MEMORANDUM

To:	Dr Johnny Ryan (Irish Council for Civil Liberties)
From:	Frederic Debusseré, Ruben Roex and Siyanna Lilova (Timelex)
Re:	Recognition of complainants as full parties in the future EU Regulation on procedural rules relating to the enforcement of the GDPR
Date:	14 June 2023

Dear Dr Ryan,

The European Commission is currently drafting a future EU Regulation on procedural rules relating to the enforcement of the GDPR[1]. The Regulation will aim to harmonise some aspects of the administrative proceedings that national data protection supervisory authorities will apply in cross-border GDPR enforcement cases.[2]

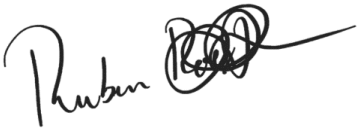
You asked us to consider the merits of complainants having the status of full parties to such proceedings in that Regulation.

Please find our analysis below.

Sincerely,



Frederic Debusseré



Ruben Roex



Siyanna Lilova

[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) ("GDPR").

[2] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13745-Further-specifying-procedural-rules-relating-to-the-enforcement-of-the-General-Data-Protection-Regulation_en.

TABLE OF CONTENTS

A. EXECUTIVE SUMMARY 3

B. THE NEED TO RECOGNISE COMPLAINANTS AS FULL PARTIES TO GDPR ENFORCEMENT PROCEEDINGS 4

1. Applicability of the right to good administration (Article 41 CFR) to GDPR enforcement proceedings 4

2. Applicability of the right to be heard (Article 41(2)(a) CFR) to complainants in GDPR enforcement proceedings 5

2.1. Purpose and applicability to GDPR enforcement procedures 5

2.2. "Adverse effects" to complainants 7

2.3. Conditions for limitations to the right to be heard (Article 52(1) CFR) 8

3. The right to be heard in current GDPR enforcement proceedings 10

3.1. National enforcement proceedings and Article 60 GDPR 10

3.2. European Data Protection Board and Article 65 GDPR 11

4. The right to be heard of complainants in other EU and Member State administrative proceedings 12

4.1. Competition law and Regulation 1/2003 12

5. Principle of equal treatment (Article 20 CFR) 14

6. Principle of legal certainty 15

C. THE NEED FOR AN IMPACT ASSESSMENT 16

D. CONCLUSION 16

A. EXECUTIVE SUMMARY

This memorandum examines the merits of complainants being recognised as full parties to cross-border GDPR enforcement proceedings in the future EU Regulation on procedural rules relating to the enforcement of the GDPR.

It argues that not recognising complainants as full parties to such proceedings would run counter to a multitude of fundamental rights and legal principles, and would also be at odds with established and necessary practice in related fields such as competition law:

- First, it would not respect the right to good administration (Article 41 of the Charter of Fundamental Rights of the European Union (hereafter "CFR")) and the right to be heard (Article 41(2)(a) CFR). These rights ensure that the competent authority can take effectively into account relevant information on the case based on the submissions of all persons who can be "adversely affected" by its decision. Limiting the applicability of that right in GDPR enforcement proceedings assumes that complainants can never be adversely affected by a supervisory authority's decision. This is not the case, however, as the dismissal or rejection of a complaint can perpetuate infringing behaviour and thus adversely affect complainants.
- Second, it would run counter to the principle of equal treatment (Article 20 CFR). This principle requires administrative authorities to grant equal procedural rights to all concerned parties to ensure overall fairness in the procedure. It is hard to see how the EU legislator would be able to justify the inequality between the parties' rights by an objective and reasonable criterion. Moreover, as the future Regulation will apply only to cross-border GDPR enforcement, it would create an unjustifiable difference in the treatment of complainants in national as opposed to cross-border cases.
- Third, it would create legal uncertainty, leading to extensive litigation at a national and European level. This approach would diverge from the EU legislator's position in other fields such as competition law, where complainants can provide information to competition authorities and are granted the right to be heard to protect their mere commercial interests, as opposed to their fundamental right to data protection in GDPR enforcement proceedings. Moreover, limiting complainants' right to be heard would be at odds with established laws and procedural rules in GDPR enforcement proceedings in most Member States.

