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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) - Chapter VIII

General

Delegations find attached a revised version of Chapter VIII 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 September 2013.

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

Apart from article-by article comments, which delegations are welcome to provide, the Presidency invites the delegations to share their views on the following questions:

1. The right to lodge a complaint with a supervisory authority:

- a. should data subjects have the right, as proposed by the Commission, to lodge a complaint at a supervisory authority in any Member State or should this right be limited, as the current Presidency draft provides, to the competent supervisory authority or the supervisory authority of the Member State of habitual residence?
- b. should the supervisory authority to which a complaint is lodged but which is not the competent supervisory authority, have the duty to forward this complaint to the competent supervisory authority or should the regulation provide for an obligation upon the supervisory authority at which a complaint is lodged (in particular that of habitual residence) to look into the matter and investigate and deal with the complaint to the extent appropriate, being not competent to take any (corrective) measures?

2. Parallel proceedings

Different administrative and/or judicial proceedings involving the same controller/processor and data subject may be on-going at the same time either in the same Member State or in different Member States. Delegations are invited to provide their views on the following questions:

- a. should the Regulation set out rules to deal with parallel proceedings or should this entirely be left to the supervisory authorities and courts concerned?
- b. if the Regulation should set out such rules, do delegations agree these should be limited to cases where the parallel proceedings involve the same parties or should they also extend to cases where different parties are involved?

Regarding the problem of possible parallel proceedings before supervisory authorities of different Member States, the Presidency will endeavour to address this in the context of the one-stop-shop mechanism.

3. Administrative fines:

The Commission proposal provides for three levels of sanctions:

- a fine up to 250 000 EUR, or in case of an enterprise up to 0,5 % of its annual worldwide turnover
- a fine up to 500 000 EUR, or in case of an enterprise up to 1 % of its annual worldwide turnover
- a fine up to 1 000 000 EUR, or in case of an enterprise up to 2 % of its annual worldwide turnover

Delegations are invited to provide their views on the following questions:

- a. should the Regulation provide (three) different sanction scales according to the gravity of the data protection violation concerned?
- b. should the levels of sanctions proposed by the Commission be maintained, lowered or increased?
- c. should the Regulation lay down rules on the calculation of the fines within these sanction scales in case a mitigating or aggravating circumstance is taken into account (e.g. maximum 1/2 of the maximum fine in case of a mitigating circumstance and at least 2/3 of the maximum fine in case of an aggravating circumstance) or should this be left entirely to the supervisory authority?
- d. should the Regulation allow to exceed the maximum fines set out (in the different sanction scales) in some circumstances, notably when the maximum fine will not allow to deprive the 'offending' controller/processor of all its ill-gotten gains?
- e. should the Regulation set out certain rules the calculation of the fines in case of concurrence of different violations (which are dealt either at the same time by the supervisory authority or at different stages (rules for repetition of violations))?

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)

- 111) Every data subject should have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, and have the right to an effective judicial remedy in accordance with Article 47 of the Charter of Fundamental Rights if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint or does not act where such action is necessary to protect the rights of the data subject. **The supervisory authority to which the complaint has been lodged shall deal with the complaint, to the extent appropriate, for example by clarifying the queries of the data subject. In case the supervisory authority to which the complaint has been lodged is not competent for the supervision of the controller or processor, it shall transmit the complaint without undue delay to the competent supervisory authority in another Member State.**

- 112) Where a data subject considers that his or rights under this Regulation are infringed, he or she should have the right to mandate a body, organisation or association which aims to protect the rights and interests of data subjects in relation to the protection of their data and is constituted according to the law of a Member State, to lodge a complaint on his or her behalf with a supervisory authority or exercise the right to a judicial remedy on behalf of data subjects. Such a body, organisation or association should have the right to lodge, independently of a data subject's complaint, a complaint where it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.
- 113) Each natural or legal person should have the right to an effective judicial remedy against decisions of a supervisory authority concerning them. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established **and shall be conducted in accordance with the national law of that Member State**. Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it.
- 114) (...)
- 115) (...)
- 116) For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority acting in the exercise of its public powers.
- 117) (...).

