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**LIMITE**

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**MI 39**  
**DRS 12**  
**DAPIX 17**  
**FREMP 13**  
**COMIX 46**  
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**NOTE**

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From: Presidency  
To: JHA Counsellors DAPIX

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COMIX 42 CODEC 90  
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COMIX 25 CODEC 51  
15395/14 DATAPROTECT 165 JAI 860 MI 965 DRS 167 DAPIX 167  
FREMP 202 COMIX 604 CODEC 2222

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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)  
- The one-stop-shop mechanism

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## **Background**

1. The one-stop-shop mechanism was discussed at the DAPIX meetings on 26-27 January and of 5-6 February 2014. Following these discussions, the Presidency has revised the text of Chapters VI and VII. To that end it has based itself on the text of the Regulation as it stood at the end of the Italian Presidency. It has inserted therein the text proposals made by Germany and France, to the extent that they were supported by a majority of Member States at the above DAPIX meetings.
2. The latest changes introduced that have not yet been discussed in the Working Party are marked in **bold underlining**.

## **Inclusion of processors in the one-stop shop mechanism**

3. The Commission proposal provided that this mechanism would cover both controllers and processors. A German-French note proposed to limit the mechanism to controllers. This was, however, supported by only a few Member States. Most delegations opposed this, referring to the considerable power of some processors, in particular in the so-called cloud environment. Reference was also made to the fact that processors have some 'autonomous' obligations under Article 26 and regarding security measures, the non-respect of which may give rise to sanctions against processors. Data subjects can exercise their rights under Chapter III only against controllers, and therefore the inclusion of processors in the one-stop-shop mechanism does not raise any 'proximity' concerns.
4. *Delegations are invited to confirm the inclusion of processors in the one-stop shop mechanism*

## **Definition of concerned supervisory authorities**

5. So far these authorities were defined in a very broad manner as covering all Member States on whose territory the controller is established or whose data subjects are substantially affected or likely to be so. This definition allows for maximum proximity, especially regarding any kind of processing related to the offering of goods and services over the internet where there may potentially be affected data subjects in all Member States. Some delegations have, however, pointed to the heavy burdens this imposes on the lead authority. With a view to making the co-operation mechanism lighter and reducing the number of possible cases going into the consistency mechanism (and possible actions before the ECJ), the Presidency had suggested to narrow the definition of concerned authorities in Article 4(19a) by incorporating a suggestion to refer to the high degree of risk of data subjects being substantially affected. This suggestion was, however, rejected by the vast majority of Member States. Therefore the Presidency is now suggesting to refer to term "***essentially" or "substantially"***" affecting data subjects (the term "concretely", which was proposed by some Member States is not a common legal term). As recital 96a clarifies, the fact that a complaint has been lodged would be indication of such substantial effect.

6. *Delegations are invited to indicate;*
- *whether they can support this revised definition of concerned supervisory authorities; and*
  - *in case they can support it, whether they think the term 'substantially' or 'essentially' should be used throughout the Regulation.*

### **Need for a separate handling of transnational cases with only local impact**

7. Both the text of the Regulation as it stood at the end of the Italian Presidency and the German-French note provide for a category of cases, which, notwithstanding the fact that they have some transnational element to them, can be dealt with locally by the territorially competent supervisory authority. Many delegations had pleaded in favour of simplifying the procedure in this regard and the Presidency has accordingly deleted Article 54b. The Presidency's suggestion to move this category of cases from Article 51a (2a) to Article 51 (1a) was, however, criticised, as it seemed to imply that cases which were intrinsically transnational were local.

8. In view of the rather confused discussions to which this has given rise, the Presidency suggests either:

- maintaining in Article 51a(2a) the possibility for a local authority to deal with transnational processing combined with a right for the lead supervisory authority to object to the 'local' supervisory authority dealing. A lead supervisory authority which is of the opinion that it should deal with a case may always investigate this in accordance with the procedure set out in Article 54a (paras. 2 and 2b); or
- have a specific procedure for this category of cases in Article 54b, as proposed in the German-French note.

9. *Delegations are invited to indicate which option they prefer.*

### **Definition of relevant and reasoned objection and quantitative threshold**

10. Further to suggestions made, the Presidency had inserted a definition of a 'serious and reasoned objection' in Article 4(19b) which restricts the subject-matter of the objection. Delegations have rightly pointed out that this restriction does not relate to the 'seriousness' of the objection and therefore the Presidency suggests to use the term 'relevant'.

11. The Presidency had also suggested inserting a low quantitative threshold of 1/3 of the concerned supervisory authorities, as soon as there is more than one concerned supervisory authority other than the lead authority. This proposal did not muster the support of a majority of the Member States, but in view of the fact that it was supported by a sizeable minority, the Presidency has, for now, kept the proposal in square brackets as an alternative.

12. The Presidency has also tried to streamline the proceedings by which the lead authority is obliged to submit a matter to Board.

*13. Delegations are invited to indicate whether they can support the deletion of the quantitative threshold.*

### **Scope of EDPB revision**

14. Regarding the scope of the revision by the EDPB, the Presidency had suggested that the Board should be entitled to verify whether an infringement of the Regulation took place and to verify whether the reaction (in most cases corrective measure) the lead supervisory authority intends to adopt is in conformity with the Regulation. This excludes that the EDPB substitutes itself for the lead supervisory authority in determining the (corrective) measure, but it does empower the Board to take decisions in this regard when the proposed measure is in violation of the Regulation, including the proportionality requirement for fines (Article 79(2)).

*Delegations are invited to indicate whether they can support this compromise.*

### **Review of legally binding EDPB decisions**

15. The discussions among Member States have clearly demonstrated Member States' wishes to have an effective system of judicial review of the legally binding decisions of the Board, the importance which was also emphasised at Ministerial level. Article 263 TFEU provides for jurisdiction of the Court of Justice of the European Union ("CJEU") to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties ("action for annulment"). This will clearly also allow for the review of legally binding EDPB decisions and such review proceedings may be instituted directly before the CJEU by the addressee(s) of the EDPB decisions or by other persons which are directly and individually concerned by them (fourth paragraph of Article 263 TFEU). In addition, Article 267 TFEU provides for jurisdiction of the CJEU to give preliminary rulings concerning *inter alia* the validity and interpretation of the legally binding EDPB decisions as well as the interpretation of the Regulation, where such questions are raised before national courts.

16. The architecture of the one-stop-shop system currently includes that the EDPB decisions, even though legally binding, will have to be implemented by the national supervisory authority (in case a violation is found, the lead authority; in case a complaint is rejected, the 'local' authority at which the complaint was lodged). In reality, the data subject will thus only get to know the 'full picture' of the reaction that is given to his complaint following the decision by the national supervisory authority. It is therefore likely that in many cases the data subject will await the outcome of the procedure at national level before evaluating or at least deciding whether to request a judicial review of the EDPB decision which is implemented by the decision of the national authority.

17. However, the sixth paragraph of Article 263 TFEU provides that the action for annulment before the CJEU must be instituted 'within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'. Therefore the data subject or the controller who had been informed of the EDPB decision when it was adopted and has awaited the subsequent notification of the decision of the national supervisory authority may be time barred if he wants to bring an action for annulment before the CJEU against the EDPB decision that gave rise to the national decision. Obviously the data subject (and/or controller) may still seek judicial review by the competent Member State court of the national decision based on the EDPB decision, but that national court will also be bound by the legally binding EDPB decision and will not be able to request a preliminary ruling to the CJEU on the validity of the EDPB decision if the data subject or the controller who is directly and individually concerned by it has not challenged it before the CJEU within the two months' period.

18. The discussions so far have shown that there are two possible avenues to address this issue and allow data subjects (and controllers) still to successfully challenge the validity of an EDPB decision at the moment they are notified of the national DPA decision implementing the EDPB decision<sup>1</sup>.

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<sup>1</sup> The Commission has sketched a complex third possibility, which would consist of having the EDPB giving, at a first stage an opinion/ to the national DPA, which would become a binding decision only if the DPA refused to follow it. The legally binding DPA decision would therefore inevitably be adopted after the national DPA decision, but there would be (many) cases where the EDPB would not be able to adopt such decision. Therefore it is doubtful whether this alternative would be in line with the orientation given by the Council that the one-stop-shop system must be build around legally binding powers by the Board.

19. A first option, which is based on the fifth paragraph of Article 263 TFEU, is to provide in the General Data Protection Regulation that the expiration of the two-months period would not prevent a data subject or a controller from challenging the validity of an EDPB decision in the context of the national judicial review of the DPA decision implementing the EDPB decision. This solution is provided for by draft paragraph 2 of Article 76b, as set out in the annex (*Option 1*). This solution would guarantee effective judicial review proceedings at Union and national level. However, the fifth paragraph of Article 263 TFEU is a new Treaty provision the scope of which has not yet been interpreted by the CJEU.

20. A second, alternative option (*Option 2*) is to provide in the General Data Protection Regulation that the EDPB decision must be published. In this case, the two-months period for launching an action for annulment of the EDPB decision by the complainant or the controller if they are directly and individually concerned, would start running only at the moment of the publication of the EDPB decision. The EDPB decision would thus be published on the website of the EDPB and, where required, in a de-personalised way (i.e. by deleting the names of the parties). The Regulation would also have to provide for a mechanism by which the EDPB would delay the publication of its decision after the adoption by the national supervisory authority of its decision, so that the two-months period for bringing an action for annulment before the CJEU would start to run only on the day of publication. At the same time the Regulation would also have to provide that the national supervisory authority would be obliged to notify its decision without delay after its adoption and in this notification, would be obliged to inform the data subject (and the controller) of the fact that the EDPB decision relating to him will be published.

