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protection of individuals with regard to the processing of personal data and on the  
free movement of such data (General Data Protection Regulation)  
- Comments on Chapter VI and VII

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Delegations find below comments from Member States on Chapters VI and VII on the document  
16529/12 of 4 December 2012.

The comments received at 24 October 2013 are set out hereafter.

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## BELGIUM

### CHAPTER VI INDEPENDENT SUPERVISORY AUTHORITIES

#### SECTION 1: INDEPENDENT STATUS

##### Article 47 Independence

3. *Members of the supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.*

4. *Members of the supervisory authority shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.*

BE thinks that §§3 and 4 should be moved in the recitals.

##### Article 48 General conditions for the members of the supervisory authority

1. *Member States shall provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned.*

BE considers that the members of the supervisory authority must always be appointed by the parliament. An appointment by parliament is more in line with the conditions of independence set out in the judgement of the Court of Justice of the 9 March of 2010.

At least, the participation of the parliament in the appointment procedure should be required.

4. *A member may be dismissed ~~or deprived of the right to a pension or other benefits in its stead by the competent national court, if he the member~~ no longer fulfils the conditions required for the performance of his ~~the~~ duties has member of the supervisory authority ~~or is guilty of serious misconduct.~~*

BE considers that the § 4 is too detailed. The consequences linked to the fact that a member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct should be left to MS.

**Article 49 Rules on the establishment of the supervisory authority**

*1. Each Member State shall provide by law within the limits of this Regulation:*

*(a) the establishment and status of the supervisory authority;*

*(b) the qualifications, experience and skills required to perform the duties of the members of the supervisory authority;*

*(c) the rules and procedures for the appointment of the members of the supervisory authority, as well the rules on actions or occupations incompatible with the duties of the office;*

*(d) the duration of the term of the members of the supervisory authority which shall be no 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;*

*(e) whether the members of the supervisory authority shall be eligible for reappointment;*

*(f) the regulations and common conditions governing the duties of the members and staff of the supervisory authority;*

*(g) the rules and procedures on the termination of the duties of the members of the supervisory authority, including in case that they no longer fulfil the conditions required for the performance of their duties or if they are guilty of serious misconduct.*

2. A member of a supervisory authority shall not exercise, in a same case, in one hand the competences laid down in article 53.1 a) to h) and 53.4 and in the other hand the competences laid down in article 53.1 i) to j) and 53.2.

See above general remark in the beginning of article 47.

## **SECTION 2: DUTIES AND POWERS**

### **Article 51 Competence**

*2. Where the processing of personal data takes place ~~within several Member state~~ ~~the context of the activities of an establishment of a controller or a processor in the Union~~, and the controller or processor is established in more than one Member State, the supervisory authority of the main establishment of the controller or processor shall be competent for the supervision of the processing activities of the controller or the processor in all Member States, without prejudice to the provisions of Chapter VII of this Regulation.*

*2 bis. Where the processing of personal data takes place in one or more Member state but is directed to a particular data subject group of a particular Member state, the supervisory authority of this last Member state is competent for such processins.*

Although on the surface, the principle of one stop shop is attractive, however, BE has serious reservations about its feasibility.

BE considers that art. 51.2 will result in significant conflicts of competence between DPA's.

The criterion of the "main establishment" is not a good one. A possible alternative criteria could be that: a DPA is competent in cases where the controller is directed to, through his/her activities, a particular customer group/market on the territory of a MS where the DPA has competences.

Moreover BE thinks that the word “competent” is not clear.

BE believes that the role of a lead authority should not be seen as an exclusive competence, but rather as a way of cooperation with other competent supervisory authorities, as the ‘lead authority’ will depend on the input and support of other supervisory authorities.

Therefore, BE has a scrutiny reservation on article 51.

### **Article 52 Duties**

*1. The supervisory authority shall:*

*(a) monitor and ensure the application of this Regulation;*

*(b) hear complaints lodged by any data subject, or by an association representing that data subject in accordance with Article 73, investigate, to the extent appropriate, the matter and inform the data subject or the association of the progress and the outcome of the complaint within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;*

*(c) share information with and provide mutual assistance to other supervisory authorities and ensure the consistency of application and enforcement of this Regulation;*

*(d) conduct investigations either on its own initiative or on the basis of a complaint or on request of another supervisory authority, and inform the data subject concerned, if the data subject has addressed a complaint to this supervisory authority, of the outcome of the investigations within a reasonable period;*

*(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) be consulted by Member State 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, in particular in the preparation of a legislative measure to be adopted by the national parliament which defines the nature of the processing or of a measure based on such a legislative measure;*

*(f) bis. Decide in which cases Privacy Impact Assessment referred to in article 33, needs to be carried out;*

*(g) authorise and be consulted on the processing operations referred to in Article 34;*

*(h) issue an opinion on the draft codes of conduct pursuant to Article 38(2);*

*(i) approve binding corporate rules pursuant to Article 43;*

*(j) participate in the activities of the European Data Protection Board.*

### **Article 53 Powers**

*1. Each supervisory authority shall have the power:*

*(a) to notify the controller or the processor of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, order the controller or the processor to remedy that breach, in a specific manner, in order to improve the protection of the data subject or, where necessary, oblige the controller to communicate the personal data breach to the data subject ;*

*(b) to order the controller or the processor to comply with the data subject's requests to exercise the rights provided by this Regulation;*

*(c) to order the controller and the processor, and, where applicable, the representative to provide any information relevant for the performance of its duties;*

*(d) to ensure the compliance with prior authorisations and prior consultations referred to in Article 34;*

*(e) to warn or admonish the controller or the processor;*

*(f) to order the rectification, erasure or destruction of all data when they have been processed in breach of the provisions of this Regulation and the notification of such actions to third parties to whom the data have been disclosed;*

*(g) to impose a temporary or definitive ban on processing;*

*(h) to suspend data flows to a recipient in a third country or to an international organisation;*

*(i) to issue opinions on any issue related to the protection of personal data;*

*(j) to inform the national parliament, the government or other political institutions as well as the public on any issue related to the protection of personal data.*

*2. Each supervisory authority shall have the investigative power to obtain from the controller or the processor:*

*(a) access to all personal data and to all information necessary for the performance of its duties;*

*(b) access to any of its premises, including to any data processing equipment and means, where there are reasonable grounds for presuming that an activity in violation of this Regulation is being carried out there.*

The point b) of article 53.2, raises the question of access to private homes. In BE, a warrant of a judge is required.

*The powers referred to in point (b) shall be exercised in conformity with Union law and Member State law.*

*3. Each supervisory authority shall have the power to bring violations of this Regulation to the attention of the judicial authorities and to engage in legal proceedings, in particular pursuant to Article 74(4) and Article 75(2).*

*4. Each supervisory authority shall have the power to sanction administrative offences, in particular those referred to in Article 79(4), (5) and (6).*

BE has a scrutiny reservation on the §4 of article 53.

## CHAPTER VII CO-OPERATION AND CONSISTENCY

### SECTION 1: CO-OPERATION

**GENERAL REM.:** BE considers that Articles 55 and 56 have to be clarified. If a decision must be taken that involves both the lead DPA in the meaning of Article 51(2) and another concerned DPA according to Article 51(1), the lead DPA and the national ‘on-site’ DPA should act *in agreement* regarding the assessment of the case and of the measures to be taken. Where the concerned DPA’s do not reach consensus on the assessment of the case and/or measures to be taken on a bilateral or multilateral basis, the case should be submitted to the consistency mechanism as in Article 57.

#### Article 55 Mutual assistance

*1. Supervisory authorities shall provide each other 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 prompt information on the opening of cases and ensuing developments where data subjects in several Member States are likely to be affected by processing operations.*

BE thinks that it is necessary to ensure a mutual assistance, in terms of budget for DPA’s, but also in terms of addressing **important details of the manner in which mutual assistance is to be put to practice**. The use of language, deadlines, the amount and nature of information requested as well as technical means, formats and procedures for information sharing, are all issues that in practice are vital to ensure effective cooperation between DPA’s and therefore also stand at the core of the “one-stop shop” principle.

2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the course of an investigation or enforcement measures to bring about the cessation or prohibition of processing operations contrary to this Regulation.

BE thinks that a distinction should be made between provisionnal measures and definitive measures.

## **SECTION 2 CONSISTENCY**

BE welcomes the principle of the consistency mechanism. But BE thinks that the entire section 2 should be redrafted. The aim is to put in place a clear, rapid and usable consistency mechanism. The consistency mechanism should be compatible with the economic life of the European Union. The entire procedure should not exceed 4 months.

Indeed for companies which have global activities in multiple MS, most if not all the decisions of the DPA's should be referred to the EDPB. This is not feasible.

### **Article 58 Opinion by the European Data Protection Board**

1. Before a supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board and the Commission.

2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:

(a) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour; or

(b) may substantially affect the free movement of personal data within the Union; or

(c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or

(d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or

(e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or

(f) aims to approve binding corporate rules within the meaning of Article 43.

~~3. Any supervisory authority or the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.~~

BE considers that the scope of the consistency mechanism is considerably broad due to the paragraph 3 and 4 of the article 58. BE proposes to delete those paragraphs.

~~4. In order to ensure correct and consistent application of this Regulation, the Commission may request that any matter shall be dealt with in the consistency mechanism.~~

BE considers that the scope of the consistency mechanism is considerably broad due to the paragraph 3 and 4 of the article 58. BE proposes to delete those paragraphs.

7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members or any supervisory authority or the Commission so requests within two weeks ~~one week~~ after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within two months ~~one month~~ by simple majority of the members of the European Data Protection Board. 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 1 and 3, the Commission and the supervisory authority competent under Article 51 of the opinion and make it public.

BE considers that the paragraph 7 of the article 58 is unclear. Particularly regarding this wording: “so decides by simple majority of its members or any supervisory authority or the Commission so requests”.

**Article 59 Opinion by the Commission**

~~1. Within ten weeks after a matter has been raised under Article 58, or at the latest within six weeks in the case of Article 61, the Commission may adopt, in order to ensure correct and consistent application of this Regulation, an opinion in relation to matters raised pursuant to Articles 58 or 61.~~

~~2. Where the Commission has adopted an opinion in accordance with paragraph 1, the supervisory authority concerned shall take utmost account of the Commission’s opinion and inform the Commission and the European Data Protection Board whether it intends to maintain or amend its draft measure.~~

~~3. During the period referred to in paragraph 1, the draft measure shall not be adopted by the supervisory authority.~~

~~4. Where the supervisory authority concerned intends not to follow the opinion of the Commission, it shall inform the Commission and the European Data Protection Board thereof within the period referred to in paragraph 1 and provide a justification. In this case the draft measure shall not be adopted for one further month.~~

BE wants the deletion of articles 59 and 60. BE thinks that both articles are in contradiction with the principle of independence of the data protection authorities.

### Article 60 Suspension of a draft measure

~~1. Within one month after the communication referred to in Article 59(4), and where the Commission has serious doubts as to whether the draft measure would ensure the correct application of this Regulation or would otherwise result in its inconsistent application, the Commission may adopt a reasoned decision requiring the supervisory authority to suspend the adoption of the draft measure, taking into account the opinion issued by the European Data Protection Board pursuant to Article 58(7) or Article 61(2), where it appears necessary in order to:~~

- ~~(a) reconcile the diverging positions of the supervisory authority and the European Data Protection Board, if this still appears to be possible; or~~
- ~~(b) adopt a measure pursuant to point (a) of Article 62(1).~~

~~2. The Commission shall specify the duration of the suspension which shall not exceed 12 months.~~

~~3. During the period referred to in paragraph 2, the supervisory authority may not adopt the draft measure.~~

BE wants the deletion of articles 59 and 60. BE thinks that both articles are in contradiction of the principle of independence of the data protection authorities.

### Article 61 Urgency procedure

1. In exceptional circumstances, where a supervisory authority considers that there is an urgent need to act in order to protect the interests of data subjects, in particular when the danger exists that the enforcement of a right of a data subject could be considerably impeded by means of an alteration of the existing state or for averting major disadvantages ~~or for other reasons~~, by way of derogation from the procedure referred to in Article 58, it may immediately adopt provisional measures with a specified period of validity. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board and to the Commission.

BE proposes to delete “*or for other reasons*”. The urgency procedure should remain for extremely limited cases which need immediate action.