- 118) Any damage which a person may suffer as a result of unlawful processing should be compensated by the controller or processor, who may be exempted from liability if they prove that they are not responsible for the damage, in particular where he establishes fault on the part of the data subject or in case of force majeure. **The concept of damage should be broadly interpreted in the light of the case law of the Court of Justice of the European Union in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law¹.**
- 118a) In order to strengthen the enforcement of the rules of this Regulation, penalties and administrative fines may be imposed for any infringement of the Regulation, in addition to, or instead of appropriate measures imposed by the supervisory authority pursuant to this Regulation. The imposition of penalties and administrative fines should be subject to adequate procedural safeguards in conformity with general principles of Union law and the Charter of Fundamental Rights, including effective judicial protection and due process.
- 119) Member States may lay down the rules on criminal sanctions for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. However, the imposition of criminal sanctions for infringements of such national rules and of administrative sanctions should not lead to the breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice.

¹ Further to DE suggestion.

120) In order to strengthen and harmonise administrative sanctions against infringements of this Regulation, each supervisory authority should have the power to impose administrative fines. This Regulation should indicate offences, the upper limit and criteria for fixing the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the breach and of its consequences and the measures taken to ensure compliance with the obligations under the Regulation and to prevent or mitigate the consequences of the infringement. The consistency mechanism may also be used to promote a consistent application of administrative sanctions. It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines. Imposing an administrative fine or giving a warning does not affect the application of other powers of the supervisory authorities or of other sanctions under the Regulation.

CHAPTER VIII

REMEDIES, LIABILITY AND SANCTIONS²

Article 73

Right to lodge a complaint with a supervisory authority

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority [**competent in accordance with Article 51³ or to a supervisory authority in the Member State of his or her habitual residence,**] if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation⁴.
- 1a. **The supervisory authority to which a complaint has been lodged shall not take any measure [referred to in paragraph 1b of Article 53] if a possible violation of the same rights related to the same processing activities is already being examined by a court in accordance with Article 74, provided the data subject is party to these proceedings⁵.**

² FR, EE, ES and RO scrutiny reservation.

³ DE suggestion. CZ and IT also asked for clear definition of when a DPA is competent. The Presidency thinks that such definition will need to be inserted in Article 51. The reference to article 51 is intended to cover both the case in which the local DPA is competent and the case in which the lead DPA is competent.

⁴ DE suggested adding "when its rights are not being respected",

⁵ Further to IT proposal. CZ, DE and NL also raised the problem of parallel proceedings. The Presidency is aware that an analogous rule for parallel proceedings will have to be established for the case where the same case is pending before another DPA. This is, however, intrinsically linked to the one-stop-shop mechanism.

2. (...) ⁶

3. (...) ⁷

4. **When the supervisory authority to which a complaint has been lodged is not competent for the supervision of the controller or the processor, it shall ex officio transmit the complaint to the supervisory authority which is competent under Article 51⁸.**

5. **The supervisory authority to which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint. Where the supervisory authority competent [in accordance with Article 51⁹] finds the complaint unfounded, the supervisory authority to which the complaint has been lodged shall notify the complainant thereof and inform him of the reasons for the rejection and of the possibility of an judicial remedy pursuant Article 74¹⁰.**

⁶ Moved to Article 76(1).

⁷ Moved to Article 76(1a).

⁸ DE proposal. EE and NL were also in favour of such duty to forward the complaint. The reference to article 51 is intended to cover both the case in which the local DPA is competent and the case in which the lead DPA is competent.

⁹ DE suggestion. CZ and IT also asked for clear definition of when a DPA is competent. The Presidency thinks that such definition will need to be inserted in Article 51. The reference to article 51 is intended to cover both the case in which the local DPA is competent and the case in which the lead DPA is competent.

¹⁰ Article 54c (2) already provides for a general duty for the supervisory authority with which a complaint has been lodged to notify the data subject of any measures taken (i.e. the scenario of a 'positive' reply by the DPA).