21. *Delegations are invited to indicate which option they prefer in order to allow the data subject/controller to successfully challenge an EDPB decision at the moment he is notified of the national DPA decision implementing the EDPB decision.*

- 92) The establishment of supervisory authorities in Member States, empowered to perform their tasks and exercise their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of their personal data. Member States may establish more than one supervisory authority, to reflect their constitutional, organisational and administrative structure.
- 92a) The independence of supervisory authorities should not mean that the supervisory authorities cannot be subjected to control or monitoring mechanism regarding their financial expenditure<sup>2</sup>. Neither does it imply that supervisory authorities cannot be subjected to judicial review.
- 93) Where a Member State establishes several supervisory authorities, it should establish by law mechanisms for ensuring the effective participation of those supervisory authorities in the consistency mechanism. That Member State should in particular designate the supervisory authority which functions as a single contact point for the effective participation of those authorities in the mechanism, to ensure swift and smooth co-operation with other supervisory authorities, the European Data Protection Board and the Commission.
- 94) Each supervisory authority should be provided with the (...) financial and human resources, premises and infrastructure, which are necessary for the effective performance of their tasks, including for the tasks related to mutual assistance and co-operation with other supervisory authorities throughout the Union. Each supervisory authority should have a separate annual budget, which may be part of the overall state or national budget.

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<sup>2</sup> Text proposed in order to accommodate concerns raised by delegations that the wording of Article 47 would prevent this type of actions with regard to the supervisory authorities.

- 95) The general conditions for the member or members of the supervisory authority should be laid down by law in each Member State and should in particular provide that those members should be either appointed by the parliament and/or the government or the head of State of the Member State or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure. In order to ensure the independence of the supervisory authority, the member or members should refrain from any action incompatible with their duties and should not, during their term of office, engage in any incompatible occupation, whether gainful or not. (...)<sup>3</sup>.
- 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, the processing of personal data, carried out by public authorities or private bodies acting in the public interest<sup>4</sup> processing affecting 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 include dealing with 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.
- 96) The supervisory authorities should monitor the application of the provisions pursuant to this Regulation and contribute to its consistent application throughout the Union, in order to protect natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the internal market. For that purpose, this Regulation should oblige and empower the supervisory authorities to co-operate with each other and the Commission, without the need for any agreement between Member States on the provision of mutual assistance or on such cooperation.

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<sup>3</sup> DK suggested deleting this sentence

<sup>4</sup> NL suggestion.

96a) 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 the controller or processor is established in more than one Member State, or where processing taking place in the context of the activities of a single establishment of a controller or processor in the Union substantially affects or is likely to substantially affect data subjects in more than one Member State, the supervisory authority for the main establishment of the controller or processor or for the single establishment of the controller or processor should act as lead authority. **It shall cooperate with the other authorities that are concerned, either because the controller has an establishment on the territory of their Member State or because data subjects residing on their territory are substantially/essentially affected, which may be demonstrated by a complaint that has been lodged with them. However, also where a data subject not residing in that Member State has lodged a complaint, the supervisory authority to which such complaint has been lodged should also be a concerned supervisory authority.** Within its tasks to issue guidelines on any question covering the application of this Regulation, the European Data Protection Board may issue guidelines in particular on the criteria to be taken into account in order to ascertain whether the processing in question substantially affects data subjects in more than one Member State.

(...)

96b) The lead authority should be competent to adopt binding decisions regarding measures applying the powers conferred on it in accordance with the provisions of this Regulation. In its capacity as lead authority, the supervisory authority should closely involve and coordinate the concerned supervisory authorities in the decision-making process. In cases where the decisions is to reject the complaint by the data subject in whole or in part that decision should be adopted by the up supervisory authority at which the complaint has been lodged.

96c) The decision (...) should be agreed jointly by the lead supervisory authority and (...) the (...) concerned supervisory authorities and should be directed towards the main or single establishment of the controller or processor and be binding on the controller and processor. The controller or processor should take the necessary measures to ensure the compliance with this Regulation and the implementation of the decision notified by the lead supervisory authority to the main establishment of the controller or processor as regards the processing activities (...) in the Union.

- 97) A supervisory authority should not act as lead supervisory authority in local cases where the controller or processor is established in more than one Member State, but the subject matter of the specific processing concerns only processing carried out in a single Member State and involving only data subjects in that single Member State, for example, where the subject matter concerns the processing of employees data in the specific employment context of a Member State. The rules on the lead supervisory authority and the one-stop-shop mechanism should not apply where the processing is carried out by public authorities or private bodies of acting in the public interest. In such cases the only supervisory authority competent to exercise the powers conferred to it in accordance with this Regulation should be the supervisory authority of the Member State where the public authority or body is established.
- 98) (...)
- 99) In order to ensure consistent monitoring and enforcement of this Regulation throughout the Union, the supervisory authorities should have in each Member State the same tasks and effective powers, including powers of investigation, corrective powers and sanctions, and authorisation and advisory powers, particularly in cases of complaints from individuals, and to bring infringements of this Regulation to the attention of the judicial authorities and/or engage in legal proceedings. Member States may specify other tasks related to the protection of personal data under this Regulation. The powers of supervisory authorities (...) should be exercised in conformity with appropriate procedural safeguards set out in Union law and national law, impartially, fairly and within a reasonable time. In particular each measure should be appropriate, necessary and proportionate in view of ensuring compliance with this Regulation, taking into account the circumstances of each individual case, respect the right of every person to be heard before any individual measure which would affect him or her adversely is taken and avoid superfluous costs and excessive inconveniences for the persons concerned. Investigatory powers as regards access to premises should be exercised in accordance with specific requirements in national procedural law, such as the requirement to obtain a prior judicial authorisation.

Each legally binding measure of the supervisory authority should be in writing, be clear and unambiguous, indicate the supervisory authority which has issued the measure, the date of issue of the measure, bear the signature of the head or a member of the supervisory authority of a person authorised by him or her, give the reasons for the measure, and refer to the right of an effective remedy. This should not preclude additional requirements pursuant to national procedural law. The adoption of such legally binding decision implies that it may give rise to judicial review in the Member State of the supervisory authority that adopted the decision.

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

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

101a) The supervisory authority receiving a complaint or detecting or being informed otherwise of situations that entail possible infringements of the Regulation should seek an amicable settlement and, if this proves unsuccessful, exercise its full range of powers in cases where another supervisory authority should act as a lead supervisory authority for the processing activities of the controller or processor but the concrete subject matter of a complaint or the possible infringement concerns only processing activities (...) of the controller or processor in the one (...) Member State where the complaint has been lodged or the possible infringement detected and the matter does not **substantially/essentially** affect (...) or is not likely to **substantially/essentially** affect data subjects in other Member States. This should include specific processing carried out in the territory of the Member State of the supervisory authority or with regard to data subjects on the territory of that Member State; or to processing that is carried out in the context of an offer of goods or services specifically aimed at data subjects in the territory of the Member State of the supervisory authority; or that has to be assessed taking into account relevant legal obligations under national law.

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<sup>5</sup> Moved to recital 111.

- 102) Awareness raising activities by supervisory authorities addressed to the public should include specific measures directed at controllers and processors, including micro, small and medium-sized enterprises, as well as (...) individuals in particular in the educational context.
- 103) The supervisory authorities should assist each other in performing their tasks and provide mutual assistance, so as to ensure the consistent application and enforcement of this Regulation in the internal market. Where a supervisory authority requesting mutual assistance, in the case of no response of the requested supervisory authority within one month of receiving the request, adopts a provisional measure, such provisional measure should be duly justified and only of a temporary nature.
- 104) Each supervisory authority should have the right to participate in joint operations between supervisory authorities. The requested supervisory authority should be obliged to respond to the request in a defined time period.

104a)(...)<sup>6</sup>

- 105) In order to ensure the consistent application of this Regulation throughout the Union, a consistency mechanism for co-operation between the supervisory authorities themselves and the Commission should be established. This mechanism should in particular apply where a supervisory authority intends to adopt a measure intended to produce legal effects as regards processing operations which substantially affect a significant number of data subjects in several Member States (...). It should also apply where any *concerned* supervisory authority or the Commission requests that such matter should be dealt with in the consistency mechanism. This mechanism should be without prejudice to any measures that the Commission may take in the exercise of its powers under the Treaties.

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<sup>6</sup> Merged with recital 110.

