



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from:	Presidency
to:	Working Party on Information Exchange and Data Protection
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Subject:	Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Chapters VI and VII

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Delegations find attached a revised version of the Chapters VI and VII of the draft General Data Protection Regulation. This version seeks to take account of the discussions on the draft Regulation that took place in the Working Party on Information Exchange and Data Protection in July 2013.

All additional changes made to the original Commission proposal are **underlined bold text**. Where text has been deleted, this is indicated by (...). Where existing text has been moved, this text is indicated in italics.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) (...) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

After consulting the European Data Protection Supervisor<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

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<sup>1</sup> OJ C, p. . .

<sup>2</sup> OJ C p. .

- 92) The establishment of supervisory authorities in Member States, empowered to perform their duties and exercise their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of their personal data. Member States may establish more than one supervisory authority, to reflect their constitutional, organisational and administrative structure.
- (92a) The independence of supervisory authorities should not mean that the supervisory authorities cannot be subjected to control or monitoring mechanism regarding their financial expenditure<sup>3</sup>.
- 93) Where a Member State establishes several supervisory authorities, it should establish by law mechanisms for ensuring the effective participation of those supervisory authorities in the consistency mechanism. That Member State should in particular designate the supervisory authority which functions as a single contact point for the effective participation of those authorities in the mechanism, to ensure swift and smooth co-operation with other supervisory authorities, the European Data Protection Board and the Commission.
- 94) Each supervisory authority should be provided with the (.) financial and human resources, premises and infrastructure, which are necessary for the effective performance of their tasks, including for the tasks related to mutual assistance and co-operation with other supervisory authorities throughout the Union. Each supervisory authority should have a separate annual budget, which may be part of the overall state or national budget.

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<sup>3</sup> Presidency proposal in order to accommodate concerns raised by delegations that the wording of Article 47 would prevent this type of actions with regard to the supervisory authorities.

- 95) The general conditions for the member or members of the supervisory authority should be laid down by law in each Member State and should in particular provide that those members should be either appointed by the parliament or the government or the head of State of the Member State (...).

In order to ensure the independence of the supervisory authority, the member or members should refrain from any action incompatible with their duties and should not, during their term of office, engage in any incompatible occupation, whether gainful or not. They should behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.

- 96) The supervisory authorities should monitor the application of the provisions pursuant to this Regulation and contribute to its consistent application throughout the Union, in order to protect natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the internal market. For that purpose, the supervisory authorities should co-operate with each other and the Commission.
- 97) Where the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union takes place in more than one Member State, one single supervisory authority should be competent for monitoring those processing activities of the controller or processor throughout the Union and taking the related decisions as regards the controller or processor, in order to increase the consistent application, provide legal certainty and reduce the administrative burden for such controllers and processors. This should not apply in relation to controllers that are not established in the Union; their representative may be addressed by each supervisory authority, in addition to or instead of the controller.

The competence of the single supervisory authority should include measures intended to produce legal effects such as the authorisation of binding corporate rule and of transfers of personal data to third countries or international organisations, administrative fines and other sanctions. However, the competence of that supervisory authority should not encompass the competence for the enforcement of its decisions, on the territory of another Member State, unless in the context of joint operations and allowed by the Member State concerned.

- 98) The competent authority for the supervision of the processing and the related decisions, providing such one-stop shop, should be the supervisory authority of the Member State in which the controller or processor has its main establishment. However, the supervision of the processing by a public authority or body should be carried out solely by the supervisory authority or the supervisory authorities of the Member State where the public authority or body is established.
- 99) While this Regulation applies also to the activities of national courts, the competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks. However, this exemption should be strictly limited to genuine judicial activities in court cases and not apply to other activities where judges might be involved in, in accordance with national law.
- 100) In order to ensure consistent monitoring and enforcement of this Regulation throughout the Union, the supervisory authorities should have in each Member State the same duties and effective powers, including powers of investigation, legally binding intervention, decisions and sanctions, particularly in cases of complaints from individuals, and to engage in legal proceedings. Investigative powers of supervisory authorities (...) should be exercised in conformity with Union law and national law. This concerns in particular the requirement to obtain a prior judicial authorisation.

- 101) Each supervisory authority should deal with complaints lodged by any data subject and should investigate the matter. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject.

Where the supervisory authority to which the complaint has been lodged is not the competent supervisory authority, the competent supervisory authority should closely co-operate with the supervisory authority to which the complaint has been lodged according to the provisions on co-operation and consistency laid down in this Regulation. In such cases, the competent supervisory authority should, when taking measures intended to produce legal effects, including the imposition of penalties and administrative fines, take utmost account of the view of the supervisory authority to which the complaint has been lodged and which should remain competent to carry out any investigation on the territory of its own Member State in liaison with the competent supervisory authority.

- 102) Awareness raising activities by supervisory authorities addressed to the public should include specific measures directed at controllers and processors, including micro, small and medium-sized enterprises, as well as data subjects.
- 103) The supervisory authorities should assist each other in performing their duties and provide mutual assistance, so as to ensure the consistent application and enforcement of this Regulation in the internal market.

- 104) Each supervisory authority should have the right to participate in joint operations between supervisory authorities. The requested supervisory authority should be obliged to respond to the request in a defined time period.
- 105) In order to ensure the consistent application of this Regulation throughout the Union, a consistency mechanism for co-operation between the supervisory authorities themselves and the Commission should be established. This mechanism should in particular apply where a supervisory authority intends to exercise its powers as regards processing operations which substantially affect a significant number of data subjects in several Member States, or (...) that might substantially affect the free flow of personal data. It should also apply where any supervisory authority concerned or the Commission requests that such matter should be dealt with in the consistency mechanism. This mechanism should be without prejudice to any measures that the Commission may take in the exercise of its powers under the Treaties.
- 106) In application of the consistency mechanism, the European Data Protection Board should, within a determined period of time, issue an opinion, if a (...) majority of its members so decides or if so requested by any supervisory authority concerned or the Commission.
- 107) (...)
- 108) There may be an urgent need to act in order to protect the rights and freedoms of data subjects, in particular when the danger exists that the enforcement of a right of a data subject could be considerably impeded. Therefore, a supervisory authority should be able to adopt provisional measures with a specified period of validity when applying the consistency mechanism.

- 109) The application of this mechanism should be a condition for the (...) enforcement of the (...) decision by a supervisory authority in those cases where its application is mandatory. In other cases of cross-border relevance, mutual assistance and joint operations might be carried out between the supervisory authorities *concerned* on a bilateral or multilateral basis without triggering the consistency mechanism.
- 110) At Union level, a European Data Protection Board should be set up. It should replace the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data established by Directive 95/46/EC. It should consist of a head of a supervisory authority of each Member State and of the European Data Protection Supervisor. The Commission should participate in its activities without voting rights. The European Data Protection Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission and promoting co-operation of the supervisory authorities throughout the Union. The European Data Protection Board should act independently when exercising its tasks.

