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| 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 |

Background

1. The one-stop-shop principle, as laid down in Section II of Chapter VI, has been discussed by the Working Party on Information Exchange and Data Protection (DAPIX) at meetings of 8-9 January, 27 March, 3-4 July and 9-10 September 2013. Various delegations have produced documents on this and the compilation of comments on Chapters VI and VII is set out in 7105/5/13 REV 5 DATAPROTECT 28 JAI 182 MI 170 DRS 42 DAPIX 49 FREMP 24 COMIX 141 CODEC 476.

2. The topic was debated at the Council meeting of 7-8 October 2013, at which the Chair concluded, inter alia, that: further expert work on the one-stop-shop mechanism would continue along a model in which a single supervisory decision is taken by the main establishment' supervisory authority but the exclusive jurisdiction of that authority would be limited to the exercise of certain powers. He also indicated that the competent Working Party needs to explore which are the exact powers to be exercised by the main establishment' supervisory authority and the methods for enhancing the proximity between individuals and the decision-making supervisory authority by involving the local supervisory authorities in the decision-making process. In this regard, the Council Chair also specified that it should be investigated to what extent elements of the co-decision model could be incorporated.

3. Following the Ministerial debate on the one-stop-shop mechanism at the Council meeting of 7-8 October 2013, the Presidency had endeavoured to revise Chapters VI and VII of the draft General Data Protection Regulation. The DAPIX meeting of 17 and 18 October 2013 showed the need for further thematical discussion. This note aims at clarifying the discussion on a number of important elements of a future one-stop-shop mechanism. The one-stop-shop principle purports to be an advantage for businesses: it aims at ensuring compliance with the Regulation and legal certainty for enterprises. The suggestions in the paper shall concentrate more on how to achieve this aim.

4. The annex to the current note does not contain all articles, but only some for which the Presidency has proposed new changes, which are in **underlined bold text**. Where text has been deleted, this is indicated by (...). Where existing text has been moved, this text is indicated in italics. The text is subject to a general scrutiny reservation: DE, DK, FI, MT, SI and SK. The Presidency does not intend to have an -article -by article discussion of the annex, but delegations are welcome to provide their opinion on the proposed drafting in the course of the discussion of this note

Preliminary remarks

5. The one-stop-shop principle aims to give an advantage for business within the internal market, which should deal only with one supervisory authority throughout the European Union. However, it does not affect the competence of the supervisory authority for the supervision of processing activities of the controller or processor which are limited to one single Member State. A preliminary point which therefore needs to be clarified is that of the competence of the local supervisory authority. In the 1995 Directive this is settled indirectly through the definition of territorial applicable law. Article 4(1) (a) of that Directive gives as the main criterion to trigger the applicability of national law the fact that ' the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State'.

6. As the Regulation will - by its very nature - not contain any rules on applicable law, the Presidency believes that is very important to clarify in the future Regulation the question of the competence of the local supervisory authority. It has endeavoured to do so by introducing a new paragraph 1 into Article 51, which also refers to criterion of an establishment of the controller or processor.

Scope of the one-stop-shop mechanism (subject-matter)

7. The one-stop-shop mechanism, as initially proposed by the Commission, covered only the situation of processing by establishments of the same controller or processor on the territory of different Member States. There appears to be considerable support for the idea that in some cases the one-stop-shop mechanism should also cover other cases, such as where the processing affects substantially data subjects in other Member States or affects the free movement of data within the European Union.

In the current Presidency draft these two different scenarios have been encapsulated into two different definitions of lead authority in Article 54a (paragraphs 1 and 1a)).

8. *Question:*

The following question merits further reflection: how to ensure that the one-stop-shop mechanism is not used for minor cases, which can be effectively dealt with by the local supervisory authority without having to go through the one-stop-shop mechanism. Should such “filter” refer to one or more of the following elements:

- the importance of the case (minor),
- the geographical nature of the case (local); and/or
- the types of action it requires from the supervisory authority (information-provision only)?

Powers of the supervisory authority (and the need for enforcement)

9. Regarding the processing activities of a controller or processor that fall within the scope of the one-stop-shop mechanism, the debate has so far concentrated on which powers should the supervisory authority of the main establishment exercise exclusively, that is excluding the exercise of those powers by local authorities' (cf. options 1-3 set out in Article 51(1a))? In the course of previous discussions on the Commission proposal for a one stop-shop principle, one of the criticisms which has been voiced on this principle¹ related to a perceived transfer of powers and the related need to enforce decisions of another Member State. If the lead supervisory authority were to be the sole responsible for the exercise of some powers regarding that controller or processor, including regarding processing operations carried out in other Member States, this would imply that decisions can be made only by the supervisory authority of the main establishment and no longer by the supervisory authority of the other Member State. In order to assess whether this concern is justified, it is worthwhile to look into the possible exclusive exercise of different types of power by the lead supervisory authority. For each of the different types of power, it needs to be examined what impact the one-stop-shop mechanism would have on the following two questions: (1) does it create a need for enforcement of decisions of another supervisory authority and 2) does it affect the powers of the local supervisory authority.