- 106) In application of the consistency mechanism, the European Data Protection Board should, within a determined period of time, issue an opinion, if a (...) majority of its members so decides or if so requested by any *concerned* supervisory authority or the Commission. The European Data Protection Board should also be empowered to adopt legally binding decisions in case of disputes between supervisory authorities. For that purposes it should issue, with a two-third majority of its members, legally binding decisions in clearly defined cases where there are conflicting views among supervisory authorities in particular in the cooperation mechanism between the lead supervisory authority and *concerned* supervisory authorities on the merits of the case, notably whether there is an infringement of this Regulation or not (...).
- 107) (...)
- 108) There may be an urgent need to act in order to protect the rights and freedoms of data subjects, in particular when the danger exists that the enforcement of a right of a data subject could be considerably impeded. Therefore, a supervisory authority should be able to adopt provisional measures with a specified period of validity when applying the consistency mechanism.
- 109) The application of this mechanism should be a condition for the (...) lawfulness of a (...) measure intended to produce legal effects by a supervisory authority in those cases where its application is mandatory. In other cases of cross-border relevance, the cooperation mechanism between the lead supervisory authority and *concerned* supervisory authorities should be applied and mutual assistance and joint operations might be carried out between the *concerned* supervisory authorities on a bilateral or multilateral basis without triggering the consistency mechanism.

- 110) In order to promote the consistent application of this Regulation, the European Data Protection Board should be set up as an independent body of the Union. To fulfil its objectives, the European Data Protection Board should have legal personality. The European Data Protection Board should be represented by its Chairperson. It should replace the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data established by Directive 95/46/EC. It should consist of a head of a supervisory authority of each Member State or his or her representative and of the European Data Protection Supervisor. The Commission should participate in its activities without voting rights. The European Data Protection Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission, in particular on the level of protection in third countries or international organisations, and promoting co-operation of the supervisory authorities throughout the Union. The European Data Protection Board should act independently when exercising its tasks
- 111) Every data subject should have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, and have the right to an effective judicial remedy in accordance with Article 47 of the Charter of Fundamental Rights if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can be completed also electronically, without excluding other means of communication.

112) Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a body, organisation or association which aims to protect the rights and interests of data subjects in relation to the protection of their data and is constituted according to the law of a Member State, to lodge a complaint on his or her behalf with a supervisory authority or exercise the right to a judicial remedy on behalf of data subjects. Such a body, organisation or association should have the right to lodge, independently of a data subject's complaint, a complaint where it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.

113) Without prejudice to the right of natural or legal person to bring an action for annulment of decisions of the European Data Protection Board which have been notified to him or her before the Court of Justice of the European Union, each natural or legal person should have the right to an effective judicial remedy against a decision of a supervisory authority which produces legal effects concerning this person. Such decisions concern in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints. However, this right does not encompass other measures of supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. The fact that a natural or legal person has not brought an action for the annulment of the European Data Protection Board's decisions before the Court of Justice of the European Union within the mandatory time-limit, does not bar that person from calling in question the lawfulness of that decision before the national courts at a later stage in particular in the context of judicial review of a supervisory authority's decision applying the European Data Protection Board's decision. In that context, where a national court considers that the European Data Protection Board's decision may be unlawful, it shall request the Court of Justice of the European Union a preliminary ruling concerning the validity of that European Data Protection Board's decision, in accordance with Article 267 TFEU as interpreted by the Court of Justice in the *Foto-frost* case<sup>7</sup>. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and shall be conducted in accordance with the national procedural law of that Member State. Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it. Where a complaint has been rejected or dismissed by a supervisory authority, the complainant may bring proceedings to the courts in the same Member State. In the context of judicial remedies relating to the application of this Regulation, national courts whose decisions may be subject to appeal under national law should endeavour to request a preliminary ruling concerning the interpretation of Union law including this Regulation, in particular where the case involves a data subject who has lodged a complaint with a supervisory authority located in a Member State other than the one where the controller or processor has its establishment.

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<sup>7</sup> Case C-314/85.

**Article 4**  
*Definitions*

(13) ‘main establishment’ means<sup>8</sup>

- 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 and the latter establishment has the power to have such decisions implemented, in this case the establishment having taken such decisions shall be considered as the main establishment<sup>9</sup>.
- as regards a processor with establishments in more than one Member State, the place of its central administration in the Union and, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;

(19a) ‘*concerned supervisory authority*’ means

- a supervisory authority which is concerned by the processing because:
  - a) the controller or processor is established on the territory of the Member State of that supervisory authority;
  - b) (...) data subjects residing in this Member State are **substantially/essentially** affected or likely to be **substantially/essentially** affected by the processing; or
  - c) the underlying complaint has been lodged to that supervisory authority.**

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<sup>8</sup> AT remarked that, in view technological developments, it was very difficult to pinpoint the place of processing and , supported by ES, HU, PL expressed a preference for a formal criterion, which referred to the incorporation of the controller (AT, PL). AT pointed out that such criterion would avoid the situation that, depending on the processing activity concerned, there would be a different main establishment and consequently a different lead DPA.

<sup>9</sup> BE reservation.



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

(a) processing which takes place in the context of the activities of an establishment in more than one Member State of a controller in the Union and the controller or processor is established in more than one Member State; or

(b) processing which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect<sup>10</sup> data subjects in more than one Member State.

(19c) “**relevant** and reasoned objection” means :

an objection as to whether there is an infringement of this Regulation or not, or, as the case may be, whether the envisaged action in relation to the controller or processor is in conformity with the Regulation. The objection shall be accompanied by an analysis of the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and where applicable, the free flow of personal data.

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<sup>10</sup> Several Member States thought that this should be clarified in recital: FI, HU, SE. IE and LU thought this definition was overly broad, especially as far as online processing was concerned.

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

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

*Article 46*

***Supervisory authority***<sup>11</sup>

1. Each Member State shall provide that one or more independent public authorities are responsible for monitoring the application of this Regulation.
- 1a. Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union (...)<sup>12</sup>. For this purpose, the supervisory authorities shall co-operate with each other and the Commission in accordance with Chapter VII<sup>13</sup>.
2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which shall represent those authorities in the European Data Protection Board and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Article 57.
- [3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to this Chapter, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them<sup>14</sup>].

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<sup>11</sup> At the request of IT, COM clarified that this DPA could be the same as the one designated/set up under the future Data Protection Directive. ES asked for clarification that a DPA may be composed of more members, but t this is already sufficiently clear from the current text. DE indicated that it would require an intra-German consistency mechanism between the its various DPAs.

<sup>12</sup> UK sought reassurance that the supervisory authority could also be given a wider remit, such as ensuring the freedom of information. DE remarked that it would require an intra-German consistency mechanism between the its various DPAs.

<sup>13</sup> EE, HU, LU, SI and UK thought there was no reason to mention this duty of co-operation here.

<sup>14</sup> DE, NL, EE that thought that this paragraph could be moved to the final provisions.

**Independence**

1. Each supervisory authority shall act with complete<sup>16</sup> independence in performing the duties<sup>17</sup> and exercising the powers entrusted to it **in accordance with this Regulation**.
2. The member or members of each supervisory authority shall, in the performance of their duties and exercise of their powers **in accordance with this Regulation**<sup>18</sup>, remain free from external influence, whether direct or indirect<sup>19</sup> and neither seek nor take instructions from anybody<sup>20</sup>.
3. (...) <sup>21</sup>
4. (...) <sup>22</sup>
5. Each Member State shall ensure that each supervisory authority is provided with the (...) human, technical and financial resources, premises and infrastructure necessary for the effective performance of its **duties** and exercise of its powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board<sup>23</sup>.

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<sup>15</sup> FR suggested merging articles 46, 47 and 48 in order to simplify the wording.

<sup>16</sup> EE, LU, SK and SI suggested deleting the word 'completely'.

<sup>17</sup> GR scrutiny reservation.

<sup>18</sup> Suggestion in order to allay concerns regarding the scope of the obligation of independence.

<sup>19</sup> BE scrutiny reservation.

<sup>20</sup> IE reservation: IE thought the latter part of this paragraph was worded too strongly. There are many cases where on other matters the DPA I subject to instructions (e.g. health and safety or employment matters).

<sup>21</sup> AT, BE, DE and HU would prefer to reinstate this text. CZ, EE and SE were satisfied with the deletion.

<sup>22</sup> COM and DE, AT reservation on deletion of paragraphs 3 and 4.

<sup>23</sup> This paragraph was criticised for being too prescriptive (FR, NL, SE, SK) and too vague (LV, UK). IT raised the question of EU funding. AT thought the recital should refer to minimum requirements.

6. Each Member State shall ensure that each supervisory authority has its own staff which shall (...) be subject to the direction of the member or members<sup>24</sup> of the supervisory authority.
7. Member States shall ensure that each supervisory authority is subject to financial control<sup>25</sup> which shall not affect its independence. Member States shall ensure that each supervisory authority has separate, public<sup>26</sup>, annual budgets, which may be part of the overall state or national budget.

*Article 48*

***General conditions for the members of the supervisory authority***

1. Member States shall provide that the member or members<sup>27</sup> of each supervisory authority must be appointed (...) by the parliament and/or the government or the head of State of the Member State concerned or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure<sup>28</sup>.
2. The member or members shall have the qualifications, experience and skills required to perform their duties and exercise their powers<sup>29</sup>.

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<sup>24</sup> BG, DE, LV, NO, PT and UK questioned who were to be considered as members of the DPA and argued that the regulation should allow different models. The question how to distinguish between members and staff was also raised in this context. IT thought EU resources could also be considered.

<sup>25</sup> EE reservation.

<sup>26</sup> Further to IE suggestion.

<sup>27</sup> DE, LV, NO, PT and UK questioned would were to be considered as members of the DPA and argued that the regulation should allow different models.