Article 74

Right to a judicial remedy against a supervisory authority¹¹

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a decision of a supervisory authority¹².
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a judicial remedy where the supervisory authority [**competent in accordance with Article 51**¹³] does not deal with a complaint, has rejected the complaint , in part or wholly, or does not inform the data subject within three months **or any shorter period provided under Union or Member State law**¹⁴ on the progress or outcome of the complaint lodged under Article 73.
3. Proceedings against **a decision of** a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established¹⁵ **according to the laws of that Member State**¹⁶.

¹¹ IT, PT and SI reservation. ES scrutiny reservation.

¹² DE suggested adding: 'by which it is adversely affected'.

¹³ DE suggestion. CZ and IT also asked for clear definition of when a DPA is competent. COM reservation. The Presidency thinks that such definition will need to be inserted in Article 51.

¹⁴ SI indicated that under its law the DPA was obliged to reply within two months.

¹⁵ IT suggests stating that proceedings may be brought before the courts of the Member state where the natural or legal person has his/her habitual residence or is established.

¹⁶ RO suggested adding a reference to national law (see also recital 113).

4. (...)
5. (...)¹⁷

Article 75

Right to a judicial remedy against a controller or processor¹⁸

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority under Article 73, a data subject shall have the right to an effective judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment **according to the laws of that Member State¹⁹**. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller is a public authority acting in the exercise of its public powers.
3. (...)
4. (...)

¹⁷ COM reservation on deletion of paragraphs 4 and 5. DE scrutiny reservation on deletion of paragraphs 4 and 5.

¹⁸ ES, IT, PL, PT and SI scrutiny reservation.

¹⁹ RO suggested adding a reference to national law (see also recital 113).

Representation of of data subjects

1. The data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State and whose **statutory**²¹ objectives include the protection of data subjects' rights and freedoms with regard to the protection of their personal data, to lodge the complaint on his or her behalf (...) ²² and to exercise the rights referred to in Articles **73**, 74 and 75 on his or her behalf²³].
- 1a. [Independently of a data subject's mandate or complaint, any body, organisation or association referred to in **paragraph 1** shall have the right to lodge a complaint with the supervisory authority **competent in accordance with Article 51**²⁴ (...) if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.²⁵].

²⁰ ES, PT and SI scrutiny reservation. ES queried whether it was necessary to lay down in the Regulation this general legal possibility of conferring a mandate for the exercise of one's rights. CZ, EE, IT, NL and SI thought this article was superfluous.

²¹ PL suggestion.

²² DE and IT scrutiny reservation.

²³ DE parliamentary reservation; BE reservation and IT scrutiny reservation.

²⁴ COM reservation on limitation to competent supervisory authority.

²⁵ This paragraph was moved from Article 73(3). BE, EE reservation. BG, DE, IT, PT and UK scrutiny reservation. UK in particular queried whether such possibility would also be open to an association when the data subject itself considered that the reply he/she had received was satisfactory. ES on the contrary thought that this possibility should not be limited to data breaches.

2. (...)
3. (...)
4. (...)
5. (...)²⁶

Article 76a

Suspension of proceedings

1. Where a competent court of a Member State has reasonable grounds to believe that proceedings concerning the same processing activities are being conducted in another Member State, it shall contact the competent court in the other Member State to confirm the existence of such proceedings.
2. Where a possible violation of the same rights related to the same processing activities is already being examined by a court in another Member State, the competent court may suspend its proceedings concerning a natural and/or legal person provided these persons are also party to the proceedings in the other Member State.

²⁶ COM scrutiny reservation on deletion of paragraphs 3 to 5. FR reservation on the deletion of paragraphs 3 to 4.

Article 77

Right to compensation and liability²⁷

1. Any person who has suffered ²⁸damage as a result of a processing operation which is non compliant²⁹ with this Regulation shall have the right to receive compensation from the controller or processor³⁰ for the damage suffered.
2. Where more than one controller or processor **or a controller and processor** are involved in the processing **which gives rise to the damage**³¹, each controller or processor shall be jointly and severally liable for the entire amount of the damage.
This is without prejudice to recourse claims between controllers and/or processors.³²³³

²⁷ Several Member States (DE, NL and UK) have queried whether there was an EU concept of damage and compensation or whether this was left to Member State law. IT suggested specifying that these rules are to be applied according to national law. COM thinks that it has to be left to ECJ to interpret these rules and concepts.

