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NOTE

From: German and French delegations
To: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: General Data Protection Regulation
- The one-stop-shop mechanism

Short introduction:

The following text is based on documents 15395/14 (mainly), 14788/14 and 16974/14 of the former Italian presidency. Only those articles which build the so called “One-Stop-Shop” are part of this draft. Recitals are not included at this stage, and, as regards chapter VIII (administrative and judicial remedies) only article 76b.

This joint paper is aimed at facilitating the further work on the One-Stop-Shop Mechanism. The architecture from the Italian presidency in doc. 15656/1/14 REV 1, which was supported by a majority of Member States in the last Council of December 2014 is fully kept. However, a number of ministers saw a need to simplify the text along this confirmed structure.

In this regard filters are included in order to not overburden the system meaning both the workload of the supervisory authorities concerned and the European Data Protection Board.

- Filter 1: competence given to supervisory authorities which are not the lead authority in local cases concerning transnational processing (Articles 51a and 54b)
- Filter 2: necessity of presenting reasoned **and serious** objections to object to the draft decision submitted by the lead authority (Article 54a).
- Filter 3: possibility for the Board to reject a case if it considers the objection as not serious (Article 57).

The term “substantially” in Art. 4 paragraph 19a might be explained further in the recitals.

The articles corresponding with the Register need to be simplified and added to the text.

Processors have been excluded from the One Stop Shop since their activities depend on their relations with controllers.

Art. 4 - definitions

(13) ‘main establishment’ means

- as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union, in this case the establishment having taken such decisions shall be considered as the main establishment.

(This definition is taken from doc. 15395/14. As regards the controller it could be kept. An explanation should be added in a recital, to clarify that the main establishment should have the position to enforce a decision by the lead dpa or the Board towards all its establishments in the EU. Insofar the main establishment is not able to enforce the decision, it would not be the main establishment. The One-Stop-Shop is foreseen for the Controller only (and not the processor).

(19a) “supervisory authority concerned” means

- a supervisory authority which is concerned by the processing, because the controller is established on the territory of the Member State of that supervisory authority or because data subjects residing in this Member State are or are likely to be substantially affected.

(This definition is taken from doc. 15395/14. To our understanding the term “substantially” might be explained further in the recitals in order to reach legal clarity if a dpa is concerned or not).

(19b) “transnational processing of personal data” means:

- a processing which involves in more than one Member State at least two establishments of a controller in the Union or
- a processing which takes place in the context of the activities of a single establishment of a controller in the Union but which substantially affects or is likely to affect substantially data subjects in more than one Member State.

(This definition could be used to simplify the wording of Art. 51a, 54a. The text was taken from doc. 16974/14 (based on a French proposal) but slightly amended in order to cover both alternatives for the “lead authority cases”).

Article 51

Competence

1. Each supervisory authority shall be competent to perform the tasks and to exercise the powers conferred on it in accordance with this Regulation on the territory of its own Member State.

Recital 95a

Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation. This should cover in particular the processing in the context of the activities of an establishment of the controller or processor on the territory of its own Member State, processing of personal data concerning data subjects on its territory or processing carried out by a controller not established in the European Union when targeting data subjects residing in its territory. This should cover a possible infringement of this Regulation detected by or otherwise brought to its attention, complaints lodged by a data subject, conducting investigations on the application of the Regulation, promoting public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data.

(The texts are taken from doc. 15395/14. The 2nd sentence of Art. 51 para 1 was deleted (in line with doc. 16974/14), because it seems to be superfluous; the content is quite similar to sentence 2 of the corresponding recital 95a. In the first sentence “be competent to” was added to be as clear as possible and also in order to align the text with recital 95a (which has not been changed).

Article 51a

Lead supervisory authority and derogation in a local case concerning transnational processing

1. The supervisory authority of the main establishment or of the single establishment of the controller shall act as lead supervisory authority for the transnational processing of this controller in accordance with the procedure in Article 54a.

