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MEMORANDUM

To: DOT Europe

From: Yann Padova - Wilson Sonsini Goodrich & Rosati, LLP

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Re: Memorandum Procedural Regulation

The European Commission ("**EC**") published its 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[1] (the "**GDPR**") in July 2023 (the **"Proposal**").[2] The Proposal takes into account several requests from the European Data Protection Board ("**EDPB**") that were made public in October 2022.[3]

The Committee on Civil Liberties, Justice and Home Affairs ("**LIBE Committee**") published its DRAFT REPORT on the Proposal in November 2023 ("**Draft Report**").[4] In its Draft Report, the LIBE Committee proposed substantial changes to the Proposal.

DOT Europe has asked us to provide a legal analysis of six questions related to the LIBE Committee's Draft Report (the "Memorandum"). In particular, the questions concern the proper interplay of the Draft Report with some core principles of the GDPR and with some European fundamental rights enshrined in the Charter of Fundamental Rights ("**CFR**")[5] as interpreted by the European Court of Justice ("**ECJ**"). We outline our response to these questions below.

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A. Executive Summary

The Memorandum highlights that two of the core ideas of the Draft Report risk conflicting with the fundamental rights of the parties under investigation and core concepts of the GDPR.

First, the **Draft Report** seeks to redesign the GDPR complaint handling procedure as a an "adversarial procedure" between organizations processing personal data ("**parties under investigation**") and complainants akin to equal parties arguing their case before a civil court. Relatedly, the Draft Report **aims at providing both parties with substantially similar procedural rights in the context of an investigation**.

These suggestions rest on a fundamentally **false premise** and threaten to conflict with the fundamental rights of the parties under investigation. This is because the GDPR complaint handling procedure is not an "adversarial procedure". Supervisory authorities of the Member States ("**SAs**") are not *neutral arbiters between the parties*. Rather, SAs are tasked with overseeing compliance of parties under investigation and may - at any time - exert the full extent of their strong repressive powers under Article 58 GDPR (e.g., issue fines) against them. The complainants on the other hand are not facing similar adverse decisions against them. As the **negative impacts of a GDPR investigation are much more severe for the parties under investigation** (similar to a criminal and not a civil procedure), **the fundamental rights of these parties require a stronger level of protection**. **In making the procedural rights equally applicable to both parties the Draft Report risks violating the fundamental rights of the parties under investigation.**

Second, the *Draft Report threatens to undermine core concepts and principles of the GDPR*. One of the core aims of the GDPR was to centralize cross-border enforcement procedures to ensure a more harmonized and effective enforcement. To that end, the GDPR introduced the concept of a lead SA and the one stop shop. The Draft Report now seeks **to encroach on the independent judgment of the lead SA, threatens to undermine its central position, and therefore chips away at core concepts and principles of the GDPR.**

Lastly, the Draft Report intends to increase the burdens and to **limit the incentives for parties to reach an amicable settlement.** In doing so the Draft Report undermines an innovative idea in the EC's Proposal to the detriment of the parties and the SAs.

B. What are the rights that the parties under investigation and complainant afforded under the CFR (e.g., right of defence) and the GDPR?

I. Protection under the CFR

1. Fundamental rights of the parties under investigation

The right to be heard is a core fundamental right afforded to the parties under investigation. According to Article 41(2)(a) CFR the **right to good administration** includes the right of every person, including the parties under investigation, to be heard. On the face of it, Article 41(1) CFR indicates that it does not apply to actions of national authorities in Member States as its protections are limited to actions taken by the *"institutions, bodies, offices and agencies of the Union".* This interpretation, that Article 41 CFR does not apply to the actions of national authorities, has been confirmed by the ECJ.[6] However, under settled case law of the ECJ, the Court recognizes **the right to good administration as a general principle of EU law**, thus, binding Member States to the extent that they are acting in scope of EU law.[7] As SAs derive their powers from the GDPR, placing their actions in the "scope of EU law", parties under investigations can rely indirectly (i.e., via the general principle of EU law) on the protections of Article 41 CFR.[8] In addition, the right to be heard is also recognized under the right of defense in Article 48 CFR.[9] On substance the right affords parties under investigation with the right to be heard in all proceedings before any measure is taken that would adversely affect them.[10]

Furthermore, parties under investigations are afforded with the **right to protect their confidential information and business secrets**. In principle, the ECJ has recognized the protection of business secrets and confidential information, either under the freedom to conduct a business in Article 16 CFR or as a general principle of EU law.[11] Such protections also apply more specifically in the context of disclosure requirements. For example, Article 41(2)(b) CFR explicitly acknowledges that the right of any person to access their case file needs to respect the "*legitimate interests of confidentiality and of professional and business secrecy*", thereby protecting such interests specifically in the context of third parties seeking access to confidential information.[12] The ECJ has also decided that parties under investigation have the right to protect their business secrets and other confidential information when public authorities (with whom such information was shared in the context of a proceeding) intend to disclose such information to third parties.[13]