¹ The most important concerns are summarised in 13643/13 DATAPROTECT 127 JAI 781 MI 767 DRS 169 DAPIX 109 FREMP 126 COMIX 502 CODEC 2025.

10. *monitoring powers*: to be exercised by each supervisory authority regarding processing on its territory.

Conclusion: no need for enforcement of decisions of another supervisory authority and no effect on the powers of the local supervisory authority.

11. *investigatory powers*: in accordance with the territoriality principle set out at the beginning of Article 51, these can be exercised by each supervisory authority only on their own territory. Also the Commission proposal acknowledges that the lead supervisory authority cannot exercise these powers on the territory of another Member State. In case a lead authority needs to have investigations carried out on the territory of another Member state, it will have to request this to the supervisory authority of that Member State via mutual assistance channels.

Conclusion: no need for enforcement of decisions of another supervisory authority and no effect on the powers of the local supervisory authority.

12. *authorisation powers*: under the current draft of the Regulation, the authorisation procedure for Binding Corporate Rules (BCRs - Article 43) and contractual clauses (Article 42(2)(c) and (d)) provides that they need to be submitted by the lead supervisory authority to the EDPB. This is not the case for prior consultation (Article 34) which, following authorisation, can be used by the controller. Some delegations argued that authorisation powers should be expanded in a way that controllers could apply for a confirmation (= proof) of compliance with the legal requirements of the Regulation. There might thus be a wider range of authorisation powers than currently provided in the draft Regulation.

13. The important challenge here is to define cases in which EU-wide legal certainty based on the one-stop-shop mechanism is necessary. Some delegations argued that the Regulation should not stipulate specific rules for this, as this can be left to the decision of the controller which seeks legal certainty by means of an authorisation or confirmation of compliance with the Regulation by the lead authority. It would, however, seem more appropriate that the substantive articles on authorisation would distinguish between a one-Member State authorisation and an EU-wide authorisation.

14. The one-stop-shop mechanism and the exclusive authorisation power of the lead supervisory authority should apply only to EU-wide authorisations. In cases of an EU-wide authorisation or confirmation of compliance, all 28 supervisory authorities could be involved through the European Data Protection Board (EDPB). In this case the lead supervisory authority could receive the application from the controller and forward it to the EDPB. All supervisory authorities receive the application and a draft measure prepared by the lead authority.

15. Following the adoption of an EU-wide authorisation by the lead authority, there is no immediate need for enforcement of this decision by other supervisory authorities as it is only the main establishment supervisory authority which exercises its authorisation powers. The EU-wide authorisation adopted by the lead authority will be binding on the supervisory authorities in other Member States where the controller or processor has establishments. In cases of non-compliance by one of these establishments, the local supervisory authority may need to enforce the EU-wide authorisation adopted by the lead supervisory authority. There may, however, be an effect on the powers of the local supervisory authority of the Member State where the controller or processor has an establishment, as it is difficult to envisage that the local supervisory authority could still use its authorisation power for the same processing activities. It would probably have to be stipulated that the exercise of the authorisation powers for EU-wide purposes by the lead supervisory authority has an exhaustive nature.

Conclusion: no need for enforcement of decisions of the lead authority and an 'exhaustive' effect on the authorisation powers of the local supervisory authority.

16. *corrective powers:* the first two types of power listed in paragraph 1b of Article 53, namely issuing warnings and/or reprimands by a lead supervisory authority may obviously also pertain to processing operations carried out in the territory of such another Member State, but they do not require enforcement in another Member State as they will logically always be served upon the main establishment of the controller or processor.

17. Also the powers listed in points (d) (e) and (f) of paragraph 1c of Article 53 (namely ordering the controller or processor to bring processing operations into compliance with the Regulation, imposing a temporary or definitive limitation on processing and ordering the suspension of data flows) as such do not imply a need for enforcement in another Member State as such orders will be served on the main establishment of the controller or processor. In case compliance with this order implies action in the territory of another Member State (e.g. because the data are stored in a data centre in that Member state), it will in principle be for the controller to ensure that this is done. When the branch in the other Member state concerned has no separate legal personality, this should be possible. In case it concerns a subsidiary with separate legal personality, the controller may invoke that he has no power to ensure that the subsidiary complies with the order. Only in that case a way will need to be found to make the order binding on the subsidiaries in other Member States and ensuring that it will be enforced by the supervisory authorities of those Member States.