(taken from doc. 16974/14, deleted were the references to the processor)

- 2a. By derogation from paragraph 1 each supervisory authority shall be competent to deal with a complaint lodged or to deal with a possible infringement of this Regulation detected or otherwise brought to its attention, including for seeking an amicable settlement of the complaint or infringement case, if the subject matter of the case concerns processing activities only in its Member State or substantially affects or is likely to substantially affect data subjects only in its Member State.

(taken but slightly amended from doc. 16974/14)

3. The lead supervisory authority shall be the sole interlocutor of the controller for its transnational processing.

(taken from doc. 16974/14, reference to the processor deleted)

4. This article shall not apply where the processing is carried out by public authorities or bodies of a Member State and where the processing is carried out by private bodies acting on the basis of a legal obligation to discharge functions in the public interest.

(taken but slightly amended from doc. 15395/14)

Article 51b // 51c - register

We agree to keep a register, but the procedure has to be simplified. Art. 51b paragraph 2 is superfluous, because the content is to be found in Article 57 (see below).

Article 54a

Cooperation between the lead supervisory authority and other supervisory authorities concerned

1. The lead supervisory authority shall cooperate with the supervisory authorities concerned in accordance with this article in an endeavour to reach agreement.

(taken from doc. 16974/14 – option 2)

2. The lead supervisory authority shall, without delay, further investigate the subject matter and communicate the relevant information on the matter to the supervisory authorities concerned and shall submit a draft decision including on whether there is an infringement of this Regulation or not and on the exercise of the powers referred to in paragraphs 1, 1b and 1c of Article 53 to all supervisory authorities concerned for their opinion. The lead supervisory authority shall take due account of the views of the supervisory authorities concerned.

(taken but slightly amended from doc. 15395/14)

- 2b. The lead supervisory authority may request at any time the supervisory authorities concerned to provide mutual assistance pursuant to Article 55 and may conduct joint operations pursuant to Article 56, in particular for carrying out investigations or for monitoring the implementation of a measure concerning a controller or processor established in another Member State.

(taken from doc. 15395/14).

3. Where any of the supervisory authorities concerned expresses a reasoned **serious** objection within a period of four weeks after having been consulted in accordance with paragraph 2 to the draft decision, the lead supervisory authority shall, if it does not follow the objection, submit the matter to the consistency mechanism referred to in Article 57. In such a case, the European Data Protection Board shall decide pursuant to paragraph 2a of Article 57. Where a supervisory authority concerned has not objected within this period, it is deemed to be in agreement with the draft decision.

(taken from doc. 15395/14 plus adding “serious” as a filter and deletion of “settle the dispute”, instead a decision of the Board is foreseen corresponding with a former text of the IT Pres. doc. 14788/14 from October 31).

4. Where no supervisory authority concerned has objected to the draft decision within a period of four weeks the lead supervisory authority and the supervisory authorities concerned shall agree on this draft decision jointly.

(taken but slightly amended from doc. 15395/14)

- 4a. The lead supervisory authority shall adopt and notify the decision to the main establishment or single establishment of the controller and the supervisory authorities concerned and inform the European Data Protection Board of the decision in question including a summary of the relevant facts and grounds.

(taken but slightly amended from doc. 16974/14, Article 54aa para 4aa. Other supervisory authorities concerned shall receive the decision for their record so that they know that the lead authority has indeed adopted it).

- 4b. By derogation from paragraph 4a, where the decision concerns a complaint and as far as it adversely affects the complainant, notably where the complaint is dismissed or rejected, the supervisory authority of the complainant shall adopt the decision and notify it to the complainant.

(taken from doc. 16974/14)

4bb. Where the decision partly dismisses or rejects a complaint, the lead supervisory shall adopt the decision for the part concerning actions in relation to the controller and notify it to the main establishment or single establishment of the controller or processor on the territory of its Member State, while the supervisory authority of the complainant shall adopt the decision for the part concerning dismissal or rejection of the complaint and notify it on the complainant.