Finally, EU law and related case law recognize the **principle of legal certainty** according to which rules must be sufficiently clear for individuals to know precisely what their rights and obligations are so that they can adjust their behavior accordingly.[14]

2. Fundamental rights of complainants

The right to good administration in Article 41 CFR also applies to the complainant via its recognition as a general principle of EU law (as mentioned above). On substance, the complainant has (i) the right to be heard if and to the extent a measure would affect them adversely; (ii) the right to seek access to their file (however, as noted above, subject to the legitimate interests of confidentiality and business secrecy)[15]; and (iii) the right to obtain a reason for any decision related to them.[16]

Furthermore, the complainant – as a data subject – can rely on the **right to have their private and family life and their communications respected** (Article 7 CFR) and on the **right to the protection of their personal data** (Article 8(1) CFR). In conjunction with Article 16 Treaty of the Functioning of the European Union ("TFEU") these provisions afford the complainant with numerous rights, including but not limited to the right to lodge a complaint with an SA[17] and the right to have access to their case file, subject to the restrictions mentioned above.[18]

II. GDPR protections

1. GDPR protections for parties under investigation

Unlike data subjects, parties under investigation are not *explicitly* afforded with procedural rights by the GDPR.[19] This does not mean, however, that they do not have any procedural rights. Rather, Article 58(4) GDPR requires that the exercise of SAs' powers must be subject to appropriate safeguards as set out in Union and national law of the Member State ("**national law**"), in accordance with the CFR.[20] Therefore, the core procedural protections are predominantly afforded by the national law of the Member State whose SA exercises its powers under the GDPR.[21] Such national law must be in accordance with the GDPR and the CFR and, thus, contain certain minimum standards (e.g., the right to be heard).[22]

2. GDPR protections for complainants

Meanwhile, a vast number of GDPR provisions are aimed at affording data subjects with substantive and procedural rights. For example, data subjects have the rights to lodge a complaint with an SA (Article 77 GDPR), to an effective judicial remedy against an SA (Article 78 GDPR), to an effective judicial remedy against a controller (Article 79 GDPR), etc.

C. To what extent does the Draft Report align with or alter/strengthen these rights?

On a high level, the Draft Report limits the rights of the parties under investigation (**I.**) and expands the rights of complainants (**II.**).

I. Limitation of the rights of the parties under investigation

The Draft Report noticeably curtails the parties under investigation's right to be heard and the right to have confidential information protected.

With regard to the right to be heard: Prior to the Proposal, the right to be heard is predominantly afforded by and regulated under national law. However, according to the EC's assessment these procedural rights vary substantially in scope and detail across the Member States.[23] As the EC considered these varying approaches to be a possible obstacle for streamlining cross-border enforcement, it proposed a set of rules to harmonize procedural standards.[24] In determining the level of protection afforded to the parties under investigation the EC convincingly concluded that, as the adverse impact of a GDPR investigation procedure on them might be severe (in particular when SAs issue penalties), they must be afforded with a level of procedural protection similar to procedures of a penal character.[25] Subsequently, the Proposal ensures that the right to be heard is provided to parties under investigation *at every relevant stage of a cross-border investigation*.[26]

In stark contrast to the Proposal, the Draft Report now seeks to replace these granular and detailed provisions with a simple and abstract reference to a right to be heard before any measures with adverse effect is taken.[27] By giving up the detailed and granular approach, the Draft Report not only risks losing legal efficiency (e.g., the abstract reference will be applied and interpreted differently across the Member States), but also creates tension with the fundamental rights of the parties under investigation and the principle of legal certainty. This impact will be addressed in more detail below (question 3 in section D).

With regard to right to protect confidential information and business secrets: Prior to the Proposal, ensuring the effective protection of confidential information and business secrets is afforded by and regulated under national law. As mentioned above, the Proposal seeks to harmonize these varying rules. It suggested a set of detailed and nuanced provisions aimed at ensuring that the right to confidentiality of the parties under investigation is maintained.[28] Dramatically, the Draft Report now seeks to eliminate most of these protective procedural rules and suggests replacing them with unprecedented powers for SAs to share this information. In

particular, it provides for the indiscriminate sharing of confidential information with an unspecified number of regulators on both an EU and national level, and severely curtails the right to protect confidential information when the case file is shared with the complainant.[29] This impact will be addressed in more detail below (question 3 in section D).

II. Expansion of the rights of data subjects

While the Draft Report restricts the rights of the parties under investigation, it noticeably expands the rights of complainants.

