EDPS intends to **fully dismiss or partially reject a complaint** in cases within the supervisory competence of the EDPS.

⁸ Discussions of 11 September, 25 September and 13 October 2023.

- Option 2: keep the existing review procedure, but slightly modify it by adding an internal suspensory effect to a review: an EDPS decision on a complaint should not apply (alternative: take effect) before the expiry of the time limit of one month for a request of a review. Such a request for review shall suspend the application (alternative: effect) of the EDPS decision on a complaint. This suspension aims to avoid triggering the two-month deadline for challenging the EDPS decision in the CJEU.

2.4. Assessment of the options

Option 1 carries several potential advantages:

1. No overlap between the EDPS review and an action for annulment: with the abolishing of the existing review procedure, there would be no more overlap between the EDPS review and an action for annulment, since there would only be one final EDPS Decision, against which an action for annulment can be brought.
2. More clarity and granting the right to be heard: A preliminary assessment by the EDPS could provide more clarity and transparency in the decision-making process, whilst granting the right to be heard to the affected entity, and/or the complainant in line with the requirements of the Charter. This step would allow for thorough information of the affected entity of all the established facts and supporting evidence that the EDPS will rely on to reach its final decision, including the EDPS' initial legal assessment of the facts, any alleged infringements of the EUDPR and the corrective measures envisaged by the EDPS, in light of aggravating or mitigating factors. The affected entity/-ies and the complainant would then be able to make their views known to the EDPS prior to the EDPS final decision. This would also be in line with the position expressed by the EDPS and the EDPB.⁹
3. Opportunity for dialogue and correction: Preliminary assessments open a last channel for dialogue between the EDPS and the entity in question. This interaction can provide valuable feedback, including on new facts or new legal arguments, allowing EUIs to understand the nature of their compliance issues better and potentially rectify them before a final decision is made. This aspect is particularly beneficial in complex cases where the facts or the application of the law may not be straightforward.
4. Reduced resource burden in the long term: While initially, this approach might seem resource-intensive, over time, it could lead to more efficient use of resources. A clear, well-reasoned preliminary assessment – as already in place for EDPS investigations – could reduce the likelihood of lengthy review requests or legal challenges against the EDPS's decisions, ultimately saving time and resources for both the EDPS and the affected EUI and/or complainant.

However, this option likely also entails disadvantages:

- In order to implement this option, a revision of the EDPS Rules of Procedure is necessary.

⁹ EDPB-EDPS Joint Opinion 01/ 2023 on the 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, adopted on 19 September 2023.

- The change could be (wrongly) perceived as reducing the rights of complainants, despite the specific introduction in the Rules of Procedure of their right to be heard.

Option 2 offers the following advantages:

1. **Legal stability:** By continuing to allowing a period for review requests and suspending the effect of a decision during this period, it ensures that entities have a reasonable opportunity to contest decisions they believe to be unjust or incorrect. This provision preserves the rights of the entities involved, allowing them to fully present their case and have it reconsidered, with only a minor change of the EDPS Rules of Procedure.
2. **Avoiding premature enforcement:** Moreover, it avoids the premature enforcement of decisions that might later be overturned, thus preventing unnecessary disruption or harm to the affected entities involved. This approach strikes a balance between effective enforcement and the rights of the entities to a fair review process, thereby enhancing the legitimacy and acceptance of EDPS's decisions.

However, this option likely also entails disadvantages:

- Adding an internal suspensory effect to the review process could complicate the legal landscape, making it more difficult for entities to understand and predict the consequences of non-compliance. This complexity could especially be challenging for smaller EUI with limited legal resources, or complainants. In addition, it is not entirely clear if the suspension would stop the two-month deadline for lodging an action for annulments.
- The introduction of a mandatory suspensory period could lead to delays in the enforcement of EDPS decisions. This delay might be particularly problematic in cases where immediate action is necessary to prevent ongoing or serious breaches of data protection laws. The suspension of the decision's effect could allow non-compliant practices to continue, potentially causing further harm or data breaches.
- Also, for individuals affected by a breach of data protection laws, this change could mean a longer wait for resolution and redress. The suspensory effect could create uncertainty and potentially diminish the sense of justice for those whose data protection rights have been violated, as they would have to wait an additional period before any remedial action is taken.
- The requirement for a review and the suspension of decisions place additional strain on the resources of the EDPS. Managing and reviewing both review requests as well as legal challenges to decisions would still require considerable time, effort, and possibly additional staffing, potentially diverting resources from other important functions of the unit.
- Knowing that any request for a review will automatically suspend the implementation of a decision, entities might be incentivized to file review requests as a delay tactic, even when the grounds for the review are weak or non-existent. This approach could lead to an increased number of frivolous or strategic challenges, undermining the efficiency of the review process. Also, the knowledge that decisions will not be immediately enforceable could reduce their deterrent effect. Entities might be less motivated to comply proactively with data protection regulations if they know that there will be a delay in the enforcement of any decision against them.

- The automatic suspension of decisions could be perceived as undermining the authority and credibility of the EDPS. If decisions are regularly suspended and subject to review, it might give the impression that EDPS's initial judgments are not final or reliable, potentially weakening respect for our role and decisions.

3. Suggested way forward

In light of the arguments above, it is suggested to prefer Option 1: transitioning to a system where the EDPS issues preliminary assessments before adopting a final decision in cases of finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, or exercising corrective powers, or imposing an administrative fine, or where the EDPS intends to fully dismiss or partially reject a complaint in cases within the supervisory competence of the EDPS clearly does away with the current overlap between the EDPS review and an action for annulment and grants the right to be heard in line with the requirements of the Charter.

In order to implement this option, a revision of the EDPS Rules of Procedure is necessary. A draft for such a Decision is annexed to this note.

Such a change in the EDPS Rules of Procedure should also be openly and publicly communicated to the EUI and future complainants.

The EDPS Legal Service Function was consulted in accordance with the note on the organisation of the Legal Service function signed 13 April 2022.

4. Request to the Supervisor

It is requested that the Supervisor a) approves the suggested way forward for the issues described above and b) adopts the Decision annexed to this note.

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Annex: Decision of the European Data Protection Supervisor (EDPS) of XX December 2023 amending the Rules of Procedure of the EDPS of 15 May 2020