noyb – European Center for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
AUSTRIA

Step 2: Proposed Core Concepts

From the list of issues provided in "Step One" of these submissions, we have derived sixteen "core concepts", which can prove solutions to a range of issues, via high-level principles and rules. Ideally, these concepts should be abstract enough to capture many issues, with a simple rule or principle that can be included in various provisions throughout the new Regulation. When developing these principles, *noyb* has actively considered existing mechanisms in EU law, such as instruments in civil litigation, which seem to have many common features with GDPR procedures.

Concept 1: Scope is limited to international cooperation of SAs (Article 2 of the Draft Regulation)

The Regulation shall be limited to cross-country procedures. This ensures that national cases, which remain the majority of all cases, are not interfered with. Member States would still be able to fully regulate national procedures. There may be some rules that could also apply to national cases (e.g. transparency and publication of decisions), but this could be optional.

Benefits of Concept 1:

- Minimal interference with national procedural law.
- Higher likeliness that the Regulation will be politically accepted.

Downsides of Concept 1:

- SAs and parties would have to apply different rules to national and cross-border cases. However, this is already the case under Article 56 and 60 to 66 GDPR.

Neutral Considerations of Concept 1:

- If national procedural laws are more limited than the guarantees in the Regulation, Member States may discriminate against their own residents in local cases. However, as the guarantees are mainly based on Article 6 ECHR and Article 41 CFR, this appears to be mainly an issue of problematic national laws, which may even become aligned with the Regulation over time, thereby resolving such differences.

Concept 2: National procedures apply between each national SA and any national party, but the Regulation requires minimum standards and an equivalence principle

Default Rule: National procedural law. To further limit the interference of the Regulation with national law and ensure that residents are not surprised by a different set of procedural laws, it is useful to have the national law apply between the SAs and the persons before it ("national inferface"). This would also include foreign persons before a national SA. For example, if a French citizen chooses to file against a Spanish controller directly in Spain they will be subject to Spanish procedural law. However, if the same French citizen files in France, it is subject to French procedural law.

Default Rule: National procedural law applies

Possible Default Rule: National Procedural Law Applies e.g. between the Irish SA and an Irish Data Subject. Equally, Swedish administrative law applies between the Swedish SA and the Controller.

This default rule should *in most cases be sufficient* to properly determine the applicable rules for procedures. However, the difference in CSA and LSA procedural laws may also lead to problems, as the relevant SAs may have higher/lower standards than the other SAs. While it can be assumed that all Member States share a common tradition of procedural fairness, e.g. under Article 6 ECHR or Article 41 CFR, the details may still be different. At the same time, SAs usually have wide discretion to structure procedures; e.g. to determine the order of procedural steps, deadlines and alike. This would allow adding certain exceptions to the default rule in law and practice, to overcome differences in national laws that deviate from the common standards.

Exception 1: If national law does not comply with EU principles. As some Member States lack procedural law or SAs limit procedural rights to an extent that may breach Article 41 CFR, the Regulation should provide for clear minimum standards. For most Member States, these minimum standards should be irrelevant, as it can be assumed that their national procedural laws are compliant with Article 41 CFR principles. However, for Member States where minimum procedural guarantees are not foreseen – e.g. in Sweden or France it is disputed whether data subjects have the right to be heard – the SAs would have to grant more extensive rights in cross-country procedures.

Exception 1: National law does not comply with EU minimum guarantees

Example: As Sweden does not guarantee data subjects' rights to be heard, this minimal standard must be applied when there is a cross-country complaints procedure.

Exception 2: National law goes beyond EU minimums. In some cases, Member State law may go beyond EU minimum guarantees. In such cases, one party may be granted more rights in Member State A than then other party is granted in Member State B.

For example, in *noyb v. Meta* the Irish DPC took the view that draft decisions must be shared with the parties and the controller can make submissions on them. However, the Austrian, German or Belgian SAs do not share these documents as they consider them to be "internal" documents. Furthermore, the EDPB shares these documents via freedom of information laws. This means the data subject was not able to make submissions, as it never received the same documents as the controller. At the same time, the German BfDI took the view that the complainant must only be heard on facts, not on matters of law – such limited submissions would however conflict with requests by the Irish SA.