It also argues that, if the European Commission intends to put forward a proposal for a Regulation that has the potential of limiting the right to be heard of complainants, then an in-depth impact assessment must be carried out.

B. THE NEED TO RECOGNISE COMPLAINANTS AS FULL PARTIES TO GDPR ENFORCEMENT PROCEEDINGS

1. Applicability of the right to good administration (Article 41 CFR) to GDPR enforcement proceedings

Article 41(1) CFR provides that every person has the fundamental right to good administration, i.e. "*the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*". While Article 41(1) CFR only refers to institutions, bodies, offices and agencies of the Union, it is established case law of the Court of Justice of the European Union (hereafter "CJEU") that the fundamental right to good administration set forth in Article 41(1) CFR is a **general principle of EU law that also binds EU Member States** when they act within the scope of EU law.[3] It is therefore clear that Article 41(1) CFR applies to both Union and national institutions, bodies, offices and agencies when conducting administrative proceedings related to enforcing data protection law in general and the GDPR in particular.

The applicability of the fundamental right to good administration to administrative GDPR enforcement proceedings before or by national institutions, bodies, offices and agencies, such as national data protection supervisory authorities within the meaning of Article 51 GDPR, is emphasised in Recital 129 and Article 58(4) GDPR. Recital 129 provides that the powers of supervisory authorities (such as investigation and corrective powers, including sanctions) have to be exercised "*in accordance with appropriate procedural safeguards set out in Union and Member State law impartially, fairly and within a reasonable time."*, and Article 58(4) provides that the exercise of the powers conferred on national supervisory authorities pursuant to Article 58 GDPR *"shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter."* In addition, the European Data Protection Board (hereafter "EDPB") in its Guidelines on the application of Article 60 GDPR explicitly states that the right to good administration must be respected in the execution of EU law throughout applying Member State administrative law in cases such as the Article 60 cooperation procedure between the lead supervisory authority and the other supervisory authorities concerned. [4]

[3] CJEU 26 February 2013, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, par. 44; CJEU 8 May 2014, C-604/12, *H.N. v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2014:302, par. 49; CJEU 30 April 2014, C-390/12, *Pfleger*, ECLI:EU:C:2014:281, par. 35.
[4] EDPB, Guidelines 02/2022 on the application of Article 60 GDPR, 14 March 2022, par. 123.

2. Applicability of the right to be heard (Article 41(2)(a) CFR) to complainants in GDPR enforcement proceedings

2.1. Purpose and applicability to GDPR enforcement procedures

The fundamental right to good administration includes i.a. the rights specifically listed under Article 41(2)(a)-(c) CFR, i.e.:

> *(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
> *(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
> *(c) the obligation of the administration to give reasons for its decisions.*

This memorandum focuses on the right to be heard set forth in Article 41(2)(a) CFR. For the sake of brevity, the rights set forth Article 41(2)(b) and (c) CFR are not discussed in detail but the arguments are applicable to these rights *mutatis mutandis.*

The CJEU has found that the right to be heard set forth in Article 41(2)(a) is itself a general principle of EU law that applies to Member State institutions when they act within the scope of EU law.[5] The Court has clarified that the right to be heard aims to guarantee "*every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely*"[6]. The purpose of the right is therefore to put the competent authority in a position **to take effectively into account all relevant information** on the case and to allow the persons concerned to correct an error or submit relevant information relating to their personal circumstances.[7] In this sense, this principle has developed into an objective standard of good administration that serves not only the individual interest but also the public interest by its observance of procedural requirements in administrative proceedings.[8]

[5] CJEU 22 November 2012, C-277/11, *M. v Ireland*, ECLI:EU:C:2012:744, par. 91-93.
[6] CJEU 22 November 2012, C-277/11 *M. v Ireland*, ECLI:EU:C:2012:744, par. 87; CJEU 5 November 2014, C-166/13, *Sophie Mukarubega*, ECLI:EU:C:2014:2336, par. 46; CJEU 16 October 2019, C-189/18, *Glencore*, ECLI:EU:C:2019:861, par. 39. See also EDPB, Guidelines 03/2021 on the application of Article 65(1)(a) GDPR, 13 April 2021, par. 100.
[7] CJEU 16 October 2019, C-189/18, *Glencore*, ECLI:EU:C:2019:861, par. 41 and 52.
[8] H.P. Nehl, *Principles of Administrative Procedure in EC Competition Law*, Bloomsbury Publishing, 1999, p. 96.