With regard to the right to be heard: Prior to the Proposal, the right to be heard is – as mentioned above – afforded by and regulated under national law. The Proposal already suggested to expand the rights of complainants substantially and affords them with the right to be heard at all relevant stages in a cross-border investigation.[30] In contrast, the Draft Report essentially suggests to provide the complainant with the same right to be heard as the parties under investigation.[31] In addition, the Draft Report also indicates impacting ex officio proceedings by granting complainants the right to be heard when an SA engages in an ex officio investigation on the same subject matter as the complaint.[32]

With regard to the right to access the case file: Prior to the Proposal, the right to access parts or the entirety of the SA's case file was governed by national law. The Proposal already suggested to expand the right to access the case file, however, subject to reasonable restrictions aimed at protecting confidential information and business secrets. For example, the Proposal provides that the complainant could seek access to the case file, but only upon request, where necessary (i.e., where they might be adversely affected because the SA intends to partially or fully reject the complaint), and limited to a non-confidential version of the case file.[33] In contrast, the Draft Report suggests to expand these rights even further, essentially granting the complainant, by default, unrestricted access to the full case file and without any further restrictions (e.g., also when a complaint is granted).[34]

D. Do any of the proposed amendments negatively impact the fundamental rights of the parties under investigation (e.g., access to joint case file, proposed limitations on confidentiality and removal of the restrictions on using data for purposes beyond specific investigation)?

Many of the Draft Report's amendments create friction with core fundamental rights of the parties under investigation. For example, there is a tension between certain Amendments and the

recognized rights of parties under investigation to be heard and to have their confidential information and business secrets protected.

Tension with the right to be heard: The exercise of the SA's powers is predominantly governed by national law.[35] As mentioned above (see the response to question 1 in section B), such national law must be in accordance with the GDPR and the CFR and, thus, contain certain minimum standards, including the right to be heard.[36]

The Proposal aims to ensure that the right to be heard is provided to parties under investigation *at every relevant stage of a cross-border investigation*. For example, the Proposal explicitly states that the parties under investigation have the right to be heard in any of the following scenarios: (i) when the lead SA notifies the preliminary findings to the parties under investigation in the context of Article 60(3) of the GDPR[37]; (ii) prior to the lead SA submitting a revised draft decision in the context of Article 60(5) of the GDPR[38]; (iii) prior to the EDPB adopting a binding decision in the context of Article 65(1)(a) GDPR.[39]

In contrast, the Draft Report seeks to replace these granular and detailed provisions with a simple and abstract reference to a right to be heard before any measures with adverse effect are taken.[40] Furthermore, the Draft Report suggests that the SA shall only hear the parties when *novel issues arise* during procedures under Articles 60, 65, 66 GDPR.[41] These Amendments create a risk that the right to be heard is not implemented where required. The proposed language is vague and gives rise to legal uncertainty regarding when it applies to specific steps of a cross-border investigation. The drafting regarding "novel issues" is equally vague and leaves open the possibility that individual SAs can freely determine what issue they consider to be "novel". This could lead to significant fragmentation at EU level and associated legal uncertainty for the parties under investigation.

Tension with the right to confidentiality/protection of trade secrets: The right of parties under investigation to protect their confidential information and business secrets is well recognized under settled ECJ case law.[42] As mentioned above (see the response to question 2 in section C), the right to confidentiality is afforded under national law. The Proposal seeks to harmonize these rules and proposes a detailed and balanced approach to ensuring the appropriate protection in accordance with the fundamental rights protections. In doing so the EC largely follows in the footsteps of competition law where the access to the case file, the sharing of information in the case file, and the protection of confidential information is governed by a detailed set of procedural rules since the early 2000s.[43]

The Proposal sets out safeguards for preserving the right to confidential information and trade secrets. It provides a set of clear and detailed rules for how parties under investigation should designate information they submit as confidential information and redact such information.[44] SAs are prohibited from disclosing confidential information that they obtain in the context of the procedure, except when provided for in the Proposal.[45] While proceedings are ongoing, SAs must exclude such information from access requests under laws on public access to official documents.[46] Disclosure of information to the complainant is also restricted. Complainants can only request to seek *access to the non-confidential version* of the case file and such a request will only be granted where necessary (i.e., where a decision may adversely impact them).[47]

The Draft Report, however, seeks to eliminate most of these protective layers. It proposes drastic expansions of the complainant's right to access the case file by allowing claimants to access the unredacted case file. It also provides the SAs with the power to share confidential information with an indiscriminate number of authorities on both at EU and national level. These Amendments raise serious concerns regarding the fundamental rights of the parties under investigation.