<sup>28</sup> Several delegations (FR, SE, SI and UK) thought that other modes of appointment should be allowed for. NL, LU and UK thought this should not be governed by the Regulation. FR (and RO) thought that a recital should clarify that "independent body" also covers courts.

<sup>29</sup> As several delegations (DE, ES, SE) thought that also the appointment of persons with prior data protection experience should be allowed for, this requirement has been deleted. CZ indicated that independence should not be a requirement for appointment, but for the functioning of DPA members.

3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement<sup>30</sup> in accordance with the law of the Member State concerned<sup>31</sup>.
4. (...).
5. (...)<sup>32</sup>.

*Article 49*

***Rules on the establishment of the supervisory authority***<sup>33</sup>

1. Each Member State shall provide by law for:
  - (a) the establishment (...) of each supervisory authority;
  - (b) the qualifications (...) required to perform the duties of the members of the supervisory authority<sup>34</sup>;
  - (c) the rules and procedures for the appointment of the member or members of each supervisory authority (...);

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<sup>30</sup> UK thought dismissal for misconduct needed to be listed here as well. CZ stated that the terms resignation or compulsory retirement were unknown under CZ law.

<sup>31</sup> COM reservation and DE and HU scrutiny reservation on the expression "in accordance with the law of the Member States concerned". The question is whether this means that the Member States are being granted the power to define the duties further or whether the wording should be understood as meaning that only constitutional conditions or other legal framework conditions (e.g. civil service law) should be taken into account. DE also suggests that rules in the event of death or invalidity be added (see, for example, Article 42(4) of Regulation (EC) No 45/2001) and also suggests referring to a procedure for the nomination of a representative in case the member is prevented from performing his or her duties.

<sup>32</sup> BE, CZ, EE, FR, LU, NL, NO, PT, SE, SK, UK are of the opinion that paragraphs 4 and 5 interfere too much with national law. CZ, NO, SE also see no need for paragraph 3. COM, DE and AT scrutiny reservation on deletion of paragraphs 4 and 5.

<sup>33</sup> AT scrutiny reservation. DE and FR queried which was the leeway given to Member States by this article as compared to the rules flowing from the previous Articles from the Regulation. Several delegations (FR, GR, SE, SI UK) thought that some of these rules, in particular those spelled out in subparagraphs (c) and (d) were too detailed.

<sup>34</sup> IE reservation: IE thought these qualifications need not be laid down in law.

- (d) the duration of the term of the member or members of each supervisory authority which shall not be<sup>35</sup> (...) less than four years, except for the first appointment after entry into force of this Regulation, part of which may take place for a shorter period where this is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure<sup>36</sup>;
- (e) whether and, if so, for how many terms<sup>37</sup> the member or members of each supervisory authority shall be eligible for reappointment;
- (f) the (...) conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions and occupations incompatible therewith during and after the term of office<sup>38</sup> and rules governing the cessation of employment<sup>39</sup>;
- (g) (...)<sup>40</sup>.

2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy *both during and after their term of office*.<sup>41</sup>, with regard to any confidential information which has come to their knowledge in the course of the performance of their (...) duties or exercise of their powers<sup>42</sup>

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<sup>35</sup> DE proposed adding a maximum term of 8 years; IT referred to 7 years.

<sup>36</sup> The last part of this point might need to be moved to the final provisions.

<sup>37</sup> IT thought a maximum term should be set.

<sup>38</sup> This addition should cover what was previously stated in Article 48, (3) and (4).

<sup>39</sup> SE thought that subparagraphs (b), (c) and (f) should be deleted or substantially redrafted as they were too detailed.

<sup>40</sup> CZ, NL, DE scrutiny reservation on deletion of this point.

<sup>41</sup> BE proposed adding an additional paragraph on the need to distinguish investigating and sanctioning powers, but this is dealt with by the general safeguard clause in Article 53(5). This is also true for the DE proposal for adding language concerning the duty to report an offence under national law and the privilege against self-incrimination.

<sup>42</sup> COM and AT scrutiny reservation on adding the provision on professional secrecy to Article 49, which concerns rules on the establishment of supervisory authorities.

*Article 50*  
*Professional secrecy*<sup>43</sup>

(...)

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<sup>43</sup> UK pointed out that also transparency concerns should be taken into account. Many delegations (CZ, DE, FR, FI, GR, IT, SE, SI, UK) raised practical questions as to the scope and the exact implications of this article. All thought that the rules on professional secrecy should be left to national law and hence the suggestion by CZ (supported by EE, SE, SI and RO) to move this to Article 49 was followed. COM and DE scrutiny reservation on moving this provision to Article 49.

## SECTION 2

### COMPETENCE, TASKS AND POWERS

#### *Article 51*

#### *Competence*<sup>44 45</sup>

1. Each supervisory authority shall be competent perform the tasks and exercise the powers conferred on it in accordance with this Regulation on the territory of its own Member State.  
(...) <sup>46</sup>
- 1a. (...)
2. Where the processing is carried out by public authorities or private bodies acting on the basis of points (c) or (e) of Article 6(1) (...), the supervisory authority of the Member State concerned shall be (...) competent<sup>47</sup>.

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<sup>44</sup> COM reservation. Scrutiny reservation on the one-stop-shop mechanism by DE, DK, EE, FR, MT, NL, PT, RO and UK. Some delegations (BG, CY, DE, GR, NL and LU) supported one-stop-shop principle, but had many questions of understanding as to its practical implementation. Other delegations (BE, CZ, ES, FR, HU, IT, AT, PT, RO and SI) had a more critical attitude and entered a reservation. Several referred to the problem of proximity. 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). In this regard the issue of divergent MS case law was mentioned. 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

<sup>45</sup> NL thought all jurisdiction rules should be set out in this article, covering both domestic and cross-border cases and private as well as public controllers (and processors). 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.

<sup>46</sup> Some Member States (ES) preferred to maintain the explanatory language regarding competence here and not merely in recital 95a.

<sup>47</sup> COM opposes the exclusion of private bodies from the one-stop mechanism, pointing to the example of cross-border infrastructure provided by private bodies in the public interest. COM, FR and FI preferred to refer to 'processing carried out by public authorities and bodies of a Member State or by private bodies acting on the basis of a legal obligation to discharge functions in the public interest'.

3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity<sup>48</sup>. (...).

*Article 51a*

***Competence of the lead supervisory authority***

1. (...)

Without prejudice to Article 51, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the transnational processing of this controller or processor in accordance with the procedure in Article 54a. The lead supervisory authority shall be the sole interlocutor of the controller or processor for their transnational processing.

2. (...)

**[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, if the subject matter of the case concerns transnational processing activities that only relate to an establishment in its Member State or data subjects only in its Member State.**

**2b. In the cases referred to in paragraph 2a, the supervisory authority shall inform the lead supervisory authority without delay on its intended decision on this matter. Within a period of three weeks after being informed the lead supervisory authority shall decide:**

- a) **whether it will deal with the case in accordance with the procedure provided in Article 54a; or**
- b) **the supervisory authority which informed it will deal with the case according to Articles 51, 55 and 56.]**

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<sup>48</sup> 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.

3. (...)

4. (...)<sup>49</sup>.

*Article 51b*

**Identification of the supervisory authority competent for the main establishment**

(...)

*Article 51c*

**One-stop shop register**

(...)

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<sup>49</sup> At the suggestion of NL, this was moved to Article 51(2).

Article 52

**Tasks**<sup>50</sup>

1. Without prejudice to other tasks set out under this Regulation<sup>51</sup>, each supervisory authority shall on its territory<sup>52</sup>:
  - (a) monitor and enforce the application of this Regulation;
  - (aa) promote public awareness and **understanding** 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) advise, in accordance with national law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data<sup>53</sup>;
  - (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;

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<sup>50</sup> DE, IT, AT, PT and SE scrutiny reservation. UK thinks the term 'functions' rather than 'duties' should be used.

<sup>51</sup> New text as paragraphs (f) to (i) have been deleted as these duties were already laid down elsewhere in the Regulation.

<sup>52</sup> A recital should be drafted 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.

<sup>53</sup> NL reservation.

- (b) deal with complaints<sup>54</sup> lodged by a data subject, or body, organisation or association representing a data subject in accordance with Article 73<sup>55</sup>, and investigate, to the extent appropriate, the subject matter of the complaint and inform the data subject or the body, organisation or association of the progress and the outcome of the investigation within a reasonable period<sup>56</sup>, in particular if further investigation or coordination with another supervisory authority is necessary;
- (c) cooperate with, including sharing information, 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 (...), including 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) adopt standard contractual clauses referred to in Article 26(2c);
- (fa) establish and make a list in relation to the requirement for data protection impact assessment pursuant to Article 33(2a);
- (g) give advice on the processing operations referred to in Article 34(3) (...)<sup>57</sup>;
- (ga) encourage the drawing up of codes of conduct pursuant to Article 38;
- (gb) promote the establishment of data protection certification mechanisms and of data protection seals and marks;

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<sup>54</sup> IT scrutiny reservation on the term complaint; UK thought the emphasis should be on complaint-resolution.

<sup>55</sup> BE suggested limiting this to the data subject itself.

<sup>56</sup> IT suggested fixing a 10-weeks period for dealing with the complaint.

<sup>57</sup> Deleted as it is already in Article 53(1c)(ab).