### **SECTION 3 EUROPEAN DATA PROTECTION BOARD**

#### **Article 64 European Data Protection Board**

*4. The Commission shall have the right to participate in the activities and meetings of the European Data Protection Board and shall designate a representative. This representative does not take part of the vote. The chair of the European Data Protection Board shall, without delay, inform the Commission on all activities of the European Data Protection Board.*

BE considers that the Commission could influence the decisions made by the Board. This is incompatible with the principle of independence of the Board.

BE proposes to add “This representative does not take part of the vote”.

This proposition may also be added in the article 68, paragraph 1.

#### **Article 65 Independence**

*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, neither seek nor take instructions from anybody.*

The paragraph 2 of the article 65 says that “*the European Data Protection Board shall, in the performance of its tasks, neither seek nor take instructions from anybody*”. But there is, in the Board, a representative of the european commission.

**Article 66 Tasks of the European Data Protection Board**

*1. The European Data Protection Board shall ensure 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:*

*(a) advise the Commission, the European Parliament and the Council on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;*

BE considers that transparency is essential.

*(b) examine, on its own initiative or on request of one of its members or on request of the Commission the European Parliament or the Council, any question covering the application of this Regulation and issue guidelines, recommendations and best practices addressed to the supervisory authorities in order to encourage consistent application of this Regulation;*

BE considers that transparency is essential.

*(c) review the practical application of the guidelines, recommendations and best practices referred to in point (b) and report regularly to the Commission on these;*

*(d) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in 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) examine codes of conduct and amendments or extensions to existing codes of conduct submitted to it pursuant to article 38, paragraph 3.*

*2. Where the Commission, the European Parliament or the Council request advice from the European Data Protection Board, it may lay out a time limit within which the European Data Protection Board shall provide such advice, taking into account the urgency of the matter.*

BE considers that transparency is essential.

### **Article 68 Procedure**

*1. The European Data Protection Board shall take decisions by a simple majority of its members.*

See remark made for the article 64.4 above

*2. The European Data Protection Board shall adopt its own rules of procedure and organise its own operational arrangements. In particular, it shall provide for the continuation of exercising duties when a member's term of office expires or a member resigns, for the establishment of subgroups for specific issues or sectors and for its procedures in relation to the consistency mechanism referred to in Article 57.*

### **Article 69 Chair**

*1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members. One deputy chairperson shall be the European Data Protection Supervisor, unless he or she has been elected chair.*

*2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable.*

BE thinks that this article is not detailed enough and raise a lot of question such as:

- is the chairperson or deputy chairperson paid or unpaid?
- is the chairperson or deputy chairperson renewable once or more?
- Quid for the expenses for a secretariat?

...

### **Article 72 Confidentiality**

*3. The members of the European Data Protection Board, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article. The chair shall ensure that experts and representatives of third parties are made aware of the confidentiality requirements imposed upon them.*

BE has some comprehension problems regarding the paragraph 3. The members of the EDPB have to respect the confidentiality principle. In the national level, the members of the DPA's have to respect the professional secrecy. Why this difference?

Article 46

- Paragraph 1 should be amended:

„1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application of this Regulation and for contributing to its consistent application throughout the Union, in order to protect the fundamental rights and freedoms of natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the Union. **To monitor the application of this Regulation and to contribute to its consistent application throughout the Union** For these purposes, the supervisory authorities shall co-operate with each other and the Commission.“

*Change proposed to avoid confusion as regards breadth of duties and of cooperation between DPAs and the Commission. Alternatively, the phrase about protecting rights and freedoms may be deleted (was not in Directive either).*

Article 47

*CZ supports proposals to merge Articles 47 and 48 as the Member State law will generally be required to stipulate necessary rules and their limits.*

- Paragraph 3 should be deleted.

*Rules in Article 49(1)(c) will be fully sufficient.*

- Paragraph 4 should be deleted.

*Vague duties binding for the rest of life should be avoided, especially if their enforcement is intended by other vague provisions (Article 78).*

- Paragraph 7 should be amended:

„7. Member States shall ensure that the supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that the supervisory authority has separate ~~annual~~ budgets **that may be part of overall state or national budget**. The budgets shall be made public.“

*There is no reason why the budget of DPA should not be part of state budget. The parliaments should not be forced to adopt various “separate” budgets. There is no reason why budgets should be annual if that is not a practice in the Member State concerned. The independence of DPA is promoted by adopting a budget where the resources of DPA are both specified and public.*

## Article 48

- Paragraph 1 should be deleted.

*There is no reason why the EU should deal with the procedure of appointments. It is not realistic to fear that Member States would otherwise delegate such decision e.g. to central bank or to some municipality. The necessary rules will be provided according to Article 49(a),(c).*

- Paragraph 2 should be amended:

„2. The members shall be chosen from persons ~~whose independence is beyond doubt and~~ whose experience and skills required to perform their duties notably in the area of protection of personal data are demonstrated.“

*The requirement of “independence beyond doubt” is strange. Even judges are not chosen due to their independence. Rather, independence is ensured for judges when they perform their functions.*

- Paragraph 3 should be deleted.

*Because paragraph 5 is to be deleted as well, and otherwise paragraph 3 has no real added value.*

- Paragraph 4 should be amended:

“4. Member States shall ensure that a member, **who no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct**, may be dismissed ~~or deprived of the right to a pension or other benefits in its stead~~ **only on the basis of decision by competent national court or if the member may involve** the competent national court, ~~if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.~~“

*The original provision meant that if a member of DPA is victim of traffic accident, and cannot work anymore, the court should have the power to take out his or her pension or other benefits. That is a little bit strict.*

*In addition, there is no need to force court decision in all cases when the member may be dismissed. The member may be convicted of crime by criminal court and then dismissed based on that independent verdict. The member may no longer fulfil the conditions required and may not wish to undergo trial because of that, etc.*

- Paragraph 5 should be deleted.

*CZ does not wish to introduce a system where someone is forced to continue working just because someone else did not manage to appoint a successor in time. In addition, this provision means that if someone cannot work anymore due to poor health, he or she still must work until a successor is found (and his or her pension may be taken out pursuant to paragraph 4).*

## Article 50

- This Article should be moved to new Article 49(h).

*That way, the Member States will be able to implement professional secrecy in a way compatible with e.g. criminal proceedings.*

## Article 51

*CZ is not convinced that paragraph (2) and the concept of “main establishment” should form the main division of competences between DPAs from different Member States. First, CZ believes that there should be greater role for DPAs where processing takes place, where it has considerable impact or where data subjects affected by processing reside. Second, CZ believes that the criteria for “main establishment” in Article 4(13) may be very difficult to apply in practice.*

## Article 53

- Chapeau of paragraph 1 should be amended:

“1. Each supervisory authority shall, **in addition to powers provided by national law**, have the power:

*Flexibility is introduced for those Member States that already apply more extensive powers.*

- The last part of paragraph 2 should be amended:

“The powers referred to in **this paragraph** ~~point (b)~~ shall be exercised in conformity with Union law and Member State law. **Member States shall provide for appropriate modalities of access of supervisory authority to all personal data and to all information necessary for performance of its duties.**“

*CZ is aware that the power to access all information (point a) is not limited this way in the 1995 Directive. However, since that directive has to be implemented into national law, Member States could do so in a way that respects their other (EU, international...) obligations particularly in the area of protection of classified information, which may of course be available to authorized members and personnel of DPA. It is necessary to comply with protection of classified information.*

- The paragraph 3 should be amended:

*“3. Each supervisory authority shall have the power to ~~bring violations of this Regulation to the attention of the judicial authorities and~~ to engage in legal proceedings, in particular pursuant to Article 74(4) ~~and Article 75(2).~~“*

*The Commission explained that this Article enables the DPA to notify law enforcement or criminal court. But that is not a “power” as such. It goes without saying that DPA can do that, so the provision would be understood to cover something else.*

*Moreover, reference to Article 75(2) is incorrect as that provision enables data subject rather than DPA.*

## GERMANY

### **Position of the Federal Government on Chapters VI and VII of the Commission proposal for a General Data Protection Regulation (COM(2012) 11 final)**

At the meeting of the Council Working Party on Information Exchange and Data Protection (DAPIX) of 22-23 July 2013, the Presidency invited the Member States to forward proposals for amendments and comments – apart from those already submitted in DAPIX – concerning Chapters VI and VII of the Commission proposal for a General Data Protection Regulation. On 7 August the Council Presidency circulated a proposal relating to Chapters VI and VII of the Regulation. It is that proposal which forms the subject matter of this position.

A. Part 1 of the comments concerning Articles 46 to 72

General scrutiny reservations and reservations on individual provisions, as submitted in DAPIX, remain in place unless explicitly lifted.

92) The establishment of supervisory authorities in Member States, empowered to perform their duties 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.	Note: DE requests that recital 27 on the "main establishment" rule also be adapted.
(92a) <u>The independence of supervisory authorities should not mean that the supervisory authorities cannot be subjected to control or monitoring mechanism regarding their financial expenditure</u> <sup>1</sup> .	
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.	

<sup>1</sup> Presidency proposal 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.

<p>94) Each supervisory authority should be provided with the (.) financial and human resources, premises and infrastructure, which <u>are</u> 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. <u>Each supervisory authority should have a separate annual budget, which may be part of the overall state or national budget.</u></p>	
<p>95) The general conditions for the <u>member or members</u> 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 or the government <u>or the head of State</u> of the Member State (...).</p> <p><u>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. They should behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.</u></p>	
<p>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, the supervisory authorities should co-operate with each other and the Commission.</p>	

<p>97) Where the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union takes place in more than one Member State, one single supervisory authority should be competent for monitoring <u>those processing activities of the controller or processor throughout the Union and taking the related decisions as regards the controller or processor</u>, in order to increase the consistent application, provide legal certainty and reduce the administrative burden for such controllers and processors. <u>This should not apply in relation to controllers that are not established in the Union; their representative may be addressed by each supervisory authority, in addition to or instead of the controller.</u></p> <p><u>The competence of the single supervisory authority should include measures intended to produce legal effects such as the authorisation of binding corporate rule and of transfers of personal data to third countries or international organisations, administrative fines and other sanctions. However, the competence of that supervisory authority should not encompass the competence for the enforcement of its decisions, on the territory of another Member State, unless in the context of joint operations and allowed by the Member State concerned.</u></p>	<p>(1) <u>Note: the concept of a "single authority" appears for the first time in recital 97. It should be made clear which DPA is meant by this.</u></p>
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<p>98) The competent authority <u>for the supervision of the processing and the related decisions</u>, providing such one-stop shop, should be the supervisory authority of the Member State in which the controller or processor has its main establishment. <u>However, the supervision of the processing by a public authority or body should be carried out solely by the supervisory authority or the supervisory authorities of the Member State where the public authority or body is established.</u></p>	
<p>99) While this Regulation applies also to the activities of national courts, the competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks. However, this exemption should be strictly limited to genuine judicial activities in court cases and not apply to other activities where judges might be involved in, in accordance with national law.</p>	<p><i>The competence of the supervisory authorities should not cover the processing of personal data by courts in the course of their independent activities, in order to safeguard the independence of the courts in the performance of their tasks. This exemption should apply to all activities assigned to the national courts for independent performance. The exemption should not apply to administrative tasks carried out by the courts or to other activities where their institutional independence is not involved. Similarly, the competence of the supervisory authority should not cover cases where the courts, though not themselves processing the data, are called upon specifically to issue an independent decision on the admissibility of the data processing.</i></p>
<p>100) 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 duties and effective powers , including powers of investigation, legally binding intervention, decisions and sanctions, particularly in cases of complaints from individuals, and to engage in legal proceedings. Investigative powers of supervisory authorities (...) should be exercised in conformity with Union law and national law. This concerns in particular the requirement to obtain a prior judicial authorisation.</p>	

101)	<p>Each supervisory authority should <u>deal with</u> complaints lodged by any data subject and should investigate the matter. 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.</p>	
	<p><u>Where the supervisory authority to which the complaint has been lodged is not the competent supervisory authority, the competent 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 competent supervisory authority should, when taking measures intended to produce legal effects, including the imposition of penalties and 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.</u></p>	
102)	<p>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 data subjects.</p>	
103)	<p>The supervisory authorities should assist each other in performing their duties and provide mutual assistance, so as to ensure the consistent application and enforcement of this Regulation in the internal market.</p>	

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.	
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 <u>exercise its powers</u> as regards processing operations <u>which substantially affect a significant number of data subjects</u> in several Member States, or (...) that might substantially affect the free flow of personal data. It should also apply where any supervisory authority <u>concerned</u> or the Commission requests that <u>such</u> 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.	
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 supervisory authority <u>concerned</u> or the Commission.	
107)	(...)	
108)	There may be an urgent need to act in order to protect the <u>rights and freedoms</u> 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.	