For example, the Draft Report expressly requires SAs to strive to communicate the information obtained in the course of an investigation with an indiscriminate number of other authorities at EU or national level.[48] This is even more concerning in light of the fact that the SA would need to share the entire case file including all confidential information related to the case.[49] These Amendments are concerning as they would completely undermine the party under investigation's right to confidential information.

The Draft Report further encroaches on the rights of parties under investigation by providing the complainant, by default, with the right to unrestricted access to the full case file, which includes confidential information.[50] The Amendments only provide limited protection of confidentiality as redactions of the case file (i) are subject to the full discretion of the SAs; (ii) only apply in the context of a specific interaction between the SA and a third party (indicating that the parties under investigation would have to lodge a request for redaction for every intended disclosure of its confidential information by the SA with a third party); and (iii) must be limited to what is "strictly proportionate".[51] The Draft Report only requires the SA to confirm that redactions made by the party under investigation are "strictly proportionate". Any redactions that the SA considers to be beyond what is strictly proportionate will lead to their disclosure, in unredacted form, to the complainant.[52] This power is usually the one of a judge. It is not the role of SAs to balance between conflicting rights and these Amendments could provoke severe harm to the party under investigation's right to confidentiality and the protection of their trade secrets.

E. To what extent do the suggested changes to the fundamental rights balance between the parties under investigation and the complainants (e.g., the introduction of an adversarial procedure between parties) negatively impact the rights of the parties under investigation?

The Draft Report seeks to make key procedural rights (i.e., the right to be heard and the right to gain access to the case file) equally applicable to both the party under investigation and the complainant.[53] In its effort to "streamline" the procedural rights "following Article 42(1) of the [CFR]", the Draft Report seems to imagine that the procedure to resolve complaints under the GDPR should be designed as a form of "adversarial procedure" akin to equal parties arguing their case before a civil court.[54] This idea that both parties are in an equal position is a fundamentally false premise and negatively impacts the rights of the parties under investigation.

While the Draft Report correctly points out that some fundamental rights, such as Articles 41 f. CFR, are applicable to both parties, it falsely assumes that *equal applicability of fundamental rights must lead to an equal protection afforded by these rights*.[55] However, it is well established in the context of EU fundamental rights that the degree of protection afforded by fundamental rights depends on the effects the measure would cause the affected party.[56] In the context of resolving complaints under the GDPR, the EC correctly and explicitly recognizes that the parties are in a different procedural position.[57] In recognition of the divergent procedural positions, the party under investigation should be awarded greater protection under the CFR.

There are several reasons why the party under investigation and the complainant are in a different procedural position. The party under investigation does not have any say in the initiation of a GDPR complaint resolution procedure. The SA commences a procedure either according to its own initiative or based on a complaint. This means that the party under investigation has limited choice but to engage and defend itself. Furthermore, the potential consequences of an SA commencing proceedings are much greater for the party under investigation than for the complainant. Parties under investigation face the risk of penalties such as an order to ban processing or a hefty fine[58] while the complainants "only" face the risk of having their complaint rejected (e.g., as it is only judicial courts, and not SAs, that are competent to award compensation for damage or harm the complainant may have suffered).[59] Finally, the disclosure requirements for each party vary. While the party under investigation may be required to disclose confidential and sensitive business information as part of the process[60], the complaint cannot and is free to decide what information to share. The inherent risk of disclosing sensitive information, which could easily be spread, is only faced by the party under investigation.

As the effects arising from an SA's investigation are more severe for the party under investigation, the level of protection afforded by fundamental rights with regard to the right to be heard and the protection of confidential information and business secrets should be stronger. As a result of the flawed assumption of the Draft Report, that both parties should be afforded equal protection, the related Amendments making the procedural rights equally applicable negatively affect the balance of protection to the detriment of the parties under investigation and give rise to fundamental rights concerns.

F. Are there any conflicts between the Amendments and the GDPR or do any of the Amendments reinterpret and/or undermine key concepts of the GDPR (i.e., the one-stop-shop mechanism, participation of other SAs, provisions on procedural law, protection of confidentiality)?

The Draft Report poses fundamental challenges to the key principle of the lead SA (and the related "one stop shop") in the GDPR and risks creating legal uncertainty, contrary to the aim of the GDPR.

A core concept of the GDPR is that, with regard to the cross-border processing of personal data, the lead SA is the "primus inter pares"[61], supported by other SAs that are concerned with the matter. This framework is considered to be "the most significant novelty of the GDPR".[62] It was designed to address the considerable problems that followed from the fragmented enforcement structure under the Data Protection Directive.[63]

Taken together, the Amendments limit the scope of independent judgment that a lead SA may exercise, undermine the central position of the lead SA in the enforcement process, and encourage independent action of other SAs. Therefore, the Amendments create tensions with the key structure of centralized enforcement in the GDPR, risk running contrary to the aim of achieving effective and harmonized enforcement throughout the EU and may trigger more legal uncertainty.