Definition «main establishment»:

(13) ‘main establishment’ means

- as regards the controller, **the place of its central administration in the Union, unless the decisions on the** purposes (...) and means of the processing of personal data are taken **in an other establishment of the controller in the Union. In this case the latter shall be considered as the main establishment.** **If** no decisions as to the purposes (...) and means of the processing of personal data are taken in the Union, (...) the place where the main processing activities in the context of the activities of an establishment of **the** controller in the Union take place<sup>4</sup>;
- as regards the processor, **the place of its central administration in the Union and, if the processor** has no central administration in the Union, the place where the **main processing activities in the context of the activities of an establishment of the processor** take place;

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<sup>4</sup> BE, CZ DE, EE and SK scrutiny reservation: they expressed concerns about this definition, which might be difficult to apply in practice. IE remarked this place may have no link with the place where the data are processed. DE also remarked that in the latter scenario, the Commission proposal did not determine which Member States' DPA would be competent. CZ thought the definition should be deleted.

**CHAPTER VI**  
**INDEPENDENT SUPERVISORY AUTHORITIES**

**SECTION 1**  
**INDEPENDENT STATUS**

*Article 46*

***Supervisory authority***<sup>5</sup>

1. Each Member State shall provide that one or more independent public authorities are responsible for monitoring the application of this Regulation.
  
- 1a Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union (...)<sup>6</sup>. For this purpose, the supervisory authorities shall co-operate with each other and the Commission **in accordance with Chapter VII**<sup>7</sup>.
  
2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which shall represent those authorities in the European Data Protection Board and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Article 57.

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<sup>5</sup> At the request of IT, COM clarified that this DPA could be the same as the one designated/set up under the future Data Protection Directive. ES asked for clarification that a DPA may be composed of more members, but the presidency thinks this is already sufficiently clear from the current text.

<sup>6</sup> UK sought reassurance that the supervisory authority could also be given a wider remit, such as ensuring the freedom of information.

<sup>7</sup> DE, EE, HU, LU, SI and UK thought there was no reason to mention this duty of co-operation here.

- [3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to this Chapter, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them<sup>8</sup>].

*Article 47*<sup>9</sup>

***Independence***

1. Each supervisory authority shall act with complete<sup>10</sup> independence in performing the duties<sup>11</sup> and *exercising* the powers entrusted to it (...).
2. The member or members of each supervisory authority shall, in the performance of their duties and exercise of their powers, remain free from external influence, whether direct or indirect<sup>12</sup> and neither seek nor take instructions from anybody.
3. (...) <sup>13</sup>
4. (...) <sup>14</sup>
5. Each Member State shall ensure that each supervisory authority is provided with the (...) human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and exercise of its powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board<sup>15</sup>.
6. Each Member State shall ensure that each supervisory authority has its own staff which shall (...) be subject to the direction of the member or members<sup>16</sup> of the supervisory authority.

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<sup>8</sup> This paragraph could be moved to the final provisions.

<sup>9</sup> FR suggested merging articles 47 and 48.

<sup>10</sup> EE, LU, SK and SI suggested deleting the word 'completely'.

<sup>11</sup> GR scrutiny reservation.

<sup>12</sup> BE, scrutiny reservation. AT, DE, EE, PT and HU would prefer to reinstate this text.

<sup>13</sup> AT, BE, DE and HU would prefer to reinstate this text.

<sup>14</sup> COM reservation on deletion of paragraphs 3 and 4.

<sup>15</sup> This paragraph was criticised for being too prescriptive (FR, SE, SK) and too vague (LV, UK).

<sup>16</sup> DE, LV, NO, PT and UK questioned who were to be considered as members of the DPA and argued that the regulation should allow different models. IT thought EU resources could also be considered.

7. Member States shall ensure that each supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that each supervisory authority has separate annual budgets, **which may be part of the overall state or national budget.**

*Article 48*

*General conditions for the members of the supervisory authority*

1. Member States shall provide that the member or members<sup>17</sup> of each supervisory authority must be appointed (...) by the parliament **and/or** the government or the head of State of the Member State concerned **or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure**<sup>18</sup>.
2. The member or members shall have the qualifications, experience and skills required to perform their duties **and exercise their powers** (...) <sup>19</sup>.
3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement **in accordance with the law of the Member State concerned.**
4. (...).
5. (...) <sup>20</sup>.

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<sup>17</sup> DE, LV, NO, PT and UK questioned would were to be considered as members of the DPA and argued that the regulation should allow different models.

<sup>18</sup> Several delegations (FR, SE, SI and UK) thought that other modes of appointment should be allowed for. LU thought this should not be governed by the Regulation.

<sup>19</sup> As several delegations (DE, ES, SE) thought that also the appointment of persons with prior data protection experience should be allowed for, this requirement has been deleted. CZ indicated that independence should not be a requirement for appointment, but for the functioning of DPA members.

<sup>20</sup> The Presidency agrees with those delegations (BE, CZ, FR, LU, NL, NO, PT, SE, SK, UK) that are of the opinion that paragraphs 4 and 5 interfere too much with national law. CZ, NO, SE also see no need for paragraph 3. COM, DE and AT scrutiny reservation on deletion of paragraphs 4 and 5.

Article 49

**Rules on the establishment of the supervisory authority**<sup>21</sup>

1. Each Member State shall provide by law for:
  - (a) the establishment (...) of each supervisory authority;
  - (b) the qualifications (...) required to perform the duties of the members of the supervisory authority;
  - (c) the rules and procedures for the appointment of the member or members of each supervisory authority (...);
  - (d) the duration of the term of the member or members of each supervisory authority which shall not be<sup>22</sup> (...) less than four years, except for the first appointment after entry into force of this Regulation, part of which may take place for a shorter period where this is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure<sup>23</sup>;
  - (e) whether and, if so, for how many terms<sup>24</sup> the member or members of each supervisory authority shall be eligible for reappointment;

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<sup>21</sup> AT scrutiny reservation. DE and FR queried which was the leeway given to Member States by this article as compared to the rules flowing from the previous Articles from the Regulation. Several delegations (FR, GR, SE, SI UK) thought that some of these rules, in particular those spelled out in subparagraphs (c) and (d) were too detailed.

<sup>22</sup> DE proposed adding a maximum term of eight years.

<sup>23</sup> The last part of this point might need to be moved to the final provisions.

<sup>24</sup> DE proposal. IT likewise thought a maximum term should be set.

- (f) the (...) conditions governing the **duties** of the member or members and staff of each supervisory authority, **including prohibitions on actions and occupations incompatible therewith during and after the term of office**<sup>25</sup> and rules governing the cessation of employment<sup>26</sup>;
- (g) (...)<sup>27</sup>.

2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their (...) duties or exercise of their powers, *both during and after their term of office.*<sup>28, 29</sup>

*Article 50*

***Professional secrecy***<sup>30</sup>

(...)

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<sup>25</sup> The Presidency thinks this addition should cover what was previously stated in Article 48, (3) and (4).

<sup>26</sup> SE thought that subparagraphs (b), (c) and (f) should be deleted or substantially redrafted as they were too detailed.

<sup>27</sup> NL, DE scrutiny reservation on deletion of this point.

<sup>28</sup> BE proposed adding an additional paragraph on the need to distinguish investigating and sanctioning powers, but the presidency deem that this is dealt with by the general safeguard clause in Article 53.5. The same goes for the DE proposal for adding language concerning the duty to report an offence under national law and the privilege against self-incrimination.

