Council of the European Union

**Brussels, 23 January 2015**
**(OR. en)**

**5571/15**

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

**LIMITE**

**DATAPROTECT 10**
**JAI 45**
**MI 33**
**DRS 10**
**DAPIX 15**
**FREMP 11**
**COMIX 41**
**CODEC 89**

**NOTE**

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| From: | Austrian delegation |
| To: | Working Group on Information Exchange and Data Protection (DAPIX) |
| No. prev. doc.: | 5315/15 DATAPROTECT 4 JAI 23 MI 22 DRS 5 DAPIX 9 FREMP 4 COMIX 25 CODEC 51 |
| Subject: | General Data Protection Regulation<br>- The one-stop-shop mechanism |

The Austrian Delegation appreciates the efforts made by the German and French delegations in order to improve the text with a view to the so-called one-stop-shop mechanism. On closer inspection, however, some questions and shortcomings are to be addressed and deserve further reflection.

**1. As to the cover note of Council document 5315/15**

As regards the issue of the proposed "filter" no 2 to be included in order to not overburden the one stop shop system Austria holds the view that the requirement of presenting only "serious" objections is too demanding and moreover it would not be justiciable in practice due to its very vague concept. Thus, reference should only be made to the criterion of "reasons" to be given for any objections.

As for the exclusion of processors from the one stop shop concept Austria can support this idea provided that textual coherence is ensured throughout the entire regulation.

Within this context we recall our proposal regarding data use by a processor breaching orders of the controller. In this case it deems appropriate to consider the processor as controller in the meaning of Art 4 para 5 of the regulation. This approach would leave untouched the one shop concept as proposed in Council doc 5315/15.

**2. As to Art. 4 para 13**

Within this context, Austria recalls its criticism already uttered several times. In our view when it comes to referring to the particular function of the "one-stop-shop" it is of utmost importance to enable supervisory authorities to easily establish whether or not any "main establishment" and thereby any lead authority comes into play in a particular case. In addition the concept of "main establishment" can only generate added value on condition that it is used only once per enterprise or per group of undertakings.
The proposed text of Art 4 para 13 as set out in doc 5315/15 does not sufficiently take account to the above requirement as its wording taken literally leaves room for more than one main establishment and moreover placing the focus on the location where decisions on purposes and means of processing operations are taken. This could imply a time consuming and costly verification procedure as the case may be.
For this reason, Austria would like to propose the following amendment to the current text:

(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.~~ **the controller has notified to the Secretariat of European Data Protection Board an alternate single point of contact vested with sufficient powers in order to ensure compliance of any transnational processing of personal data by the controller.**

Within this context Austria recalls ist proposal for a one-stop-shop register set out in Council doc no 8275/14 of 27 March 2014. Compared to the current text of Art 51b as set out in Council doc no 15395/14 the Austrian proposal takes also into account the specific case of the dominant undertaking in a group of undertakings. We therefore propose to pick up this element of the Austrian proposal and insert it into Art. 51b para 1.

**3. As to Art. 4 para 19a**

In order to highlight the distinction between a supervisory authority acting only as a local authority "concerned" and a supervisory authority acting in its particular capacity as a "lead dpa" as well as to clarify that the supervisory authority with which the complaint triggering the procedure has been lodged is always to be considered as "authority conderned" it deems appropriate to make the insertion as proposed below:

(19a) "supervisory authority concerned" means
- a supervisory authority **not acting as a lead supervisory authority** (Art 51a para 1) which is concerned by the processing, because the controller is established on the territory of the Member State of that supervisory authority, **the underlying complaint has been lodged with this authority** or because data subjects residing in this Member State are or are likely to be substantially affected.