18. Regarding the power to impose an administrative fine, this also implies no transfer of powers and no need for enforcement in the territory of another Member State as such fines will be served on the main establishment of the controller.

19. For all of the above corrective powers (but especially for sanctions) , the exercise of those powers will probably need to have an effect of some kind on the on the powers of the local supervisory authority of the Member State where the controller has an establishment, as it is difficult to envisage that the local supervisory authority could still use its corrective powers for the same processing activities. It would probably have to be stipulated that the exercise of the corrective powers in a one-stop-shop mechanism case by the lead supervisory authority has an exhaustive nature.

Conclusion: no need for enforcement of decisions of the lead authority and an 'exhaustive' effect on the corrective powers of the local supervisory authority.

Questions

20. Delegations are invited to indicate their views on the above analysis and in particular on how they want to ensure that the decision of a lead supervisory authority of its authorisation and corrective powers (including sanctions and administrative fines) under the one-stop-shop mechanism can be enforced in other Member States.

Decision-making process within the one-stop-shop mechanism

21. In order to achieve legal certainty for controllers with regard to their business models through the one-stop-shop mechanism the coordination of the supervisory authorities with regard to their powers seems to be a main goal of the consistency mechanism. Different questions arise regarding the involvement of other supervisory authorities than the one of the lead authority in the one-stop-shop mechanism.

22. *'Circle' of involvement: only supervisory authorities concerned or all supervisory authorities (EDPB)*

The initial Commission proposal provided a possibility to submit cases to the EDPB, which could give an opinion, but also refuse to do so. The latest Presidency draft envisages a two-tier approach. In the first tier, the use of the one-stop-shop mechanism implies a consensus-seeking cooperation between the lead supervisory authority and the supervisory authorities of the other Member States involved. The second tier allows a supervisory authority, in case of serious objection, to submit a case to the consistency mechanism. In such case the EDPB (i.e. all supervisory authorities) should give a non-binding opinion.

23. *'Triggering' role for the one-stop-shop mechanism*

In the initial Commission proposal for the one-stop-shop , the draft measure was always proposed by the lead authority. It might be considered whether also other supervisory authorities could be given the right to trigger the one-stop-shop mechanism by submitting draft measures, either to the lead authority (within the 'consensus-seeking' cooperation between the lead supervisory authority and the supervisory authorities of the other Member States involved) or directly to the EDPB.

24. This would appear to be useful for corrective measures, where a local supervisory authority may receive a complaint from a data subject, but may not have be competent regarding the controller responsible for the alleged data protection violation (because the controller has no establishment on the territory of that Member State). There may also be an alternative scenario in which the controller has an establishment on the territory of the 'complainant' supervisory authority, but the alleged data protection violation is of such a nature that it is one which should be submitted to the one-stop-shop mechanism. In both cases it would also appear logical to provide the local supervisory authority with the possibility of triggering the one-stop-shop mechanism and possibly also the possibility to submit a draft corrective measure to the lead supervisory authority.

25. *Nature of the involvement*

The draft Regulation provided the strong co-operation mechanism and the latest presidency draft strengthened the ‘consensus-seeking’ cooperation between the lead supervisory authority and the supervisory authorities of the other Member States involved with the role of the EDPB under the consistency mechanism. None of these solutions give any ‘veto’ power to the other Member States. The EDPB opinions are, however, adopted by a 2/3 majority (even though they are admittedly) not binding on the lead supervisory authority. Under the latest draft, supervisory authorities moreover have the possibility to temporarily block measures proposed by the lead supervisory authority. Should delegations still be of the opinion that stronger involvement of other the supervisory authorities is desirable, alternative decision-making procedures for the one-stop-shop mechanism will need to be looked into.

26. One possibility is a co-decision making process whereby all Member States involved ‘co-decide’ about the measure to be decided by a 2/3 majority (French proposal). Another alternative is to provide a possibility for national supervisory authorities to express their views and decide to opt out of the decision proposed by the lead supervisory authority. This could especially be envisaged for authorization or confirmation of compliance, which would then become binding for all Member States that have not used the opt-out possibility.

27. Another possibility consists of giving a certain role to the European Data Protection Board (EDPB) by allowing supervisory authorities from other Member States to submit a (final) decision by the lead authority to the EDPB, as a type of appeal mechanism. This possibility of submitting a case to the EDPB could be opened up to any supervisory authority that is competent regarding the establishment of the controller/processor concerned as well as every supervisory authority at which a data subject has lodged a complaint. It could also be envisaged to allow a controller which has establishments in several Member States to submit to the EDPB a decision of a supervisory authority with regard to him.