- (gc) where applicable, carry out a periodic review of certifications issued in accordance with Article 39(4);
  - (gd) (...);
  - (h) draft and publish the criteria for accreditation of a body for monitoring codes of conduct pursuant to Article 38a and of a certification body pursuant to Article 39a;
  - (ha) conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 38a and of a certification body pursuant to Article 39a;
  - (hb) authorise contractual clauses referred to in Article 42(2)(d);
  - (i) approve binding corporate rules pursuant to Article 43<sup>58</sup>;
  - (j) contribute to the activities of the European Data Protection Board;
  - (k) fulfil any other tasks related to the protection of personal data.
2. (...).
  3. (...).
  4. Each supervisory authority shall facilitate the submission of complaints referred to in point (b) of paragraph 1, by measures such as providing a complaint submission form which can be completed also electronically, without excluding other means of communication.
  5. The performance of the tasks of each supervisory authority shall be free of charge for the data subject and for the data protection officer, if any.
  6. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may refuse to act on the request<sup>59</sup>. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request<sup>60</sup>.

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<sup>58</sup> FR: this overlaps with.....

<sup>59</sup> 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.

<sup>60</sup> DE, NL and SE reservation: this could be left to general rules.

*Article 53*  
***Powers***<sup>61 62</sup>

1. Each Member State shall provide by law that its supervisory authority shall have at least<sup>63</sup> the following investigative powers:
  - (a) to order the controller and the processor, and, where applicable, the controller's representative to provide any information it requires for the performance of its duties;
  - (aa) to carry out investigations in the form of data protection audits<sup>64</sup>;
  - (ab) to carry out a review on certifications issued pursuant to Article 39(4);
  - (b) (...)

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<sup>61</sup> DE, NL, RO, PT and SE scrutiny reservation; SE thought this list was too broad. Some Member States were uncertain (CZ, RO and UK) or opposed (DE, DK, and IE) to categorising the DPA powers according to their nature. DK has raised serious constitutional concerns -based on the understanding that a decision by a “lead authority” in one Member State would be directly binding for the concerned establishments in all Member States. There is no problem if there were to be no doubt that a decision by the “lead authority” should be directed towards the “main establishment” and should only be binding for this establishment. It would then be for the “main establishment” – e.g. through internal business/cooperation rules – to implement the decision in subsidiaries in other Member States. If it is the case that a decision by a “lead authority” in another Member State is not to be binding for e.g. an establishment in Denmark, Denmark will not have a constitutional problem with the one-stop-shop principle. In this case the principle would not entail the transfer of powers from Danish authorities to authorities in other Member States.

<sup>62</sup> Several Member States (DE, FR) stated that it was unacceptable that the supervisory authority would be able to exercise these powers vis-à-vis public authorities. DE thought a distinction should be drawn between powers with regard to public and non-public bodies. Direct powers of instruction in respect of public bodies subject to supervisory and judicial control, which might therefore lead to conflicts, would be problematic for Germany. Moreover, consideration also needs to be given to the delimitation between this proposal and the proposal for a Directive on police and judicial affairs, which accords fewer powers to the supervisory authorities in some respects.

<sup>63</sup> Further to BG suggestion, supported by EE, IT, 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 on 'at least' in paragraphs 1 and 1a.

<sup>64</sup> CZ, IT, PL and SK scrutiny reservation. CZ and PL pleaded for a recital explaining that audit could be understood as inspection.

- (c) (...)
  - (d) to notify the controller or the processor of an alleged infringement of this Regulation<sup>65</sup> (...);
  - (da) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its duties;
  - (db) to obtain access to any premises of the controller and the processor , including to any data processing equipment and means, in conformity with Union law or Member State procedural law.
- 1a. (...).
- 1b. Each Member State shall provide by law that its supervisory authority shall have the following corrective powers:
- (a) to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;
  - (b) to issue reprimands<sup>66</sup> to a controller or processor where processing operations have infringed provisions of this Regulation<sup>67</sup>;
  - (c) (...);
  - (ca) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;
  - (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; in particular by ordering the rectification, restriction or erasure of data pursuant to Articles 16, 17 and 17a and the notification of such actions to recipients to whom the data have been disclosed pursuant to Articles 17(2a) and 17b;

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<sup>65</sup> BE suggested adding the power to oblige the controller to communicate the personal data breach to the data subject.

<sup>66</sup> PL and SK scrutiny reservation.

<sup>67</sup> PL scrutiny reservation on points (a) and (b).

- (e) to impose a temporary or definitive limitation on processing<sup>68</sup>;
- (f) to order the suspension of data flows to a recipient in a third country or to an international organisation<sup>69</sup>;
- (g) to impose an administrative fine pursuant to Articles 79 and 79a<sup>70</sup>, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case<sup>71</sup>.

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

- (a) to advise the controller in accordance with the prior consultation procedure referred to in Article 34<sup>72</sup>,
- (aa) to issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, (...) in accordance with national law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data;
- (ab) to authorise processing referred to in Article 34(7a), if the law of the respective Member State requires such prior authorisation<sup>73</sup>;
- (ac) to issue an opinion and adopt draft codes of conduct pursuant to Article 38(2);
- (ad) to accredit certification bodies under the terms of Article 39a;
- (ae) to issue certifications in accordance with Article 39(2a);
- (b) authorise standard data protection clauses referred to in point (c) of Article 42(2);
- (c) authorise contractual clauses referred to in point (d) of Article 42(2);

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<sup>68</sup> RR: insert reference to Article 33

<sup>69</sup> SK reservation.

<sup>70</sup> DK reservation on the introduction of administrative fines.

<sup>71</sup> DE reservation on points (e), (f) and (g) insofar as these powers could be applied vis-à-vis public authorities, which it considered as unacceptable.

<sup>72</sup> NL scrutiny reservation. This was placed in the wrong category.

<sup>73</sup> FR proposal.

- (d) approve binding corporate rules pursuant to Article 43.
2. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter of Fundamental Rights of the European Union.<sup>74</sup>
3. Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and(...), where appropriate, to commence or engage otherwise in legal proceedings<sup>75</sup>, in order to enforce the provisions of this Regulation<sup>76</sup>.
4. (...)
5. (...)

*Article 54*

***Activity Report***

Each supervisory authority shall draw up an annual report of its activities. The report shall be transmitted to the national Parliament, the government and other authorities as designated by national law. It shall be made available to the public, the European Commission and the European Data Protection Board.

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<sup>74</sup> CY, ES, FR, IT and RO thought this could be put in a recital as these obligations were binding upon the Member States at any rate. COM could accept this.

<sup>75</sup> DE, FR and RO reservation on proposed DPA power to engage in legal proceedings. UK scrutiny reservation. CZ and HU reservation on the power to bring this to the attention of the judicial authorities.

<sup>76</sup> DE thought para. 3 and 4 should be deleted.

## CHAPTER VII<sup>77</sup>

### CO-OPERATION AND CONSISTENCY

#### SECTION 1

#### CO-OPERATION

##### *Article 54a*

##### *Cooperation between the lead supervisory authority and (...) concerned supervisory authorities*<sup>78</sup>

1. The lead supervisory authority (...) shall cooperate with the concerned supervisory authorities in accordance with this article (...) in an endeavour to reach consensus (...). The lead supervisory authority and the concerned supervisory authorities shall exchange all relevant information with each other<sup>79</sup>.
- 1a. 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<sup>80</sup>.
2. If the lead supervisory authority decides to further investigate the subject matter, it shall, without delay communicate the relevant information on the matter to the concerned supervisory authorities and shall submit a draft decision (...) to the concerned supervisory authorities for their opinion and take due account of their views.
- 2a. (...)

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<sup>77</sup> AT and FR scrutiny reservation on Chapter VII.

<sup>78</sup> BE, CZ, CY, DE, EE, FR, FI, IE, LU, RO, PT and NL scrutiny reservation. IE pointed out that in the case of personal data processed by social media or other internet platforms, all 28 MS DPAs would be 'concerned'. LU and NL doubted that one DPA concerned would be sufficient to trigger the consistency mechanisms. BE, FR, PL and LU expressed a preference for amicable settlements.

<sup>79</sup> Further to BE and COM suggestion.

<sup>80</sup> This is the previous paragraph 2a.

3. Where any of the *concerned* supervisory authorities within a period of four<sup>81</sup> weeks after having been consulted in accordance with paragraph 2 to the draft decision, expresses a **relevant and reasoned objection**, the lead supervisory authority shall, if it does not follow the objection or is of the opinion it is not relevant and reasoned<sup>82</sup>, submit the matter to the consistency mechanism referred to in Article 57. (...)

**[ALTERNATIVE**

Any of the *concerned* supervisory authorities **shall have the right**, within a period of four<sup>83</sup> weeks after having been consulted in accordance with paragraph 2 to the draft decision, to express a **relevant and reasoned objection** (...). In case there is more than one concerned supervisory authority and the lead supervisory authority *does not follow the objection, it shall submit* the matter to the consistency mechanism referred to in Article 57 **only** if at least one third of the concerned supervisory authorities **supports the expressed relevant and reasoned objection to the draft decision.**]

**3a.** Where the lead supervisory authority intends to follow the objection made, it shall submit to the concerned supervisory authorities a revised draft decision for their opinion. This revised draft decision shall be subject to the procedure referred to in paragraph 3 within a period of two weeks.

(...).