Besides, Austria is convinced that the goal of coherent Union wide application of the reguation together with the aim of ensuring legitimacy and acceptance of interpretation by supervisory authorites broad consultation in particular situations deems necessary. In this regard Austria proposes the insertion of the wording below into recital 101a or the insertion as a separate new recital in order to further contribute to the interpretation of the "supervisory authority concerned" as set out in Article 4 para 19:

"A lead authority when operating the concept of "supervisory authorities concerned" has to take duly into account the given type of data processing. For example in the case of an internet service in the form of a social network or an internet webshop offering goods or services in a widely used language throughout the Union the competent lead authority should involve the supervisory authorities in all Member States. The same should apply to devices designed to notably process personal data and due to their specific nature being typically being used in public places and by their wide distribution gaining a cross border dimension such as wearable optoelectronical devices, dash cams and like applications. If in doubt the lead authority should in the interest of ensuring a coherent application of the Regulation launch broad consultation."

**4. As to Art. 51a para 2a**

This provision has to be read together with Art. 73. It flows from the latter that in any case data subjects shall have the right to lodge a complaint with the supervisory authority of the Member State of his/her habitual residence. This right must not be restricted by the one stop shop system. At first sight, however, Article 51a para 2a seems to limit the competence of a local supervisory authority to "deal" with complaints lacking any cross border relevance of processing activities – apart from the mere fact of existence of a main establishment. Taken literally this would mean, that in the case of a data processing operation adversely affecting data subjects in more than one Member State the data subject would be compelled to lodge his/her complaint with the lead dpa. As this should not be the consequence, some clarification seems to be needed in order to establish a link between Art 73 para 1 and Art 51a para 2a and to make clear that the applicability of the one stop shop system in a particular case does not narrow the scope of application of Art 73 para 1.

**5. As to Art 51b, 51c**

Austria holds the view that a public register quickly providing both supervisory authorities dealing with transnational cases and data subjects exercising e.g. their right of access with valid information about whether or not a main establishment comes into play in a particular case is absolutely indispensable. Therefore the content both of Art 51b and Art 51c should be kept and supplemented with a reference to the possible case of a dominant undertaking in a group of undertakings as proposed in Art 54 para 2 of Council doc no 8275/14 of 27 March 2014. Besides, in order to ensure the proper application of the one stop shop system any supervisory authority whenever dealing with a case involving transnational processing should be obliged to consult the public register on a routine basis.

**6. As to Art. 54a para 3**

As regards the insertion of the term "serious" we refer to the relating introductory remarks on the cover note.
In addition, this para does not give an answer to the subsequent procedure in the case of rejection by the European Data Protection Board according to Art 54a para 4bb.

**7. As to Art. 54a para 3, 4 and 4a**

The interplay of these provisions is not quite clear. According to Art 54a para 3 "silence" (in the meaning of not objecting) of supervisory authorities concerned in regard of any proposal made by the lead dpa shall be considered as consent. Then, Art 54a para 4 states that in such a case the lead dpa and the supervisory authorities concerned shall in addition jointly "agree" on the respective draft decision. The purpose of this step may be seen in the production of a "formal decision". Based on this assumption, however, it does not seem logical to provide for a further formal step of "adoption" such as set out in Art 54 para 4a ("The lead supervisory authority shall adopt **and** notify the decision […]. In our view it would last to provide for "notification" at this stage.
If, however, the step of adoption and notification by the lead authority according to Art 54 para 4a is aiming at enabling the controller to launch an appeal procedure with this particular supervisory authority, then one could renounce on previous step of formal joint agreement by the supervisory authorities according to Art, 54 para 4.

As for Art 54 para 3 it is worth pointing to the fact, that this provision leaves unaddressed the further procedure in the case that the lead dpa takes on board objections rised by a supervisory authority concerned according to Art 54a para 3. It deems necessary to clarify the next steps thereafter (e.g. presentation of a new proposal to other authorities concerned?).

According to Art 54a para 4a the lead supervisory authority shall inform the European Data Protection Board of the decision in question including a summary of the relevant facts and grounds. There should be no doubt about the added value of a general accessibility of the latter information. Thus Austria proposes to provide for the obligation of the Secretariat of the European Data Protection Board to enter the said information into the publicly available register to be kept according to Art 66 para i. The latter provision should therefore be supplemented accordingly.