The Article 41 CFR *principle of fairness and equality* could overcome these issues. This also seems necessary to comply with the right to equal treatment before the law in Article 20 CFR. The SAs would then have to apply the "higher standard" and grant both parties the same rights. This may also be necessary under various national law provisions (like *audiatur et altera pars*). In similar national situations, national law suggests 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. This principle may be extended to a European level ("*leveling up*"). However, this approach requires that the SAs openly communicate about the steps taken in each jurisdiction.

The application of this principle could be limited by limiting the principle of equivalence to *substantial* difference. For example, the equivalence principle could apply to issues of the right to be heard, but not minor differences in formalities.

The only logical alternative to the second exception would be that the higher standard would be dis-applied, which would not be desirable and could raise issues when a case is appealed nationally, as this may give rise under national constitutional or procedural laws.

Exception 2: National law goes beyond other law (fairness issue)

Example: As Ireland may allow additional rights to be heard (like the 'draft decision' under Article 60(3) GDPR), such rights must also be guaranteed by the Swedish SA that may not grant these rights to "level up".

Benefits of Concept 2:

- This solution would allow for a minimal interference with (most) national procedural law, that already complies with typical baseline guarantees like Article 41 CFR and Article 6 ECHR.
- As a default, parties to the procedure and SAs can act under the known national procedural law and not under a separate European procedure.
- In most cases, minimum thresholds will already be complied with by Member State law, as these standards are largely in line with Article 6 ECHR and Article 41 CFR.
- Only in cases where the national procedural law is unclear or lacks sufficient protections, the Regulation would fill the gap and the SA and parties would have to apply the national law and the Regulation in parallel. In the long term, this may be overcome by adjustments in national

procedural law. Otherwise the parallel application would be similar to the need to apply GDPR and national law; which is already the case, even if not ideal.

Downsides of Concept 2:

- There may still be differences in procedure that would require SAs to coordinate bilaterally for equivalence tests under exception 2. This requires comparisons of procedural laws that may generate further legal uncertainty.
- A limitation on exception 2, to only include material differences in procedural law, may allow SAs for more flexibility, but would also generate more legal uncertainty. Overall such a limitation of exception 2 seems to be a reasonable solution.

Concept 3: Improved and upfront clarification of jurisdiction and SA roles

The provisions of Article 4(22), 4(23), 55 and 56 GDPR have many factual and legal elements that need to be checked before the jurisdiction of a SA is clear. If this is done in detail, it can take years. If it is not done in detail, it allows for final decisions to be challenged on the grounds of the SA lacking jurisdiction.

Compared to other EU procedural laws (e.g. Brussels I Regulation) many elements of the GDPR require deeper investigation. Examples of these elements include the objectively defined "*main establishment*", the "*center of decision making*", or the standard of "*substantially affects or is likely to substantially affect data subjects in more than one Member State*". Lengthy consideration of many factors, such as the number of national and EU customers, is required in order to make a determination.

The objective approach removes the option to rely on mere declarations of parties. Rather vague terminology and aggressive forum shopping leads to unstable jurisdictions.

The objective approach also does not allow parties to simply agree on jurisdiction (even if some SAs try to get such commitments). This often leads to years of discussions over jurisdiction or disagreements between SAs and/or parties and conflicting decisions (cases are often "sent aboard" and the receiving SA does not treat them under Article 60 GDPR). In practice, controllers use this situation to ensure that no one challenges "forum shopping", as the material claim of a complainant is blocked for years once a complainant brings up possible "forum shopping".

An additional problem lies in long procedures and frequent changes in the structure of controllers (e.g. via mergers and acquisitions) and/or claims of controllers that decision-making was moved to another jurisdiction. The current view of the EDPB is that a change in the main establishment means that the LSA changes – which would mean that the entire procedure would have to "move" to another Member State and start anew. In many procedural laws, the jurisdiction is "locked" at an early stage to ensure that procedures do not get frustrated when parties move, merge, or otherwise try to disappear.