<sup>29</sup> COM scrutiny reservation on adding the provision on professional secrecy to Article 49, which concerns rules on the establishment of supervisory authorities.

<sup>30</sup> UK pointed out that also transparency concerns should be taken into account. Many delegations (CZ, DE, FR, FI; GR, IT, SE, SI, UK) raised practical questions as to the scope and the exact implications of this article. All thought that the rules on professional secrecy should be left to national law and hence the Presidency has followed the suggestion by CZ and SI and moved this to Article 49. COM and DE scrutiny reservation on moving this provision to Article 49; should remain a separate provision.

## SECTION 2

### COMPETENCE<sup>31</sup>, DUTIES AND POWERS

#### *Article 51*

#### *Competence<sup>32</sup>*

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<sup>33 34</sup>.

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<sup>31</sup> GR thought it would be better to refer to jurisdiction rather than competence.

<sup>32</sup> Scrutiny reservation by DE, DK, ES, HU, NL and UK. Some delegations (BG, CY, DE, GR, NL and LU) supported the principle of the main-establishment rule (aka as the one-stop-shop principle), but had many questions of understanding as to its practical implementation. Other delegations (BE, CZ, ES, FR, IT, AT, PT, RO and SI) had a more critical attitude and entered a reservation. One of the main questions was whether the allocation of competence to the DPA of the main establishment was exclusive and whether it also implied a rule of applicable law (DE, ES). A practical question was that of the language regime which would govern the co-operation between the DPAs and the communication with the controllers and the data protection. All delegations seemed to agree that at any rate the establishment of such a rule could not lead to the exercise of investigative powers by the DPA of one authority in the territory of another Member State.

<sup>33</sup> At the request of several delegations, COM indicated that the main-establishment rule under this paragraph would not apply to controllers established outside the EU. In the view of the Commission, this constituted an incentive for non-EU controllers to establish themselves in the EU in order to avail themselves of the benefit of the main establishment rule. PL and HU pointed out that there was a need to specify the criterion on the basis of which the competent DPA would be established in such cases and the Presidency has endeavoured to do so by adding a sentence.

<sup>34</sup> Some Member States questioned the interaction between paragraphs 1 and 2 and requested more clarity on which was to be the competent Member State: DE, SE. The Presidency has endeavoured to redraft paragraph 1 so as to clarify that this paragraph sets out the principle of the territoriality of supervision, from which the main-establishment rule in paragraph 2 derogates. The new drafting of § 1 also implies that for controllers established outside the EU, the competent DPA will be that of the Member State where the data subjects resides. IT thought the latter rule should also be applied regarding processing of personal data by controllers/processors established within the EU.

- 1a. **Where pursuant to Article 54A a supervisory authority is competent to act as lead authority, it shall cooperate with other competent authorities in accordance with Chapter VII.**
2. (...)<sup>35</sup>.
- 2a. (...)<sup>36</sup>.
- 2b. (...)<sup>37</sup>.
3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity<sup>38</sup>.

*Article 52*

***Duties***<sup>39</sup>

1. Each supervisory authority shall<sup>40</sup>:
  - (a) monitor and enforce the application of this Regulation;
  - (aa) *promote (...) public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data. Activities addressed specifically to children shall receive specific attention;*
  - (ab) *inform the national parliament, the government or other political institution as well as the public on any issue related to the protection of personal data*<sup>41</sup>
  - (ac) promote the awareness of controllers, their representatives and processors of their obligations under this Regulation;
  - (ad) *upon request, provide information to any data subject concerning the exercise of their rights under this Regulation and, if appropriate, co-operate with the supervisory authorities in other Member States to this end;*

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<sup>35</sup> Moved to Article 54a (5).

<sup>36</sup> Moved to Article 54b (2).

<sup>37</sup> Moved to Article 54a (7).

<sup>38</sup> FR, HU, UK scrutiny reservation.

<sup>39</sup> DE, IT, AT and SE scrutiny reservation.

<sup>40</sup> The Presidency shall seek to draft a recital in order to clarify that Member States may allocate other tasks to DPAs. See also new point (g) in paragraph 1.

<sup>41</sup> Moved from Article 52(1)(j) as this a duty rather than a power from the DPA.

- (b) deal with complaints<sup>42</sup> lodged by a data subject, or body, organisation or<sup>43</sup> association representing a data subject in accordance with Article 73<sup>44</sup>, and investigate, to the extent appropriate, the subject matter of the complaint and inform the data subject or the body, organisation or association of the progress and the outcome of the investigation within a reasonable period<sup>45</sup>, in particular if further investigation or coordination with another supervisory authority is necessary;
- (c) share information with and provide mutual assistance to other supervisory authorities with a view to ensuring the consistency of application and enforcement of this Regulation;
- (d) conduct investigations on the application of this Regulation either on its own initiative or on the basis of a **information received from another** supervisory or other public authority (...);
- (e) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices;
- (f) respond to consultation requests by Member State institutions and bodies, including those pursuant to paragraph 7 of Article 34, on legislative and administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data<sup>46</sup>;
- (fa) establish and make public a list in relation to the requirement for a data protection impact assessment pursuant to Article 33(2a)<sup>47</sup>;
- (g) give advice on the processing operations referred to in Article 34(3) and authorise processing referred to in Article 34(7a);

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<sup>42</sup> IT scrutiny reservation on the term complaint; UK thought the emphasis should be on complaint-resolution.

<sup>43</sup> Alignment with the text of Article 73.

<sup>44</sup> BE suggested limiting this to the data subject itself.

<sup>45</sup> IT suggested fixing a 10-weeks period for dealing with the complaint.

<sup>46</sup> CZ, MT reservation on this measure, which they considered as an interference with the legislative process. Other delegations (CH, DE, FI, LU, SI) did not have problems with this obligation, which already existed under the data protection Directive 46/95

<sup>47</sup> Further to BE proposal. DE scrutiny reservation.

- (ga) to ensure (...) compliance with the requirement for prior consultations referred to in Article 34(2) and prior authorisations referred to in Article 34(7a) and Article 42(2)(d) and (5)<sup>48</sup>;
  - (gb) encourage the drawing up of codes of conduct pursuant to Article 38;
  - (gc) promote the establishment of data protection certification mechanisms and of data protection seals and marks<sup>49</sup>;
  - (gd) carry out a periodic review of certifications issued in accordance with Article 39(4);
  - (h) give an opinion on the draft codes of conduct pursuant to Article 38(2);
  - (ha) conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 38a and of a certification body pursuant to Article 39a<sup>50</sup>;
  - (hb) authorise contractual clauses referred to in Article 42(2)(d);
  - (i) approve binding corporate rules pursuant to Article 43;
  - (j) contribute to the activities of the European Data Protection Board;
  - (k)** issue opinions **as well as fulfill any other duties** related to the protection of personal data.
2. (...) <sup>51</sup>
3. (...) <sup>52</sup>
4. **Each supervisory authority shall facilitate the submission of** complaints referred to in point (b) of paragraph 1, **by measures such as providing** a complaint submission form, which can be completed electronically, without excluding other means of communication.