<p>109) The application of this mechanism should be a condition for the (...) enforcement of the (...) decision by a supervisory authority <u>in those cases where its application is mandatory</u>. In other cases of cross-border relevance, mutual assistance and joint <u>operations</u> might be carried out between the supervisory authorities <i>concerned</i> on a bilateral or multilateral basis without triggering the consistency mechanism.</p>	
<p>110) At Union level, a European Data Protection Board should be set up. 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 and of the European Data Protection Supervisor. The Commission should participate in its activities <u>without voting rights</u>. The European Data Protection Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission and promoting co-operation of the supervisory authorities throughout the Union. The European Data Protection Board should act independently when exercising its tasks.</p>	<p>111)</p>

Definition «main establishment»:

(13) ‘main establishment’ means

- as regards the controller, **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 an other establishment of the controller in the Union. In this case the latter shall be considered as the main establishment. If** no decisions as to the purposes (...) and means of the processing of personal data are taken in the Union, (...) the place where the main processing activities in the context of the activities of an establishment of **the** controller in the Union take place<sup>1</sup>;
- as regards the processor, **the place of its central administration in the Union and, if the processor has no central administration in the Union, the place where the main processing activities in the context of the activities of an establishment of the processor take place;**

*Note: The Presidency's efforts to define the main establishment on the basis of more objective and transparent criteria, such as the location of the central administration in the EU, are welcome. However, DE still has a scrutiny reservation in footnote 4. The new provision could also give rise to demarcation problems in practice.*

<sup>1</sup> BE, CZ DE, EE and SK scrutiny reservation: they expressed concerns about this definition, which might be difficult to apply in practice. IE remarked this place may have no link with the place where the data are processed. DE also remarked that in the latter scenario, the Commission proposal did not determine which Member States' DPA would be competent. CZ thought the definition should be deleted.

<p style="text-align: center;"><i>Article 46</i></p> <p style="text-align: center;"><b><i>Supervisory authority</i></b></p> <p>1. Each Member State shall provide that one or more independent public authorities are responsible for monitoring the application of this Regulation.</p>	<p style="text-align: center;"><i>Article 46</i></p> <p style="text-align: center;"><b><i>Supervisory authority</i></b></p> <p>1. Each Member State shall provide that one or more independent public authorities are responsible for monitoring the application of this Regulation.</p>
<p>1a. <u>Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union (...). For this purpose, the supervisory authorities shall co-operate with each other and the Commission <b>in accordance with Chapter VII</b></u><sup>1</sup>.</p>	<p>1a. <u>Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union(...). For this purpose, the supervisory authorities shall co-operate with each other and the Commission <b>in accordance with Chapter VII</b></u>.</p>
<p>2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which <u>shall represent</u> 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.</p>	<p>2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which <u>shall represent</u> 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.</p> <p>Note: DE would point out that the national consistency mechanism still needs to be discussed in depth.</p>
<p>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>2</sup>.]</p>	<p><i>[Note: DE supports the deletion of this extra notification requirement. In any event the provision should be moved to Chapter IX and discussed in the context of other notification requirements.]</i></p>

<sup>1</sup> [FN. 7] DE thought there was no reason to mention this duty of co-operation here.]

<sup>2</sup> [FN. 8] This paragraph could be moved to the final provisions.

<p style="text-align: center;"><i>Article 47</i> <b>Independence</b></p> <p>1. <u>Each</u> supervisory authority shall act with complete independence in <u>performing</u> the duties and <i>exercising</i> <u>the</u> powers entrusted to it (...).</p>	<p style="text-align: center;"><i>Article 47</i> <b>Independence</b></p> <p>1. <u>Each</u> supervisory authority shall act with complete independence in <u>performing</u> the duties and <i>exercising</i> <u>the</u> powers entrusted to it (...).</p>
<p>2. The <u>member or</u> members of each supervisory authority shall, in the performance of their duties and exercise of their powers , <u>remain free from external influence, whether direct or indirect</u> <sup>1</sup> and neither seek nor take instructions from anybody.</p>	<p>2. The <u>member or</u> members of each supervisory authority shall, in the performance of their duties and exercise of their powers , <u>remain free from external influence, whether direct or indirect and</u> neither seek nor take instructions from anybody.</p>
<p>3. (...) <sup>2</sup>.</p>	<p>3. The member or members of the supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.</p> <p>[Note: DE welcomes the strict limit on secondary activities by supervisory authorities mentioned in recital 95. However, DE continues to take the view that this should also be incorporated into the enacting terms of the Regulation, and continues to oppose the deletion of Article 47(3). This deletion impairs the supervisory authority's independence and sends out the wrong political message. DE doubts whether the Member States have any room for manoeuvre on this point in the absence of an explicit conferral of competence. There is also the danger of forum shopping if the specifics of supervisory authority independence are defined (differently) by the Member States themselves. This would be inconsistent with the objective of harmonisation. The additions made to Article 49(1)(f) in the new Presidency proposal, whereby the Member States would be required to make the necessary provisions, are also insufficient in this regard.]</p>

<sup>1</sup> [FN. 12] DE would prefer to reinstate this text.

<sup>2</sup> [FN. 13] DE would prefer to reinstate this text.

<p>4. (...).</p>	<p>4. The member or members of the supervisory authority shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.</p> <p><i>[Note: DE is against the deletion of the provision on the taking-up of new activities by supervisory authority members after their terms of office. This follows the same reasoning as applies to paragraph 3.]</i></p>
<p>5. Each Member State shall ensure that <u>each</u> supervisory authority is provided with the (...) human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and <u>exercise of</u> its powers , including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.</p>	<p>5. Each Member State shall ensure that <u>each</u> supervisory authority is provided with the (...) human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and <u>exercise of</u> its powers , including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.</p>
<p>6. Each Member State shall ensure that <u>each</u> supervisory authority has its own staff which shall (...) be subject to the direction of the <u>member or members</u><sup>1</sup> of the supervisory authority.</p>	<p>6. Each Member State shall ensure that <u>each</u> supervisory authority has its own staff which shall (...) be subject to the direction of the <u>member or members</u> of the supervisory authority.</p>
<p>7. Member States shall ensure that <u>each</u> supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that <u>each supervisory</u> authority has separate annual budgets, <b><u>which may be part of the overall state or national budget.</u></b></p>	<p>7. Member States shall ensure that <u>each</u> supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that <u>each supervisory</u> authority has separate annual budgets, <b><u>which may be part of the overall state or national budget.</u></b></p> <p><i>[Does not affect the English version of the text.]</i></p>

<sup>1</sup> [FN 16] DE questioned who were to be considered as members of the DPA and argued that the regulation should allow different models.

<p style="text-align: center;"><i>Article 48</i></p> <p style="text-align: center;"><b>General conditions for the members of the supervisory authority</b></p> <p>1. Member States shall provide that the <u>member or members</u><sup>1</sup> of <u>each supervisory authority</u> must be appointed (...) by the parliament <b>and/or</b> the government <u>or the head of State</u> of the Member State concerned <b><u>or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure.</u></b></p>	<p style="text-align: center;"><i>Article 48</i></p> <p style="text-align: center;"><b>General conditions for the members of the supervisory authority</b></p> <p>1. Member States shall provide that the <u>member or members of each supervisory authority</u> must be appointed (...) by the parliament <b>and/or</b> the government <u>or the head of State</u> of the Member State concerned <b><u>or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure.</u></b></p> <p>[Note: DE can support these amendments. Data protection officers are appointed in different ways in the Member States, not least because states are structured differently.]</p>
<p>2. The <u>member or members</u> shall <u>have the qualifications, experience and skills</u> required to perform their duties <u>and exercise their powers</u>(...) <sup>2</sup>.</p>	<p>2. The <u>member or members</u> shall <u>have the qualifications, experience and skills</u> required to perform their duties <u>and exercise their powers</u>(...).</p>

<sup>1</sup> [FN.17] DE questioned who were to be considered as members of the DPA and argued that the regulation should allow different models.

<sup>2</sup> [FN.19] 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.

<p>3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement <b><u>in accordance with the law of the Member State concerned.</u></b></p>	<p>3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement <b><u>in accordance with the law of the Member State concerned.</u></b> <i>The Member States or Unions law provide a procedure for the nomination of a representative, who shall act on behalf of the member if the latter is prevented from performing his or her duties.</i></p> <p>[Note: DE enters a 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 in respect of the European Data Protection Supervisor).]</p>
<p>4. (...).</p>	<p>4. <i>At the request of the parliament or government, a member may be dismissed or deprived of the right to a pension or other benefits in its stead by the competent national court, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.</i></p> <p>Note: DE continues to oppose the deletion of paragraph 4.</p>
<p>5. (...) <sup>1</sup>.</p>	<p>5. <i>Where the term of office expires or the member resigns, the member shall continue to exercise the duties until a new member is appointed.</i></p> <p>[Note: DE continues to oppose the deletion of paragraph 5.]</p>

<sup>1</sup> [FN. 20] DE scrutiny reservation on deletion of paragraphs 4 and 5.

Article 49

**Rules on the establishment of the supervisory authority<sup>1</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;
  - (c) the rules and procedures for the appointment of the member or members of each supervisory authority (...);
  - (d) the duration of the term of the member or members of each supervisory authority which shall not be <sup>2</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>3</sup>;
  - (e) whether and, if so, for how many terms <sup>4</sup> the member or members of each supervisory authority shall be eligible for reappointment;
  - f) the (...) conditions governing the **duties** of the member or members and staff of each supervisory authority, **including prohibitions on actions and occupations incompatible therewith during and after the term of office** <sup>5</sup> and rules governing the cessation of employment;

Article 49

**Rules on the establishment of the supervisory authority**

1. Each Member State shall provide by law for:
  - a) the establishment (...) of each supervisory authority;
  - b) the qualifications, **experience and skills** (...) required to **exercise the powers** of the members of the supervisory authority;
  - c) the rules and procedures for the appointment of the member or members of each supervisory authority (...);
  - d) the duration of the term of the member or members of each supervisory authority which shall not be **no more than eight years and no** 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;
  - e) whether and, if so, for how many terms the member or members of each supervisory authority shall be eligible for reappointment;
  - f) the (...) conditions governing the **duties** of the member or members and staff of each supervisory authority (...) and the rules governing the cessation of employment;

Note: justification: DE takes the view that this express provision is necessary in the Regulation; see Article 47(3) and (4).

<sup>1</sup> [FN.21] 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.

<sup>2</sup> [FN. 22] DE proposed adding a maximum term of eight years.

<sup>3</sup> [FN. 23] The last part of this point might need to be moved to the final provisions.

<sup>4</sup> [FN. 24] DE proposal.

<sup>5</sup> [FN.25] The Presidency thinks this addition should cover what was previously stated in Article 48, (3) and (4).

<p>(g) (...) <sup>1</sup></p> <p>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 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 , both during and after their term of office.</p>	<p>g) (...).</p> <p>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 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 , both during and after their term of office.</p> <p><i>[Note: DE expresses its thanks for the deletion of the reference to the status of the supervisory authority in paragraph 1(a). Rules on incompatibility with other tasks and conduct requirements should not be left to national law, however. DE therefore requests that the passage inserted into paragraph 1(f) be deleted. The remark in footnote 21 is maintained.]</i></p>
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<sup>1</sup> [FN.27] DE scrutiny reservation on deletion of this point.

*Article 50*  
**Professional secrecy**  
(...) <sup>1</sup>

*Article 50*  
**Professional secrecy**  
*(...) Members and (...) staff of the supervisory authority shall be subject, both during and after their term of office, to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties. This shall be without prejudice to any statutory duty under the Member State's law to report criminal offences<sup>1</sup>. Pursuant to the law of the Member State, members of the supervisory authority shall be entitled to withhold evidence against persons who have entrusted them with information in their capacity as members of the supervisory authority, or indeed evidence regarding the information itself. This also applies to staff of the supervisory authority, provided that it is the members of the supervisory authority who decide to exercise that right. Insofar as this is covered by the right to withhold evidence, the person concerned shall not be required to produce or hand over documents.*

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<sup>1</sup> [FN.30] DE raised practical questions as to the scope and the exact implications of this article. All MS that spoke thought that the rules on professional secrecy should be left to national law and hence the Presidency has followed the suggestion by CZ and SI and moved this to Article 49. DE and COM scrutiny reservation on moving this provision to Article 49; should remain a separate provision.

*Article 51*  
**Competence**<sup>1</sup>

1. Each supervisory authority shall be competent to perform the duties and to exercise the powers conferred on it in accordance with this Regulation on the territory of its own Member State<sup>2</sup>.