4. Where no supervisory authority concerned has objected to the draft decision submitted by the lead supervisory authority within the period referred to in paragraphs 3 and 3a, the lead supervisory authority and the *concerned* supervisory authorities shall be deemed to be in agreement with this draft decision and shall be bound by it<sup>84</sup>.

**4a.** The lead supervisory authority shall adopt and notify the decision to the main establishment or single establishment of the controller or processor, as the case may be and inform the concerned supervisory authorities and the European Data Protection Board of the decision in question including a summary of the relevant facts and grounds. The supervisory authority to which a complaint has been lodged shall inform the complainant on the decision.

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<sup>81</sup> SE suggested 6 weeks.

<sup>82</sup> Wording designed to 'catch' the previous paragraph 3c.

<sup>83</sup> SE suggested 6 weeks.

<sup>84</sup> Previously in para. 4bb.; DK and NO thought its meaning should be clarified in a recital.

- 4b. By derogation from paragraph 4a, where the complaint is dismissed or rejected, the supervisory authority to which the complaint was lodged shall adopt the decision and notify it to the complainant and shall inform the controller thereof.
- 4bb. Where the lead supervisory authority and the concerned supervisory authorities are in agreement to dismiss or reject parts of a complaint and to act on other parts of the complaint, a separate decision shall be adopted for each of those parts of the matter. The lead supervisory authority 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<sup>85</sup>.
- 4c. After being notified of the decision of the lead supervisory authority pursuant to paragraph 4a and 4bb, the controller or processor 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 or processor shall notify the measures taken for complying with the decision to the lead supervisory authority, which shall inform the concerned supervisory authorities.
- 4d. Where, in exceptional circumstances, a concerned supervisory authority 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.
5. The lead supervisory authority and the *concerned* supervisory authorities shall supply the information required under this Article (...) to each other by electronic means, using a standardised format.

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<sup>85</sup> SI scrutiny reservation. PL reservation on paras 4b and 4bb: PL and FI thought para. 4bb should be deleted as it was opposed to the concept of a split decision. IT thought para 4bb overlapped with para 4b.

*Article 54b*

*Cooperation between the lead supervisory authority and the other supervisory authorities concerned in individual cases of possible non-compliance with the Regulation*

(...)

*Article 55*

*Mutual assistance*<sup>86</sup>

1. Supervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective co-operation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations. (...)
2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without undue delay and no later than one month<sup>87</sup> after having received the request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation (...).
3. The request for assistance shall contain all the necessary information<sup>88</sup>, including the purpose of the request and reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.

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<sup>86</sup> DE, NL SE and UK scrutiny reservation. Several other delegations indicated that further clarity was required on this fundamental Article and the concept of mutual assistance, and announced text proposals: EE pleaded for much more detailed rules on mutual assistance, as is already the case in civil and criminal law. AT, supported by DE, declared that it had no specific problem with this Article, but that, in general, there was a need to follow developments in relation to CoE Convention No. 108.

<sup>87</sup> ES had suggested reducing it to 15 days. PT supported the suggestion of two weeks, with a possibility of adding more time, if needed. RO, on the other hand, found one month too short, and requested SE remarked that this timeline might be unrealistic in some cases. COM indicated that it was only a deadline for replying, but that paragraph 5 allowed longer periods for executing the assistance requested. UK requested a timetable, indicating deadlines.

<sup>88</sup> EE and SE scrutiny reservation.

4. <sup>89</sup> A supervisory authority to which a request for assistance is addressed may not refuse to comply with it unless:
- (a) it is not competent for the subject-matter of the request or for the measures it is requested to execute<sup>90</sup>; or
  - (b) compliance with the request would be incompatible with the provisions of this Regulation or with Union or Member State law to which the supervisory authority receiving the request is subject.
5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress or the measures taken in order to respond to the request. In cases of a refusal under paragraph 4, it shall explain its reasons for refusing the request<sup>91</sup>.
6. Supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means<sup>92</sup>, using a standardised format.
7. No fee shall be charged for any action taken following a request for mutual assistance. Supervisory authorities may agree with other supervisory authorities rules for indemnification by other supervisory authorities for specific expenditure arising from the provision of mutual assistance in exceptional circumstances<sup>93</sup>.

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<sup>89</sup> SE indicated further scrutiny was required as to whether other grounds of refusal were required. UK thought that this paragraph was drafted in much too absolute a fashion.

<sup>90</sup> Several delegations stressed the importance of establishing which is the competent DPA: DE, EE, SE, SI. NL and IT asked for further clarification.

<sup>91</sup> RO scrutiny reservation.

<sup>92</sup> PT (supported by RO) suggested adding "or other means if for some reason, electronic means are not available, and the communication is urgent".

<sup>93</sup> PT, UK and DE asked for clarification in relation to the resources needed / and estimate of costs.

8. Where a supervisory authority does not provide the information referred to in paragraph 5 within one month of receiving the request of another supervisory authority, the requesting supervisory authority may adopt a provisional measure<sup>94</sup> on the territory of its Member State in accordance with Article 51(1) and shall submit the matter to the European Data Protection Board (...) in accordance with the consistency mechanism referred to in Article 57<sup>95</sup>.
9. The supervisory authority shall specify the period of validity of such a provisional measure which shall not exceed three months<sup>96</sup>. The supervisory authority shall, without delay, communicate such a measure, together with its reasons for adopting it, to the European Data Protection Board (...) in accordance with the consistency mechanism referred to in Article 57.
10. The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)<sup>97</sup>.

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<sup>94</sup> LU requested more clarification with regard to what would happen if this provisional measure were not confirmed.

<sup>95</sup> EE, FR, RO, and UK reservation. DE scrutiny. UK did not find the drafting sufficiently clear, for instance regarding which authority would be competent and action on other Member States territory. COM specified that this Article would apply specifically in bilateral relations (whereas Article 56 would cover joint operations), the underlying philosophy being to avoid extraterritorial activity.

<sup>96</sup> DE asked for deletion of this deadline; the measure should be withdrawn if the conditions for imposing it were no longer fulfilled.

<sup>97</sup> DE, IT, EE, CZ and NL reservation. EE questioned whether implementing acts were necessary for this purpose. ES reminded about its proposal for an Article 55a.

Article 56

***Joint operations of supervisory authorities***<sup>98</sup>

1. The supervisory authorities may, where appropriate, conduct joint operations, including joint investigations and joint enforcement measures in which members or staff from other Member States' supervisory authorities are involved.
2. In cases where the controller or processor has establishments in several Member States or where [a significant number of<sup>99</sup>] data subjects in more than one Member State are likely to be substantially affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in the joint operations, as appropriate. The competent supervisory<sup>100</sup> authority shall invite the supervisory authority of each of those Member States to take part in the joint operations concerned and respond without delay to the request of a supervisory authority to participate<sup>101</sup>.
3. A supervisory authority may, in compliance with its own Member State law, and with the seconding supervisory authority's authorisation, confer powers, including investigative powers on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the law of the Member State of the host supervisory authority permits, allow the seconding supervisory authority's members or staff to exercise their investigative powers in accordance with the law of the Member State of the seconding supervisory authority. Such investigative powers may be exercised only under the guidance and in the presence of members or staff of the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. (...) <sup>102</sup>

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<sup>98</sup> IT requested a specification in this Article that this was also about multilateral cooperation. FR asked for a clearer distinction between Articles 55 and 56. DE, EE, PT and UK scrutiny reservation. Several delegations (DE, LV, NL, SE, IT, UK) supported the idea of joint operations, but thought more details needed to be clarified. DE and EE referred to a criminal law model of a joint investigation team. LU indicated it was not convinced of the added value of joint investigations. UK requested to make sure that these mechanisms would work in practice and drew the attention to the fact that paragraphs 1 and 3 were discretionary, whereas paragraph 2 was binding, and that this was confusing and potentially contradictory.

<sup>99</sup> COM reservation; more criteria should be added. IT, supported by FR, BE and CZ suggested stressing the multilateral aspect by adding text.

<sup>100</sup> LU asked for a clarification of who would be the lead authority. UK stated that it seemed like a mix of Art. 51(1) and 51(2) competences.

<sup>101</sup> SE entered a favourable scrutiny reservation on this paragraph.

<sup>102</sup> DE, LU, PT and COM scrutiny reservation on the deletion of this last phrase.

- 3a. Where, in accordance with paragraph 1, staff of a seconding supervisory authority are operating in another Member State, the Member State of the host supervisory authority shall be liable for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.
- 3b. The Member State in whose territory the damage was caused shall make good such damage under the conditions applicable to damage caused by its own staff. The Member State of the seconding supervisory authority whose staff has caused damage to any person in the territory of another Member State shall reimburse the latter in full any sums it has paid to the (...) persons entitled on their behalf.
- 3c. Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3b, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement of damages [it has sustained] from another Member State<sup>103</sup>.
4. (...)
5. <sup>104</sup>Where a joint operation is intended and a supervisory authority does not comply within one month with the obligation laid down in the second sentence of paragraph 2, the other supervisory authorities may adopt a provisional measure on the territory of its Member State in accordance with Article 51(1).
6. The supervisory authority shall specify the period of validity of a provisional measure referred to in paragraph 5, which shall not exceed three months. The supervisory authority shall, without delay, communicate such a measure, together with its reasons for adopting it, to the European Data Protection Board and to the Commission in accordance with the consistency mechanism referred to in Article 57.