Respecting the right to be heard of both the complainant and the allegedly infringing data controller/processor is therefore essential to ensure the **effectiveness, fairness, and objectivity** of administrative proceedings, including GDPR enforcement proceedings. By providing an opportunity for both the complainant and the controller/processor to present their factual and legal arguments and evidence, supervisory authorities can gain a comprehensive and balanced understanding of the facts and circumstances surrounding the alleged GDPR violation.

In this context, it is important to highlight that the CFR does not include a requirement for the right to be heard to apply only where proceedings have been initiated against that person.[9] The only condition in Article 41(2)(a) is that *"an individual measure could affect [that person] adversely".* In the field of data protection, this means that the right to be heard applies to controllers/processors against which administrative proceedings have been initiated as well as **to complainants where they can be adversely affected by the supervisory authority's decision**.

Recital 129 GDPR does not distinguish between complainants and alleged infringers, noting that supervisory authorities should exercise their powers and implement individual measures by respecting the "*right of every person to be heard"*. The applicability of the right to be heard to complainants, not only to controllers/processors, has been explicitly recognised by the EDPB in its Guidelines on the application of Article 60 GDPR, in which the EDPB highlights that the lead supervisory authority (hereafter "LSA") has to make sure that its decision is fully compliant with the right to be heard of the parties "*in particular the controller/processor at issue* ***and the complainant, if a complaint has to be dismissed or rejected according to the applicable national laws***."[10] The complainants' right to be heard has also been recognised in national legislation on GDPR enforcement procedures in most Member States (see Section 3.1).

The introduction of a harmonised set of Union rules that recognise complainants as full parties to administrative GDPR enforcement proceedings and have the right to be heard will not only guarantee that all parties are given an equal opportunity to express their views but will also help instil public confidence in the fairness and reliability of GDPR enforcement procedures. Ensuring that complainants have the right to be heard will therefore be essential for strengthening the integrity, legitimacy and procedural economy of the new GDPR enforcement regime.

[9] P. Craig, "Article 41 – The Right to Good Administration" in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2nd edition, Bloomsbury Publishing, 2021, p. 1079.
[10] EDPB, Guidelines 02/2022 on the application of Article 60 GDPR, 14 March 2022, par. 105.

2.2. "Adverse effects" to complainants

A complainant's right to be heard in proceedings leading to decisions of an individual nature applies where such decisions adversely affect the interest of the complainant. The CJEU has further stated that, as a fundamental principle of EU law, the right to be heard must be guaranteed also in cases where sanctions are not imposed and "*even in the absence of any specific rules*" in the legislation in question.[11] This means that persons who are adversely affected by an individual measure taken by an administrative authority can rely on Article 41(2)(a) CFR directly even if this is not provided in the applicable national or Union legislation. In other words, regardless of the legislation in question, unless it includes a specific limitation to the right to be heard (see Section 2.3), the main condition for the right to be heard to apply is that the person concerned may be adversely affected by the individual measure resulting from the proceedings. In cases where national procedural laws do not expressly grant the party the right to be heard, a case-by-case assessment should be performed.

Consequently, if the future Regulation on procedural rules relating to the enforcement of the GDPR does not provide for a complainant's right to be heard in cross-border GDPR enforcement procedures, without even granting the opportunity for a case-by-case assessment, this will equate to making the **unsubstantiated assumption that decisions in such cases cannot lead to any adverse effects for complainants**. However, there is no obvious argument legitimising such an assumption, especially as it about proceedings regarding infringements of individuals' *fundamental* right to data protection set forth in Article 8 CFR.