(taken from doc. 16974/14)

4c. After being notified of the decision of the lead supervisory authority pursuant to paragraph 4a and 4bb, the controller shall take the necessary measures to ensure compliance with the decision as regards the processing activities in the context of all its establishments in the Union. The controller shall notify the measures taken for complying with the decision to the lead supervisory authority, which shall then inform all the supervisory authorities concerned. The supervisory authorities concerned shall be bound by the single decision agreed jointly in the manner described above.

(taken from doc. 16974/14)

4d. Where, in exceptional circumstances, a supervisory authority concerned has reasons to consider that there is an urgent need to act in order to protect the interests of data subjects, the urgency procedure referred to in Article 61 shall apply.

(taken from doc. 15395/14)

5. The lead supervisory authority and the supervisory authorities concerned shall supply the information required under this Article to each other by electronic means, using a standard format.

(taken from doc. 15395/14)

Article 54b

Cooperation between the lead supervisory authority and the other supervisory authority concerned in local cases concerning transnational processing

1. In the cases referred to in Article 51a, paragraph 2a, the supervisory authority in charge of the case shall:
 - a) inform the lead supervisory authority of all the actions undertaken;
 - b) send it its requests for mutual assistance pursuant to Article 55 and its requests to conduct joint operations pursuant to Article 56;
 - c) submit a draft decision to the lead authority.
2. The lead supervisory authority may decide at any stage/step of the procedure that the case must be dealt in accordance with the procedure foreseen in Article 54a.
3. Where the lead supervisory authority has not objected within a period of 3 weeks to the draft decision, it is deemed to be in agreement with the draft decision.
4. Where the lead supervisory authority expresses a reasoned and serious objection within a period of 3 weeks, the supervisory authority shall, if it does not follow the objection, submit the matter to the European Data Protection Board, which shall settle the dispute by issuing a binding decision for all the supervisory authorities concerned pursuant to Article 58a.
5. For the adoption of the final decision, the procedure of Article 54a, paragraphs 4a or 4b as the case may be shall apply.

(This article was taken from doc. 16974/14)

Article 57

Consistency mechanism

2a. The European Data Protection Board shall be requested to adopt a binding decision in the following cases:

- a) Where, in a case referred to in paragraph 3 of Article 54a a supervisory authority concerned expresses a reasoned **serious** objection to a draft measure. In that case, the lead supervisory authority shall communicate the matter to the European Data Protection Board.

(Last part of the sentence seems unclear therefore deleted.)

Article 58a paragraph 1 will apply unless the European Data Protection Board decides by simple majority that the objection is not serious. In such a case the European Data Protection shall send the request back to the lead supervisory authority in order to decide upon in accordance with the procedure foreseen in Article 54a;

(Sentence 3 is taken but amended from EP-Text, Art. 58a paragraph 4)

- b) Where there are conflicting views on which supervisory authorities concerned is competent for the main establishment. In that case, any of the supervisory authorities concerned may communicate the matter to the European Data Protection Board;
- c) Where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56. In that case, any supervisory authority concerned, the European Data Protection Board or the Commission may communicate such matter to the European Data Protection Board;

- d) Where a competent supervisory authority does not request the opinion of the European Data Protection Board in the cases mentioned in paragraph 2 of this Article, or does not intend to follow the opinion of the European Data Protection Board issued as per Article 58. In that case, any supervisory authority concerned, the European Data Protection Board or the Commission may communicate the matter to the European Data Protection Board.

(The text is - without paragraph 1 3rd sentence - taken and slightly amended from doc. 14788/14. We agree that the Board shall be in the position to decide the subject matter completely. It shall not settle the dispute only as foreseen in Art. 57 paragraph 2a and 58a of doc. 15395/14).