There are several instances that illustrate the tensions between the Draft Report and the key role of the lead SA in the GDPR framework. The Amendments highlight the ability of SAs to use their powers under the GDPR to act independently of the lead SA (e.g., by invoking powers under Article 66 GDPR), where diverging views between SAs cannot be overcome or in the case of inactivity of another SA.[64] Encouraging other SAs to act independently, particularly where diverging views cannot be overcome, undermines the centrality of the lead SA's judgment.

Restricting the scope for the lead SA to exercise independent judgment is echoed in other aspects of the Draft Report. For example, the lead SA is bound by the assessment of the admissibility of the complaint of the SA with which the complaint was lodged[65] and is required to comply with any request of another SA under the proposed procedural regulation and Articles 60 to 62 of the GDPR.[66] In addition, the Amendments also explicitly provide for SAs to request the EDPB to intervene in the case of no consensus (e.g., about relevant facts)[67] and in case of an intervention by the EDPB in the context of an urgency procedure (Article 66 GDPR) the Amendments now allow for an increased involvement of multiple SAs.[68] By leaving no room for the lead SA to exercise independent judgment in crucial matters, including where disagreements arise, these Amendments risk undermining the lead SA's role under the GDPR and raise serious questions as to guaranteeing its independence.

Finally, the SA with which the complaint has been lodged may establish which SA should assume the role of the lead SA.[69] The Amendment provides no scope for other SAs, beyond the assumed lead SA, to raise any objection to this initial assessment.[70] The question of which SA is the competent lead SA is important and can be contentious and complex which is not reflected in the Draft Report.

In addition to eroding the central and independent position of lead SAs, the Draft Report also risks creating legal uncertainty. The Draft Report grants parties the right to an effective judicial remedy where an SA fails to use its powers to ensure that another SA progresses the procedure.[71] However, it is unclear what such resulting remedy would look like (i.e., what order a judicial body is able to issue against an SA to ensure that another SA from another Member State progresses the procedure), giving rise to the risk of creating an "impossible remedy". Furthermore, the Draft Report allows any SA to declare that it is concerned with a matter.[72] However, the circumstances in which an SA may claim to be concerned is already explicitly defined in Article 4(22) of the GDPR. This ambiguity could create tension as SAs who may not be concerned according to the definition under the GDPR may be empowered to claim concern according to the Draft Report.

G. Would the proposed amendments on complaints handling ensure all organizations have a fair and equal opportunity to resolve complaints themselves and at an early stage (in line with the EC's goal) and do the amendments on amicable settlements create a duty to facilitate such mechanisms and incentivize their use?

It is the EC's goal to encourage early settlement of GDPR complaints[73] and yet the Draft Report creates obstructions to achieving this goal. The Amendments restrict and disincentivize parties

from reaching a settlement and, as the SAs are not under a duty to facilitate settlement, the Draft Report renders it unlikely that parties will engage in reaching resolution at an early stage.

The Amendments frustrate both parties having a fair and equal opportunity to resolve complaints themselves and at an early stage. In principle, both parties have equal opportunities to resolve the complaint. However, in this context, as the EC recognizes in the Proposal, the parties are not in the same procedural position.[74] This is because the potential consequences of an SA investigation are much greater for the party under investigation than for the complainant (see question 4 in section E). The Amendments now aim at aligning the process to be adversarial by nature and afford the complainant with numerous and expansive rights to be heard and to gain access to a case file.[75] The resolution of the complaint by amicable settlement would result in the complainant losing these rights. This reduces the incentive for the complainant to resolve the complaint themselves, thereby creating a disadvantage for parties under investigation who are willing to do so.

Parties under investigation are further disadvantaged by the fact that the Amendments do not facilitate parties coming to an amicable settlement.

First, the Draft Report increases the burden of reaching an amicable settlement. Under the Proposal, a complaint may be resolved by amicable settlement, either through explicit agreement between both parties, or if the complainant does not object to the settlement, as proposed by the SA, within one month.[76] In contrast, the Draft Report requires that an amicable settlement can only be reached with the *explicit agreement* between the complainant and the party under investigation.[77] Achieving explicit agreement is a higher bar than reaching an agreement in the event of no objection. This creates an increased burden for SAs to take measures to resolve disagreements between the parties.

Second, the scope for reaching an amicable settlement is restricted. The Draft Report introduces a requirement that coming to a settlement is only available where the complaint concerns the data subject's rights and if the data processing in question *is no longer taking place*.[78] In practice, this significantly limits the scope of opportunity for considering settlement as an option as one of the typical remedies sought in a complaint – the ceasing the processing in question - is excluded from the scope of settlements.