28. It has been established that from an EU law point of view, the EDPB as proposed by the Commission cannot be vested with the power to take legally binding decisions. The lack of binding nature of EDPB opinions could be overcome by giving legal personality to the EDPB and conferring upon it only clearly defined executive powers which should exclude too broad and discretionary powers involving policy choices (so-called "Meroni" case law). The EDPB would thus not only be empowered but also obliged to adopt measures where clearly defined criteria laid down in the Regulation are fulfilled. Some Member States have voiced strong concerns in this regard, but the Council at its meeting on 7 October mandated the Working Party to look into this possibility.

29. *Questions*

Delegations are invited to indicate:

- a). Whether they could envisage a split system whereby the adoption of EU-wide authorisations would need to be submitted to the EDPB, but the use of the one-stop-shop mechanism for corrective powers would only involve the Member States concerned?

- b) Whether they think a "triggering" role should be granted to the local supervisory authority and if so in which cases (only in a case of complaint or also in other cases)?

- c) Whether the mechanisms for involvement of the supervisory authorities other than the lead supervisory authority provided for under the annexed draft are sufficient or they would see a need for a stronger involvement in all or some cases?

Judicial redress and judicial review

30. Under the 1995 Data Protection Directive a Member State has jurisdiction to supervise processing of personal data (and, should the processing be in violation of EU law, to have penalties imposed on the controller or processor), only if there is an establishment on the territory of that Member State. The mere fact that one or several individuals (data subjects) in a Member State claim to have been the victim of wrongful data processing operations carried out in another Member State, does, in the current situation, not give jurisdiction to the Member State of the complainant if there is no establishment of the controller/processor in that Member State.

31. Under Article 73(1) of the draft Regulation data subjects would have the right to lodge a complaint with a supervisory authority in any Member State (e.g.: where he or she has his or her residence or where the controller is established or to another supervisory authority). This would give supervisory authorities the possibility to hear complaints by data subjects and give data subjects the possibility to decide where they want to go.

32. Many Member States have pleaded for a strong element of ‘proximity’ in the draft Regulation. In that context, the plea has been made that a data subject should always have the right to go to his or her ‘own’ court, that is the court of his or her habitual residence. Here a distinction should be made between judicial review of the decisions of supervisory authorities by the courts (Article 74) on the one hand, and the direct exercise of a judicial remedy (Article 75) against a controller or processor and/or the seeking of compensation (Article 77) on the other hand.

33. Judicial review under Article 74 is closely linked to the power of the supervisory authority of that Member State. Under the one-stop-shop mechanism the logical course of action is to seek judicial review of the decision of the lead supervisory authority in the courts of that Member State. The proximity argument would plead in favour of granting this review possibility also to the courts of the Member State of habitual residence of the data subject, but is difficult to see how the courts (‘civil or administrative’) could review an administrative decision of the supervisory authority of another Member State. Major constitutional and practical difficulties would arise.

34. If, however, the one-stop-shop mechanism were to be designed in such a way that some decisions of the lead authority would in certain cases have to be recognised and formally 'adopted' by the local supervisory authority in order to notify them to the data subject, this would open up the possibility for these 'converted' decisions to be challenged before the (civil or administrative) courts of that Member State. Thus the lodging of a complaint to a supervisory authority would force that supervisory authority to recognise the decision of the lead supervisory authority and 'convert' it into a national decision (cf. Article 54). In the same vein it could be envisaged that the local supervisory authority which has been involved in the one-stop-shop mechanism should notify, under its national (procedural) law, the measure to the controller. Of course, this 're-adoption' of the decision of the lead authority by the local authorities may open the way for judicial review of that decision, not only by data subjects, but also by the controller or processor concerned. At any rate, national procedural law will probably allow a controller or processor which is concerned by a decision from the (lead) supervisory authority, to intervene in the court proceedings commenced by a data subject in order to have that decision reviewed.

35. The legislator can provide that the courts of that Member state should have the jurisdiction to order measures against the controller or processor responsible for the alleged data protection violation, even though the controller or processor has no establishment on the territory of that Member State. This is what is currently proposed in Article 75(2) regarding judicial remedy against a controller or processor. For seeking compensation, Article 77 remains silent. If the court of habitual residence of the data subject has no jurisdiction over the controller or processor responsible for the alleged data protection violation, the exercise of a judicial remedy against or the seeking of compensation from a controller or processor will result in a judgment that needs to be enforced in the territory of the Member State where the controller or processor has an establishment. This is possible under the Brussels I Regulation.

36. Another alternative would be to provide that a court which receives a complaint from a data subject, but has no jurisdiction over the controller or processor responsible for the alleged data protection violation, transmits this complaint to the court of the relevant Member State.

