



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 31 July 2013

12879/13

**Interinstitutional File:
2012/0011 (COD)**

LIMITE

**DATAPROTECT 116
JAI 688
MI 691
DRS 148
DAPIX 102
FREMP 115
COMIX 472
CODEC 1858**

NOTE

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| from: | the Italian delegation |
| to: | Working Party on Information Exchange and Data Protection |
| No. prev. doc.: | 11013/13 DATAPROTECT 78 JAI 496 MI 546 DRS 119 DAPIX 88 FREMP 85 COMIX 380 CODEC 1475 |
| Subject: | Amendment proposal on cooperation and consistency |

The amendments proposed by the Italian delegation in this document are aimed at (1) streamlining application of the main establishment rule as well as (2) extending application of the consistency mechanism to the handling of complaints with a transnational character.

These amendments are without prejudice to the ultimate configuration of the one-stop-shop and the consistency mechanism and the powers conferred on the “competent” authority under such mechanism, on which we still have some reservations.

As for (1), we would propose re-introducing the original wording in the Commission’s proposal for Article 51(2), to clarify that the processing operations for which competence is exercised are those “*in the context of the activities of an establishment of the data controller or data processor*” – this being a concept already well-known under the existing Directive 95/46/EC as interpreted, *inter alia*, by the Article 29 Working Party.

An amendment is also introduced in Article 57(3), letters a) and b), to clarify that the consistency procedure as related to the exercise of a DPA’s powers under Article 53 is initiated only if multiple establishments of the relevant data controller/data processor exist in several Member States – regardless of other factors such as the number of data subjects involved or the risk for fundamental rights. Such factors might be possibly taken into account by the Board in reaching its final decision on the given case.

Furthermore, an amendment is introduced to Article 58 in the Presidency’s text to the effect that the non-binding opinions of the Board may be made binding on the competent supervisory authorities (and all the other DPAs as well) following a request made by the Board to the Commission, which will then have to adopt an implementing act for this purpose (under Article 62). This would hopefully reconcile the Board’s independence requirements with the need to ensure streamlined, harmonised application of the principles set forth in the Regulation by way of binding instruments (which the Board is currently not empowered to issue).

As for (2), the rationale behind the proposal is to clarify that complaints involving two or more DPAs on account of the existence of multiple establishments of a data controller/processor should be handled ultimately in the framework of the consistency mechanism, but only if the mutual assistance mechanism set forth in the relevant articles (in particular, Article 55) of the Regulation has failed – i.e., an upstream filter should be envisaged to prevent overloading of the Board.

This is actually in line with the stance taken by the competent Ministers at the recent informal JHA Council in Vilnius.

To that end, the text of Article 54a as proposed in the Irish Presidency's text was amended by providing that a supervisory authority other than the supervisory authority of the main establishment shall decide on a complaint lodged to it, however the final decision will be made after submitting the relevant draft measure to the supervisory authority of the main establishment; if the latter supervisory authority has serious objections to such draft measure, the referring supervisory authority should submit the issue to the Board, which will then issue an opinion through the consistency mechanism.

In this manner, it would be ensured that complaints lodged with the supervisory authority of a given Member State are handled by such supervisory authority (as per Article 73), though with the involvement of the main establishment supervisory authority as also related to the enforcement of such decisions pursuant to Article 51(2); in case of disagreements between the supervisory authorities involved, the Board would step in. Article 57(2) of the proposal was amended accordingly as well.

On a separate note, the Italian delegation would actually consider that this filtering mechanism should apply throughout, i.e. that a consensus-finding attempt should be made in pursuance of the mutual assistance obligation whenever multiple DPAs are involved; only if such attempt fails would the consistency mechanism in Article 57 be engaged.

AMENDMENTS PROPOSED BY ITALIAN DELEGATION IN BOLD ITALICS

Article 51

Competence

1. Each supervisory authority shall be competent to perform the duties and to exercise the powers conferred on it in accordance with this Regulation on the territory of its own Member State.
 2. Where the processing of personal data takes place ***in the context of the activities of an establishment of a controller or processor in the Union***, and the controller or processor is established in more than one Member State, the supervisory authority of the main establishment of the controller or processor shall be competent for measures intended to produce legal effects by performing the duties pursuant to points (hb) and (i) of Article 52(1) and exercising the powers pursuant to points (a) to (h) of Article 53(1) and Articles 79 and 79a as regards the processing activities of the controller or the processor in all Member States concerned.
 - 2a. The supervisory authority of the main establishment shall cooperate with other supervisory authorities and, in particular, with the supervisory authority to which a complaint has been lodged, pursuant to the provisions of Chapter VII of this Regulation.
 - 2b. Paragraph 2 shall not apply to public authorities and bodies.
 3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.
- (...)