Third, the potential advantages for the party under investigation of engaging to reach an amicable settlement are limited. Under the Proposal, SAs *may engage* in an in an ex-officio investigation notwithstanding a prior amicable settlement.[79] In contrast, the Draft Report *requires* SAs to open

an ex-officio investigation in certain cases (e.g., if the party under investigation has engaged in a large number of settlements).[80] The prospect that the party under investigation will in certain cases be subject to further investigation even if they have come to a settlement will disincentivize them from investing resources into engaging with complainants to come to an appropriate amicable settlement.

While the Amendments do not create a duty for the SA to facilitate the process of reaching a settlement, there are advantages to the SA doing so. Under both the Proposal and the Draft Report, SAs are not bound by a requirement to facilitate amicable settlements.[81] However, the Proposal and the Draft Report both state that if parties reach a settlement, then the complaint is deemed withdrawn.[82] This benefits the SA by reducing the burden of fully handling each complaint thereby creating an incentive to facilitate such a settlement. This incentive supports the EDPB Guidelines that seeking an amicable settlement may be good practice, depending on national procedural legislation.[83]

H. References

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[2] 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, COM/2023/348 final, 4 July 2023, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0348.
[3] See EDPB Letter to the EU Commission on procedural aspects that could be harmonised at EU level, 10 October 2022, available at https://edpb.europa.eu/our-work-tools/our-documents/letters/edpb-letter-eu-commission-procedural-aspects-could-be_en.
[4] DRAFT REPORT 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, Committee on Civil Liberties, Justice and Home Affairs, 2023/0202(COD), 9 November 2023, available at https://www.europarl.europa.eu/doceo/document/LIBE-PR-755005_EN.pdf.
[5] Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391.
[6] Judgment of the Court (Third Chamber) of 21 December 2011, C-482/10, *Teresa Cicala v Regione Siciliana*, ECLI:EU:C:2011:868, para. 28; Judgment of the Court (Third Chamber) of 17 July 2014, (Joined Cases), C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S.*, ECLI:EU:C:2014:2081, paras. 66 – 69.
[7] Judgment of the Court (First Chamber) of 22 November 2012, C-277/11, *M. M. v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2012:744, para. 82 ff; Judgment of the Court (Third Chamber) of 17 July 2014, (Joined Cases), C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S.*, ECLI:EU:C:2014:2081, paras. 66 – 69. See for further ECJ judgments *P. Craig*, Article 41 – The Right to Good Administration, in: Peers/Hervey/Kenner/Ward (eds.), The EU Charter of Fundamental Rights: A Commentary, 2nd edt., Bloomsbury Publishing, 2021, p. 1126, at footnote 3.
[8] See Article 58 GDPR (in particular Article 58(4) GDPR) and Recital 129 GDPR. The EDPB has recognized this in the context of Article 60 GDPR, see Guidelines 02/2022 on the application of Article 60 GDPR (version 1), Adopted 14 March 2022, paras. 110 and 123, available at https://edpb.europa.eu/system/files/2022-03/guidelines_202202_on_the_application_of_article_60_gdpr_en.pdf.
[9] The relationship between Article 41(2)(a) CFR and Article 48(2) CFR overlap as Article 48(2) also affords the right to be heard in the context of an administrative proceedings. However, legal scholars (see *H. P. Nehl*, Article 48 – Administrative Law, in: Peers/Hervey/Kenner/Ward (eds.), The EU Charter of Fundamental Rights: A Commentary, 2nd edt., Bloomsbury Publishing, 2021, p. 1399) and ECJ caselaw (Judgment of the Court (Grand Chamber) of 25 October 2011, C109/10, *Solvay SA v European Commission*, ECLI:EU:C:2011:686, para. 53 – in the context of an administrative fine under competition law) indicate that Article 41(2)(a) CFR applies as *lex specialis* in that case.
[10] Judgment of the Court (First Chamber) of 22 November 2012, C-277/11, *M. M. v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2012:744, para. 82 ff.; Judgment of the Court (Fifth Chamber) of 5 November 2014, C-166/13, *Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis*, ECLI:EU:C:2014:2336, paras. 42 ff.
[11] See, in particular, Judgment of the Court (Third Chamber) of 14 February 2008, C-450/06, *Varec SA v Belgian State*, ECLI:EU:C:2008:91, para. 49 (and the case-law cited); Judgment of the Court (Fourth Chamber) of 29 March 2012, C-1/11, *Interseroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)*, ECLI:EU:C:2012:194, para. 43. See also M. *Everson/R.C. Goncalves*, in: Peers/Hervey/Kenner/Ward (eds.), The EU Charter of Fundamental Rights: A Commentary, 2nd edt., Bloomsbury Publishing, 2021, p. 478 f. (leaning towards Article 16 CFR).