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<sup>48</sup> Moved from Article 53(1)(d), as this is a duty of the DPA and not a power conferred on the DPA.

<sup>49</sup> IT scrutiny reservation on points (gb) and (gc).

<sup>50</sup> Further to DE proposal.

<sup>51</sup> Moved to paragraph 1.

<sup>52</sup> Moved to paragraph 1.

5. The performance of the duties of each supervisory authority shall be free of charge for the data subject and for the data protection officer<sup>53</sup>.
6. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may refuse to act on<sup>54</sup> the request (...) <sup>55</sup>. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request<sup>56</sup>.

*Article 53*

***Powers***<sup>57 58</sup>

1. Each Member State shall provide by law that<sup>59</sup> its supervisory authority shall have at least<sup>60</sup> the following monitoring powers:
- (a) *to order the controller and the processor, and, where applicable, the representative to provide any information it requires for the performance of its duties;*
- (b) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights provided by this Regulation;

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<sup>53</sup> DE proposal.

<sup>54</sup> DE proposal.

<sup>55</sup> EE pointed out that under its constitution this required an act of parliament. NL also thought this should be left to Member States.

<sup>56</sup> NL and SE thought this could be left to general rules.

<sup>57</sup> NL, RO and SE scrutiny reservation; SE thought this list was too broad.

<sup>58</sup> Several Member States (DE, FR) stated that it was unacceptable that the supervisory authority would be able to exercise these powers vis-à-vis public authorities. DE thought a distinction should be drawn between powers with regard to public and non-public bodies. Direct powers of instruction in respect of public bodies subject to supervisory and judicial control, which might therefore lead to conflicts, would be problematic for Germany. Moreover, consideration also needs to be given to the delimitation between this proposal and the proposal for a Directive on police and judicial affairs, which accords fewer powers to the supervisory authorities in some respects.

<sup>59</sup> Suggested amendment in order to allay the concern from Member States (FR, NL) that they should be able to specify in their national law, as has been the case under the 1995 Data Protection Directive, the exact scope of, conditions and guarantees for the exercise of these powers.

<sup>60</sup> Further to BG suggestion, supported by EE, IT, NL, to make this an indicative list. RO argued in favour of the inclusion of an explicit reference to the power of DPAs to issue administrative orders regarding the uniform application of certain data protection rules. COM scrutiny reservation.

- (c) to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;
- (d) to notify the controller or the processor of an alleged infringement of this Regulation, and where appropriate, order the controller or the processor to remedy that infringement<sup>61</sup>;

**1a. Each Member State shall provide by law that its supervisory authority shall have at least the following investigatory powers:**

- (a) to carry out data protection audits<sup>62</sup>;
- (b) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its duties;
- (c) to obtain access to any premises of the controller and the processor , including to any data processing equipment and means (...)<sup>63</sup>.

**1b. Each Member State shall provide by law that its supervisory authority shall have the following corrective powers:**

- (a) to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;
- (b) to issue reprimands<sup>64</sup> to a controller or processor where processing operations have infringed provisions of this Regulation;
- (c) (...)<sup>65</sup>;

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<sup>61</sup> BE suggested adding the power to oblige the controller to communicate the personal data breach to the data subject.

<sup>62</sup> IT, PL and SK scrutiny reservation.

<sup>63</sup> The requirement of reasonable grounds has been deleted here as the procedural requirements will be set out under national law to which the new paragraph 5 refers.

<sup>64</sup> IT, PL and SK scrutiny reservation.

<sup>65</sup> Moved to para. 1.

- (d) to order the rectification, restriction or erasure (...) of (...) data **pursuant to Articles 16, 17a and 17** (...) <sup>66</sup> and the notification of such actions to recipients to whom the data have been disclosed pursuant to Articles 17(2a) and 17b;
- (e) to impose a temporary or definitive prohibition on processing;
- (f) to order the suspension of data flows to a recipient in a third country or to an international organisation <sup>67</sup>;
- (i) (...) <sup>68</sup>.
- (j) (...) <sup>69</sup>.

**1c. Each Member State shall provide by law that its supervisory authority shall have the following authorisation powers:**

- (a) authorise contractual clauses referred to in Article 42(2)(d);*
- (b) approve binding corporate rules pursuant to Article 43* <sup>70</sup>.

2. (...)

The powers referred to in **paragraphs 1, 1a, 1b and 1c** shall be exercised in conformity with Union law or Member State law.

3. Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and to commence or engage **otherwise** in legal proceedings <sup>71</sup>, in order to enforce the provisions of this Regulation.

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<sup>66</sup> Deleted further to DE suggestion as the breach of the Regulation is obvious here.

<sup>67</sup> SK reservation.

<sup>68</sup> Moved to Article 52(1)(k).

<sup>69</sup> Moved to Article 52(1)(ab).

<sup>70</sup> Moved from Article 52(1).

<sup>71</sup> CZ, DE, FR and RO reservation on proposed DPA power to engage in legal proceedings.

4. Each supervisory authority shall have the power to impose an administrative fine pursuant to Articles 79 and 79a in addition to, or instead of, measures referred to in points (e) to (h) of paragraph 1, depending on the circumstances of each individual case,<sup>72</sup>.

**4a. Member State law may empower the supervisory authority or another authority to impose penalties referred to in Article 79b.**

5. The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process<sup>73</sup>.

#### *Article 54*

#### *Activity report*

Each supervisory authority shall draw up an annual report<sup>74</sup> on its activities. The report shall be presented to the national parliament or the government<sup>75</sup> and shall be made available to the public, the Commission and the European Data Protection Board.

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<sup>72</sup> BE scrutiny reservation. PT thought this should be included in para 1. DE thought paras 3 and 4 should be deleted.

<sup>73</sup> New paragraph, partially inspired by the last sentence of paragraph 2. The additional language is proposed by the Presidency in order to clarify that these powers will be exercised under the national law of the Member States, which needs to provide for the necessary guarantees for the rights of the defence. The reference to national law will allow Member States to apply their procedural rules (cf. remarks by BE, DE, ES). This should also allow to take into account any concerns regarding self-incrimination.

<sup>74</sup> This article does not detract from the possibility for Member States to provide under national law that other, extraordinary reports may also be conveyed to the parliament and the government. However, the Presidency agrees with SI that there no need to oblige Member States to do so, certainly as there is a risk of an 'overkill' of reports.

<sup>75</sup> SE proposal; ES suggested adding 'other authorities designated under national law'.

CHAPTER VII<sup>76</sup>  
CO-OPERATION AND CONSISTENCY  
SECTION 1  
LEAD AUTHORITY AND CO-OPERATION

*Article 54a*

Competence of the lead authority

1. Where the processing of personal data takes place in the context of the activities of establishments of a controller or processor in several Member States, the supervisory authority of the main establishment of the controller or processor shall act as lead authority for the supervision of the processing activities of the controller or the processor in all Member States.
2. Where the processing takes place in the context of the activities of establishments of a group of undertakings in several Member States, the supervisory authority of main establishment of the controlling undertaking shall act as lead authority for the supervision of the processing activities of the group of undertakings, unless the purposes and means of processing are determined by another undertaking; in this case the authority which is competent for the main establishment of that undertaking shall act as lead authority for the supervision of its processing activities.
3. Where the controller exercises also activities as a processor, the supervisory authority of the main establishment of the controller shall act as lead authority for the supervision of processing activities.
4. Where a complaint has been lodged with a supervisory authority other than to the authority which is competent for supervision of processing activities of the controller or processor, the authority of the Member State which is competent for the supervision of those processing activities shall act as the lead authority.