37. The one-stop-shop mechanism aims to bring efficiency and legal certainty to businesses in the European Union. Proximity is an important element for the data subject, which can be ensured by the involvement of the local supervisory authorities in the decision-making process as well as through the 'architecture' of the judicial review and redress mechanism available to data subjects. An important argument in favour of concentrating not only the exercise of certain powers in the hands of a supervisory authority of one Member State, but also the judicial redress/review functions in the hands of the courts of one Member State is that this reduces the risk of contradictory court judgments regarding processing activities by the same controller.

38. *Questions:*

In the light of the above delegations are invited to indicate:

- a) Whether they want to provide jurisdiction to the court of the habitual residence of the data subject to review the decision of the lead supervisory authority of another Member State?

- b) Whether they want to provide jurisdiction to the court of the habitual residence of the data subject to decide on judicial redress (and compensation) against a controller or processor even if it has no jurisdiction over the controller or processor?

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)

SECTION 2

COMPETENCE², DUTIES AND POWERS

Article 51

*Competence*³

1. **Each supervisory authority shall be responsible for supervising the processing carried out in the context of the activities of an establishment of the controller or processor on the territory of its own Member State.**

² GR thought it would be better to refer to jurisdiction rather than competence.

³ Scrutiny reservation by DE, DK, EE, ES, FR, HU, NL, PT 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.

- 1a. 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^{4 5}
- 1b. **OPTION 1: However, where pursuant to Article 54a a supervisory authority acts as lead authority, this authority shall be the sole supervisory authority competent for exercising the powers pursuant to paragraph 1c of Article 53 as regards the processing activities of the controller or the processor in all Member States concerned.**
- OPTION 2: However, where pursuant to Article 54a a supervisory authority acts as lead authority, this authority shall be the sole supervisory authority competent for exercising the powers pursuant to points (d), (e) and (f) of paragraph 1b and paragraph 1c of Article 53 as regards the processing activities of the controller or the processor in all Member States concerned.**
- OPTION 3: However, where pursuant to Article 54a a supervisory authority acts as lead authority, this authority shall be the sole supervisory authority competent for exercising the powers pursuant to points (d), (e) to (g) of paragraph 1b and paragraph 1c of Article 53 as regards the processing activities of the controller or the processor in all Member States concerned.**
- 1c. Paragraph 1b shall not apply to public authorities and bodies.
2. (...)⁶.
- 2a. (...)⁷.

⁴ 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.

⁵ 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.

⁶ Moved to Article 54a (5).

⁷ Moved to Article 54b (2).

- 2b. (...) ⁸.
3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity ⁹.

Article 52

Duties ¹⁰

1. Without prejudice to other duties set out under this Regulation ¹¹, each supervisory authority shall ¹²:

- (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* ¹³
- (ac) promote the awareness of controllers 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*;

⁸ Moved to Article 54a (7).

⁹ FR, HU, NL, RO and UK scrutiny reservation. DE suggested adding " other matters assigned to courts for independent performance. The same shall apply insofar as judicially independent processing has been ordered, approved or declared admissible", as the derogation must apply whenever courts' work falls within the scope of their institutional independence, which is not only the case in the core area of judicial activity but also in areas where courts are assigned tasks specifically for independent performance.

¹⁰ DE, IT, AT, PT and SE scrutiny reservation. UK thinks the term 'functions' rather than 'duties' should be used.

¹¹ New text as paragraphs (f) to (i) have been deleted as these duties were already laid down elsewhere in the Regulation.

¹² The Presidency shall seek to draft a recital in order to clarify that Member States may allocate other tasks to DPAs. DE thought it preferable to use the words 'at least' in the chapeau. See also new point (g) in paragraph 1.

¹³ Moved from Article 52(1)(j) as this a duty rather than a power from the DPA.

- (b) deal with complaints¹⁴ lodged by a data subject, or body, organisation or¹⁵ association representing a data subject in accordance with Article 73¹⁶, 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 period¹⁷, 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) (...);
- (fa) (...);
- (g) (...);
- (ga) (...);
- (gb) (...);
- (gc) (...);
- (gd) (...);
- (h) (...);
- (ha) (...);

¹⁴ IT scrutiny reservation on the term complaint; UK thought the emphasis should be on complaint-resolution.

¹⁵ Alignment with the text of Article 73.

¹⁶ BE suggested limiting this to the data subject itself.

¹⁷ IT suggested fixing a 10-weeks period for dealing with the complaint.