While changing the system of an objective definition of the main establishment does not seem desirable, there should be a simple and fast European procedure to determine jurisdiction upfront. This could be achieved in a similar manner to the Brussels Regulations (with a clear sequence of claims of jurisdictions and decisions over such claims). There should be short deadlines to raise objections, leading to legal certainty even if factual details were not determined by the SAs. Even an "incorrect"

SA could thereby act with legal certainty, as the duration for objections would have simply lapsed. This could avoid controllers "fleeing" the jurisdiction towards the end of an unfavorable procedure.

Benefit of Concept 3:

- Minor interference with national procedural law.
- Quick decision on jurisdictions and roles of a procedure, that cannot be changed thereafter.
- Increased legal certainty and stable procedures.

Downside of Concept 3:

- Need to add a specific step in the procedure for the clarification of jurisdictions.
- Changes in facts or false jurisdictional decisions can led to the "wrong" SA deciding as LSA. This may lead to issues during the enforcement stage. However, these can be overcome via cross-country enforcement options so that the LSA in Member State A can still enforce the final decision in Member State B (see below).

Concept 4: Separate procedural decisions from final decisions and early European resolutions on procedural disagreements

Under the current practice, SAs are meant to "cooperate" throughout the procedure. However, in practice, CSAs are only left to raise reasoned objections at the end of a national procedure, unless an LSA actively involves a CSA during the course of the procedure.
When errors already happen at an early stage because of incorrect procedural decisions (scope of procedures, lack of investigations, party rights not granted, etc.), CSAs currently take the view that they are only left with filing a reasoned objection at the end of the procedure; sometimes years later. This is not only inefficient, but in certain cases it is impossible to file a "relevant and reasoned objection". For example, when key elements were not even investigated, but these elements would be the basis for an objection. There could be room to interpret Articles 60 and 61 GDPR to also allow CSAs to make specific and early requests with the LSA to take certain steps, but most SAs fear that any use of these systems, including Article 66 GDPR, would not be useful; and/or would upset other SAs too much.
In particular, filing CSAs may get into a very complicated situation as they may have to defend procedural shortcomings by the LSA before appeals courts when a decision is issued by them under Article 60(8) or (9) GDPR, while they do not have any real influence over the procedure.

From the perspective of the parties, it is problematic that they may have rights under national law before a CSA to demand certain steps (e.g. a specific investigation, hearing a witness or just access to documents), but the local CSA may take the position that the LSA is free to take such steps or not (e.g. not provide documents, thereby undermining the right to access to documents at the filing CSA). This may mean that national rights of parties are practically impossible to comply with, as these rights only reach the CSA, but not the LSA. There is currently no "link" between national procedures that would allow parties to directly (or indirectly via the national SA) apply for certain steps by the LSA. Article 60 and 61 GDPR would allow for such "mutual assistance", but CSAs currently take the view that they cannot force an LSA to comply with these obligations.

Regarding redress for procedural mistakes, it is common that these mistakes can "heal" under national law when they do not influence the outcome of the procedure. In many jurisdictions, there is therefore

a limitation on judicial remedies during an ongoing investigation, as such issues shall only be raised in a final appeal. In other jurisdictions there is, however, an option to raise such issues instantly with a court (e.g. Judicial Review in Ireland), which leads to a (lengthy) pause of the pending procedure (e.g. 2-3 years in Ireland).

There seems to be no remedy between CSAs, LSAs and the EDPB, when local SAs do not follow requests under Articles 60-66 GDPR. Consequently, there seems to be a need to ensure that remedies against procedural decisions are treated in fast, simple and a coherent way.