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<sup>76</sup> AT a scrutiny reservation on the whole of chapter VII.

5. **In the situations referred to in paragraphs 1 to 4 the lead authority shall be the sole supervisory authority competent for deciding on measures intended to produce legal effects by (...) exercising the powers pursuant to paragraphs 1b and 1c of Article 53 and Articles 79 and 79a as regards the processing activities of the controller or the processor in all Member States concerned.**
6. **Where there are conflicting views between the supervisory authorities involved on which supervisory authority shall be competent to act as lead authority, the European Data Protection Board shall issue an opinion on the identification of the lead authority.**
7. **This Article shall not apply to public authorities and bodies<sup>77</sup>**

#### Article 54b

#### Cooperation obligations of the lead authority

1. **The lead authority referred to in Article 54a shall cooperate with the supervisory authorities of the Member States concerned, and consult them in an endeavour to reach consensus.**
2. **Where a complaint has been lodged with a supervisory authority other than the lead authority referred to in paragraph 4 of Article 54a, the lead authority shall, on receiving the complaint, take appropriate measures in consultation with the supervisory authority to which the complaint has been lodged.**
3. **When preparing and deciding on a measure intended to produce legal effects pursuant to paragraph 5 of Article 54a, the lead authority shall:**
  - a) **share all relevant information and consult the supervisory authorities of the Member States concerned;**
  - b) **submit the draft measure to all authorities which are competent pursuant to paragraph 1 of Article 51;**

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<sup>77</sup> Further to LU proposal.

- c) **take utmost account of the views of the supervisory authorities involved.**
4. **Where a supervisory authority has indicated, within a period of two weeks after having been consulted by the lead authority, objections to the draft measure, the lead authority or any other supervisory authority involved shall submit the matter to the consistency mechanism referred to in Article 57.**
5. **The lead authority shall submit the measures referred to in Article 54a(5) to the a supervisory authority of the Member State concerned. These measures shall be enforceable in the Member States concerned in accordance with Article 63.**

*Article 55*

***Mutual assistance***<sup>78</sup>

1. Supervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective co-operation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations. This shall apply in particular where the supervisory authority to which the complaint has been lodged is not the authority of the main establishment of the controller or processor. Mutual assistance shall also cover the provision of information on the conduct of investigations **where the controller or processor has establishments in several Member States or** where data subjects in several Member States are likely to be affected by processing operations by the controller or processor.<sup>79</sup>

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<sup>78</sup> SE and UK scrutiny reservation. Several other delegations indicated that further clarity was required on this fundamental Article and the concept of mutual assistance, and announced text proposals: EE pleaded for much more detailed rules on mutual assistance, as is already the case in civil and criminal law. AT, supported by DE, declared that it had no specific problem with this Article, but that, in general, there was a need to follow developments in relation to CoE Convention No. 108.

<sup>79</sup> ES requested that the added text be taken out.

2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without undue delay and no later than one month<sup>80</sup> after having received the request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation or enforcement measures to bring about the suspension or prohibition of processing operations which infringe this Regulation.
3. The request for assistance shall contain all the necessary information<sup>81</sup>, including the purpose of the request and reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.
4. <sup>82</sup>A supervisory authority to which a request for assistance is addressed may not refuse to comply with it unless:
  - (a) it is not competent for the subject-matter of the request **or for the measures it is requested to execute**<sup>83</sup>; or
  - (b) compliance with the request would be incompatible with the provisions of this Regulation or with Union or Member State law to which the supervisory authority receiving the request is subject.

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<sup>80</sup> ES reiterated its suggestion to reduce it to 15 days. PT supported the suggestion of two weeks, with a possibility of adding more time, if needed. RO, on the other hand, found one month too short, and requested SE remarked that this timeline might be unrealistic in some cases. COM indicated that it was only a deadline for replying, but that paragraph 5 allowed longer periods for executing the assistance requested. UK requested a timetable, indicating deadlines.

<sup>81</sup> EE and SE scrutiny reservation.

<sup>82</sup> SE indicated further scrutiny was required as to whether other grounds of refusal were required. UK thought that this paragraph was drafted in much too absolute a fashion.

<sup>83</sup> Several delegations stressed the importance of establishing which is the competent DPA: DE, EE, SE, SI. NL and IT asked for further clarification.

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress or the measures taken in order to respond to the request. In cases of a refusal under paragraph 4, it shall explain its reasons for refusing the request<sup>84</sup>.
6. Supervisory authorities shall, **as a rule**, supply the information requested by other supervisory authorities by electronic means (...) <sup>85</sup>, using a standardised format.
7. No fee shall be charged for any action taken following a request for mutual assistance. Supervisory authorities may agree with other supervisory authorities rules for indemnification by other supervisory authorities for specific expenditure arising from the provision of mutual assistance in exceptional circumstances.<sup>86</sup>
8. Where a supervisory authority does not provide the information referred to in paragraph 5<sup>87</sup> within one month of receiving the request<sup>88</sup> of another supervisory authority, the requesting supervisory authority may adopt a provisional measure<sup>89</sup> on the territory of its Member State in accordance with Article 51(1) and shall submit the matter to the European Data Protection Board and the Commission in accordance with the consistency mechanism referred to in Article 57<sup>90</sup>.

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<sup>84</sup> Further to IT remark

<sup>85</sup> PT suggested adding "*or other means if for some reason, electronic means are not available, and the communication is urgent*"

<sup>86</sup> PT, UK and DE asked for clarification in relation to the resources needed / and estimate of costs.

<sup>87</sup> SE suggestion.

<sup>88</sup> Further to DE and GR suggestion. RO found this deadline too short.

<sup>89</sup> LU requested more clarification with regard to what would happen if this provisional measure were not confirmed.

<sup>90</sup> EE, FR, RO, and UK reservation. DE scrutiny. UK did not find the drafting sufficiently clear, for instance regarding which authority would be competent and action on other Member States territory. COM specified that this Article would apply specifically in bilateral relations (whereas Article 56 would cover joint operations), the underlying philosophy being to avoid extraterritorial activity.

9. The supervisory authority shall specify the period of validity of such a provisional measure which shall not exceed three months<sup>91</sup>. The supervisory authority shall, without delay, communicate such a measure, together with its reasons for adopting it, to the European Data Protection Board and to the Commission in accordance with the consistency mechanism referred to in Article 57.
10. The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)<sup>92</sup>.

#### *Article 56*

##### *Joint operations of supervisory authorities*<sup>93</sup>

1. (...) The supervisory authorities may<sup>94</sup>, where appropriate, conduct joint operations, including joint investigations and joint enforcement measures (...) in which (...) members or staff from other Member States' supervisory authorities are involved.

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<sup>91</sup> DE asked for deletion of this deadline; the measure should be withdrawn if the conditions for imposing it were no longer fulfilled.