Even if one does not consider the case-specific adverse effects data subjects might incur, there are several more universal ways in which supervisory authorities' decisions, in particular ones dismissing or rejecting a complaint, can have adverse effects on complainants:

- First, a dismissal or rejection of a complaint, especially in cases of violations of data subject rights, can adversely affect the complainant by **perpetuating infringing behaviour**. One of the main underlying rationales for supervisory authorities' central role as *"watchdogs"* and *"guardians"* of the fundamental right to data protection[12] is to alleviate the burden on data subjects to seek individual judicial redress under Article 79 GDPR against controllers/processors. Seeking individual judicial redress after a dismissal or rejection of a complaint requires the investment of substantial resources on the part of data subjects, which means that the

[11] CJEU 12 February 1992, C-66/90, *Netherlands and others v Commission*, ECLI:EU:C:1992:63, par. 44; Court of First Instance 19 June 1997, T-260/94, *Air Inter SA v Commission*, ECLI:EU:T:1997:89, par. 59-61.
[12] CJEU 9 March 2010, C-518/07, *Commission v Germany*, ECLI:EU:C:2010:125, par. 23; CJEU 6 October 2015, C-362/14, *Schrems*, ECLI:EU:C:2015:650, par. 42; CJEU 5 June 2018, C-210/16, *Wirtschaftsakademie*, ECLI:EU:C:2018:388, par. 68.

supervisory authority's decision often remains the only practically feasible resort for natural persons against violations of their fundamental right to data protection.

- Second, some Member States' laws on court proceedings (e.g., Germany and Slovakia[13]) require the exhaustion of administrative remedies before being entitled to initiate court proceedings. The CJEU has already found that such an obligation to exhaust an administrative remedy as a condition for bringing legal proceedings is not precluded under EU law.[14] In countries with an exhaustion requirement, it is even more important that the status of complainants as a party to the administrative proceedings is clearly recognised so as to allow them to effectively and timely exercise their right to judicial redress. Any uncertainty and differences in the treatment of complainants adversely affect the complainants' exercise of their right to effective judicial redress, particularly in cross-border cases under Article 60 GDPR, where different exhaustion or legal interest requirements might apply across the Member States.

These two arguments highlight some of the adverse consequences for complainants that could follow from decisions by national supervisory authorities. As clarified above, in individual cases the general principle of the right to be heard will be applicable even if the future Regulation does not specifically grant complainants the right to be heard. This means that the Charter will always apply directly, unless a limitation of the rules is specifically provided pursuant to Article 52 CFR.

2.3. Conditions for limitations to the right to be heard (Article 52(1) CFR)

Article 52(1) CFR sets out the conditions for exceptions to the rights set forth in the Charter:

> *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"* (emphasis added).

[13] See par. 68 of the *Verwaltungsgerichtsordnung* (German Code of Administrative Court Procedure), and par. 250v(1) and (3) of the *Občiansky súdny poriadok* (Slovakian Code of Civil Procedure).
[14] CJEU 27 September 2017**,** C-73/16, *Peter Puškár*, ECLI:EU:C:2017:725, par 76.

Pursuant to this Article, if the EU legislator decides to introduce in the future Regulation a limitation to complainants' right under Article 41(2)(a) CFR, two proportionality conditions must be met: the limitation should 1) be necessary, and 2) genuinely meet objectives of general interest or the need to protect the rights and freedoms of others. These two requirements are **cumulative**. In addition, when interpreting these exceptions, it is important to note the general requirement set out by the CJEU that exceptions from human rights rules have to be **interpreted narrowly**.[15]

It seems highly unlikely that any of the conditions set forth in Article 52(1), either alone or cumulatively, could be met in order to legitimise the limitation of the right of complainants to be heard in cross-border GDPR enforcement proceedings:

- First, the "rights and freedoms of others" set forth in Article 52(1) CFR encompass the rights and freedoms set forth in the Charter itself. In other words, a limitation of the right to be heard can be introduced in cases where its exercise will interfere with another person's rights and freedoms (so-called 'conflict of rights' scenarios)[16]. It is hard to see how denying or limiting complainants' the fundamental right to be heard in cross-border GDPR enforcement cases, and certainly as a general rule, could be necessary to protect the rights and freedoms of the alleged data controllers or processors.

- Second, it is also difficult to conceive how a limitation of complainants' right to be heard in such proceedings could genuinely meet objectives of general interest to protect the rights or freedoms of others. The Explanations to the CFR[17] clarify that the concept of "objectives of general interest recognized by EU law" covers "*both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union*." In other words, these are objectives formally recognized by the Union such as promoting freedom of movement, social progress, economic growth, etc. Any limitation of the right to be heard of complainants thus needs to meet at least one of these objectives and interests. It is difficult to conceive how a limitation of complainants' right to be heard in such proceedings could genuinely meet objectives of general interest to protect the rights or freedoms of others. If anything, the Union's interest in high protection of human rights would rather necessitate that ensuring the right to be heard is respected in cross-border GDPR enforcement proceedings.