*Article 51*  
**Competence**

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

[Note: *DE maintains its scrutiny reservation and remarks in footnotes 32 and 34. The introduction of a "lead authority" is welcome. The objective of the consistency mechanism must be to ensure uniform interpretation and uniform enforcement of the General Data Protection Regulation throughout Europe. This represents a key added value of the General Data Protection Regulation. However, in the proposal as it stands, a number of questions concerning the division of competences remain open. DE continues to suggest that an example should be used to cast light on questions of how individual enterprises would be affected. Recital 97 and Article 54a(5), in conjunction with Article 53(1b) and (1c) and with Articles 79 and 79a, suggest that a lead authority may exercise powers in other Member States or at least give binding instructions to the supervisory authorities of the respective host state. In DE's view, this requires deeper constitutional scrutiny. The respective powers of the courts, and the interplay between them, are also unclear.*]

<sup>1</sup> [FN. 32] Scrutiny reservation by DE. DE supported the principle of the main-establishment rule (aka as the one-stop-shop principle), but had many questions of understanding as to its practical implementation. One of the main questions was whether the allocation of competence to the DPA of the main establishment was exclusive and whether it also implied a rule of applicable law (DE, ES). A practical question was that of the language regime which would govern the co-operation between the DPAs and the communication with the controllers and the data protection. All delegations seemed to agree that at any rate the establishment of such a rule could not lead to the exercise of investigative powers by the DPA of one authority in the territory of another Member State.

<sup>2</sup> [FN. 34] DE questioned the interaction between paragraphs 1 and 2 and requested more clarity on which was to be the competent Member State. The Presidency has endeavoured to redraft paragraph 1 so as to clarify that this paragraph sets out the principle of the territoriality of supervision, from which the main-establishment rule in paragraph 2 derogates. The new drafting of § 1 also implies that for controllers established outside the EU, the competent DPA will be that of the Member State where the data subjects resides.

<p>1a. <u>Where pursuant to Article 54A a supervisory authority is competent to act as lead authority, it shall cooperate with other competent authorities in accordance with Chapter VII.</u></p>	<p>1a. <u>Where pursuant to Article 54A a supervisory authority is competent to act as lead authority, it shall cooperate with other competent authorities in accordance with Chapter VII(...)</u></p> <p>Note: Provisions on competence should appear in this paragraph, as the lead authority is an exception to the basic rule contained in Article 51(1).</p>
<p>2. (...) <sup>1</sup>.</p>	<p>2. (...).</p>
<p>2a. (...) <sup>2</sup>.</p>	<p>2a. (...).</p>
<p>2b. (...) <sup>3</sup>.</p>	<p>2b. (...).</p>

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<sup>1</sup> [FN. 35] Moved to Article 54a (5).  
<sup>2</sup> [FN. 36] Moved to Article 54b (2).  
<sup>3</sup> [FN. 37] Moved to Article 54a (7).

<p>3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.</p>	<p>3. <del>Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.</del>  <b><i>The supervisory authority shall not be competent to supervise matters assigned to courts for independent performance. The same shall apply insofar as judicially independent processing has been ordered, approved or declared admissible.</i></b>  <i>[Note: This wording excludes only court activities serving the administration of justice, which are subject to judicial independence. In the case of court activities which are purely administrative in nature, the supervisory authorities must continue to be competent. This derogation must apply whenever courts' work falls within the scope of their institutional independence. This 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 (e.g. in the area of non-contentious jurisdiction under the German Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction, the register of companies and the land register).]</i></p>
<p style="text-align: center;"><i>Article 52</i> <b><i>Duties</i></b><sup>1</sup></p> <p>1. <u>Each</u> supervisory authority shall:</p>	<p style="text-align: center;"><i>Article 52</i> <b><i>Duties</i></b></p> <p>1. <u>Each</u> supervisory authority shall:  <i>[Note: DE would point out that it cannot automatically be assumed that Member States have the power to define the tasks of the supervisory authorities in more detail if the Regulation contains no exhaustive provisions. The last version by the Irish Presidency of 21 June included the words "shall at least". Could the Lithuanian Presidency explain why that wording has been removed?]</i></p>

<sup>1</sup> [FN. 39] DE scrutiny reservation.

(a) monitor and <u>enforce</u> the <u>application</u> of this Regulation;	(a) monitor and <u>enforce</u> the <u>application</u> of this Regulation;  [Note: DE expresses its thanks for the adoption of its proposal to replace "ensure" with "enforce".]
<i>(aa) promote (...) <u>public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data. Activities addressed specifically to children shall receive specific attention;</u></i>	<i>(aa) promote (...) <u>public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data. Activities addressed specifically to children shall receive specific attention;</u></i>
<i>(ab) <u>inform the national parliament, the government or other political institution as well as the public on any issue related to the protection of personal data</u><sup>1</sup></i>	<i>(ab) <u>inform the national parliament, the government or other political institution as well as the public on any issue related to the protection of personal data</u></i>
<i>(ac) <u>promote the awareness of controllers, <b>their representatives</b> and processors of their obligations under this Regulation;</u></i>	<i>(ac) <u>promote the awareness of controllers, <b>their representatives</b> and processors of their obligations under this Regulation;</u></i>
<i>(ad) <u>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;</u></i>	<i>(ad) <u>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;</u></i>

<sup>1</sup> [FN. 41] Moved from Article 52(1)(j) as this a duty rather than a power from the DPA.

<p>(b) <u>deal with complaints</u> lodged by <u>a data subject, or body, organisation or</u><sup>1</sup> <u>association representing a data subject</u> in accordance with Article 73, <u>and investigate</u>, to the extent appropriate, the <u>subject matter of the complaint</u> and inform the data subject or the <u>body, organisation or association</u> of the progress and the <u>outcome of the investigation</u> within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;</p>	<p>b) <u>deal with complaints</u> lodged by <u>a data subject, or body, organisation or</u> <u>association representing a data subject</u> in accordance with Article 73, <u>and investigate</u>, to the extent appropriate, the <u>subject matter of the complaint</u> and inform the data subject or the <u>body, organisation or association</u> of the progress and the <u>outcome of the investigation</u> within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;</p>
<p>(c) share information with and provide mutual assistance to other supervisory authorities <u>with a view to ensuring</u> the consistency of application and enforcement of this Regulation;</p>	<p>c) share information with and provide mutual assistance to other supervisory authorities <u>with a view to ensuring</u> the consistency of application and enforcement of this Regulation;</p>
<p>d) conduct investigations <u>on the application of this Regulation</u> either on its own initiative or on the basis of a <b><u>information received from another supervisory or other public authority</u></b> (...);</p>	<p>d) conduct investigations <u>on the application of this Regulation</u> either on its own initiative or on the basis of a <b><u>information received from another supervisory or other public authority</u></b> (...);</p>
<p>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;</p>	<p>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;</p>
<p>f) <u>respond to consultation requests</u> by Member State institutions and bodies, <u>including those pursuant to paragraph 7 of Article 34</u>, on legislative and administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data<sup>2</sup>;</p>	<p>f) <u>respond to consultation requests</u> by Member State institutions and bodies, <u>including those pursuant to paragraph 7 of Article 34</u>, on legislative and administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data;</p>

<sup>1</sup> [FN. 43] Alignment with the text of Article 73.

<sup>2</sup> [FN.46] DE does not have problem with this obligation, which already existed under the data protection Directive 46/95.

(fa) <u>establish and make public a list in relation to the requirement for a data protection impact assessment pursuant to Article 33(2a)</u> <sup>1</sup> ;	(fa) <u>establish and make public a list in relation to the requirement for a data protection impact assessment pursuant to Article 33(2a)</u> ;  <i>[Note: DE welcomes the requirement to provide public lists with references to impact assessments. However, this requirement should compulsorily be uniformly applied throughout Europe. DE therefore maintains its scrutiny reservation in footnote 47.]</i>
g) <u>give advice on the processing operations referred to in Article 34(3) and authorise processing referred to in Article 34(7a)</u> ;	g) <u>give advice on the processing operations referred to in Article 34(3) and authorise processing referred to in Article 34(7a)</u> ;  <i>[Note: DE expresses its thanks for the adoption of its proposal.]</i>
(ga) <u>to ensure (...) compliance with the requirement for prior consultations referred to in Article 34(2) and prior authorisations referred to in Article 34(7a) and Article 42(2)(d) and (5)</u> <sup>2</sup> ;	(ga) <u>to ensure (...) compliance with the requirement for prior consultations referred to in Article 34(2) and prior authorisations referred to in Article 34(7a) and Article 42(2)(d) and (5)</u> ;
(gb) <u>encourage the drawing up of codes of conduct pursuant to Article 38</u> ;	(gb) <u>encourage the drawing up of codes of conduct pursuant to Article 38</u> ;
(gc) <u>promote the establishment of data protection certification mechanisms and of data protection seals and marks</u> ;	(gc) <u>promote the establishment of data protection certification mechanisms and of data protection seals and marks</u> ;
(gd) <u>carry out a periodic review of certifications issued in accordance with Article 39(4)</u> ;	(gd) <u>carry out a periodic review of certifications issued in accordance with Article 39(4)</u> ;
h) <u>give an opinion on the draft codes of conduct pursuant to Article 38(2)</u> ;	h) <u>give an opinion on the draft codes of conduct pursuant to Article 38(2)</u> ;

<sup>1</sup> [FN. 47] DE scrutiny reservation.

<sup>2</sup> [FN.48] Moved from Article 53(1)(d), as this is a duty of the DPA and not a power conferred on the DPA.

(ha) <u>conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 38a and of a certification body pursuant to Article 39a</u> <sup>1</sup> ;	(ha) <u>conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 38a and of a certification body pursuant to Article 39a</u> ;
(hb) <u>authorise contractual clauses referred to in Article 42(2)(d)</u> ;	(hb) <u>authorise contractual clauses referred to in Article 42(2)(d)</u> ;
i) <u>approve binding corporate rules pursuant to Article 43</u> ;	i) <u>approve binding corporate rules pursuant to Article 43</u> ;
j) <u>contribute to the activities of the European Data Protection Board</u> .	j) <u>contribute to the activities of the European Data Protection Board</u> .
<b><u>(k) issue opinions <i>as well as fulfill any other duties</i> related to the protection of personal data.</u></b>	<b><u>(k) issue opinions <i>as well as fulfil any other duties</i> related to the protection of personal data.</u></b>
2. (...) <sup>2</sup>	2. (...).
3. (...) <sup>3</sup>	3. (...).
4. <b><u>Each supervisory authority shall facilitate the submission of</u></b> complaints referred to in point (b) of paragraph 1, <b><u>by measures such as providing</u></b> a complaint submission form, which can be completed electronically, without excluding other means of communication.	4. <b><u>Each supervisory authority shall facilitate the submission of</u></b> complaints referred to in point (b) of paragraph 1. <b><i>Therefore, each supervisory authority shall provide at least</i></b> a complaint submission form, which can be completed electronically, without excluding other means of communication.
5. The performance of the duties of <u>each</u> supervisory authority shall be free of charge for the data subject <u>and for the data protection officer</u> <sup>4</sup> .	5. The performance of the duties of <u>each</u> supervisory authority shall be free of charge for the data subject <u>and for the data protection officer</u> . [Note: <i>DE expresses its thanks for the adoption of its proposal to include "data protection officer" in the sentence.</i> ]

<sup>1</sup> [FN. 50] Further to DE proposal.

<sup>2</sup> [FN.51] Moved to paragraph 1.

<sup>3</sup> [FN. 52] Moved to paragraph 1.

<sup>4</sup> [FN. 53] DE proposal.