<sup>92</sup> DE, IT, EE, CZ and NL reservation. EE questioned whether implementing acts were necessary for this purpose. ES reminded about its proposal for an Article 55a.

<sup>93</sup> IT requested a specification in this Article that this was also about multilateral cooperation. FR asked for a clearer distinction between Articles 55 and 56. EE and PT scrutiny reservation. Several delegations (DE, LV, NL, SE, IT, UK) supported the idea of joint operations, but thought more details needed to be clarified. DE and EE referred to a criminal law model of a joint investigation team. Other Member States (LU, PL) indicated they were not convinced of the added value of joint investigations. UK requested to make sure that these mechanisms would work in practice and drew the attention to the fact that paragraphs 1 and 3 were discretionary, whereas paragraph 2 was binding, and that this was confusing and potentially contradictory.

<sup>94</sup> LU proposal, supported by many.

2. In cases where **the controller or processor has establishments in several Member States or where [a significant number of<sup>95</sup>]** data subjects in several Member States are likely to be adversely<sup>96</sup> affected by processing operations<sup>97</sup>, a supervisory authority of each of those Member States shall have the right to participate in the (...) joint operations, as appropriate. The competent supervisory<sup>98</sup> authority shall invite the supervisory authority of each of those Member States to take part in the (...) joint operations concerned and respond to the request of a supervisory authority to participate (...) without delay.<sup>99</sup>
3. A supervisory authority may, (...) in compliance with its own Member State law, and with the seconding supervisory authority's authorisation, confer (...) powers, including investigative powers on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the host supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their investigative powers in accordance with the seconding supervisory authority's law. Such investigative powers may be exercised only under the guidance and (...) in the presence of members or staff from the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. (...) <sup>100</sup> <sup>101</sup>
- 3a. **Where, in accordance with paragraph 1, officials of a Member State are operating in another Member State, the first Member State shall be liable for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.**

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<sup>95</sup> LU proposal. COM reservation; more criteria should be added IT, supported by PL, FR, BE and CZ suggested stressing the multilateral aspect by adding text.

<sup>96</sup> LU and SI suggestion.

<sup>97</sup> At the request of several delegations, COM indicated that this phrase was the criterion which could trigger the establishment of a joint operation.

<sup>98</sup> LU asked for a clarification of who would be the lead authority. UK stated that it seemed like a mix of Art. 51(1) and 51(2) competences.

<sup>99</sup> SE entered a favourable scrutiny reservation on this paragraph.

<sup>100</sup> SI and GR suggestion.

<sup>101</sup> DE, LU, PT and COM scrutiny reservation on the deletion of this last phrase.

3b. **The Member State in whose territory the damage was caused shall make good such damage under the conditions applicable to damage caused by its own officials. The Member State whose officials have caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.**

3c. **Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3b, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement of damages it has sustained from another Member State<sup>102</sup>.**

4. (...)

5.<sup>103</sup> Where a joint operation is intended and a supervisory authority does not comply within one month with the obligation laid down in the second sentence of paragraph 2, the other supervisory authorities may adopt a provisional measure on the territory of its Member State in accordance with Article 51(1).

6. The supervisory authority shall specify the period of validity of a provisional measure referred to in paragraph 5, which shall not exceed three months. The supervisory authority shall, without delay, communicate such a measure, together with its reasons for adopting it, to the European Data Protection Board and to the Commission (...) in accordance with the consistency mechanism referred to in Article 57.

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<sup>102</sup> Inspired by Article 3 of the Council Framework Decision of 13 June 2002 on joint investigation teams.

<sup>103</sup> NL asked whether the measures of paragraphs 5 and 6 were really necessary. DE reminded that it had already provided written comments. EE suggested a merger of the two paragraphs.

## SECTION 2

### CONSISTENCY<sup>104</sup>

#### *Article 57*

#### ***Consistency mechanism***<sup>105</sup>

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<sup>106</sup>.
2. *Before the competent supervisory authority adopts a measure **intended to produce legal effects**, it shall communicate the draft measure to the European Data Protection Board and the Commission*<sup>107</sup>, **when the measure:**
  - (a) is intended to exercise the powers of the supervisory authority referred to in points (a), (b) and (c) of paragraph 1 of Article 53 , and points (d), (e) and (f) of paragraph 1b of Article 53, or to impose an administrative fine pursuant to Articles 79 and 79a<sup>108</sup> and relates to processing activities which substantially affect a significant number of<sup>109</sup> data subjects in several Member States; or
  - (b) *may substantially affect the free movement of personal data within the Union*<sup>110 111</sup>;

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<sup>104</sup> BE, SK and SI scrutiny reservation. BE reservation on the time required for a consistency mechanism procedure. DE parliamentary reservation reservation on the role of COM in the consistency mechanism.

<sup>105</sup> EE, FI, LU and NL scrutiny reservation.

<sup>106</sup> DE, ES thought that supervisory authorities of third countries for which there is an adequacy decision should be involved in the consistency mechanism; if third countries participated in the consistency mechanism, they would be bound by uniform implementation and interpretation.

<sup>107</sup> IT proposed limiting this to cases where a coordination mechanism implemented by the lead authority does not result a solution acceptable to all supervisory authorities concerned.

<sup>108</sup> IT suggested adding the sanctioning power under Article 79.

<sup>109</sup> LU proposed adding ‘a significant number’. HU, PL and SE also thought the involvement of the EDPB should be confined to cases where the DPAs cannot agree among each others and referred in particular to paragraph 2(a). COM scrutiny reservation.

<sup>110</sup> IT scrutiny reservation.

<sup>111</sup> DE proposed combining (a) and (b) and thereby reducing the cases in which the consistency mechanism would need to be applied.

- (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 accereditation 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. **Where the competent supervisory authority does not submit a draft measure referred to in paragraph 2 to the Board or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56, any supervisory authority concerned<sup>112</sup>, the European Data Protection Board or the Commission may request that such matter shall be communicated to the European Data Protection Board<sup>113</sup>.**

5. (...) <sup>114</sup>.

<sup>112</sup> BE, IT, SE, SI, SK and PL thought the scope of this paragraph should be limited so as to limit the number of cases. BE suggested deleting this paragraph.

<sup>113</sup> LU proposed restricting this to cases where the coordination mechanism implemented by the competent authority did not allow for a solution to be reached; ES referred to cases where the other authorities did not agree with the proposal of the competent(/lead) authority.

<sup>114</sup> BE, DE, LU, RO, SI, SK and UK had asked for the deletion of this paragraph. In paragraph 4, it is proposed that the Commission has the power to *communicate* a measure to the EDPB.

6. *Supervisory authorities and the Commission shall electronically communicate to the European Data Protection Board<sup>115</sup>, 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<sup>116</sup> 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 **secretariat** of the European Data Protection Board shall, where necessary, provide translations of relevant information.*

*Article 58*

***Opinion by the European Data Protection Board***<sup>117</sup>

1. (...)
2. (...)
3. (...)
4. (...)
5. (...)
6. (...)<sup>118</sup>

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<sup>115</sup> DE proposal.

<sup>116</sup> GR and IT suggestion.

<sup>117</sup> NL scrutiny reservation.