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<sup>103</sup> Inspired by Article 3 of the Council Framework Decision of 13 June 2002 on joint investigation teams. UK reservation on paras. 3a, 3b and 3c.

<sup>104</sup> NL asked whether the measures of paragraphs 5 and 6 were really necessary. EE suggested a merger of the two paragraphs.

## SECTION 2

### CONSISTENCY<sup>105</sup>

#### *Article 57*

#### ***Consistency mechanism***<sup>106</sup>

1. For the purpose set out in Article 46(1a), the supervisory authorities shall co-operate with each other through the consistency mechanism as set out in this section<sup>107</sup>.
2. The European Data Protection Board shall (...) issue an opinion whenever a competent supervisory authority intends to adopt any of the measures below (...). To that end, the competent supervisory authority shall communicate the draft **decision** to the European Data Protection Board, when it:

  - (a) (...);
  - (b) (...);
  - (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
  - (cb) aims at approving the criteria for accreditation of a body pursuant to paragraph 3 of Article 38a or a certification body pursuant to paragraph 2a of Article 39 or paragraph 3 of Article 39a;

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<sup>105</sup> 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.

<sup>106</sup> EE, FI, LU, NL and UK scrutiny reservation.

<sup>107</sup> CZ, DE, ES and RO 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.

- (d) aims at determining standard data protection clauses referred to in point (c) of Article 42(2); or
- (e) aims to authorising contractual clauses referred to in point (d) of Article 42(2); or
- (f) aims at approving binding corporate rules within the meaning of Article 43.

**3.** The European Data Protection Board shall adopt a binding decision in the following cases:

- a) Where, in a case referred to in paragraph 3 of Article 54a(...), a *concerned supervisory authority* (...) has expressed a **relevant** and reasoned objection to a draft decision of the lead authority **or the lead authority has rejected an objection as being not relevant and/or reasoned.** The binding decision shall concern all the matters which are the subject of the **relevant** and reasoned objection.  
(...);
- b) Where (...), there are conflicting views on which of the *concerned supervisory authorities* is competent for the main establishment. (...);
- c) (...)
- d) (...)<sup>108</sup>

**4.** Any supervisory authority (...), the Chair of the European Data Protection Board or the Commission may request that any matter of general application or producing effects in more than one Member State be examined by the European Data Protection Board with a view to obtaining an opinion, in particular:

- a) *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 concerned supervisory authority or the Commission may communicate such matter to the European Data Protection Board<sup>109</sup>; or*

<sup>108</sup> Moved to paragraph 4.

<sup>109</sup> LU proposed restricting this to cases where the coordination mechanism implemented by the competent authority did not allow for a solution to be reached; ES referred to cases where the other authorities did not agree with the proposal of the competent(/lead) authority.

*b) 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 (...) follow the opinion of the European Data Protection Board issued as per Article 58. In that case, any concerned supervisory authority (...) or the Commission may communicate the matter to the European Data Protection Board*

5. Supervisory authorities and the Commission shall electronically communicate to the European Data Protection Board, using a standardised format any relevant information, including as the case may be a summary of the facts, the draft decision, the grounds which make the enactment of such measure necessary, and the views of other concerned supervisory authorities.
6. The chair of the European Data Protection Board shall without undue delay electronically inform the members of the European Data Protection Board and the Commission of any relevant information which has been communicated to it using a standardised format. The secretariat of the European Data Protection Board shall, where necessary, provide translations of relevant information.

*Article 58*

***Opinion by the European Data Protection Board<sup>110</sup>***

1. (...)
2. (...)
3. (...)
4. (...)
5. (...)
6. (...)

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<sup>110</sup> NL and UK scrutiny reservation.

7. In the cases referred to in paragraphs 2 and 4 of Article 57, the European Data Protection Board shall issue an opinion on the subject- matter submitted to it provided it has not already issued an opinion on the same matter<sup>111</sup>. This opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. This period may be extended by a further month, taking into account the complexity of the subject matter. [Regarding the draft decision circulated to the members of the Board in accordance with paragraph 6 of Article 57, a member which has not objected within the period indicated by the Chair, shall be deemed to be in agreement with the draft decision.]
- 7a. Within the period referred to in paragraph 7 the competent supervisory authority shall not adopt its draft **decision** as per paragraph 2 of Article 57.
- 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 utmost 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 will amend its draft **decision** and, if any, the amended draft **decision**, using a standardised format.
9. Where the *concerned* supervisory authority informs the chair of the European Data Protection Board within the period referred to in paragraph 8 that it does not intend to follow the opinion of the Board, in whole or in part, providing the relevant grounds, paragraph 3 of Article 57 shall apply.
10. (...)
11. (...)

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<sup>111</sup> ES suggested keeping the possibility for one DPA requesting an opinion from the EDPB.

*Article 58a*

**Decisions by the European Data Protection Board<sup>112</sup>**

1. In the cases referred to in paragraph 3 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 and consistent application of this Regulation in individual cases. *The decision shall be reasoned and addressed to the lead supervisory authority and all the concerned supervisory authorities and binding on them.*
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<sup>113</sup> 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. In case the Board has been unable to adopt a decision within the periods referred to in paragraph 2, it shall adopt its decision within two weeks following the expiration of the second month referred to in paragraph 2 by a simple majority of the members of the Board. In case the members of the Board are split, the decision shall be adopted by the vote of its Chair.
4. The *concerned* supervisory authorities (...). shall not adopt a decision on the subject-matter submitted to the Board under paragraph 1 during the period referred to in paragraph 2.
5. (...)
6. The Chair of the European Data Protection Board shall notify, without undue delay, the decision referred to in paragraph 1 to the *concerned* supervisory authorities (...). It shall inform the Commission thereof. **[The decision shall be published on the website of the European Data Protection Board without delay after the supervisory authority has notified the final decision referred to in paragraph 7.]**

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<sup>112</sup> PL scrutiny reservation. IE thought the controller should have standing to intervene in the proceedings before the EDPB.

<sup>113</sup> Supported by IE, HR, NL, some of the delegations underscored that this threshold was justified by the seriousness of the cases to be submitted to the EDPB and therefore constituted an appropriate threshold; PL queried what would happen in case no such majority could be reached. PT suggested a simple majority which could be scaled up to a 2/3 majority in some cases.

7. **The lead supervisory authority or, as the case may be, the supervisory authority to which the complaint has been lodged shall adopt their final decision on the basis of the decision** referred to in paragraph 1<sup>114</sup>, without undue delay and at the latest by one month after **the European Data Protection Board has notified its decision. [The lead supervisory authority or, as the case may be, the supervisory authority to which the complaint has been lodged, shall inform the European Data Protection Board of the date when its final decision is notified respectively to the controller and the data subject.] The final decision of the concerned supervisory authorities shall be adopted** under the terms of Article 54a, paragraph 4a, 4b **and 4bb. [The final decision shall refer to the decision referred to in paragraph 1 and shall specify that the decision referred to in paragraph 1 will be published on the website of the European Data Protection Board in accordance with paragraph 6. The final decision shall attach the decision referred to in paragraph 1.]**

*Article 59*

*Opinion by the Commission<sup>115</sup>*

(...)

*Article 60*

*Suspension of a draft measure<sup>116</sup>*

(...)

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<sup>114</sup> FI reservation; would prefer a system under which the EDPB decision would be directly applicable and would not have to be transposed by the lead DPA.

<sup>115</sup> Deleted in accordance with the request from BE, CZ, DE, ES, SE and UK. COM and FR reservation on deletion.

<sup>116</sup> Deleted at the suggestion of BE, CZ, DE, ES, IT, SE and UK. PT scrutiny reservation. COM and FR reservation on deletion.

*Article 61*

***Urgency procedure***<sup>117</sup>

1. In exceptional circumstances, where **a** 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 or the procedure referred to in Article 54a, immediately adopt provisional measures intended to produce legal effects (...) **within the territory of its own Member State**<sup>118</sup>, with a specified period of validity. The supervisory authority shall, without delay, communicate those measures and the reasons for adopting them, to the European Data Protection Board and to the Commission<sup>119</sup>.
2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion or an urgent binding decision from the European Data Protection Board, giving reasons for requesting such opinion or decision.
3. Any supervisory authority may request an urgent opinion or an urgent binding decision, as the case may be, from the European Data Protection Board 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 or decision, including for the urgent need to act.
4. By derogation from paragraph 7 of Article 58 and paragraph 2 of Article 58a, an urgent opinion or an urgent binding decision 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.

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<sup>117</sup> DE scrutiny reservation. COM explained that the urgency procedure was an essential part of the consistency mechanism. The existence of an urgency procedure was welcomed by several delegations (DE, ES, IT, NL), but also gave rise to many questions. There was lack of clarity surrounding the criteria which could warrant the taking of provisional measures (DE, FR, PT), in particular by another DPA. The need to respect certain procedural guarantees (e.g. giving notice to the data controller) prior to the taking of provisional measures was emphasised by FR.

<sup>118</sup> COM scrutiny reservation.

<sup>119</sup> The conditions under which the EDPB needed to be informed also gave rise to questions (ES). COM stated the obligation only existed in cross-border one-stop-shop mechanism cases.