[12] See *P. Craig*, Article 41 – The Right to Good Administration, in: Peers/Hervey/Kenner/Ward (eds.), The EU Charter of Fundamental Rights: A Commentary, 2nd edt., Bloomsbury Publishing, 2021, p. 1137 ff. Therefore, to the extent that complainants rely on Article 41(2)(b) CFR to seek access to the SA's case file, parties under investigation's confidential information and business secrets must be protected.
[13] Judgment of the Court of First Instance (Fourth Chamber) of 20 March 2002, T-23/99, *LR AF 1998 A/S, formerly Løgstør Rør A/S v Commission of the European Communities*, ECLI:EU:T:2002:75, paras. 170, 183 (stating: "It is settled case-law that access to the file cannot extend to the business secrets of other undertakings and to other confidential information.").
[14] Judgment of the Court (Grand Chamber) of 10 March 2009, C-345/06, *Gottfried Heinrich*, ECLI:EU:C:2009:140, para. 44; see also for a comprehensive analysis of the respective case law *Van Meerbeeck*, The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust, in: European Law Review (41) 2016, pp. 275 – 288.
[15] With regard to the right to access documents, Art. 42 CFR provides substantially similar rights.
[16] Judgment of the Court (First Chamber) of 22 November 2012, C-277/11, *M. M. v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2012:744, para. 82 ff.
[17] See Judgment of the Court (Grand Chamber) of 6 October 2015, C-362/14, *Maximillian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650; Judgment of the Court (Grand Chamber) of 16 July 2020, C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, ECLI:EU:C:2020:559.
[18] Judgment of the Court (First Chamber) of 22 November 2012, C-277/11, *M. M. v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2012:744, para. 83.
[19] See, however, Recital 143 GDPR which refers to the right of a party under investigation to bring an action for annulment of a decision made by the EDPB before the ECJ.
[20] See Article 58(4) GDPR and similarly Article 83(8) GDPR. See also *L. Georgieva/M. Schmidl*, in: Kuner/Bygrave/Docksey (eds.), The General Data Protection Regulation - Commentary, 2020, p. 947.
[21] This was already the case under the Directive 95/46, see also Judgment of the Court (Third Chamber) of 1 October 2015, C-230/14, *Weltimmo*, ECLI:EU:C:2015:639.
[22] See Recital 129 GDPR listing numerous safeguards (e.g., the right to be heard, the proportionality of any measure, that a decision by an SA should be in writing, clear, and contain the reasons for the measure. Further on this topic *L. Georgieva/M. Schmidl*, in: Kuner/Bygrave/Docksey (eds.), The General Data Protection Regulation - Commentary, 2020, pp. 945, 947. See for the minimum procedural rights required under the CFR the references in footnote 10 ff.
[23] Proposal, p. 2 f.
[24] Ibid, at p. 2 f., 5.
[25] Ibid, at. p. 2 f.
[26] See Article 14(3) – (4) EC Proposal (i.e., when notifying the preliminary findings to the parties under investigation in the context of Article 60(3) GDPR); Article 17 EC Proposal (i.e., prior to submitting a revised draft decision in the context of Article 60(5) GDPR); Article 24(2) EC Proposal (i.e., prior to the EDPB adopting a binding decision in the context of Article 65(1)(a) GDPR).
[27] Article 2(b)(1)(b) - Amendment 59 Draft Report.
[28] See Articles 11, 15, 21, 21 Proposal.
[29] See Article 7(1a) - Amendment 117 Draft Report; Article 2(b)(3) - Amendment 61 Draft Report.
[30] Article 11(2) Proposal provides the complainant with the right to be heard before the intended full or partial rejection of his complaint in a draft decision in the context of Article 60(3) GDPR; Article 12(1) right to be heard before the intended full or partial rejection of his complaint in a revised draft decision in the context of Article 60(5) GDPR. Article 15(1) Proposal provides the complainant with the right to be heard with respect to the preliminary findings of the lead SA if it is related to a matter in respect of which it has received a complaint. Article 24(2) provides the complainant with the right to be heard before the EDPB