It would therefore seem advisable to define procedural decisions (in addition to "draft decisions" under Article 60 GDPR), introduce a quick procedure for preliminary procedural decisions (e.g. to investigate a matter, hear a party or collect evidence or not) between SAs, with a clear European decision making process, if there is disagreement of SAs. This would allow a European decision making process to take place before the final "draft decision" and expand the option to get a European determination on situations that arise already during earlier stages of a procedure. Solving such issues early (such as the scope of a case) could ensure that inefficient re-runs of procedures can be avoided.

While the EDPB seems to be best placed to settle such disputes, the full EDPB panel may not be necessary for such minor decisions. See below for the option to create a sub-committee of the EDPB for solving minor disagreements.

Benefit of Concept 4:

- Early cooperation during the ongoing procedure (e.g. the scope or agreement on the necessary investigations) can eliminate frustrated procedures and larger disputes at a later stage.
- Quick decision making on procedural disagreements could ensure that SAs have legal certainty as soon as possible, and do not have to wait until a draft decision is issued to intervene (when it is too late to fix the problem).

Downside of Concept 4:

- There could be more need for decision making on a European level. This could be countered with a standing sub-committee of the EDPB, which could act as an arbitrator for minor disputes (see next concept).

Concept 5: Quicker European decision processes for smaller decisions (e.g. procedural disagreements) via an EDPB sub-body

An option to make more European decision making realistically possible, would be the introduction of a *standing* sub-committee or other sub-body within the EDPB. Special decision makers appointed by the EDPB could take smaller decisions on behalf of the EDPB.

Such smaller decisions could be procedural matters during ongoing investigations, disputes where there is clear guidelines by the EDPB or disputes where there is clear case law by the CJEU.

This could speed up European decision-making and would ensure that decisions over, for example, smaller procedural disputes, would not require the entire EDPB. The easier access to a quick decision could motivate SAs to use this mechanism, compared to triggering rather complicated reasoned

objections before the EDPB. These decisions could be defined as preliminary and only binding on the SAs, to allow the parties of the procedure to challenge such decisions.

Benefit of Concept 5:

- A quick and easy decision on a European level over smaller disputes or procedural matters could ensure that SAs can solve issues at an early stage, without delaying procedures.
- If the sub-committee or sub-body is appointed by the EDPB and would act on its behalf, there seems to be no issue with the independence of SAs.

Downside of Concept 5:

- There seems to be the need to employ a standing committee of experts in GDPR and procedural matters, which may form part of the EDPB secretariat or be a standing (remotely meeting) group of SA representatives. This may result in some administrative issues.

Concept 6: Recognition of different sizes of procedures (normal / minor / major)

There is a chance that a European procedure could be too detailed for some minor procedures (e.g. a simple unanswered subject access request). At the same time, short deadlines or simplified decision making may be not take proper account of more complex major procedures.

The Regulation could take this into account through a mechanism which declares a procedure "minor" or "major", allowing deviation from the standard procedure. "Minor" procedures could make certain steps not applicable, major procedure could e.g. allow for more time and allow (especially smaller) SAs to use European resources (e.g. at the EDPB), such as translation services or technical expertise. This could also make it easier for SAs to accept European deadlines for procedures, as they have an option to prolong them for large complex investigations. There would need to be clear requirements for declaring a case to be major/minor, in order to ensure that cases are not, for example, continuously declared "major" to overcome normal deadlines and alike.

Benefit of Concept 6:

- This differentiation could allow for: strict deadlines in most common cross-country procedures in standard situations; faster and more efficient minor procedures; and more flexibility in complex cases. This would also address likely criticism of any European deadlines, as the "fast track" or "in depth" procedure may allow for more flexible deadlines.

Downside of Concept 6:

- The differentiation between procedures adds more complexity.
- Allowing national SAs to use European / EDPB resources requires them to be expanded.

Concept 7: Joint case file, use of language, translations and length of documents

Currently, the case files are "siloed" before each SA. There is no "joint file" in procedures under Article 60 to 66 GDPR. This causes major delays until CSAs and EDPB staff can, for the first time, read the relevant case files. It also leads to unanswered requests for access to documents by SAs, as well as different information for the parties in different jurisdictions. There have been reports that documents sent via the IMI get lost or cannot be tracked. There is no use of existing APIs to automatically import documents in national case management systems. A joint European file, consisting of a joint system with all relevant documents of the case, could eliminate these issues.