<sup>118</sup> Paragraphs 1 to 6 have been moved to Article 57.

- 6a. **In the cases referred to in point (a) of Article 57(2), the European Data Protection Board shall issue an opinion on the subject matter where a supervisory authority concerned has indicated reasoned objections to the draft measure in accordance with paragraph 4 of Article 54b.**
7. **In the cases referred to in points (b) to (f) of Article 57(2), the** European Data Protection Board shall issue an opinion on **the subject-** matter submitted to it in the **consistency mechanism provided it has not already issued an opinion on the same matter**<sup>119</sup>.
- 7a. The opinion **referred to in paragraphs 6a and 7** shall be adopted within one month<sup>120</sup> by simple 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**<sup>121</sup>.
- 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**<sup>122</sup> 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.

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<sup>119</sup> ES suggested deleting the possibility for one DPA requesting an opinion from the EDPB, but keeping this possibility for the Commission.

<sup>120</sup> BE and GR proposed two months.

<sup>121</sup> Further to LU proposal.

<sup>122</sup> Further to IT suggestion.

9. Where the supervisory authority concerned does not intend to follow the opinion, it shall inform the chair of the European Data Protection Board and the Commission within the period referred to in paragraph 8 and shall explain its refusal to follow the opinion<sup>123</sup>.
10. **Within one month after receiving the information referred to in paragraph 9, the European Data Protection Board may by a two-third majority of its members, adopt a further opinion on the subject-matter<sup>124</sup>.**
11. **Where the supervisory authority concerned does not intend to follow such opinion, it shall inform the chair of the European Data Protection Board and the Commission within 10 working days of the receipt of that opinion and shall explain its refusal to follow the opinion.**

*Article 59*

*Opinion by the Commission<sup>125</sup>*

(...)

*Article 60*

*Suspension of a draft measure<sup>126</sup>*

(...)

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<sup>123</sup> Further to DE proposal.

<sup>124</sup> DE proposed providing a mechanism for consultation of stakeholders.

<sup>125</sup> Deleted in accordance with the request from BE, CZ, DE, ES, SE and UK. COM and FR reservation on deletion.

<sup>126</sup> Deleted at the suggestion of BE, CZ, DE, ES, IT, SE and UK. PT scrutiny reservation. COM and FR reservation on deletion.

*Article 61*  
***Urgency procedure***<sup>127</sup>

1. In exceptional circumstances, where the competent supervisory authority considers that there is an urgent need to act in order to protect rights and freedoms of data subjects, (...) *it may*, by way of derogation from the consistency mechanism referred to in Article 57, immediately adopt provisional measures pursuant to points (a), (b) and (c) of paragraph 1 of Article 53 and points (d), (e) and (f) of paragraph 1b of Article 53<sup>128</sup>, with a specified period of validity. The supervisory authority shall, without delay, communicate those measures and the reasons for adopting them, to the European Data Protection Board and to the Commission<sup>129</sup>.
  
2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion of the European Data Protection Board, giving reasons for requesting such opinion (...).
  
3. Any supervisory authority may request an urgent opinion where the competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the rights and freedoms of data subjects, giving reasons for requesting such opinion, including for the urgent need to act.

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<sup>127</sup> DE scrutiny reservation. COM explained that the urgency procedure was an essential part of the consistency mechanism. The existence of an urgency procedure was welcomed by several delegations (DE, ES, IT, NL), but also gave rise to many questions. There was lack of clarity surrounding the criteria which could warrant the taking of provisional measures (DE, FR, PT), in particular by another DPA. The need to respect certain procedural guarantees (e.g. giving notice to the data controller) prior to the taking of provisional measures was emphasised by FR.

<sup>128</sup> COM scrutiny reservation.

<sup>129</sup> The conditions under which the EDPB needed to be informed also gave rise to questions (GR, ES). Com stated the obligation only existed in cross-border cases

4. By derogation from paragraph 7a of Article 58, an urgent opinion referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the European Data Protection Board.

*Article 62<sup>130</sup>*

***Implementing acts***

1. The Commission may adopt implementing acts of general scope for:
- (a) ensuring the correct and uniform application of this Regulation (...) in relation to matters communicated by supervisory authorities pursuant to Article 57(2)(b)(...)<sup>131</sup>.
  - (b) (...);
  - (c) (...)
  - (d) specifying the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in Article 57(6) and (7) and in Article 58(5).

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

2. On duly justified imperative grounds of urgency relating to the interests of data subjects in the cases referred to in point (a) of paragraph 1, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 87(3). Those acts shall remain in force for a period not exceeding 12 months.
3. The absence or adoption of a measure under this Section does not prejudice any other measure by the Commission under the Treaties.

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<sup>130</sup> COM reservation.

<sup>131</sup> ES scrutiny reservation. DE and SE reservation: they asked for the deletion.

*Article 63*  
***Enforcement***<sup>132</sup>

1. For the purposes of this Regulation, a (...) **legally binding** measure of a supervisory authority of one Member State which is compliant with the requirements of this **Chapter** shall be enforceable in all Member States concerned.
2. (...) <sup>133</sup>

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<sup>132</sup> DE, DK, EE, FR, NL, AT, PL, SE, SI and UK scrutiny reservation.

<sup>133</sup> COM scrutiny reservation on deletion.

## SECTION 3

# EUROPEAN DATA PROTECTION BOARD<sup>134</sup>

### *Article 64*

#### ***European Data Protection Board***<sup>135</sup>

1. A European Data Protection Board is hereby set up.
2. The European Data Protection Board shall be composed of the head<sup>136</sup> of one supervisory authority of each Member State and of the European Data Protection Supervisor<sup>137</sup>.
3. Where in a Member State more than one supervisory authority is responsible for monitoring the application of the provisions pursuant to this Regulation, they shall nominate the head of one of those supervisory authorities as joint representative.
4. The Commission<sup>138</sup> shall have the right to participate in the activities and meetings of the European Data Protection Board and shall designate a representative without voting rights<sup>139</sup>. The chair of the European Data Protection Board shall, **communicate** the Commission **the** activities of the European Data Protection Board.

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<sup>134</sup> Several Member States (BE, DE, IT, PT) pleaded in favour of granting the EDPB the power to take legally binding decisions in the context of the consistency mechanism and do away with the proposed Commission power to intervene. It was reiterated that the DPAs should have the same independence vis-à-vis the Commission, as vis-à-vis the Member States' authorities. COM argued that it was legally impossible under the T(F)EU to confer such powers on the EDPB. ES was also opposed to granting the EDPB the power to take legally binding decisions.

<sup>135</sup> The term 'Board' seems inappropriate and could be replaced by Committee.

<sup>136</sup> BE, supported by CZ, SE and SI, suggested adding "*or his/her representative*". IT suggested referring to Art. 68(2).

<sup>137</sup> NO pleaded in favour of the participation of the associated States. COM replied that the modalities for such participation were provided for in the association agreement.

<sup>138</sup> It pleaded in favour of also including the Council and the Parliament.

<sup>139</sup> IT, CY, NL, BE, FR supported this addition.