- (hb) (...);
- (i) (...)¹⁸;
- (j) contribute to the activities of the European Data Protection Board;
- (k) issue opinions¹⁹ as well as fulfill any other duties related to the protection of personal data.
2. (...)²⁰.
3. (...)²¹.
4. Each supervisory authority shall enable the submission of complaints referred to in point (b) of paragraph 1, by measures which can be completed electronically, such as providing a complaint submission form, without excluding other means of communication.
5. The performance of the duties of each supervisory authority shall be free of charge for the data subject and for the data protection officer²².
6. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may refuse to act on²³ the request²⁴. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request²⁵.

¹⁸ Paragraphs (f) to (i) have been deleted as these duties are already laid down elsewhere in the Regulation.

¹⁹ Some delegations (IE, PL) thought this was worded too generally.

²⁰ Moved to paragraph 1.

²¹ Moved to paragraph 1.

²² DE proposal.

²³ DE proposal.

²⁴ EE pointed out that under its constitution this required an act of parliament. NL and RO also thought this should be left to Member States.

²⁵ DE, NL and SE reservation: this could be left to general rules.

Article 53
Powers^{26 27}

1. Each Member State shall provide by law that²⁸ its supervisory authority shall have at least²⁹ the following monitoring powers:
- (a) *to order the controller and the processor*³⁰, and, where applicable, the representative to provide any information it requires for the performance of its duties;
 - (aa) *to carry out data protection audits*³¹ ;
 - (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;
 - (c) (...) ³²
 - (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*³³;

²⁶ NL, RO, PT and SE scrutiny reservation; SE thought this list was too broad. Some Member States were uncertain (CZ, DE, RO and UK) or opposed (IE) to categorising the DPA powers according to their nature.

²⁷ Several Member States (DE, FR, SI) 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.

²⁸ 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. COM reservation.

²⁹ 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 and ES scrutiny reservation.

³⁰ NL thought that all the powers listed in para. 1 should also be available vis-à-vis others than controllers and processors.

³¹ Moved from paragraph 1b. IT, PL and SK scrutiny reservation. NL indicated that such audits could also be carried out by an external office, but the Presidency points out that the current drafting does not preclude this.

³² Moved to para. 1b (d).

- 1a. Each Member State shall provide by law that its supervisory authority shall have at least the following investigatory powers:
- (a) *to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its duties;*
 - (b) *to obtain access to any premises of the controller and the processor , including to any data processing equipment and means (...) ³⁴.*
- 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 ³⁵ to a controller or processor where processing operations have infringed provisions of this Regulation; ³⁶*
 - (c) *(...) ³⁷;*
 - (d) *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; inter alia by ordering the rectification, restriction or erasure of data pursuant to Articles 16, 17a and 17 ³⁸ 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 limitation on processing ³⁹;*

³³ BE suggested adding the power to oblige the controller to communicate the personal data breach to the data subject.

³⁴ 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.

³⁵ EE, IT, PL, SE and SK scrutiny reservation.

³⁶ PL scrutiny reservation on points (a) and (b).

³⁷ Moved to para. 1.

³⁸ Deleted further to DE suggestion as the breach of the Regulation is obvious here.

³⁹ NL scrutiny reservation. The Presidency suggests to use the word 'limitation' so as to accommodate concerns relating to the compatibility with the freedom of expression.

- (f) to order the suspension of data flows to a recipient in a third country or to an international organisation⁴⁰;
- (g) to impose an administrative fine pursuant to Articles 79 and 79a⁴¹.
- 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 34, or in points (c) and (d) of Article 42(2);
- (b) approve binding corporate rules pursuant to Article 43.
2. (...)
- The powers referred to in paragraphs 1, 1a, 1b and 1c shall be exercised in conformity with Union law or Member State law and subject to appropriate procedural safeguards, including effective judicial remedy and due process, set out therein⁴².
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 or to commence or engage otherwise in legal proceedings⁴³, in order to enforce the provisions of this Regulation.
4. (...)⁴⁴
- 4a. (...)₂
5. (...)⁴⁵

⁴⁰ SK reservation.

⁴¹ Moved from para. 4.

⁴² 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.

⁴³ DE, FR and RO reservation on proposed DPA power to engage in legal proceedings. CZ reservation on the power to bring this to the attention of the judicial authorities. UK scrutiny reservation.

⁴⁴ Moved to para. 1b. DE thought paras 3 and 4 should be deleted.

⁴⁵ Moved to para. 2.