<p>6. Where requests are manifestly <u>unfounded or excessive</u>, in particular <u>because of</u> their repetitive character, the supervisory authority may <u>refuse to act on</u> <sup>1</sup> <u>the request</u> (...). The supervisory authority shall bear the burden of <u>demonstrating</u> the manifestly <u>unfounded or excessive</u> character of the request <sup>2</sup>.</p>	<p>6. Where requests are manifestly <u>unfounded or excessive</u>, in particular <u>because of</u> their repetitive character, the supervisory authority may <u>refuse to act on</u> <u>the request</u> (...). The supervisory authority shall bear the burden of <u>demonstrating</u> the manifestly <u>unfounded or excessive</u> character of the request. [Note: <i>DE would ask the Presidency to enter a reservation in footnote 56.</i>]</p>
<p style="text-align: center;"><i>Article 53</i> <b><i>Powers</i></b> <sup>3</sup></p> <p>1. Each Member State shall provide by law that its supervisory authority shall have <u>at least the following <b>monitoring</b></u> powers:</p>	<p style="text-align: center;"><i>Article 53</i> <b><i>Powers</i></b></p> <p>1. Each Member State shall provide by law that its supervisory authority shall have <u>at least the following <b>monitoring</b></u> powers: [Note: <i>DE emphasises its remarks in footnote 58.</i>]</p>
<p>(a) <i>to order the controller and the processor, and, where applicable, the representative to provide any information it <u>requires</u> for the performance of its duties;</i></p>	<p>(a) <i>to order the controller and the processor, and, where applicable, the representative to provide any information it <u>requires</u> for the performance of its duties;</i></p>
<p>(b) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights provided by this Regulation;</p>	<p>(b) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights provided by this Regulation;</p>
<p>(c) <i>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;</i></p>	<p>(c) <i>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;</i></p>

<sup>1</sup> [FN. 54] DE proposal.

<sup>2</sup> [FN. 56] DE reservation: this can be left to general rules.

<sup>3</sup> [FN. 58] DE stated that it was unacceptable that the supervisory authority would be able to exercise these powers vis-à-vis public authorities. A distinction must 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.

<p>(d) <i>to notify the controller or the processor of an alleged <u>infringement of this Regulation, and where appropriate, order the controller or the processor to remedy that infringement</u></i></p>	<p>(d) <i>to notify the controller or the processor of an alleged <u>infringement of this Regulation, and where appropriate, order the controller or the processor to remedy that infringement</u></i></p> <p>d1) <i>to establish, in respect of the controller or the processor, a breach of the provisions governing the processing of personal data, and if necessary make suggestions on how to rectify the shortcomings established</i></p> <p><i>[Note: This wording largely reflects the current legal situation in DE (Section 24(5) of the Federal Data Protection Act).]</i></p> <p>d2) <i>where appropriate, to order the controller or the processor, in the case referred to in paragraph (d1), (...) to remedy a breach, in a specific manner, in order to improve the protection of the data subject.</i></p> <p>In respect of public authorities or bodies, the supervisory authority shall have only the powers laid down in paragraph (d1) but restricted on notifying the controller or the processor.</p>
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**1a. Each Member State shall provide by law that its supervisory authority shall have at least the following investigatory powers:**

- (a) *to carry out data protection audits;*
- (b) *to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its duties;*
- (c) *to obtain access to any premises of the controller and the processor, including to any data processing equipment and means (...) <sup>1</sup>.*

**1a. Each Member State shall provide by law that its supervisory authority shall have at least the following investigatory powers:**

- (a) *to carry out data protection audits;*
- (b) *to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its duties;*
- (c) *to obtain access to any premises of the controller and the processor, including to any data processing equipment and means (...), **during operating and business hours, insofar as this is necessary for the performance of its tasks.***

[Note: DE welcomes the fact that (c) is now consistent with the principle of random inspections, and calls for the phrase "during operating and business hours, insofar as this is necessary for the performance of its tasks" to be inserted in order to ensure proportionality.

The right of access should not be restricted only to those cases where there is already a presumption of an infringement. This contradicts the principle of random inspections. Supervision frequently takes the form of monitoring compliance with data protection law and then establishing any infringements. Access should therefore continue to be possible under the same conditions as access pursuant to paragraph (b). This provision must not result in, for example, the disclosure of tax data by a financial authority to the data protection supervisory authority within the framework of the powers pursuant to paragraph 1 becoming a punishable violation of tax secrecy. This must be clarified in the Regulation. DE maintains a scrutiny reservation in that regard.]

<sup>1</sup> [FN. 63] The requirement of reasonable grounds has been deleted here as the procedural requirements will be set out under national law to which the new paragraph 5 refers.

**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 to a controller or processor where processing operations have infringed provisions of this Regulation;
- (c) (...)<sup>1</sup>;
- (d) to order the rectification, restriction or erasure (...) of (...) data **pursuant to Articles 16, 17a and 17** (...) <sup>2</sup> and the notification of such actions to recipients to whom the data have been disclosed pursuant to Articles 17(2a) and 17b;
- (e) to impose a temporary or definitive prohibition on processing;
- (f) to order the suspension of data flows to a recipient in a third country or to an international organisation;
- (i) (...) <sup>3</sup>.
- (j) (...) <sup>4</sup>.

**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 to a controller or processor where processing operations have infringed provisions of this Regulation;
- (c) (...);
- (d) to order the rectification, restriction or erasure (...) of (...) data **pursuant to Articles 16, 17a and 17** (...) and the notification of such actions to recipients to whom the data have been disclosed pursuant to Articles 17(2a) and 17b;
- (e) to impose a temporary or definitive prohibition on processing;
- (f) to order the suspension of data flows to a recipient in a third country or to an international organisation;
- (i) (...).
- (j) (...).

***With respect to public authorities or bodies, the supervisory authority shall have only the powers laid down in paragraph (a).***

Note: *[Does not affect the English version of the text.]*

<sup>1</sup> [FN.65] Moved to para. 1.

<sup>2</sup> [FN. 66] Deleted further to DE suggestion as the breach of the Regulation is obvious here.

<sup>3</sup> [FN. 68] Moved to Article 52(1)(k).

<sup>4</sup> [FN. 69] Moved to Article 52(1)(ab).

	<p><i>DE has entered a reservation in relation to the new Article 54a(5) concerning the (sole) competence of the lead authority for the measures referred to in paragraphs 1 to 1c. In principle DE is basically in favour of a uniform decision-making competence. However, proper discussion is still needed as to how the procedure should be understood in practice. Do, for example, a warning (paragraph 1b(a)) or a ban (paragraph 1b(e)) represent a direct exercise of powers that could be conducted by a lead authority outside its territory in cases such as laid down in Article 54a(5)? If so, DE would enter a scrutiny reservation.</i></p>
<p><b>1c. <u>Each Member State shall provide by law that its supervisory authority shall have the following authorisation powers:</u></b>  <u>(a) authorise contractual clauses referred to in Article 42(2)(d);</u>  <u>(b) approve binding corporate rules pursuant to Article 43<sup>1</sup>.</u></p>	<p><b>1c. <u>Each Member State shall provide by law that its supervisory authority shall have the following authorisation powers:</u></b>  <u>(a) authorise contractual clauses referred to in Article 42(2)(d);</u>  <u>(b) approve binding corporate rules pursuant to Article 43.</u></p>
<p>2. (...) The powers referred to in <b>paragraphs 1, 1a, 1b and 1c</b> shall be exercised in conformity with Union law or Member State law.</p>	<p>2. (...) The powers referred to in <b>paragraphs 1, 1a, 1b and 1c</b> shall be exercised in conformity with Union law or Member State law.</p>
<p>3. Each Member State shall provide by law that its supervisory authority shall have the power to bring <u>infringements</u> of this Regulation to the attention of the judicial authorities and to <u>commence or engage otherwise</u> in legal proceedings<sup>2</sup>, <u>in order to enforce the provisions of this Regulation.</u></p>	<p>3.</p> <p><i>[Note: Paragraph 3 should be deleted as the ambiguous wording regarding the provisions of Chapter VIII will lead to misunderstandings. In terms of powers, a distinction must be drawn between public and non-public officials. The rules laid down in Chapter VIII are sufficient and should not be duplicated.]</i></p>

<sup>1</sup> [FN.70] Moved from Article 52(1).

<sup>2</sup> [FN. 71] DE reservation on proposed DPA power to engage in legal proceedings.

<p>4. Each supervisory authority shall have the power to <u>impose an administrative fine pursuant to Articles 79 and 79a in addition to, or instead of, measures referred to in points (e) to (h) of paragraph 1, depending on the circumstances of each individual case<sup>1</sup>.</u></p>	<p>4. (...)   [Note: DE maintains its scrutiny reservation in footnote 72. In particular, the relationship with Article 54a(5) is unclear. Moreover, the reference to "(e) to (h) of paragraph 1" leads nowhere.]</p>
<p><b>4a. <u>Member State law may empower the supervisory authority or another authority to impose penalties referred to in Article 79b.</u></b></p>	<p>4a. (...)   Note: Paragraph 4a should be deleted.</p>
<p>5. <u>The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process<sup>2</sup>.</u></p>	<p>5. <u>The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process.</u></p>
<p style="text-align: center;"><i>Article 54</i> <b>Activity report</b></p> <p>Each supervisory authority <u>shall</u> draw up an annual report on its activities. The report shall be transmitted to the <u>government</u> and the national parliament and shall be made available to the public, the Commission and the European Data Protection Board.</p>	<p style="text-align: center;"><i>Article 54</i> <b>Activity report</b></p> <p>Each supervisory authority <u>shall</u> draw up an annual report on its activities. The report shall be <b>presented</b> to the <b>national parliament and the government</b> and shall be made available to the public, the Commission and the European Data Protection Board.</p>

<sup>1</sup> [FN. 72] DE reservation: deletion.

<sup>2</sup> [FN.73]New paragraph, partially inspired by the last sentence of paragraph 2. The additional language is proposed by the Presidency in order to clarify that these powers will be exercised under the national law of the Member States, which needs to provide for the necessary guarantees for the rights of the defence. The reference to national law will allow Member States to apply their procedural rules (cf. remarks by DE). This should also allow to take into account any concerns regarding self-incrimination.

**Position of the Federal Government on Chapters VI and VII of the Commission proposal for a General Data Protection Regulation  
(COM(2012) 11 final)**

B. Part 2 of the comments on Articles 54a to 72

	<p><i>[Preliminary comment on Chapter VII:]</i></p> <p><i>DE endorses Austria's view in FN 76 and also enters a scrutiny reservation on Chapter VII.</i></p> <p><i>In principle DE welcomes the proposal of a "lead authority" as a single contact point so that uniform decisions may be made and the question of powers in Chapter VII settled. Certain issues concerning the determination of the lead authority and the demarcation of powers vis-à-vis supervisory bodies in their respective territories (Article 51(1)) remain unresolved.</i></p> <p><i>This means that under Article 54a(5) in conjunction with Articles 54b(5), 53(1b), 53(1c), 79 and 79a the lead authority receives competences of its own to exercise powers in other Member States or to take decisions on the matter. This still needs to be examined in depth in the light of European and constitutional law.</i></p> <p><i>Moreover, there is still a need to discuss in detail whether it is right to entirely deny supervisory authorities at the location of a branch the possibility of imposing sanctions or taking measures under Article 54a(5) in conjunction with Article 53(1b) and (1c).</i></p>
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DE would also point out that the terms used create additional confusion. For example, the Regulation as it now stands contains the following distinctions:

- "single supervisory authority" in recital 97

- "(competent) authority" in Article 51(1) and (1a)

- "(competent) lead authority" in Article 54a( 1)

- "(competent) lead authority" in Article 54a(4) (differs from paragraph 1)

- "supervisory authority, where a complaint has been lodged" in Article 54a(4)

- "sole supervisory authority" in Article 54a( 5)

- "supervisory authority of the Member State concerned" in Article 54b(2).

These distinctions are not consistent. On the one hand, this concerns the delimitation of competences, tasks and powers (see also the comments on Articles 51 to 53). On the other hand there are some duplications, not all of which are consistent. Thus the "supervisory authority, where a complaint has been lodged "will usually be the supervisory body pursuant to paragraph 1 of Article 51, because the data subject will normally contact the supervisory authority of the Member State in which the data processing takes place. But this is by no means obligatory. Thus an Austrian citizen, for example, may lodge his or her complaint with the Austrian data protection supervisory authority, although the complaint is concerned with the data processing in a branch in Germany of an undertaking whose principal place of business is in Ireland. Under Article 51(1) the German supervisory body would be competent. Under Article 54a, however, the Irish supervisory body, as the lead authority, would be competent and would have sole powers under Article 54a(5) to impose sanctions, inter alia.