²⁸ DE suggested adding “material or immaterial/moral”. NO suggested clarifying this in a recital.

²⁹ COM reservation as the current draft (contrary to the initial version and the 195 Directive) no longer embodies the principle of strict liability.

³⁰ DE suggested restricting the possibility to seek compensation from the processor to cases where, in violation of point (a) of paragraph 2 of Article 26, the processor has processed personal data contrary to or in the absence of instructions from the controller. ES suggested adding a reference to ‘a right to exercise a direction action’, but the Presidency thinks this I already encompassed in the current draft.

³¹ Further to DE suggestion. SK has pointed out that this provision may also cover cases other than those provided for in that article and therefore the reference to Article 24 has been deleted.

³² DE suggestion.

³³ SI reservation: SI thought this paragraph could be deleted and left entirely to national law.

3. The controller or the processor may³⁴ be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage³⁵.

Article 78

Penalties

(...)³⁶

Article 79

General conditions for imposing administrative fines³⁷

1. Each supervisory authority [**competent in accordance with Article 51**] shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation. **Administrative** fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Article 53³⁸.
2. Administrative fines imposed pursuant to Article 79a shall in each individual case be effective, proportionate and dissuasive.

³⁴ PL thought this should be turned into a mandatory provision.

³⁵ DE and PL thought this paragraph needed to be further elaborated. DE in particular thought that the relationship to Article 39 needed to be further clarified. SI thought an arrangement for strict liability in the case of processing by public bodies should be inserted into this paragraph.

³⁶ This Article was moved to Article 79b.

³⁷ PL meant that Article 79 should set out guidelines only, maybe a maximum threshold this would provide simpler general powers for the DPA to impose fines.

³⁸ Some delegations thought that the corrective measures of Article 53 (1b) should be listed rather here.

2a. **When deciding whether to impose an administrative fine and ³⁹deciding on** the amount of the administrative fine in each individual case (...) due regard **shall be had** to the following:

- (a) the nature, gravity and duration of the infringement having regard to the nature scope or purpose of the processing concerned;
- (b) the intentional or negligent character of the infringement,
- (c) the number of data subjects affected by the infringement and the level of damage suffered by them;
- (d) action taken by the controller or processor to mitigate the damage suffered by data subjects;
- (e) the degree of responsibility of the controller or processor having regard to technical and organisational measures implemented by them pursuant to Articles 23 and 30;
- (f) any previous infringements by the controller or processor;
- (g) (...) ⁴⁰ any financial benefits gained, or losses avoided, directly or indirectly from the infringement;
- (h) the maner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;

³⁹ Further to DE suggestion. Some delegations (EE, SK, PL) thought that aggravating circumstances should be distinguished from mitigating circumstances. SK suggested laying down exact thresholds (e.g. more than 2/3 of the maximum fine in case of aggravating circumstances).

⁴⁰ Deleted further to DE and FR suggestion.

- (i) **compliance with measures referred to in point (b) and (c) of paragraph 1 and points (a), (d), (e) and (f) of paragraph 1b of Article 53, ordered against the controller or processor concerned with regard to the same subject-matter⁴¹**;
- (j) adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39⁴²;
- (k) (...) ⁴³;
- (l) (...) ⁴⁴;
- (m) any other aggravating or mitigating factor applicable to the circumstances of the case.

2b. When the consideration of the factors set out in paragraph 2 leads to the conclusion that it concerns a less grave violation, it may be decided to impose measures referred to in points (b) of paragraph 1b of Article 53 instead of the imposing an administrative fine⁴⁵.

3. (...) ⁴⁶

3a. (...) ⁴⁷

⁴¹ Further to ES proposal. At the same time the Presidency hopes to have accommodated concerns regarding the privilege against self-incrimination (DE) by removing a general reference to co-operation in the investigation.