[15] E.g., CJEU 4 March 2010, C-578/08, *Chakroun*, ECLI:EU:C:2010:117, par 43.
[16] S. Peers, "Article 52 – Scope and interpretation of right and principles" in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2nd edition, Bloomsbury Publishing, 2021, p. 1629.
[17] Explanations relating to the Charter of Fundamental Rights, OJ 14 December 2007, C-303/17.

3. The right to be heard in current GDPR enforcement proceedings

3.1. National enforcement proceedings and Article 60 GDPR

As recognised by the EDPB in its letter to the European Commission on the procedural aspects of GDPR enforcement, procedural rights afforded to the parties are currently different across Member States. The right to be heard, in particular, is applied in Article 60 GDPR proceedings "*under a patchwork of diverse Member State laws and/or practice of national supervisory authorities*".[18]

In some Member States, complainants are regarded as parties to data protection enforcement procedures and/or specific rights are conferred on them, while it is not the case in other Member States.[19] It should be highlighted, however, that based on the available data from the EDPB's overview of enforcement actions by the national data protection authorities, from August 2021[20], in **most EU Member States complainants are recognised as parties to the administrative proceedings and/or have been granted the right to be heard**. This is the case in Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Slovakia, and Slovenia.

While some Member States do not explicitly regulate the matter, others have introduced a case-by-case analysis of the applicability of the right to be heard. This is the case in Spain, where complainants are not considered parties to the proceedings except where the envisaged decision may adversely affect them, and which is assessed on a case-by-case basis. This is, however, *by default deemed to be the case in all proceedings related to the exercise of data protection rights*.[21] A similar structure is followed in Croatia. While Croatia does not grant the right to be heard automatically to complainants, this approach is in line with the general principle of the right to be heard, as it recognises the possibility of individuals being adversely affected in specific cases.[22] Only few Member States explicitly grant the right to be heard in their national data protection enforcement proceedings only to controllers/processors, namely the Czech Republic, France, and Sweden.[23]

[18] EDPB, Letter to the European Commission on the procedural aspects of GDPR enforcement, 10 October 2022, available at https://edpb.europa.eu/our-work-tools/our-documents/letters/edpb-letter-eu-commission-procedural-aspects-could-be_en.
[19] Ibid., p.3.
[20] EDPB, Overview on resources made available by Member States to the Data Protection Authorities and on enforcement actions by the Data Protection Authorities, 5 August 2021, available at https://edpb.europa.eu/system/files/2021-08/edpb_report_2021_overviewsaressourcesandenforcement_v3_en_0.pdf., p.23-29.
[21] Ibid., p. 29.
[22] Ibid., p.23.
[23] Ibid., p.23, 24 and 29.

3.2. European Data Protection Board and Article 65 GDPR

The right to be heard also applies in situations where the enforcement of EU law is divided or shared between the EU and the Member States (so-called "composite procedures"[24]). The EDPB has already addressed the right to be heard as part of its Rules of Procedure[25] and in the context of its Guidelines on Article 65(1)(a) GDPR[26]. Article 11 of the EDPB Rules of Procedure provides that "*before taking decisions, the Board shall make sure that all persons that might be adversely affected have been heard*". It thus does not contain an upfront limitation as to the application of the right to be heard.

Article 65(2) GDPR confirms that EDPB decisions do not address directly any party other than the LSA and the concerned supervisory authorities. Nevertheless, the decision adopted by the EDPB at the Union level is binding on the LSA or, depending on the case, the competent supervisory authority with which the complaint has been lodged, and is thus decisive for the outcome of the procedure at the national level. It therefore **may also affect the interests of persons who were part of the procedure that gave rise to the draft decision**.[27]

Acknowledging this fact, the EDPB specifies in its Guidelines on Article 65(1)(a) GDPR that[28] *"any of these persons which would be adversely affected by the decision, in particular the controller(s) and/or processor(s) who are addressed by the draft decision of the LSA, as well as any other person which would be adversely affected by the decision, must be afforded the right to be heard in relation to the subject matter which is brought before the EDPB pursuant to Articles 60(4), 63 and 65(1)(a) GDPR*." (emphasis added). The Guidelines do not explicitly clarify that complainants in GDPR enforcement procedures before LSAs have the right to be heard, but they do **confirm that this right is not applicable solely to controllers/processors.** The Guidelines set out the substance of the fundamental right to be heard, thus remaining within the remit of the law while falling short of providing the necessary certainty for complainants.