CHAPTER VII⁴⁶

CO-OPERATION AND CONSISTENCY

SECTION 1

LEAD AUTHORITY AND CO-OPERATION

Article 54a

Lead authority⁴⁷

1. Where the processing of personal data takes place in the context of the activities of **an** establishment of a controller or processor in the Union and where the controller or processor is established in more than one Member States, the supervisory authority of the main establishment of a controller or processor shall act as lead authority as regards the processing activities of the controller or the processor in all Member States concerned by the processing activities.
 - 1a. Where the processing of personal data takes place in the context of the activities of a single establishment of a controller or processor in the Union but the processing affects substantially data subjects in **more than one** Member States or the free movement of data within the Union, the supervisory authority of that Member State shall act as lead authority as regards all Member States concerned by the processing activities.
 - 1b** **OPTION 1: Paragraphs 1 and 1a shall not apply where the processing concerned only relates to one Member State.**
 - OPTION 2: Paragraphs 1 and 1a shall not apply where the case at hand can be dealt with by the supervisory authority responsible for supervising the processing by the establishment of the controller or processor on the territory of its own Member State without it being necessary to take any of the measures listed in paragraph 1b of Article 51.**
2. In the cases referred to in paragraphs 1 and 1a the lead authority shall be the sole contact point for the controller or processor.

⁴⁶ AT and FR scrutiny reservation on Chapter VII.

⁴⁷ BE, CY, DK, DE, EE, FR, FI, RO, PT and SE scrutiny reservation

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 (...).
4. (...)
5. (...)⁴⁸
6. Any controller or processor may ask the supervisory authority of the Member State in which it considers that its main establishment is located for confirmation that it is the lead authority. The lead authority shall communicate its reply to the other supervisory authorities concerned⁴⁹.
7. Where there are conflicting views between the supervisory authorities **concerned** on which supervisory authority shall be competent to act as lead authority, any of the supervisory authorities **concerned** may communicate the matter to the European Data Protection Board. The European Data Protection Board shall issue an opinion on the identification of the lead authority in accordance with Article 57.

Article 54b

Cooperation between the lead authority and other supervisory authorities⁵⁰

1. The lead authority referred to in Article 54a shall cooperate with the supervisory authorities of the Member States concerned in an endeavour to reach consensus on the cases set out hereafter.
2. When preparing and deciding on a measure referred to in **paragraph 1b of Article 53**, the lead authority shall:
 - a) share all relevant information with the supervisory authorities of the Member States concerned;

⁴⁸ Moved to Article 51, (1a).

⁴⁹ Further to FR proposal.

⁵⁰ BE, CY, DE, EE, FR, FI, RO, PT and NL scrutiny reservation

- b) submit the draft measure to all supervisory authorities of the Member States concerned;
 - c) take utmost account of the views of the supervisory authorities of the Member States concerned.
3. Where, in accordance with Article 73, a complaint has been lodged with a supervisory authority other than the lead authority referred to in Article 54a, this supervisory authority may prepare a draft a measure referred to [...⁵¹] and submit it to the lead authority, which shall act in accordance with paragraph 2.
 4. Where any of the supervisory authorities has objected, within a period of two weeks after having been consulted under paragraphs 2 or 3, to the draft measure, this authority may submit the matter to the consistency mechanism referred to in Article 57.
 5. Where the lead authority does not act on a draft measure referred to in paragraph 3, within a period of two weeks after having received the draft measure, the supervisory authority to which a complaint has been lodged may submit the matter to the consistency mechanism referred to in Article 57.
 6. By way of derogation to paragraph 1a of Article 51, each supervisory authority may, where there is an urgent need to act in order to protect the rights of data subjects, adopt a provisional measure on the territory of its Member State with a maximum validity of one month. The supervisory authority shall, without delay, communicate such a measure with full reasons to the European Data Protection Board in accordance with the consistency mechanism referred to in Article 57.
 7. The lead authority and the other supervisory authorities concerned shall supply the information required under this Article to each other by electronic means, using a standardised format.

⁵¹ This should correspond to the powers listed in Article 51 (1a).

Article 54c

Notification and enforcement of the measures adopted by the lead authority⁵²

1. The lead authority shall notify the measure it adopts to the controller or processor concerned.
2. The supervisory authority to which a complaint has been lodged shall notify **under its national law** the measure which the lead authority has adopted to the data subject.
3. **Any legally binding measure referred to in paragraph 1b of Article 51 and adopted by the lead supervisory authority in compliance with the requirements of this Chapter shall be binding in all Member States .**
4. The controller or processor which is concerned by a measure referred to in paragraph 1 shall have the right to an effective judicial remedy against the lead authority in accordance with Article 74(1) and (3).
5. The data subject which is concerned by a measure notified to him or her pursuant to paragraph 2 shall have the right to an effective judicial remedy against the supervisory authority to which the complaint has been lodged in accordance with Article 74⁵³.

⁵² CZ scrutiny reservation.

⁵³ Paragraphs 4 and 5 could also be placed in Chapter VIII. PL and SE scrutiny reservation on these two paragraphs.