	<p><i>As the supervisory authority with which the complaint was lodged, the Austrian supervisory authority would be competent and involved in the cooperation procedure set out in Article 54b. In addition, the fact that the complaint was lodged in Austria, and not in Germany or in Ireland, would under Article 54a(5) result in a different lead authority. According to the wording of Article 54a(4), this would presumably be the German supervisory authority.</i></p> <p><i>Given that this is the case, Chapter VII requires further revision. DE remains committed to the supervisory authorities being harmonised and coordinated essentially via the European Data Protection Board and to enhancing the role of the Board. The legal concerns of the Commission and of the Council's Legal Service are only partially convincing and may be resolved by stepping up the role of the EDPB. The EIOPA could possibly serve as a model.</i></p>
<p style="text-align: center;"><b><u>Article 54a</u></b> <b><u>Competence of the lead authority</u></b></p> <p><b><u>1. Where the processing of personal data takes place in the context of the activities of establishments of a controller or processor in several Member States, the supervisory authority of the main establishment of the controller or processor shall act as lead authority for the supervision of the processing activities of the controller or the processor in all Member States.</u></b></p>	<p style="text-align: center;"><b><u>Article 54a</u></b> <b><u>Competence of the lead authority</u></b></p> <p><b><u>1. Where the processing of personal data takes place in the context of the activities of establishments of a controller or processor in several Member States, the supervisory authority of the main establishment of the controller or processor shall act as lead authority for the supervision of the processing activities of the controller or the processor in all Member States.</u></b></p>

<p><b><u>2. Where the processing takes place in the context of the activities of establishments of a group of undertakings in several Member States, the supervisory authority of main establishment of the controlling undertaking shall act as lead authority for the supervision of the processing activities of the group of undertakings, unless the purposes and means of processing are determined by another undertaking; in this case the authority which is competent for the main establishment of that undertaking shall act as lead authority for the supervision of its processing activities.</u></b></p>	<p><b><u>2. Where the processing takes place in the context of the activities of establishments of a group of undertakings in several Member States, the supervisory authority of main establishment of the controlling undertaking shall act as lead authority for the supervision of the processing activities of the group of undertakings, unless the purposes and means of processing are determined by another undertaking; in this case the authority which is competent for the main establishment of that undertaking shall act as lead authority for the supervision of its processing activities.</u></b></p>
<p><b><u>3. Where the controller exercises also activities as a processor, the supervisory authority of the main establishment of the controller shall act as lead authority for the supervision of processing activities.</u></b></p>	<p><b><u>3. Where the controller exercises also activities as a processor, the supervisory authority of the main establishment of the controller shall act as lead authority for the supervision of processing activities.</u></b></p>

4. **Where a complaint has been lodged with a supervisory authority other than to the authority which is competent for supervision of processing activities of the controller or processor, the authority of the Member State which is competent for the supervision of those processing activities shall act as the lead authority.**

4. **Where a complaint has been lodged with a supervisory authority other than to the authority which is competent for supervision of processing activities of the controller or processor, the authority of the Member State which is competent for the supervision of those processing activities shall act as the lead authority.**

*[Note: DE welcomes the plan to give citizens free rein to contact the supervisory authority of their choice. It should be made clearer, however, that the supervisory authority which they contact will not automatically be competent as a result. This would on the one hand undermine the division of powers between the competent authority under Article 51(1) and the lead authority under paragraphs 1 and 2 of Article 54a. On the other hand, data subjects may be able to lodge complaints with a number of authorities. This rule should under no circumstances lead to data subjects "forum shopping" with respect to supervisory authorities. Data subjects should contact the supervisory authority at their usual place of residence. In such cases the legal effect would also be ambiguous.]*

*Furthermore, the rule in paragraph 4 does not make it clear which supervisory authority would then act as lead authority (see in this connection the general comments on Article 54a). The text "authority of the Member State which is competent for the supervision of those processing activities" in paragraph 4 of Article 54a is confusing, because at no point in the Regulation are the "Member States" given the responsibility for data protection supervision. Lastly, it is unclear whether the reference is to Article 51(1) or to Article 54a(1). DE asks that this point be clarified.*

	<p><i>Moreover, the Regulation should also make provision for lead responsibility in cases where the undertaking does not have a branch in the EU. The representatives designated pursuant to Article 25 could constitute a connecting point here. If no representative is designated, use could be made of the criteria applicable to BCR. Competence should derive directly from the Regulation.]</i></p>
<p>5. <b><u>In the situations referred to in paragraphs 1 to 4 the lead authority shall be the sole supervisory authority competent for deciding on measures intended to produce legal effects by (...) exercising the powers pursuant to paragraphs 1b and 1c of Article 53 and Articles 79 and 79a as regards the processing activities of the controller or the processor in all Member States concerned.</u></b></p>	<p>5. <b><u>In the situations referred to in paragraphs 1 to 4 the lead authority shall be the sole supervisory authority competent for deciding on measures intended to produce legal effects by (...) exercising the powers pursuant to paragraphs 1b and 1c of Article 53 and Articles 79 and 79a as regards the processing activities of the controller or the processor in all Member States concerned.</u></b></p> <p><i>Note: DE welcomes the establishment of a sole decision-making competence for the lead authority. On this point DE enters a separate scrutiny reservation, as some questions relating to constitutional law remain unresolved. On which considerations was the decision based to make the lead authority competent for the measures laid down in paragraphs 1b and 1c of Article 53? What exactly is meant by "deciding on measures to produce legal effects by exercising powers"? Should the actual measure, e.g. a warning pursuant to Article 53(1b)(a),</i></p>
	<p><i>be taken by the authority in the territory pursuant to Article 51 and should the "lead authority" be able to give this authority binding instructions? If so: can it also determine the text of the warning? Or can the lead authority itself issue the warning? This then gives rise, however, to the question of the admissibility under constitutional law of exercising powers in another Member State. If necessary, a rule should be drafted in the event of conflicting measures taken by the lead authority and other authorities involved.</i></p>

<p>6. <b><u>Where there are conflicting views between the supervisory authorities involved on which supervisory authority shall be competent to act as lead authority, the European Data Protection Board shall issue an opinion on the identification of the lead authority.</u></b></p>	<p>6. <b><u>Where there are conflicting views between the supervisory authorities involved on which supervisory authority shall be competent to act as lead authority, the European Data Protection Board shall issue an opinion on the identification of the lead authority.</u></b></p> <p><i>Note: DE welcomes the involvement of the EDPB, but regards the legal effect as too weak and therefore enters a reservation. A non-binding opinion cannot provide a conclusive solution to conflicts over competence which are at the expense of data subjects and controllers.</i></p>
<p>7. <i>This Article shall not apply to public authorities and bodies.</i></p>	<p>7. <i>This Article shall not apply to public authorities and bodies.</i></p>
<p style="text-align: center;"><b><u>Article 54b</u></b> <b><u>Cooperation obligations of the lead authority</u></b></p> <p>1. <b><u>The lead authority referred to in Article 54a shall cooperate with the supervisory authorities of the Member States concerned, and consult them in an endeavour to reach consensus.</u></b></p>	<p style="text-align: center;"><b><u>Article 54b</u></b> <b><u>Cooperation obligations of the lead authority</u></b></p> <p>1. <b><u>The lead authority referred to in Article 54a shall cooperate with the supervisory authorities of the Member States concerned, and consult them in an endeavour to reach consensus.</u></b></p> <p><i>Note: DE enters a scrutiny reservation, as the intended legal effects of this provision are unclear. The need for the supervisory authorities to cooperate in general goes without saying and does not require a separate provision, unless additional cooperation tasks needed to be justified or procedures laid down. Moreover it is unclear what is meant by "authorities of the Member States concerned. Following the logic of the draft, it is most likely that the competent authority under Article 51(1) shall conduct investigations (Article 53(1) and (1a)) and the lead authority take the measures specified in paragraphs (1b) and (1c) of Article 53. In addition, the competent authority pursuant to Article 51(1) may issue instructions to the processor under Article 53(1) and (1a). In terms of achieving a single contact point, the draft requires further thought.</i></p>

<p><b><u>2. Where a complaint has been lodged with a supervisory authority other than the lead authority referred to in paragraph 4 of Article 54a, the lead authority shall, on receiving the complaint, take appropriate measures in consultation with the supervisory authority to which the complaint has been lodged.</u></b></p>	<p><b><u>2. Where a complaint has been lodged with a supervisory authority other than the lead authority referred to in paragraph 4 of Article 54a, the lead authority shall, on receiving the complaint, take appropriate measures in consultation with the supervisory authority with which the complaint has been lodged.</u></b></p> <p>[Note: DE asks for further details regarding the role and influence of the supervisory authority which receives the complaint].</p>
<p><b><u>3. When preparing and deciding on a measure intended to produce legal effects pursuant to paragraph 5 of Article 54a, the lead authority shall:</u></b></p> <ul style="list-style-type: none"> <li>a) <b><u>share all relevant information and consult the supervisory authorities of the Member States concerned;</u></b></li> <li>b) <b><u>submit the draft measure to all authorities which are competent pursuant to paragraph 1 of Article 51;</u></b></li> <li>c) <b><u>take utmost account of the views of the supervisory authorities involved.</u></b></li> </ul>	<p><b><u>3. When preparing and deciding on a measure intended to produce legal effects pursuant to paragraph 5 of Article 54a, the lead authority shall:</u></b></p> <ul style="list-style-type: none"> <li>a) <b><u>share all relevant information and consult the supervisory authorities of the Member States concerned;</u></b></li> <li>b) <b><u>submit the draft measure to all authorities which are competent pursuant to paragraph 1 of Article 51;</u></b></li> <li>c) <b><u>take utmost account of the views of the supervisory authorities involved.</u></b></li> </ul>

<p>4. <b><u>Where a supervisory authority has indicated, within a period of two weeks after having been consulted by the lead authority, objections to the draft measure, the lead authority or any other supervisory authority involved shall submit the matter to the consistency mechanism referred to in Article 57.</u></b></p>	<p>4. <b><u>Where a supervisory authority has indicated, within a period of two weeks after having been consulted by the lead authority, objections to the draft measure, the lead authority or any other supervisory authority involved shall submit the matter to the consistency mechanism referred to in Article 57.</u></b></p> <p><i>Note: DE also enters a separate scrutiny reservation on this provision. Under this rule, only those supervisory authorities which have been consulted by the lead authority or which are already "involved" may initiate the consistency mechanism in Article 57. On the other hand, supervisory authorities which (also) consider themselves competent under Article 51(1), but have not been involved at any stage, do not have this possibility. This is not acceptable. DE therefore asks that the words "any other supervisory authority involved" be replaced by "any other supervisory authority concerned".</i></p>
<p>5. <b><u>The lead authority shall submit the measures referred to in Article 54a(5) to the a supervisory authority of the Member State concerned. These measures shall be enforceable in the Member States concerned in accordance with Article 63.</u></b></p>	<p>5. <b><u>The lead authority shall submit the measures referred to in Article 54a(5) to the supervisory authority of the Member State concerned. These measures shall be enforceable in the Member States concerned in accordance with Article 63.</u></b></p> <p><i>Note: It is not clear here whether the national authority which receives the decision from the lead authority also has to adopt a separate (legal) act in order to transpose this decision into national law. This is how we understand the provision, but would ask for clarification (for example: "The lead authority shall submit the measures referred to in Article 54a(5) to the supervisory authority of the Member State concerned which shall enforce the measure in its Member State in accordance with Article 63.").</i></p>

*Artikel 55*  
***Mutual assistance***<sup>1</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. This shall apply in particular where the supervisory authority to which the complaint has been lodged is not the authority of the main establishment of the controller or processor. Mutual assistance shall also cover the provision of information on the conduct of investigations **where the controller or processor has establishments in several Member States or** where data subjects in several Member States are likely to be affected by processing operations by the controller or processor.

*Artikel 55*  
***Mutual assistance***

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 (...). ***On request, they shall take all appropriate measures for furnishing factual information relating to specific automatic processing carried out in its territory, with the exception however of the personal data being processed. They shall provide each other with relevant information, in particular on the course of an investigation to bring about the cessation or prohibition of processing operations contrary to this Regulation.***  
***(...) Assistance shall cover, in particular, cases where the controller or processor has establishments in several Member States or where data subjects in several Member States are likely to be affected by processing operations. The competent supervisory authority pursuant to Article 54a(1) shall ensure coordination with the relevant supervisory authorities and shall act as the central contact point for the controller or processor.***

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<sup>1</sup> [FN.78] DE indicated further clarity was required on the concept of mutual assistance. 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.