[24] See, e.g., the Opinion of Advocate General Compos Sánchez-Bordana of 27 June 2018 in C-219/17, *Silvio Berlusconi*, ECLI:EU:C:2018:502, par. 57-79.
[25] EDPB's Rules of Procedure, available at https://edpb.europa.eu/our-work-tools/ourdocuments/publication-type/rules-procedure_en.
[26] EDPB, Guidelines 03/2021 on the application of Article 65(1)(a) GDPR, 13 April 2021, in particular par. 94 and following.
[27] Ibid., par. 98.
[28] Ibid., par. 99.

4. The right to be heard of complainants in other EU and Member State administrative proceedings

Many regulations and directives in sectors where the enforcement is in the competence of the EU institutions already contain provisions clarifying the rights of parties to administrative proceedings, including the right to be heard. One of the most prominent examples is competition law, where the role of complainants and the extent of the right to be heard has been under frequent consideration in cases relating to the administrative powers of the European Commission and national competition authorities.

4.1. Competition law and Regulation 1/2003

The right to be heard of complainants and third parties has long been recognised by the EU legislator and the CJEU in competition law as an important means to ensure competition authorities have access to all relevant information and materials on the case.

The right to be heard was first 'constitutionalised' in EU competition proceedings in the *Transocean Marine Paint* case, where the CJEU recognised that "*there is* a *general rule that persons whose interests are perceptibly affected by a decision, taken by a public authority must be given the opportunity to make their point of view known*"[29]. It is important to highlight that the Court initially took a stricter interpretation when confirming the principle in the *Hoffmann la Roche* case. There the Court used more restrictive language in referring to "*the right to be heard before a sanction or penalty*" is inflicted.[30] This interpretation, however, was soon reversed and the CJEU began to adopt a more lenient position whereby a measure only had to 'adversely' or even 'significantly' affect any person's interests. This expansion **ensured that the right to be heard can also be invoked by complainants** and other interested parties in the competition proceedings.[31]

The rights of complainants in competition proceedings have been further reinforced in Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which provides that complainants must receive a non-confidential version of the statement of objections and a date by which they can make their views known in writing.[32] While there is no automatic right to be heard for complainants and other third parties under the Regulation, they can be granted the right if they show "*sufficient interest*" to the European Commission.

[29] CJEU 23 October 1974, 17/74, *Transocean Marine Paint v Commission*, ECLI:EU:C:1974:106, par. 15.
[30] CJEU 13 February 1979, 85/76, *Hoffman-La Roche v Commission*, ECLI:EU:C:1979:36, par. 9.
[31] J. Flattery, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing", *The Competition Law Review*, December 2010, p. 55.
[32] Article 27(1) Regulation No 1/2003 – 'complainants shall be associated closely with the proceedings'.

The Hearing Officer is responsible for admitting natural or legal persons with a "sufficient interest" to proceedings before the European Commission taking into consideration the contribution the party has made or is likely to make to establish "*the truth and relevance of the facts and circumstances"* pertinent to the proceedings[33]. The EU legislator therefore clearly recognises the importance of hearing all interested parties for the objectivity of the proceedings. Providing the right to be heard to complainants in competition cases guarantees that evidence supporting all viewpoints can be provided to the competition authority giving it more **complete and objective information on the facts and legal analysis of the case**. This approach is commendable for recognising the importance of hearing complainants for improving the quality of materials available to authorities and for introducing **an even lower standard of "sufficient interest"** as opposed to "adverse effect" in such cases.