renders a binding decision in the context of Article 65(1)(a) GDPR with the intention to fully or partially reject a complaint.
[31] Recital 21 - Amendment 25 Draft Report; Article 2(b)(1)(b) - Amendment 59 Draft Report.
[32] Recital 5(e) - Amendment 10 Draft Report.
[33] Article 11(4) Proposal.
[34] Article 2(b)(1)(c) - Amendment 59 Draft Report; Article 2(b)(3) - Amendment 61 Draft report.
[35] See Article 58(4) GDPR.
[36] See the references provided in footnote 20ff.
[37] Article 14(3) – (4) Proposal.
[38] Article 17 Proposal.
[39] Article 24(2) Proposal.
[40] Article 2(b)(1)(b) - Amendment 59 Draft Report. It is only in the Recitals that the Draft Report becomes more specific in mentioning that the right to be heard should be provided prior to the submission of a revised draft decision under Article 60(5) GDPR or the adoption of a binding decision by the EDPB pursuant to Article 65(1)(a) GDPR to the Recitals (see Recital 24 - Amendment 28 Draft Report). In contrast to the proposed Articles of the GDPR Procedural Regulation the Recitals are not binding (see Judgment of the Court (Fifth Chamber), Case C-136/04, *Deutsches Milch-Kontor*, EU:C:2005:716, para. 32).
[41] Article 2(b)(2) - Amendment 60 Draft Report.
[42] See for more detail and the applicable case law the responses to question 1 (in section B).
[43] See for two examples of such regulations: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18–24; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, pp. 7–15.
[44] Article 21(4) – (7) Proposal.
[45] Article 21(1) Proposal.
[46] Article 21(2) Proposal.
[47] Articles 11(5), 15(1) Proposal.
[48] See Article 7(1a) - Amendment 117 Draft Report. The Proposal foresees that such information shall be shared with “national and Union SAs competent in other areas, including competition, financial services, energy, telecommunications and consumer protection authorities, where the information is deemed relevant to the tasks and duties of those authorities.”
[49] Article 2(b)(3) - Amendment 61 Draft Report.
[50] Article 2(b)(1)(c) - Amendment 59 Draft Report; Article 2(b)(3) - Amendment 61 Draft Report.
[51] Ibid.
[52] Article 2(b)(3) - Amendment 61 Draft Report.
[53] Article 2(b)(1) - Amendment 59 Draft Report; see also Draft Report, p. 123.
[54] See Article 2(2)(1d) - Amendment 53 Draft Report, defining the “complaints procedure” an “adversarial procedure” and Draft Report, p. 123.
[55] See for the applicability to both parties the response to question 1 (in section B).
[56] Lorenzo Dalla Corte, On proportionality in the data protection jurisprudence of the CJEU, IDPL 4(2022), pp. 259 – 275.
[57] See Recital 25 Proposal: “However, an investigation by a supervisory authority of a possible infringement of [the GDPR] by a controller or processor does not constitute an adversarial procedure between the complainant and the parties under investigation. It is a procedure commenced by a supervisory authority, upon its own initiative or based on a complaint […]. The parties under investigation and the complainant are, therefore, not in the same procedural situation and the latter cannot invoke the right to a fair hearing when the decision does not adversely affect her or his legal position.”
[58] See Article 58(2)(f) GDPR and Article 58(2)(i) GDPR respectively.

[59] The rejection does not preclude the complainant from exercising the right to an effective judicial remedy against the SA (Article 78 GDPR) or from exercising the right to an effective judicial remedy directly against the party under investigation (Article 79 GDPR).
[60] See Article 58(1)(a) GDPR.
[61] See *H. Hijmans*, in: Kuner/Bygrave/Docksey (eds.), The General Data Protection Regulation - Commentary, 2020, p. 918.
[62] Ibid, at p. 915.
[63] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
[64] Article 2c(7) - Amendment 70 Draft Report.
[65] Article 3(2)(e)(i) - Amendment 90 Draft Report.
[66] Article 2c(2) - Amendment 65 Draft Report.
[67] Article 10(4) – Amendment 144 Draft Report.
[68] Article 27(2) – Amendment 202 Draft Report; Article 28(2) – Amendment 209 Draft Report.
[69] Article 3(2)(c) - Amendment 87 Draft Report.
[70] Article 3(2b) - Amendment 94 Draft Report.
[71] Article 26c - Amendment 198 Draft Report.
[72] Article 2c(2) - Amendment 65 Draft Report.
[73] Proposal, pp. 4, 7.
[74] Recital 25 Proposal.
[75] See the response to question 4 (in section E).
[76] Article 5 Proposal.
[77] Article 5(1a) - Amendment 112 Draft Report.
[78] Article 5(1) - Amendment 111 Draft Report.
[79] Article 5(1b) Proposal.
[80] Article 5(1b) - Amendment 113 Draft Report.
[81] Article 5(1a) - Amendment 112 Draft Report explicitly states that SAs “may” facilitate such settlements.
[82] Article 5(1a) - Amendment 112 Draft Report.
[83] EDPB Guidelines 06/2022 on the practical implementation of amicable settlements (version 2.0), adopted 12 May 2022, available at: https://edpb.europa.eu/system/files/2022-06/edpb_guidelines_202206_on_the_practical_implementation_of_amicable_settlements_en.pdf.