	<p><i>[Note: DE endorses the view in FN 78 of those Member States which have entered a scrutiny reservation. Firstly, a common understanding must be reached on whether the aim is to have a mutual assistance procedure based on information exchange (such as the system provided for in Council of Europe Convention 108) or a system of genuine administrative assistance based on cooperation requests. DE has fundamental concerns concerning the latter option, as long as clear rules have not been established on responsibility and legal protection. That is the aim of the following proposals by the German delegation. With regard to the first option, DE refers to the continuation of the negotiations on Council of Europe Convention 108 in the CAHDATA scheduled for autumn 2013. Particular attention must be paid to ensuring consistency between the highly detailed Council of Europe and EU provisions on cooperation between supervisory authorities. DE supports those Member States which consider that the procedure laid down in Articles 55 and 56 must be clear and practical. ]</i></p>
<p>2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without <u>undue</u> delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the <u>conduct</u> of an investigation or enforcement measures to bring about the <u>suspension</u> or prohibition of processing operations <u>which infringe</u> this Regulation.</p>	<p>2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without <u>undue</u> delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the <u>conduct</u> of an investigation or enforcement measures to bring about the <u>suspension</u> or prohibition of processing operations <u>which infringe</u> this Regulation.</p>

<p>3. The request for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only <u>for the purpose</u> for which it was requested.</p>	<p>3. The request (...) for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only <u>for the purpose</u> for which it was requested.</p>
<p>4. A supervisory authority to which a request for assistance is addressed may not refuse to comply with it unless:</p> <p>a) it is not competent for the <u>subject-matter of the request</u><sup>1</sup> <b><u>or for the measures it is requested to execute</u></b>; or</p> <p>(b) compliance with the request would be incompatible with the provisions of this Regulation <u>or with Union or Member State law to which the supervisory authority receiving the request is subject</u>.</p>	<p>4. A supervisory authority to which a request for assistance is addressed may not refuse to comply with it unless:</p> <p>(a) it is not competent for the <u>subject-matter of the request</u> <b><u>or for the measures it is requested to execute</u></b>; <i>or</i></p> <p>(b) compliance with the request would be incompatible with the provisions of this Regulation <u>or with Union or Member State law to which the supervisory authority receiving the request is subject</u>.</p> <p><i>The admissibility of the measure which the request for assistance seeks to implement shall be determined by the law applicable to the requesting authority, while the provision of such assistance shall be governed by the law applicable to the requested authority. The requesting authority shall be responsible for ensuring the legality of the measure to be taken. The requested authority shall be responsible for providing the assistance<sup>1</sup>.</i></p> <p>[Note: This wording is based on the current legal situation in Germany (Section 7(1) and (2) of the Law on Administrative Procedure).</p>
<p>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 <u>respond</u> to the request. <u>In cases of a refusal under paragraph 4, it shall explain its reasons for refusing the request</u>.</p>	<p>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 <u>respond</u> to the request. <u>In cases of a refusal under paragraph 4, it shall explain its reasons for refusing the request</u>.</p>

<sup>1</sup> [FN. 83] DE stressed the importance of establishing which is the competent DPA.

<p>6. Supervisory authorities shall, <b>as a rule</b>, supply the information requested by other supervisory authorities by electronic means (...), using a standardised format.</p>	<p>6. Supervisory authorities shall, <b>as a rule</b>, supply the information requested by other supervisory authorities by electronic means (...), using a standardised format. <b><i>The request and the electronic transfer of information shall be made using the Internal Market Information System provided for in Regulation (EU) No 1024/2012.</i></b></p> <p>[Note: DE proposes that provision be made in Article 6 for using the Internal Market Information System (IMI) for the information exchange among supervisory authorities. The IMI would help to determine the competent authorities in another EU Member State as well as allow information requests/information to be sent electronically. IMI could resolve the language issue and paragraph 10 (conferring powers of the Commission) could be deleted altogether.]</p>
<p>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>1</sup>.</p>	<p>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.</p> <p>[Note: DE suggests that paragraph 7 should also provide for the option of financial rules.]</p>

<sup>1</sup> [FN.86] DE asked for clarification in relation to the resources needed / and estimate of costs.

<p>8. Where a supervisory authority does not <u>provide the information referred to in paragraph 5</u> within one month <u>of receiving the request</u><sup>1</sup> of another supervisory authority, the requesting supervisory authority <u>may adopt</u> a provisional measure on the territory of its Member State in accordance with Article 51(1) and shall submit the matter to the European Data Protection Board <u>and the Commission</u> in accordance with the <u>consistency mechanism</u> referred to in Article 57<sup>2</sup>.</p>	<p>8. Where a supervisory authority does not <u>provide the information referred to in paragraph 5</u> within one month <u>of receiving the request</u> of another supervisory authority, the requesting supervisory authority <u>may adopt</u> a provisional measure on the territory of its Member State in accordance with Article 51(1), <b><i>if as a result of the failure to comply with the request</i></b>, it is not yet possible to take a final measure and shall submit the matter to the European Data Protection Board <u>and the Commission</u> in accordance with the <u>consistency mechanism</u> referred to in Article 57.</p>
<p>9. The supervisory authority shall specify the period of validity of such <u>a provisional measure which</u> shall not exceed three months<sup>3</sup>. The supervisory authority shall, without delay, communicate <u>such a measure, together with its reasons for adopting it</u>, to the European Data Protection Board and to the Commission <u>in accordance with the consistency mechanism referred to in Article 57</u>.</p>	<p>9. The supervisory authority <b><i>taking a provisional measure pursuant to the second sentence of paragraph 8</i></b> shall specify the period of validity of such <u>a provisional measure (...)</u>. The supervisory authority shall, without delay, communicate <u>such a measure, together with its reasons for adopting it</u>, to the European Data Protection Board and to the Commission <u>in accordance with the consistency mechanism referred to in Article 57</u>. <b><i>It shall repeal the provisional measure as soon as the relevant conditions no longer apply.</i></b></p> <p>[Note: DE proposes not specifying a period of validity of the provisional measure (here: 3 months). With a period of validity there is a risk that, once that time limit has expired, the supervisory authority would not be competent to act if the requested authority failed to respond. Our proposal is to leave the supervisory authority to specify the period of validity and to provide, in the third sentence of paragraph 9, that the provisional measure be repealed as soon as the relevant conditions no longer apply. In this way the measures can be maintained for as long as they are needed.]</p>

<sup>1</sup> [FN.88]Further to DE suggestion.

<sup>2</sup> [FN. 90] DE scrutiny.

<sup>3</sup> [FN. 91] DE asked for deletion of this deadline; the measure should be withdrawn if the conditions for imposing it were no longer fulfilled.

<p>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>1</sup>.</p>	<p>10. (...)</p> <p><i>Note: DE asks that paragraph 10 be deleted and that paragraph 6 be completed as suggested.</i></p>
<p style="text-align: center;"><i>Artikel 56</i></p> <p style="text-align: center;"><b><i>Joint operations of supervisory authorities<sup>2</sup></i></b></p> <p>1. (...) The supervisory authorities <u>may, where appropriate, conduct joint operations, including joint investigations and joint enforcement measures</u> (...) in which (...) members or staff from other Member States' supervisory authorities are involved.</p>	<p style="text-align: center;"><i>Artikel 56</i></p> <p style="text-align: center;"><b><i>Joint operations of supervisory authorities</i></b></p> <p>1. (...) The supervisory authorities <u>may, where appropriate, conduct joint operations, including joint investigations and joint enforcement measures</u> (...) in which (...) members or staff from other Member States' supervisory authorities are involved <b><i>as observers.</i></b></p> <p><i>Note: DE has a scrutiny reservation regarding Article 56. DE's comment in FN 93 should be understood as meaning that more comprehensive provisions would be needed, akin to those governing the joint investigation teams in the field of criminal proceedings, if this instrument were chosen. There is a need for further examination to establish whether this would be possible and useful in the case of independent supervisory authorities. In particular, it needs to be borne in mind that placing operations under the instructions of the supervisory authority of the Member State in which the investigation is taking place could conflict with the independence of the other supervisory authorities taking part in the investigation.</i></p>

<sup>1</sup> [FN 92] DE reservation.

<sup>2</sup> [FN. 93] DE 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.

<p>2. In cases where <b><u>the controller or processor has establishments in several Member States or where [a significant number] of</u></b> data subjects in several Member States are likely to be <u>adversely</u> 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 authority shall invite the supervisory authority of each of those Member States to take part in the (...) joint operations concerned and respond to the request of a supervisory authority to participate (...) without delay.</p>	<p>2. In cases <i>of particular serious data protection breaches, where the controller or processor has establishments in several Member States or</i> where data subjects in several Member States are likely to be <u>adversely</u> affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in the (...) joint operations, as <b><i>an observer</i></b>. The lead authority shall invite the supervisory authority of each of those Member States to take part in the (...) joint operations concerned and respond to the request of a supervisory authority to participate (...) without delay. <b><i>The competent authority shall act as a central contact point for the controller or processor.</i></b></p> <p>[Note: For constitutional reasons, the Regulation should not empower authorities in other Member States to exercise powers in Germany. Participation must therefore take the form of observer status only. This question also arises in conjunction with Article 54a(1), hence DE's scrutiny reservation.]</p>
<p>3. <u>A</u> supervisory authority may, (...) in compliance with its own <u>Member State</u> law, and with the seconding supervisory authority's authorisation, confer (...) powers, including <u>investigative powers</u> on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the host supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their <u>investigative</u> powers in accordance with the seconding supervisory authority's law. Such <u>investigative</u> powers may be exercised only under the guidance and (...) in the presence of members or staff from the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. (...) <sup>1</sup>.</p>	<p>3. (...)</p> <p>[Note: At the DAPIX meeting, the Commission was unable to justify a need to confer jurisdiction. DE therefore maintains a scrutiny reservation. In any case, the police missions of the joint investigation teams (JIT), which are cited by way of an example, do not constitute a model which can be applied to joint operations in the field of data protection. Consequently, DE cannot support the wording proposed by the Commission. Furthermore, DE would point to a clash with national constitutional law. For reasons of constitutional law, DE sees only very limited scope for participation by the authorities of other Member States in official missions.]</p>

<sup>1</sup> [FN.101] DE scrutiny reservation.

<p>3a. <u>Where, in accordance with paragraph 1, officials of a Member State are operating in another Member State, the first Member State 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.</u></p>	<p>3a. <u>Where, in accordance with paragraph 1, officials of a Member State are operating in another Member State, the first Member State 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.</u></p>
<p>3b. <u>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 officials. The Member State whose officials have 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 victims or persons entitled on their behalf.</u></p>	<p>3b. <u>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 officials. The Member State whose officials have 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 victims or persons entitled on their behalf.</u></p>
<p>3c. <u>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>1</sup>.</u></p>	<p>3c. <u>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.</u></p>
<p>4. (...).</p>	<p>4. <b><i>Supervisory authorities shall lay down the practical aspects of specific cooperation actions.</i></b></p>

<sup>1</sup> [FN. 102] Inspired by Article 3 of the Council Framework Decision of 13 June 2002 on joint investigation teams.

<p>5<sup>1</sup>. Where a <u>joint operation is intended and</u> a supervisory authority does not comply within one month with the obligation laid down <u>in the second sentence of paragraph 2</u>, the other supervisory authorities <u>may adopt</u> a provisional measure on the territory of its Member State in accordance with Article 51(1).</p>	<p>5. Where a <u>joint operation is intended and</u> a supervisory authority does not comply within one month with the obligation laid down <u>in the second sentence of paragraph 2</u>, the other supervisory authorities <b><i>bring the matter before the European Data Protection Board in accordance with the procedure laid down in Article 57. They may take provisional measures pursuant to Article 53 in the territory of their Member State if, as a result of the failure to comply with the obligation pursuant to the second sentence of paragraph 2, it is not yet possible to take a final measure.</i></b></p> <p>[Note: DE proposes that paragraph 5 also provide for the possibility of referring the matter to the European Data Protection Board. Should agreement be reached on a "lead authority" system, the word "lead" should be added here. This presupposes that there is always a lead authority (even in cases where there is no branch located in the EU). Adaptation of paragraphs 5 and 6 to the amendments to Article 55(8) and (9).]</p>
<p>6. The supervisory authority shall specify the period of validity of such <u>a provisional measure referred to in paragraph 5</u>, <u>which</u> shall not exceed three months. The supervisory authority shall, without delay, communicate <u>such a measure, together with its reasons for adopting it</u>, to the European Data Protection Board and to the Commission <u>in accordance with the consistency mechanism referred to in Article 57</u>.</p>	<p>6. The supervisory authority shall specify the period of validity of such <u>a provisional measure referred to in paragraph 5 (...)</u>. The supervisory authority shall, without delay, communicate <u>such a measure, together with its reasons for adopting it</u>, to the European Data Protection Board and to the Commission <u>in accordance with the consistency mechanism referred to in Article 57</u>. <b><i>It shall repeal the provisional measure as soon as the relevant conditions no longer apply.</i></b></p>

<sup>1</sup> [FN.103] . DE reminded that it had already provided written comments.