**8. As to Art. 54a para 4a, 4b, 4bb in conjunction with Art 52 para 1 point b and Art 73**

These provisions have to be read together with Art 73 para 2 and Art 52 para 1 point b. According to the latter, the supervisory authority shall inform the complainant on the progress and the outcome of the complaint […]. Art. 54a para 4a places the focus on the information of the main establishment or a single establishment of a controller and the supervisory authorities concerned as well as the European Data Protection Board. The data subject, however, has also a keen interest in being informed about a decision adopted by the lead dpa in his/her favour. In the absence of any reference to this aspect doubts could arise to what extent a data subject is to be addressed within the given context. Besides, the legal nature of such information remains largely unclear as well as the legal consequences in the case of failure to provide such information in due course.
The same applies to the case of a decision partly dismissing or rejecting a complaint of a data subject according to Art 54a para 4bb.

**9. As to Art. 54a para 4bb**

In the event that a complaint is only upheld partially according to Art 54a para 4bb both the supervisory authority which has received such a complaint and the lead dpa shall adopt a (partial) decision concerning that complaint and serve it on to the complainant or to the main establishment of the controller concerned. As both parties, i.e. the controller and the data subject may decide to go against the respective partial decision two different appeals procedures in two different Member States may develop and ultimately result in contradictory court decisions. Within this context the question arises how such risk could be mitigated (e.g.: by establishing a common register with the European Data Protection Board). Having said that it is also worth pointing to the fact that making use of the right of suspension of proceedings according to Art 76a para 2 basically depends on sufficient knowledge about cases pending before foreign courts. And the same applies to the obligation of courts to consult set out in Art 76 para 1.

Moreover the case may appear that only one of the aforementioned parties decides to go against the decision of the respective (local) dpa, which adopted a (partial) decision whereas the complementary decision in another Member State has already become final. In this case the question of potential negative effects of res judicata arises namely in the event of diverging decisions on a point of law raised by that case. Should the controller or data subject concerned be provided with a right to apply for revision of the uncontested judgment?

**10. As to Art. 54b para 4**

As regards the insertion of the term “serious” we refer to the relating introductory remarks on the cover note.

**11. As to Art. 57 para 2a**

The first line of para 2a should be modified as follows: “The European Data Protection Board shall ~~be requested to~~ adopt a binding decision in the following cases: […]”

As regards the insertion of the term “serious” in point a we refer to the relating introductory remarks on the cover note.

Besides, in the second last line of subpara 2 of Art 57 para 2a point a the term “Board” has to be inserted.

**12. As to Art. 58a para 7**

Within the context of the last sentence of this provision the question arises, what legal consequences should arise in the absence of implementation of a Board Decision by the supervisory authorities concerned.

**13. As to Art 58a, 74 and 76b**

Here again the interplay of the various provisions give rise to some questions. According to Art 76b para 3 complainants to whom the European Data Protection Board has notified its decision in accordance with Article 58a para 6 shall have the right to bring an action for annulment against such decision before the General Court of the European Union in accordance with Article 263 TFEU. Art 58a para 7 requires the supervisory authorities having brought the case underlying the aforementioned decision before the European Data Protection Board to adopt their final decision on the basis of the Board’s decision. The complainant in turn, upon notification of the supervisory authority’s decision pursuant to Art 54a para 4bb, is entitled to lodge an appeal against the latter according to Art 74. Given the dual judicial protection offered to the complainant the question arises as to what legal consequences will result for a procedure based on Art 74 in the case of an additional action brought before the European Court of Justice according to Art 76b.

**14. General remark on Art. 54a and 54b**

What are the legal consequences of breaches of obligations to cooperate by any lead dpa or dpa concerned? What are the legal consequences of breaches of the obligation to bring a case before the European Data Protection Board according to Art 57?