The EU General Court has also explicitly recognised the importance of guaranteeing the rights of complainant in competition administrative proceedings:

> *"Where the institutions have wide discretion, respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the obligation to consider attentively all the relevant matters of fact and of law, in particular those brought to its attention by the complainant[34], and the obligation to give the complainant an effective hearing, in order to decide what action to take in response to the complaint submitted to it."* [35](emphasis added).

The EU legislator has already recognised the right to be heard of complainants in competition law proceedings that usually protect their commercial and business interests. A fortiori, GDPR enforcement procedures, where the decision of the supervisory authority directly impacts the protection of individuals' fundamental right to data protection, should also guarantee the right to be heard of complainants. Data protection supervisory authorities are essential for protecting individuals' fundamental rights and freedoms with regard to the processing of personal data[36], and as such it is crucial that they ensure that complainants' arguments are heard during the proceedings and their right to be heard is respected.

[33] See Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU), Articles 5 and 6.
[34] General Court 16 October 2013, T-432/10, *Vivendi v Commission*, ECLI:EU:T:2013:538, par. 27 and the case law cited there; General Court 16 May 2017, T-480/15, *Agria Polska and Others v Commission*, ECLI:EU:T:2017:339, par. 36 and the case law cited there.
[35] General Court 2 February 2022, T-399/19, *Polskie Górnictwo Naftowe i Gazownictwo v Commission*, ECLI:EU:T:2022:44, par. 49.
[36] CJEU 16 October 2012, C-614/10, *Commission v Austria*, ECLI:EU:C:2012:631, par. 37.

5. Principle of equal treatment (Article 20 CFR)

Another important principle that should be reflected in GDPR enforcement proceedings is the general EU law principle of equal treatment, which is enshrined in Articles 20 and Article 21 CFR. The principle requires that comparable situations must not be treated differently and that difference in treatment is justified only if it 'is based on an "*objective and reasonable criterion, that is if the difference relates to a legally permitted aim pursued by the legislation in question*"[37]. The expression of that principle in administrative procedural law means that when an authority grants rights to one party, it must equally grant these procedural rights to all concerned parties to ensure overall fairness in the procedure.

The application of the equal treatment principle to GDPR enforcement proceedings has two dimensions:

- First, any limitation of the right to be heard that is introduced only for the complainant, not for the allegedly infringing party, and is not based on an objective and reasonable criterion will result in a violation of the principle of equal treatment. The fundamental right to good administration implies that interested parties should be given an effective opportunity to justify their views and position in order to allow the administrative body to take a reasoned and objective decision. The burden, therefore, lies with the EU legislator to justify why a difference in the treatment of the parties in GDPR enforcement proceedings would be necessary and proportionate.
- Second, if the new legislative action to harmonise GDPR enforcement proceedings denies or limits the right to be heard of complainants in cross-border enforcement proceedings, this will create an unjustifiable difference in the treatment of complainants in national as opposed to cross-border cases, thus also resulting in a violation of the principle of equal treatment. As outlined in section 3.1, most Member States already recognise the complainants' right to be heard in proceedings before their national supervisory authority. There does not seem to be any legally justifiable reason why national supervisory authorities would have to give complainants better treatment in national enforcement proceedings as opposed to in cross-border enforcement procedures relying on the one-stop-shop mechanism.

[37] CJEU 9 March 2017, C-406/15, *Milkova*, ECLI:EU:C:2017:198, par. 55.

6. Principle of legal certainty

As argued above, not recognising complainants' right to be heard in GDPR enforcement proceedings could infringe on the general EU legal principles of the right to good administration (Article 41 CFR) and the principle of equal treatment (Article 20 CFR). These general principles are often guaranteed by Member States' constitutions in addition to the Charter[38]. Consequently, if the future Regulation limits and/or potentially violates these rights, this will lead to **multiple objections to its application in national courts, and referrals to national constitutional courts and the CJEU**. The legal uncertainty created by the new rules will lead to years of litigation on a national and European level questioning the legitimacy of cross-border GDPR enforcement proceedings – a situation that the EU legislator is unlikely to have aimed to achieve.

Furthermore, if complainants are not recognised as a party to GDPR enforcement proceedings with a right to be heard, complainants whose cases have been dismissed or rejected will see court proceedings in their home country as the only means to effectively defend and express their position. This means that the same matter is likely to be dragged through the administrative and judicial system until the complainant has been able to fully exercise their rights. In practice, this situation will create an additional burden for national judicial systems and is **not in the interest of either the complainants or the defendants**.