Currently the GDPR does not specify the use of languages. The matter was partly moved to the rules of the IMI, where it is demanded that all communication is undertaken in English. Many SAs only use automated translations, which are often useful and efficient, but especially relay translations (e.g. Slovakian to English, English to German) with poor quality translations can lead to documents that are not understandable anymore and therefore undermine the right to be heard. A joint file could include a function for direct translations (e.g. Slovak to German and English) with high quality language models. The Regulation could include rules as to the translating SA having to certify the correct translation (e.g. proofread automated translations), as a middle ground between efficient automated translations and ensuring a minimum standard. Parties could get the right to access the original documents to have the option to verify translations and find errors, which is currently impossible.

The need to translate documents properly is closely related to the volume of documents. In an equal situation, the CJEU has limited the length of submissions in rules of procedure (e.g. 20 or 30 pages), to ensure that translations are achievable in practice. It would be an option to have the SAs or EDPB set such rules for cross-country procedures, as some SAs and national procedural traditions have a tendency to produce extremely lengthy documents that cause very long delays for translations. For example, the German BfDI used human translations for Irish documents, resulting in at least two months of delays just for the translation of minor submissions. The Regulation could allow for a legal basis for such procedural rules that could be adapted by the EDPB on an ongoing basis.

<u>Benefit of Concept 7:</u>

- A joint file would limit: the need to exchange documents via the IMI; the options for SAs to withhold documents; and the need of the EDPB to ensure that a file is "complete". It would also ensure that SAs are not overwhelmed with a last minute "drop" of a huge file when a draft decision is issued by the LSA.
- Officially recognising automated translations as an option may facilitate faster and more efficient processes, while also ensuring a minimum quality of such approaches. In addition, ensuring that all language versions are provided would ensure transparency.

<u>Downside of Concept 7:</u>

- Limitations on the length of documents would limit the right to be heard, however such limitations are rather common and may ensure that all parties focus their submissions more.
- Compared to the current practice of some SAs the need to verify translation would cause additional work, as they currently do not seem to verify if automated translations are readable.

Concept 8: Defining cooperation under Article 60

Currently Article 60 GDPR only defines that SAs shall "cooperate", but lacks any specific rules on this cooperation.

While the GDPR and the EDPB guidelines seem to follow the idea of active cooperation and joint decision-making, most CSAs only function as a "post box", while LSAs are left with running the procedures. A general section about the details of such cooperation would be useful to ensure that there is a common understanding of the practical meaning of "cooperation".

Concept 9: Defining the steps of complaints procedures

Especially in complaints procedures, where the filing CSA and the LSA may have to deal with at least two parties, it seems that the initial procedure (e.g. defining the LSA, sending the case, the LSA accepting the referred case, forwarding the complaint to the controller or processor) should be defined and have a clear structure, at least up to the first exchange of positions by the parties.

It seems reasonable that the CSA and LSA would agree on the necessary steps in the investigation after such a first exchange and, for example: define the scope of the investigation; the need for evidence; or the need for further material law clarifications.

Such a structure could ensure that jurisdictional issues are clarified, other problems are identified early enough and the CSA must be included in the procedure. This should limit the need to deal with such disagreements via the Article 65 procedure.

Benefit of Concept 9:

- Ensures that at least the initial steps of a complaints procedure are done in an uniform way.
- Ensures that LSAs and CSAs agree on the necessary procedural steps early.

Downside of Concept 9:

- European rules may interfere with traditional ways of dealing with complaints in Member States. As authorities usually have a lot of leeway on how to structure procedures, such rules should usually not conflict with any national legal obligations.

Concept 10: Defining *ex officio* procedures

In some cases, SAs have tried to "push" additional elements into *ex officio* procedures by LSAs, as there seems to be no mechanism to trigger new *ex officio* procedures by CSAs.