*Article 65*

***Independence***

1. The European Data Protection Board shall act independently when performing its tasks pursuant to Articles 66 and 67.<sup>140</sup>
2. Without prejudice to requests by the Commission referred to in point (b) of paragraph 1 and in paragraph 2 of Article 66, the European Data Protection Board shall, in the performance of its tasks, neither seek nor take instructions from anybody.

*Article 66*

***Tasks of the European Data Protection Board***

1. The European Data Protection Board shall promote the consistent application of this Regulation. To this effect, the European Data Protection Board shall, on its own initiative or at the request of the Commission, in particular<sup>141</sup>:
  - (a) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;
  - (b) examine, on its own initiative or on request of one of its members<sup>142</sup> or on request of the Commission<sup>143</sup>, any question covering the application of this Regulation and issue guidelines, recommendations and best practices<sup>144</sup> (...) in order to encourage consistent application of this Regulation;

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<sup>140</sup> UK and SI scrutiny reservation.

<sup>141</sup> DE suggested adding the provision of an opinion on the level of data protection in third countries or international organisations. UK expressed concerns about the extensive list of tasks in a period of scarce resources. IT wanted it to figure that the list was not exhaustive.

<sup>142</sup> FR suggested that controllers be added here. However a controller can always ask 'its' DPA to submit a certain issue to the DPA.

<sup>143</sup> Some Member States (IT, DE) thought that, if Commission requests were included here, a similar possibility for the Council and the Parliament should be provided.

<sup>144</sup> FR expressed the opinion that it would be preferable to have a legally binding text.

- (ba) draw up guidelines for supervisory authorities concerning the application of measures referred to in point (c) of paragraph 1 of Article 53 and in paragraph 1b of Article 53 and the fixing of administrative fines pursuant to Articles 79 and 79a<sup>145</sup>;
- (c) review the practical application of the guidelines, recommendations and best practices referred to in points (b) and (ba);
- (ca) encourage<sup>146</sup> the drawing-up of codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Articles 38 and 39;<sup>147</sup>
- (cb) give the Commission an opinion on the level of protection in third countries or international organisations;<sup>148</sup>
- (d) issue opinions on draft measures of supervisory authorities pursuant to the consistency mechanism referred to in Article 57 (...);
- (e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;
- (f) promote common training programmes and facilitate personnel exchanges between the supervisory authorities, as well as, where appropriate, with the supervisory authorities of third countries or of international organisations;

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<sup>145</sup> RO, SE and UK scrutiny reservation. UK and SE inquired how this would be possible in relation to national law. CZ and SI noted that the method stated would not be appropriate in relations to individuals, and suggested adding "for undertakings".

<sup>146</sup> The term, that a couple of delegations found too weak, has been overtaken from Articles 38 and 39. IT, FR and UK entered a scrutiny reservation in view of the fact that these two Articles have not been finalised.

<sup>147</sup> RO a scrutiny reservation.

<sup>148</sup> This point was supported by a number of delegations.

- (g) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide;
2. Where the Commission requests advice from the European Data Protection Board, it may lay out a time limit within which the European Data Protection Board shall provide such advice<sup>149</sup>, taking into account the urgency of the matter.
  3. The European Data Protection Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 87 and make them public.
  4. The Commission shall inform the European Data Protection Board of the action it has taken following the opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.

#### *Article 67*

##### ***Reports***

1. The European Data Protection Board shall **communicate with** the Commission about (...) its activities<sup>150</sup>.
2. *It shall draw up an annual report (...) regarding the protection of natural persons with regard to the processing of personal data in the Union and, where relevant, in third countries and international organisations. The report shall be made public and be transmitted to the European Parliament, the Council and the Commission.*

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<sup>149</sup> Many delegations found that this provision interfered with the independence of the Board and suggested either to delete it or completely redraft it. BE suggested to delete the reference to a deadline and to clarify that the Board can refuse to issue an opinion. COM argued that opinions had to arrive on time and had to be tailored with the legislative procedure.

<sup>150</sup> Some delegations suggested merging one or more paragraphs and to specify "at regular intervals". ES found it too submissive in relation to COM, and IT mentioned that there might be overlaps with Article 64(4).

3. The annual report shall include a review of the practical application of the guidelines, recommendations and best practices referred to in point (c) of Article 66(1).

*Article 68*

***Procedure***

1. The European Data Protection Board shall take decisions<sup>151</sup> by a simple majority of its members unless a two-third majority is required pursuant to Article 58(10)<sup>152</sup>.
2. The European Data Protection Board shall adopt its own rules of procedure and organise its own operational arrangements. (...) <sup>153</sup>.

*Article 69*

***Chair***

1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members (...). <sup>154</sup>
2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable once<sup>155</sup>.

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<sup>151</sup> Some delegations suggested replacing this term that could give rise to confusion, with another, such as for instance "resolution". COM would consider an alternative.

<sup>152</sup> BE and FR suggested deleting the addition.

<sup>153</sup> DE thought that the majorities by which further decisions shall be taken should be established by the EDPB itself.

<sup>154</sup> COM found this problematic and maintained its reservation on deletion.

<sup>155</sup> Further to BE proposal. NL thought that also the case where a chair or a deputy chairperson ceases to be a member of the European Data Protection Board[/Committee], should be addressed by the Regulation. However, this may be left to national law of the Member state concerned. COM and SK scrutiny reservation.

*Article 70*

***Tasks of the chair***

1. The chair shall have the following tasks<sup>156</sup>:
  - (a) to convene the meetings of the European Data Protection Board and prepare its agenda;
  - (b) to ensure the timely performance of the tasks of the European Data Protection Board, in particular in relation to the consistency mechanism referred to in Article 57.
2. The European Data Protection Board shall lay down the attribution of tasks between the chair and the deputy chairpersons in its rules of procedure.

*Article 71*

***Secretariat***

1. The European Data Protection Board shall have a secretariat. The European Data Protection Supervisor shall provide that secretariat<sup>157</sup>.
2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board under the direction of the chair.
3. The secretariat shall be responsible in particular for:
  - (a) the day-to-day business of the European Data Protection Board;
  - (b) the communication between the members of the European Data Protection Board, its chair, and the Commission and for communication with other institutions and the public;

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<sup>156</sup> BE suggesting adding another task, namely the chair's role towards the exterior.

<sup>157</sup> DE, SK, ES, RO, SI and UK reservation on entrusting the EDPS with the EDPB secretariat. The risk of conflicts of interest of EDPS staff was also raised. FR and UK inquired about the costs.

- (c) the use of electronic means for the internal and external communication;
- (d) the translation of relevant information;
- (e) the preparation and follow-up of the meetings of the European Data Protection Board;
- (f) the preparation, drafting and publication of opinions and other texts adopted by the European Data Protection Board.

*Article 72*

***Confidentiality***<sup>158</sup>

1. The discussions<sup>159</sup> of the European Data Protection Board shall be confidential.
2. Access to documents submitted to members of the European Data Protection Board, experts and representatives of third parties shall be governed by Regulation (EC) No 1049/2001.

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<sup>158</sup> DE, EE, ES, SE and UK reservation: it was thought that the EDPB should operate in a manner as transparent as possible and a general confidentiality duty was obviously not conducive to this.

<sup>159</sup> IT suggested replacing this term with 'minutes' or 'summary records'.