⁴² DE reservation: DE pointed out that non-adherence to approved codes of conduct or approved certification mechanisms could as such not amount to a violation of the Regulation.

⁴³ Removed at the suggestion of DE and SK.

⁴⁴ If Member states are entirely free to decide whether or not to provide for sanctions against public authorities, it does not seem appropriate to list the fact that the controller is a public body here.

⁴⁵ DE suggestion. This idea was also supported by SK.

⁴⁶ COM reservation on deletion; linked to reservation on Article 79a.

⁴⁷ COM reservation on deletion.

- 3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State⁴⁸.
4. The exercise by the supervisory authority [**competent in accordance with Article 51**] 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.

⁴⁸ DE would prefer to rule out this possibility in the regulation. ES thought it should be provided that no administrative fines can be imposed on the public sector.

Article 79a

Administrative fines⁴⁹

1. The supervisory authority **[competent in accordance with Article 51]** may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] %⁵⁰ of its total worldwide annual turnover⁵¹ **of the preceding financial year**⁵², on a controller who, intentionally or negligently⁵³:

⁴⁹ DE and ES scrutiny reservation. COM reservation on replacing ‘shall’ by ‘may’ and the deletion of amounts and percentages in paragraphs 1, 2 and 3. FI and SI reservation. DE wanted that the risk-based approach should be made clearer. DE meant that proportionality was important because Article 79a concerned fundamental rights/rule of law, *i.d.* Google against the small man (man on the street). DE considered it disproportionate that the supervisory authority could impose a fine that the data subject was unaware of. DE said that it was necessary to set out the fines clearly and that the one-stop shop principle did not allow for exceptions being set out in national law. IE thought e gravity of offences was not sufficiently illustrated, *e.g.* infringement in para. 3(m), which according to IE is the most serious one. CZ suggested to add other possible sanctions such as reprimands, prevent the company or other alternative penalties. NL thought that the exact status of codes of conduct and certification needed to be looked at as well as the consequences of adhering to them. IE considered that the text was too complicated and asked for a simpler structure. FR thought that the structure of the Article was very strict which contradicted the independence of the DPA, it consequently had a reservation on that aspect.

⁵⁰ EE did not consider it appropriate to set out sanctions in percentage because the sanction was not predictable. PL thought that administrative fines should be implemented in the same way in all MS. PL said that the fines should be flexible and high enough to represent a deterrent, also for overseas companies. PT considered that there should be minimum penalties for a natural person and that for SME and micro enterprises the volume of the business should not be looked at when applying the fines, that should only be applicable for multinationals.

⁵¹ UK commented that *turnover* was used in competition law and asked whether the harm was the same here. EE asked how the annual turnover was connected to the sanction. SI meant that compared to competition law where the damage concerned the society as a whole, in the field of data protection it was about private processing of personal data between a processor and the data subject, that is private infringements. COM said that both competition law and data protection concern economic values, whereas data protection protects values of the data subject. COM referred to the Market Abuse Regulation with three levels of fines. EE meant that it was better to look at the content of the infringement and that the Regulation was "over-sanctioned". UK wanted to know if it was the offence or the entity that was punished. UK expressed the need to look at the economic impact of this model.

⁵² DE suggestion.

⁵³ IT wanted to delete "intentionally or negligently" and thought that those notions were already integrated part of the mechanism to calculate fines.

- (a) does not respond within the period referred to in Article 12(2) to requests of the data subject;
 - (b) charges a fee in violation of the first sentence of paragraph 4 of Article 12.
2. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total worldwide annual (...) turnover of the preceding financial year⁵⁴, on a controller or processor who, intentionally or negligently:⁵⁵
- (a) does not provide the information, or (...) provides incomplete information, or does not provide the information timely or in a sufficiently transparent manner, to the data subject pursuant to Articles 12(3), 14 and 14a;
 - (b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 or does not comply with the rights and obligations pursuant to Articles 17, 17a, 17b, 18 or 19;
 - (c) (...);
 - (d) (...);
 - (e) does not or not sufficiently determine the respective responsibilities with joint controllers pursuant to Article 24;

⁵⁴ DE suggestion.