The urge to expand existing procedures could be limited by a Regulation which foresees clear requirements for a CSA to open an *ex officio* procedure with the LSA. To ensure that CSAs do not overwhelm LSAs, minimum requirements such as 'probable cause' and 'being concerned' should be introduced.

Benefit of Concept 10:

- This option would clarify if and when CSAs can raise an case with the LSA even if there is no specific complaint and generate legal certainty on this situation.
- The option to raise additional elements with the LSA should take pressure off the Article 65 procedure, as there is an alternative to attempts by CSA to add more elements to a pending case.

Downside of Concept 10:

- Some SAs may find it unpleasant that colleagues can order them to investigate matters of European relevance, this could be overcome by limiting the power to make such requests (e.g. probable cause, being actually concerned and alike).

Concept 11: Defining minimal requirements for decisions

Given that the "looser's SA" is in charge of issuing a decision under Article 60(7) to (9), it is unclear at the outset of a (complaints) procedure, which SA will have to issue the final decision. This can lead to the filing CSA in Member State A having to issue a decision that the LSA in Member State B has drafted, under the procedural law of Member State B.

I would be necessary that a decision has common minimal standards that are also accepted through the EU. Currently CSAs simply "forward" the LSA decision as it is; sometimes only as an auto translation, with no comment, information on appeals and alike.

This also means that an appeals court in the CSA's Member State A may have to overturn the decision simply because the LSA in Member State B has not followed the CSA Member State A's procedural requirements and the CSA was not allowed to rewrite the decision.

Minimum standards would allow the free flow of decisions that fulfill minimal requirements (see next concept), which would be similar to the Brussels-Regulations for civil law decisions.

Benefit of Concept 11:

- A uniform minimum standard would ensure the free flow of decisions in the Union.
- There seems to be hardly any conflict with national law when SAs have to add some elements to decisions to fulfill these minimal requirements.

- These minimal requirements would only have to be fulfilled if the decision is actually to be issued in another Member State than the LSA (so in cases under Article 60(8) and (9) GDPR), or when SAs are envisaging European enforcement (see below).

Downside of Concept 11:

- There may be the need to apply the national requirements for decisions in parallel with the requirements under the Regulation.

Concept 12: Decisions other than those named in Article 60 GDPR

In practice, SAs do not only "dismiss" or "reject" cases, but also have other forms of ending a case, such as "amicable resolutions", "closing" a case without taking any decision, or the need to end a case for procedural or technical reasons (e.g. because parties cease to exist).

The Regulation should ensure that such forms of decisions are regulated and do not undermine the rules in Article 60 GDPR, such as when LSAs simply "close" OSS procedures without investigation or using alternative forms of decisions to not trigger the dispute resolution or redress options under Article 60(3) to (5) or 78 GDPR.

An open formulation for another option - apart from 'upholding', 'rejecting' or dismissing a complaint – such as "other decision" would ensure that such acts by SAs are still seen as decisions and open to challenge under the existing structure of the GDPR.

Benefit of Concept 12:

- The recognition of other forms of ending a case would ensure that there is no "third way" out of the system of Article 60 to 66 GDPR, which would allow the dispute resolution or redress system of GDPR to be undermined.

Downside of Concept 12:

- None.

Concept 13: European enforcement

Currently there is no option for cross-country enforcement under GDPR. Especially for third-country controllers or processors, this means that the SA at the place of the complaint or any *ex officio* investigation can easily be frustrated when such decisions are simply not enforceable, because any assets or processing systems are in another European jurisdiction.
Equally, when a controller moves the main establishment to another Member State, the previous LSA may be unable to enforce a decision, as there may not be any assets left in the Member States.
Some SAs even reject to investigate complaints, claiming that they would be unable to enforce complaints against controllers outside of their territory anyways (see e.g. Luxembourg).