Article 54a

Cooperation in case of complaints

1. Where a complaint has been lodged with a supervisory authority other than the one of the main establishment of the controller or processor, such supervisory authority shall act in compliance with the mutual assistance requirements laid down in Article 55 and in Article 56. .
2. In the case mentioned in paragraph 1, the supervisory authority to which the complaint has been lodged shall submit the draft measure it intends to take on such complaint to the supervisory authority of the main establishment and shall take utmost account of the views of the latter supervisory authority.(...)
3. (new)In the case mentioned in paragraph 1, the supervisory authority to which the complaint has been lodged shall not decide on the complaint if the supervisory authority of the main establishment has indicated, within a period of one month from submission of the draft measure mentioned in paragraph 2, that it has serious objections to such decision. In the latter case, the supervisory authority to which the complaint has been lodged shall submit the issue to the European Data Protection Board, which shall decide in accordance with the procedure laid down in Article 57. Otherwise, the supervisory authority shall adopt its decision on the complaint and the supervisory authority of the main establishment shall cooperate in enforcing such decision under Article 51(2).

(...)

Article 57

Consistency mechanism

1. For the purpose set out in Article 46(1a), the supervisory authorities shall co-operate with each other through the consistency mechanism as set out in this section.
2. *Before the competent supervisory authority adopts a measure referred to in paragraph 3, it shall communicate the draft measure to the European Data Protection Board and the Commission. **Such communication shall be also performed by the supervisory authority to which a complaint has been lodged if it is other than the authority of the main establishment of the controller or processor and the latter authority has serious objections to a draft measure deciding on the complaint as per Article 54 a, paragraph 3.***
3. *The obligation set out in paragraph 2 shall apply to a draft measure (...) which:*
 - (a) is intended to exercise the powers of the supervisory authority referred to in points (b), (c), (eb), (f), (g) and (h) of paragraph 1 of Article 53 or to impose an administrative fine pursuant to Articles 79 and 79a (...); or
 - (b) (...);
 - (c) *aims at adopting a list of the processing operations subject to the requirement for a data protection impact assesment pursuant to Article 33(2b); or*
 - (ca) concerns a matter pursuant to Article 38(2b) whether a draft code of conduct or an amendment or extension to a code of conduct is in compliance with this Regulation; or

- (cb) aims to approve the criteria for accreditation of a body pursuant to paragraph 3 of Article 38a or a certification body pursuant to paragraph 3 of Article 39a;
 - (d) *aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or*
 - (e) *aims to authorise contractual clauses referred to in point (d) of Article 42(2); or*
 - (f) *aims to approve binding corporate rules within the meaning of Article 43.*
4. *Any supervisory authority concerned or the European Data Protection Board may request that any matter referred to in paragraph 3 shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph **2 or 3** or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.*
5. *In order to ensure correct and consistent application of this Regulation, the Commission may request that any matter referred to in paragraph 3 shall be dealt with in the consistency mechanism*
6. *Supervisory authorities and the Commission shall electronically communicate to the European Data Protection Board, using a standardised format any relevant information, including as the case may be a summary of the facts, the draft measure, (...) the grounds which make the enactment of such measure necessary, and the views of other supervisory authorities concerned.*

7. *The chair of the European Data Protection Board shall without undue delay electronically inform the members of the European Data Protection Board and the Commission of any relevant information which has been communicated to it using a standardised format. The chair of the European Data Protection Board shall, where necessary, provide translations of relevant information.*

Article 58

Opinion by the European Data Protection Board

1. (...)
2. (...)
3. (...)
4. (...)
5. (...)
6. (...)
7. The European Data Protection Board shall issue an opinion on matters submitted to it in the consistency mechanism referred to in Article 57 provided it has not already issued an opinion on the same matter.
- 7a. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board unless a supervisory authority of the Member State where a complaint has been lodged requests further consideration of the opinion. In that case the opinion shall be adopted by a two-third majority of the members of the European Data Protection Board.

- 7b. Where within the period referred to in paragraph 7a the European Data Protection Board does not adopt an opinion, the supervisory authority referred to in paragraph 2 of Article 57 may adopt its draft measure.
- 7c. The chair of the European Data Protection Board shall inform, without undue delay, the supervisory authority referred to, as the case may be, in paragraphs 2 and 4 of Article 57 and the Commission (...) of the opinion and make it public.
8. The supervisory authority referred to in paragraph 2 of Article 57 (...) shall take utmost account of the opinion of the European Data Protection Board and shall within two weeks after receiving the opinion, electronically communicate to the chair of the European Data Protection Board (...) whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.
9. Where the supervisory authority concerned does not intend to follow the opinion of the European Data Protection Board, it shall inform the Chair of the European Data Protection Board within the period referred to in paragraph 8 **and provide a reasoned explanation to the Board.**
- 10. (new)The European Data Protection Board may request the Commission to decide that an opinion rendered by the Board shall be binding on the authority referred to in paragraph 2 of Article 57 or on any of the supervisory authorities concerned, as the case may be.**