Article 58a

Decisions by the European Data Protection Board

1. In the cases referred to in paragraph 2a of Article 57, the European Data Protection Board shall adopt a decision on the subject-matter submitted to it in order to ensure the correct application of this Regulation in individual cases.
2. The decision referred to in paragraph 1 shall be adopted within one month from the referral of the subject-matter by a two-third majority of the members of the Board. This period may be extended by a further month on account of the complexity of the subject-matter.
3. The supervisory authorities concerned, as the case may be, shall not adopt a decision on the subject-matter submitted to the Board under paragraph 1 during the period referred to in paragraph 2.

(The “lead dpa” is deleted because the lead dpa is also a dpa concerned pursuant the definition in Art. 4 para 19a).

4. The decision referred to in paragraph 1 shall state the underlying reasons.

5. *(We have deleted the paragraph 5 (“The decision referred to in paragraph 1 shall be binding in its entirety and addressed on the supervisory authorities concerned and the lead authority, as the case may be”) because the meaning of this par. Seems unclear. What is the difference in between “addressed on” in para. 5 and “shall notify” in para. 6? The notification and the latter adoption of a decision by the dpa’s is sufficient.)*

6. The Chair of the European Data Protection Board shall notify, without undue delay, the decision referred to in paragraph 1 on the supervisory authorities concerned, as the case may be, as well as, where applicable, the controller and the complainant(s). It shall inform the Commission thereof.

(The reference on “lead dpa” is deleted because the lead dpa is also a dpa concerned pursuant the definition in art. 4 para 19a. This paragraph has been brought in line with Art. 76b paragraph 1. That means the Board-decision have to be notified towards all “addresses” mentioned in 76b paragraph 1 in order to enable them to execute their right to directly access the ECJ to challenge the Board-decision).

7. The supervisory authorities concerned shall adopt their final decision on the basis of the decision referred to in paragraph 1, without undue delay and at the latest by one month after the European Data Protection Board has notified its decision. The final decision of the supervisory authorities concerned shall be adopted on the case under the terms of Article 54a, paragraph 4a, 4b and 4bb.

(The text of this article was taken but amended from doc. 14788/14)

Chapter VIII

Article 76b

Actions before the Court of Justice of the European Union against decisions by the European Data Protection Board

1. Actions may be brought before the Court of Justice of the European Union in accordance with Article 263 TFEU, in order for it to review the legality of decisions taken by the European Data Protection Board pursuant to Article 58a. Such actions may be brought before the Court of Justice of the European Union by supervisory authorities, Member States and the Union institutions as well as by natural or legal persons to whom decisions taken by the European Data Protection Board have been notified or to whom such decisions are of direct and individual concern, including data subjects who have lodged a complaint in accordance with Article 73.
2. The expiration of the time-period provided for in the sixth subparagraph of Article 263 TFEU and the Rules of Procedure of the General Court shall not bar the persons referred to in paragraph 1 from calling in question the lawfulness of any decision taken by the European Data Protection Board before the national courts in accordance with Article 74 or 75 and those national courts from requesting the Court of Justice of the European Union a preliminary ruling concerning the validity of any decision taken by the European Data Protection Board in accordance with Article 267 TFEU.)

(Paragraph 2 has been put into brackets, not because FR and DE disagree on it, but because the Commission and several delegations have objected to it. There is a need to discuss this point further).

3. Where the European Data Protection Board notifies its decision in accordance with Article 58a paragraph 6, such a notification shall state the possibility for the persons referred to in paragraph 1 to bring an action for annulment before the General Court of the European Union in accordance with Article 263 TFEU as well as the time-period for such an action in accordance with the sixth subparagraph of Article 263 TFEU and the Rules of Procedure of the General Court. It shall also refer to the additional right conferred on that person pursuant to paragraph 2.

4. In the event that the European Data Protection Board has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU.
5. The European Data Protection Board shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

(The text of this article is taken from doc. 15395/14).