SECTION 2

CONSISTENCY⁵⁴

Article 57

Consistency mechanism⁵⁵

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 section⁵⁶.
2. Without prejudice to the cases referred to in paragraph 4 of Article 54b, a competent supervisory authority which intends to adopt a measure aimed at producing legal effects, shall communicate the draft measure to the European Data Protection Board and the Commission⁵⁷, when the measure:
 - (a) (...);
 - (b) (...)⁵⁸;
 - (c) *aims at adopting a list of the processing operations subject to the requirement for a data protection impact assessment 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

⁵⁴ BE, IT, SK and SI scrutiny reservation. BE reservation on the time required for a consistency mechanism procedure. DE parliamentary reservation and BE and UK reservation on the role of COM in the consistency mechanism.

⁵⁵ EE, FI, LU, NL and UK scrutiny reservation.

⁵⁶ CZ, 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.

⁵⁷ 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.

⁵⁸ Points (a) and (b) have been deleted, as these elements are now incorporated into Article 54a (1a).

- (cb) aims to approve the criteria for accreditation of a body pursuant to paragraph 3 of Article 38a or a certification body pursuant to paragraph 3 of Article 39a;
 - (d) *aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or*
 - (e) *aims to authorise contractual clauses referred to in point (d) of Article 42(2); or*
 - (f) *aims to approve binding corporate rules within the meaning of Article 43.*
3. 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 concerned⁵⁹, the European Data Protection Board or the Commission may request that such matter shall be communicated to the European Data Protection Board⁶⁰.
4. (...) ⁶¹.
5. *Supervisory authorities and the Commission shall electronically communicate to the European Data Protection Board⁶², 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.*

⁵⁹ BE, IT, SE, SI, SK and PL thought the scope of this paragraph should be limited so as to limit the number of cases.

⁶⁰ 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.

⁶¹ 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.

⁶² DE proposal.

6. *The chair of the European Data Protection Board shall without undue delay⁶³ 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 Board⁶⁴

1. (...)
2. (...)
3. (...)
4. (...)
5. (...)
6. (...)⁶⁵
- 6a. (...)
7. In the cases referred to in paragraph 4 of Article 54b, paragraph 6 of Article 54a and paragraph 2 of Article 57, the European Data Protection Board shall issue an opinion on the subject- matter submitted to it in (...) provided it has not already issued an opinion on the same matter⁶⁶. This opinion (...) shall be adopted within one month⁶⁷ by simple majority of the members of the European Data Protection Board (...).

⁶³ GR and IT suggestion.

⁶⁴ NL and UK scrutiny reservation.

⁶⁵ Paragraphs 1 to 6 have been moved to Article 57.

⁶⁶ ES suggested deleting the possibility for one DPA requesting an opinion from the EDPB, but keeping this pone-stop-shop possibility for the Commission.

⁶⁷ RO and GR proposed two months.

- 7a. Where within the period referred to in paragraph 7 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 measure⁶⁸.
- 7b. 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 utmost⁶⁹ account of the opinion of the European Data Protection Board and shall within two weeks after receiving the opinion , electronically communicate to the chair of the European Data Protection Board (...) whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.
9. Where the supervisory authority concerned does not intend to follow the opinion, 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 opinion⁷⁰.
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-matter⁷¹.
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.

⁶⁸ Further to LU proposal.

⁶⁹ Further to IT suggestion.

⁷⁰ Further to DE proposal.

⁷¹ DE and NL proposed providing a mechanism for consultation of stakeholders. IE and ES reservation.

Article 59

Opinion by the Commission⁷²

(...)

Article 60

Suspension of a draft measure⁷³

(...)

Article 61

Urgency procedure⁷⁴

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 53⁷⁵, 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 Commission⁷⁶.

⁷² Deleted in accordance with the request from BE, CZ, DE, ES, SE and UK. COM and FR reservation on deletion.

⁷³ Deleted at the suggestion of BE, CZ, DE, ES, IT, SE and UK. PT scrutiny reservation. COM and FR reservation on deletion.

⁷⁴ 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.

⁷⁵ COM scrutiny reservation.

⁷⁶ The conditions under which the EDPB needed to be informed also gave rise to questions (GR, ES). Com stated the obligation only existed in crone-stop-shop mechanism-border cases.

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.
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 62⁷⁷

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(....)⁷⁸.
 - (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).

⁷⁷ COM reservation.

⁷⁸ ES scrutiny reservation. CZ, DE and SE reservation: they asked for the deletion.

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.

Article 63

Enforcement⁷⁹

1. (...) ⁸⁰.
2. (...) ⁸¹

⁷⁹ DE, DK, EE, FR, NL, AT, PL, SE, SI and UK scrutiny reservation.

⁸⁰ See paragraph 3 of Article 54c

⁸¹ COM scrutiny reservation on deletion.