*Article 62*

***Implementing acts***

1. The Commission may adopt implementing acts of general scope for:
  - (a) (...)<sup>120</sup>
  - (b) (...);
  - (c) (...);
  - (d) specifying the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in Article 57(5) and (6) and in Article 58(8).

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

2. (...)

3. (...)

*Article 63*

***Implementation of measures adopted by way of the consistency mechanism***<sup>121</sup>

(...)

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<sup>120</sup> COM reservation on deletion.

<sup>121</sup> Deleted further to EE and SI reservation and DE and DK scrutiny reservation.

### SECTION 3

## EUROPEAN DATA PROTECTION BOARD<sup>122</sup>

#### *Article 64*

#### ***European Data Protection Board***

- 1a. The European Data Protection Board is hereby established as body of the Union and shall have legal personality.
- 1b. The European Data Protection Board shall be represented by its Chair.
2. The European Data Protection Board shall be composed of the head<sup>123</sup> of one supervisory authority of each Member State or his/her representative and of the European Data Protection Supervisor<sup>124</sup>.
3. Where in a Member State more than one supervisory authority is responsible for monitoring the application of the provisions pursuant to this Regulation, they shall nominate the head of one of those supervisory authorities as joint representative.
4. The Commission<sup>125</sup> shall have the right to participate in the activities and meetings of the European Data Protection Board and shall designate a representative without voting rights. The chair of the European Data Protection Board shall, communicate the Commission the activities of the European Data Protection Board.

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<sup>122</sup> Several Member States (BE, DE, HR, IT, PL and PT) pleaded in favour of granting the EDPB the power to take legally binding decisions in the context of the consistency mechanism and do away with the proposed Commission power to intervene. It was argued that the DPAs should have the same independence vis-à-vis the Commission, as vis-à-vis the Member States' authorities. COM argued that it was legally impossible under the T(F)EU to confer such powers on the EDPB.

<sup>123</sup> BE, supported by CZ, CY, SE and SI, suggested adding "*or his/her representative*". IT suggested referring to Art. 68(2).

<sup>124</sup> NO pleaded in favour of the participation of the associated States. COM replied that the modalities for such participation were provided for in the association agreement.

<sup>125</sup> IT pleaded in favour of also including the Council and the Parliament.

## Article 65

### **Independence**

1. The European Data Protection Board shall act independently when performing its tasks or exercising its powers pursuant to Articles 66 (...) and 67.<sup>126</sup>
2. Without prejudice to requests by the Commission referred to in point (b) of paragraph 1 and in paragraph 2 of Article 66, the European Data Protection Board shall, in the performance of its tasks or the exercise of its powers, neither seek nor take instructions from anybody<sup>127</sup>.

## Article 66

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

1. The European Data Protection Board shall promote the consistent application of this Regulation. To this effect, the European Data Protection Board shall, on its own initiative or at the request of the Commission, in particular:
  - (aa) monitor and ensure the correct application of this Regulation in the cases provided for in Article 57(3) without prejudice to the tasks of national supervisory authorities;
  - (a) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;
  - (b) examine, on its own initiative or on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation;
  - (ba) draw up guidelines for supervisory authorities concerning the application of measures referred to in paragraph 1, 1b and 1c of Article 53 and the fixing of administrative fines pursuant to Articles 79 and 79a<sup>128</sup>.

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<sup>126</sup> UK and SI scrutiny reservation.

<sup>127</sup> DE scrutiny reservation.

<sup>128</sup> DK reservation on the introduction of administrative fines in the text and meant that it was for national authorities to decide on that.

- (c) review the practical application of the guidelines, recommendations and best practices referred to in points (b) and (ba);
- (ca) encourage the drawing-up of codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Articles 38 and 39;
- (cb) carry out the accreditation of certification bodies and its periodic review pursuant to Article 39a and maintain a public register of accredited bodies pursuant to paragraph 6 of Article 39a and of the accredited controllers or processors established in third countries pursuant to paragraph 4 of Article 39<sup>129</sup>;
- (cd) specify the requirements mentioned in paragraph 3 of Article 39a with a view to the accreditation of certification bodies under Article 39;
- (ce) give the Commission an opinion on the level of protection in third countries or international organisations, in particular in the cases referred to in Article 41;
- (d) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in paragraph 2 and on matters submitted pursuant to paragraph 4 of Article 57;
- (e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;
- (f) promote common training programmes and facilitate personnel exchanges between the supervisory authorities, as well as, where appropriate, with the supervisory authorities of third countries or of international organisations;
- (g) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide;
- (h) (...);

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<sup>129</sup> HU said that paragraphs (caa) and (cab) were contrary to the text of the general approach reached in June 2014 (11028/14); it is for the national supervisory authority to do this.

- (i) maintain a publicly accessible electronic register of decisions taken by supervisory authorities and courts on issues dealt with in the consistency mechanism.
2. Where the Commission requests advice from the European Data Protection Board, it may indicate a time limit, taking into account the urgency of the matter.
3. The European Data Protection Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 87 and make them public.

#### *Article 67*

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

1. (...)
2. The European Data Protection Board shall draw up an annual report regarding the protection of natural persons with regard to the processing of personal data in the Union and, where relevant, in third countries and international organisations. The report shall be made public and be transmitted to the European Parliament, the Council and the Commission.
3. The annual report shall include a review of the practical application of the guidelines, recommendations and best practices referred to in point (c) of Article 66(1) as well as of the binding decisions referred to in paragraph 3 of Article 57.

#### *Article 68*

##### ***Procedure***

1. The European Data Protection Board shall adopt binding decisions referred to in paragraph 3 of Article 57 by a two-third majority of its members. As regards decisions related to the other tasks listed in Article 66 hereof, they shall be taken by a simple majority of its members (...).
2. The European Data Protection Board shall adopt its own rules of procedure by a two-third majority of its members and organise its own operational arrangements.

*Article 69*

***Chair***

1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members (...).<sup>130</sup>
2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable once.<sup>131</sup>

*Article 70*

***Tasks of the chair***

1. The chair shall have the following tasks<sup>132</sup>:
  - (a) to convene the meetings of the European Data Protection Board and prepare its agenda;
  - (aa) to notify **decisions adopted by the European Data Protection Board pursuant to Article 58a to the lead supervisory authority and the concerned** supervisory authorities (...);
  - (b) to ensure the timely performance of the tasks of the European Data Protection Board, in particular in relation to the consistency mechanism referred to in Article 57.
2. The European Data Protection Board shall lay down the attribution of tasks between the chair and the deputy chairpersons in its rules of procedure.

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<sup>130</sup> COM reservation on deletion.

<sup>131</sup> NL thought that also the case where a chair or a deputy chairperson ceases to be a member of the European Data Protection Board[/Committee], should be addressed by the Regulation. However, this may be left to national law of the Member state concerned. COM and SK scrutiny reservation.

<sup>132</sup> BE suggesting adding another task, namely the chair's role towards the exterior.

*Article 71*

***Secretariat***

1. The European Data Protection Board shall have a secretariat. The European Data Protection Supervisor shall provide that secretariat<sup>133</sup>.
2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board.
3. The secretariat shall be responsible in particular for:
  - (a) the day-to-day business of the European Data Protection Board;
  - (b) the communication between the members of the European Data Protection Board, its chair, and the Commission and for communication with other institutions and the public;
  - (c) the use of electronic means for the internal and external communication;
  - (d) the translation of relevant information;
  - (e) the preparation and follow-up of the meetings of the European Data Protection Board;
  - (f) the preparation, drafting and publication of opinions, **positions on the settlement of disputes between supervisory authorities** and other texts adopted by the European Data Protection Board.

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<sup>133</sup> DE, EE, FR, ES, HU, AT, IRL, RO, PT, SI, SK and UK reservation on entrusting the EDPS with the EDPB secretariat. The risk of conflicts of interest of EDPS staff was also raised. FR and UK inquired about the costs. NL scrutiny reservation.

*Article 72*

***Confidentiality***<sup>134</sup>

1. The discussions<sup>135</sup> of the European Data Protection Board shall be confidential.
2. Access to documents submitted to members of the European Data Protection Board, experts and representatives of third parties shall be governed by Regulation (EC) No 1049/2001.

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<sup>134</sup> DE, EE, ES, RO, PL, PT, SE and UK reservation: it was thought that the EDPB should operate in a manner as transparent as possible and a general confidentiality duty was obviously not conducive to this. This article should be revisited once there is more clarity on the exact role and powers of the board, including the question whether the EDPS shall ensure the Secretariat.

<sup>135</sup> IT scrutiny reservation: it suggested replacing this term with 'minutes' or 'summary records', thereby distinguishing between confidentiality of decision-making and access to documents.

# CHAPTER VIII

## REMEDIES, LIABILITY AND SANCTIONS<sup>136</sup>

.....

*Article 76b*

*Actions before the Court of Justice of the European Union against decisions by the European  
Data Protection Board<sup>137</sup>*

**Option 1:**

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.

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<sup>136</sup> AT, FR, EE, ES and RO scrutiny reservation.

<sup>137</sup> NL, AT, PL and PT scrutiny reservation; LU thought this article was superfluous and should be deleted.

3. Where the European Data Protection Board notifies its decision in accordance with Article 58a(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.

**Option 2:**

*Under option 2 there would be no Article 76b, but the bracketed text in paragraphs 6 and 7 of Article 58a would be added to that Article.*