In particular, enforcement actions at the place of IT infrastructure or third party enforcement (e.g. enforcing a financial penalty against the bank of the controller with a branch in the Union) often require the enforcement of a decision outside of the national boundaries of the decision making SA.

Similar to the Brussels-I-Regulation or Council Framework Decisions on traffic fines, such an enforcement option needs to be added to GDPR to ensure that cross-country cases are not only decided, but also have a realistic option to be enforced.

Benefit of Concept 13:

- Adding an element to the Regulation would allow that SAs can enforce their decisions throughout the Union and are not limited to their boundaries.

Downside of Concept 13:

- The enforcement of foreign decisions is usually a delicate matter, but given that the GDPR forms harmonised material law and the OSS system allows all CSAs to intervene in a joint European decision process, it seems that GDPR enforcement lends itself to European enforcement.

Concept 14: Clear deadlines, especially for LSAs

Currently most clear deadlines only apply to CSAs and the EDPB, leaving the LSA with very open deadlines like "without delay". This leads to some LSAs taking up to four years to reach a "draft decision", more than three years to even open an investigation, or taking more than half a year to e.g. trigger the Article 65 procedure after reasoned objections arrived. These loopholes need to be fixed to ensure that LSAs cannot undermine procedures just by delaying them. The fact that LSAs cannot be held to account for delays is also problematic for CSAs that must adhere to maximum durations for procedures nationally.

While the short deadlines of two or four weeks in Article 60 GDPR have proven to be unrealistic, a comparison by the EDPB largely found that SAs have to decide within three, six or twelve months in many Member States. These durations could be the baseline for deadlines in the Regulation.

An option to prolong deadlines in cases of force majeure or in very complex cases (see above for the differentiation of minor/normal/major cases) could allow for necessary flexibility.

Concept 15: Transparency and accountability

There are currently very different statistics provided by SAs on how they enforce the GDPR, usually in annual reports. In addition, while some SAs publish all or most decisions (e.g. Spain), others do not publish decisions (e.g. Germany). Some Member States see the publication of a decision as an additional penalty. This leads to a lack of legal certainty for controllers, processors and data subjects, as there is virtually no case law in some Member States. The publication of decisions is also an element of general deterrence, as DPOs and other decision makers get clear evidence of what may lead to consequences.

Benefit of Concept 15:

- Consistent European rules on yearly statistics and the publication of decisions could ensure that the public accountability of SAs, legal certainty and deterrence is increased.

Downside of Concept 15:

- These requirements may lead to more bureaucratic workload for SAs. However, most statistics are already published in annual reports – a common format should not increase the workload dramatically. Equally, certain limitations on the publication of decisions (e.g. only in relevant cases) may limit the workloads.
- There may be legitimate reasons why parties may not want their cases to be published. It would be possible to allow Member States certain discretion to, for example, follow the national traditions on publications, such as redacting names or facts to overcome these reservations.

Concept 16: Defining GDPR terminology, legal assumptions and deadlines

Many elements of the GDPR are not defined, such as "mutual assistance", "rejection", or the "dismissal" of a case. The new Regulation could increase legal certainty when applying the GDPR, by using the same wording as the GDPR but also defining these words in detail.

The GDPR has certain elements that may have definitions that are too strict or turned out to be hard to prove, like the "main establishment" in Article 4(16) "cross-border processing" in Article 4(23), "substantially affected" in Articles 4(22)(b) and 56(2) or "relevant and reasoned objection" in Article 4(24) GDPR. These elements could be adapted by adding legal assumptions (e.g. that an objection is 'relevant' or that the named establishment is the 'main establishment') as well as short deadlines to raise objections to such assumptions. Such an approach limits the need to investigate each matter and creates legal certainly, while still allowing parties to raise matters when they consider them to be crucial.

Benefit of Concept 16:

- Increased legal certainty.

Downside of Concept 16:

- GDPR terminology would be defined in a separate Regulation, requiring the parallel reading of the two Regulations. However, as this would only concern procedural matters and a small group of people is concerned with these matters, the impact would be limited.