⁵⁵ IT considered that paragraphs 2 and 3 were very generic and only described the infringements but that the scale of gravity was not well defined. IT asked for a better categorisation of the infringements.

- (f) does not or not sufficiently maintain the documentation pursuant to Article 28 and Article 31(4).
 - (g) (...)
3. The supervisory authority **[competent in accordance with Article 51]** may impose a fine that shall not exceed [...] EUR or, in case of an undertaking, [...] % of its total worldwide annual turnover **of the preceding financial year**⁵⁶, on a controller or processor who, intentionally or negligently:
- (a) processes personal data without a (...) ⁵⁷ legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6, 7, 8 and 9;
 - (b) (...);
 - (c) (...);
 - (d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20;
 - (e) does not (...) implement appropriate measures or is not able to demonstrate compliance pursuant to Articles 22 (...) and 30;
 - (f) does not designate a representative in violation of Article 25;
 - (g) processes or instructs the processing of personal data in violation of (...) Articles 26;

⁵⁶ DE suggestion.

⁵⁷ FI pointed out that "sufficient" was unclear taking into consideration of the principles in Article 6 (f).

- (h) does not alert on or notify a personal data breach or does not timely or completely notify the data breach to the supervisory authority or to the data subject in violation of Articles 31 and 32;
- (i) does not carry out a data protection impact assessment in violation of Article 33 or processes personal data without prior consultation of the supervisory authority in violation of Article 34(1);
- (j) (...);
- (k) misuses a data protection seal or mark in the meaning of Article 39 or does not comply with the conditions and procedures laid down in Articles 38a and 39a;
- (l) carries out or instructs a data transfer to a recipient in a third country or an international organisation in violation of Articles 40 to 44;
- (m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) or does not provide access in violation of Article 53(2).
- (n) (...)⁵⁸
- (o) (...).

⁵⁸ IT wanted to reinstate failure to cooperate with the DPO. IE that meant that this was a subjective infringement.

[3a. If a controller or processor intentionally or negligently violates several provisions of this Regulation listed in paragraphs 1, 2 or 3, the total amount of the fine may not exceed the amount specified for the gravest violation⁵⁹.

The administrative fines shall be higher than the economic advantage obtained by committing the violation concerned. Should the maximum amounts referred to in paragraphs 1 to 3 not allow for the deprivation of this economic advantage, the supervisory authority competent in accordance with Article 51 shall be authorised to impose a higher amount⁶⁰.

4. [The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.]⁶¹

⁵⁹ PL suggestion.

⁶⁰ DE suggestion. IT thought that it was necessary to look at other factors than gain/benefit such as fundamental rights.

⁶¹ CZ, DE, NL and RO reservation. NL that thought that guidelines from the EDPB could solve the problems on the amounts. CZ wanted to delete the paragraph and thought that the DPA could set out the amounts.

Article 79b

Penalties⁶²

1. For infringements of the provisions of this Regulation not listed in Article 79a⁶³
Member States shall lay down the rules on penalties⁶⁴ applicable to such
infringements and shall take all measures necessary to ensure that they are
implemented (...). Such penalties shall be effective, proportionate and dissuasive.
2. (...).
3. Each Member State shall notify to the Commission those provisions of its law which it
adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest
and, without delay, any subsequent amendment affecting them.

⁶² DE, ES, IT and SK scrutiny reservation. This corresponds to Article 78 of the Commission proposal.. NL considered that it was necessary to bring Article 79a in line with Article 79b and asked what would happen for example to infringements of Article 23. COM explained that infringements not listed in Article 79a were for example infringements in employment law and relating to freedom of expression. COM said that Article 79b is complementary to the list in Article 79 and does not exclude other penalties. IT indicated that since it was difficult to know what was punished at national level and that it should be valid at EU level it was better to delete the Article but lay down the possibility to legislate at national level.

⁶³ PL reservation on this limitation. PL wanted it to be possible to impose penalties under national law on infringements of all provisions under the Regulation.

⁶⁴ FR reservation on the imposition of criminal penalties. DE on the contrary pleads for referring *expressis verbis* to criminal penalties.