On the other hand, if the EU legislator decides to remain silent on the question of the complainants' right to be heard in its harmonisation efforts, then the *Air Inter SA* case would still apply. In this case the Court of First Instance rejected the European Commission's argument based on the absence of a specific provision in the legislation in question: *"[the right to be heard] is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules"*[39]. Therefore, if the EU legislator does not clarify this crucial aspect of GDPR enforcement proceedings, this will **undermine its goal of achieving harmonisation.** Complainants will still be able to directly rely on Article 41(2)(a) CFR on a case-by-case basis but without the necessary guidance as to the conditions of its applicability.

Thus, it is highly desirable that the EU legislator provides much-needed legal certainty by explicitly providing the right to be heard to complainants in GDPR enforcement proceedings in order to avoid future long-lasting high-profile litigation on the matter.

[38] E.g., Articles 10 and 11 of the Constitution of Belgium, Article 22 of the Constitution of Slovenia, Article 3 of the Basic Law for the Federal Republic of Germany, and Article 267 of the Constitution of Portugal.
[39] Court of First Instance 19 June 1997, 260/94, *Air Inter SA v Commission*, ECLI:EU:T:1997:89, par. 59-61.

C. THE NEED FOR AN IMPACT ASSESSMENT

Finally, if the future Regulation does not recognise the right to be heard of complainants in cases where they could be adversely affected by data protection administrative decisions, one of their fundamental rights protected under the CFR will be limited. According to the European Commission's Better Regulation Guidelines, an impact assessment is required for Commission initiatives "*that are likely to have significant economic, environmental or social impacts*"[40]. The limitation of individuals' fundamental rights guaranteed by the CFR is certainly likely to have a significant social impact. The brief sentence in the Commission's Call for Evidence that "*No impact assessment is necessary in this case because the initiative will not affect the rights of data subjects*"[41] will certainly **not hold to be true**. If the European Commission intends to put forward a legislative proposal that has the potential of limiting and adversely affecting the right to be heard of individuals, in this case complainants, then an in-depth impact assessment must be carried out.

D. CONCLUSION

In conclusion, not recognising complainants as full parties and denying them the right to be heard in GDPR enforcement proceedings under the future Regulation would give rise to significant concerns, as it would run counter to a multitude of fundamental rights and legal rules and principles:

- First, such an exclusion assumes that complainants can never be adversely affected by a supervisory authority's decision. However, this is clearly not the case, as a dismissal or rejection of a complaint, especially in cases of violations of complainants' rights, can adversely affect complainants by perpetuating infringing behaviour. An approach that does not recognise the possibility of *any* adverse effects for complainants is bound to lead to violations of Article 41 CFR.

- Second, excluding complainants from the right to be heard contradicts the established laws and procedural rules regarding the right to be heard in GDPR enforcement procedures before national supervisory authorities in most Member States. These procedures recognise the importance of allowing complainants to present their case and provide input in order to ensure a fair and balanced decision-making process.

[40] Commission Staff Working Document, Better Regulation Guidelines, SWD(2021) 305 final, 3 November 2021 p. 30, available at https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en.

[41] European Commission, Call for evidence for an initiative (without an impact assessment), Ref. Ares(2023)1378380 - 24/02/2023, p. 3, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13745-Further-specifying-procedural-rules-relating-to-the-enforcement-of-the-General-Data-Protection-Regulation_en.

- Third, this approach contrasts the practice of the CJEU and European Commission in other areas of law, such as competition law, where guarantees are put in place to ensure the complainants' right to participate and be heard in cases where individual administrative decisions can significantly affect them. Consistency in granting the right to be heard across different legal domains is crucial for upholding the general EU law principles of fairness, equality, and good administration.
- Fourth, excluding complainants from the right to be heard will result in legal uncertainty leading to years of litigation on a national and European level questioning the legitimacy of the new rules for GDPR enforcement proceedings. The European Commission's goal of achieving harmonisation in the field cannot be achieved without the implementation of a clear and consistent framework which ensures that complainants have a meaningful opportunity to express their views, present evidence, and actively participate in the proceedings.

_____