## Preliminary comments on the consistency mechanism

Germany considers that a special procedure is needed to ensure that data protection law is applied uniformly throughout Europe. It therefore welcomes in principle the rules on a consistency mechanism. In order to actually fulfil the objective of the consistency mechanism, the possibility of requiring individual supervisory authorities to adopt certain measures should be provided for in the rules. *Furthermore, there remains in DE's view a substantial need to clarify the relationship between the mechanism and other provisions, in particular the rules in Chapter VI. DE therefore enters a general scrutiny reservation on the consistency mechanism. DE also has doubts as to whether the actors involved in the consistency mechanism, in particular the EDPB and the Commission, will accept their roles. It has particular concerns regarding the (mutual) powers, with the Commission's role requiring particular clarification.*

In developing the procedure, it is necessary to take account of the independent status granted supervisory authorities and confirmed by the EU Charter of Fundamental Rights, and to maintain that independence as far as possible. Bearing this in mind, the Commission's role in the consistency mechanism should be rethought. Under the draft Regulation, the Commission could block decisions by independent supervisory authorities until it achieved legal changes by legislative means, using implementing acts pursuant to Article 62 with the assistance of the Member States. The Commission's extensive powers to participate in and suspend decisions require a thorough review in the light of the independence of the supervisory authorities and the European Data Protection Board. Germany is also considering whether a final decision in the consistency mechanism could instead be taken by the independent European Data Protection Board acting as a joint body for the independent supervisory bodies<sup>1</sup>. The new rules on financial supervision (EPA, ESMA, EIOPA) could serve as models in this regard. The Commission could make amendments to the law independently thereof, e.g. through drafting initiatives or through the authorisation to adopt delegated acts and implementing provisions, which remains valid. Germany therefore proposes comprehensive amendments in the following articles.

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<sup>1</sup> In the DAPIX Working Party meeting on 29 and 30 January 2013 the Council Legal Service did not rule out this approach altogether, referring to the Meroni judgment. However, the Board would need to be given legal personality on account of its capacity to be sued. Under certain conditions, which would need to be set out clearly in the Regulation, a transfer of powers would be possible. In DE's view, the Legal Service should first of all be asked to elaborate on its opinion on the need to give the Board legal personality in view of the possibility of bringing legal action against the supervisory body under Article 74 of the draft Regulation. In this case, a restrictive interpretation of the Meroni judgment may also be required. Irrespective of this, there is also a need to examine in detail how legal personality could be granted under secondary legislation. In any case, some adjustments are needed to the draft Regulation to develop the objective of binding Board decisions in a way which complies with European law. Individual solutions still need to be looked into.

<p style="text-align: center;"><i>Article 57</i> <b>Consistency mechanism<sup>1</sup></b></p> <p>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>2</sup>.</p>	<p style="text-align: center;"><i>Article 57</i> <b>Consistency mechanism</b></p> <p>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. <b><i>The supervisory authorities of third countries for which there is an adequacy decision shall be involved in the consistency mechanism.</i></b></p> <p>[Note: <i>The proposal to involve third countries is intended as a mechanism against forum-shopping by enterprises in third countries, by removing the incentives. If third countries participated in the consistency mechanism, this would encourage uniform implementation and interpretation. For the mechanism to work in practice, special provisions will be needed specifying the nature of the involvement and the status of the respective supervisory authorities in the third country. This aspect still needs to be examined in detail.]</i></p>
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<sup>1</sup> [FN.104] DE parliamentary reservation on the role of the Commission in the consistency mechanism.

<sup>2</sup> [FN.106] DE 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.

<p>2. Before <u>the competent</u> supervisory authority adopts a measure <b><u>intended to produce legal effects</u></b>, it shall communicate the draft measure to the European Data Protection Board and the Commission, <b><u>when the measure:</u></b></p> <p>(a) is intended to exercise the powers of the supervisory authority referred to in points (a), (b) and (c) of paragraph 1 of Article 53, and points (d), (e) and (f) of paragraph 1b of Article 53, or to impose an administrative fine pursuant to Articles 79 and 79a and relates to processing activities which substantially affect a significant number of data subjects in several Member States; or</p> <p>(b) may substantially affect the free movement of personal data within the Union<sup>1</sup>;</p> <p>(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</p> <p>(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</p> <p>(cb) aims to approve the criteria for accreditation of a body pursuant to paragraph 3 of Article 38a or a certification body pursuant to paragraph 3 of Article 39a;</p> <p>(d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or</p> <p>(e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or</p> <p>(f) aims to approve binding corporate rules within the meaning of Article 43.</p>	<p>2. Before <u>the competent</u> supervisory authority adopts a measure <b><u>intended to produce legal effects</u></b>, it shall communicate the draft measure to the European Data Protection Board and the Commission, <b><u>when the measure:</u></b></p> <p>(a) is intended to exercise the powers of the supervisory authority referred to in points (a), (b) and (c) of paragraph 1 of Article 53, and points (d), (e) and (f) of paragraph 1b of Article 53, or to impose an administrative fine pursuant to Articles 79 and 79a and relates to processing activities which substantially affect a significant number of data subjects in several Member States; or</p> <p>Note: What considerations came into play when selecting precisely these powers under Article 53? What criteria were used? If anything, the scope ought to be restricted.</p> <p>(b) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour, and may substantially affect the free movement of personal data within the Union or the right of individuals to protection with regard to the processing of personal data.;</p> <p>(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</p> <p>(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</p>
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<sup>1</sup> [FN. 111] DE proposed combining (a) and (b) and thereby reducing the cases in which the consistency mechanism would need to be applied.

*(cb) aims to approve the criteria for accreditation of a body pursuant to paragraph 3 of Article 38a or a certification body pursuant to paragraph 3 of Article 39a;*

*(d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or*

*(e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or*

*(f) aims to approve binding corporate rules within the meaning of Article 43.*

*[Note: The supervisory authorities should not be burdened with an excessive workload in the consistency mechanism. Ways of reducing red tape should be looked into, for example where a contract clause is standardised and used regularly within a given context, or a Binding Corporate Rule (BCR) corresponds to a BCR which has already been "approved". The scope should therefore be significantly restricted, for which various criteria may be considered. One option is the addition to paragraph 2(b). A further option could be the adoption of a risk-based approach, i.e. the consistency mechanism should apply where there are special risks to the data subjects' right to data protection. This point still needs to be examined and discussed in depth.]*

<p>4. <b><u>Where the competent supervisory authority does not submit a draft measure referred to in paragraph 2 to the Board or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56, any supervisory authority concerned, the European Data Protection Board <u>or the Commission</u> may request that <u>such</u> matter shall be <u>communicated to the European Data Protection Board.</u></u></b></p>	<p>4. <b><u>Where the competent supervisory authority does not submit a draft measure referred to in paragraph 2 to the Board or does not comply with the obligations for <i>cooperation and mutual assistance in accordance with Articles 54 b) and 55</i> or for joint operations in accordance with Article 56, any supervisory authority concerned, the European Data Protection Board <u>or the Commission</u> may request that <u>such</u> matter shall be <u>communicated to the European Data Protection Board.</u> The <i>first sentence shall also apply where a supervisory authority considers that a measure within the meaning of paragraph 2 may be adopted.</i></u></b></p>
<p>5. (...) <sup>1</sup>.</p>	<p>5.</p>
<p>6. <i>Supervisory authorities and the Commission shall electronically communicate to the European Data Protection Board<sup>2</sup>, using a standardised format any relevant information, including as the case may be a summary of the facts, the draft measure, (...) the grounds which make the enactment of such measure necessary, and the views of other supervisory authorities concerned.</i></p>	<p>6. <i>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 measure, (...) the grounds which make the enactment of such measure necessary, and the views of other supervisory authorities concerned.</i></p>
<p>7. <i>The chair of the European Data Protection Board shall <u>without undue delay</u> 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 <u>secretariat</u> of the European Data Protection Board shall, where necessary, provide translations of relevant information.</i></p>	<p>7. <i>The chair of the European Data Protection Board shall <u>without undue delay</u> 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 <u>secretariat</u> of the European Data Protection Board shall, where necessary, provide translations of relevant information.</i></p>

<sup>1</sup> [FN.114] DE asked for the deletion of this paragraph.

<sup>2</sup> [FN. 115] DE proposal.

<i>Article 58</i> <b>Opinion by the European Data Protection Board</b>	<i>Article 58</i> <b>Opinion by the European Data Protection Board</b>
1. (...).	1. (...).
2. (...).	2. (...).
3. (...)	3. (...).
4. (...)	4. (...).
5. (...)	5. (...).
6. (...) <sup>1</sup>	6. (...).
<b>6a. <u>In the cases referred to in point (a) of Article 57(2), the European Data Protection Board shall issue an opinion on the subject matter where a supervisory authority concerned has indicated reasoned objections to the draft measure in accordance with paragraph 4 of Article 54b.</u></b>	<b>6a. <u>In the cases referred to in point (a) of Article 57(2), the European Data Protection Board shall issue an opinion on the subject matter where a supervisory authority concerned has indicated reasoned objections to the draft measure in accordance with paragraph 4 of Article 54b.</u></b>
<b>7. <u>In the cases referred to in points (b) to (f) of Article 57(2), the European Data Protection Board shall issue an opinion on <u>the subject-</u> matter submitted to it in the consistency mechanism provided it has not already issued an opinion on the same matter.</u></b>	<b>7. <u>In the cases referred to in points (b) to (f) of Article 57(2), the European Data Protection Board shall issue an opinion on <u>the subject-</u> matter submitted to it in the consistency mechanism provided it has not already issued an opinion on the same matter.</u></b>
7a. The opinion <b>referred to in paragraphs 6a and 7</b> shall be adopted within one month by simple majority of the members of the European Data Protection Board (...).	7a. The opinion <b>referred to in paragraphs 6a and 7</b> shall be adopted within <i>two</i> months by simple majority of the members of the European Data Protection Board (...). [Note: <i>While the proposed extension of the time-limit aims to promote rights of participation, DE nonetheless doubts whether the time-limit is sufficient in practice. It should therefore be re-examined.</i> ]

<sup>1</sup> [FN. 118] Paragraphs 1 to 6 have been moved to Article 57.

7b. <u>Where within the period referred to in paragraph 7a the European Data Protection Board does not adopt an opinion, the supervisory authority referred to in paragraph 2 of Article 57 may adopt its draft measure.</u>	7b. <u>Where within the period referred to in paragraph 7a the European Data Protection Board does not adopt an opinion, the supervisory authority referred to in paragraph 2 of Article 57 may adopt its draft measure.</u>
7c. 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.	7c. 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 <u>utmost</u> account of the opinion of the European Data Protection Board and shall within two weeks <u>after receiving the opinion</u> , electronically communicate to the chair of the European Data Protection Board (...) whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.	8. The supervisory authority referred to in paragraph 2 of Article 57 (...) shall take <u>utmost</u> account of the opinion of the European Data Protection Board and shall within two weeks <u>after receiving the opinion</u> , electronically communicate to the chair of the European Data Protection Board (...) whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.
9. <u>Where the supervisory authority concerned does not intend to follow the opinion, it shall inform the chair of the European Data Protection Board and the Commission within the period referred to in paragraph 8 and shall explain its refusal to follow the opinion<sup>1</sup>.</u>	9. <u>Where the supervisory authority concerned does not intend to follow the opinion, it shall inform the chair of the European Data Protection Board and the Commission within the period referred to in paragraph 8 and shall explain its refusal to follow the opinion.</u>
<b><u>10. Within one month after receiving the information referred to in paragraph 9, the European Data Protection Board may by a two-third majority of its members, adopt a further opinion on the subject-matter<sup>2</sup>.</u></b>	<b><u>10. Within one month after receiving the information referred to in paragraph 9, the European Data Protection Board may by a two-third majority of its members, adopt a further opinion on the subject-matter.</u></b>

<sup>1</sup> [FN.123] Further to DE proposal.

<sup>2</sup> [FN.124] DE proposed providing a mechanism for consultation of stakeholders.

<p><b><u>11. Where the supervisory authority concerned does not intend to follow such opinion, it shall inform the chair of the European Data Protection Board and the Commission within 10 working days of the receipt of that opinion and shall explain its refusal to follow the opinion.</u></b></p>	<p><b><u>11. Where the supervisory authority concerned does not intend to follow such opinion, it shall inform the chair of the European Data Protection Board and the Commission within 10 working days of the receipt of that opinion and shall explain its refusal to follow the opinion.</u></b></p>
	<p><i>11. Where the European Data Protection Board still objects to the supervisory authority's draft measure, it may adopt a measure which is binding on the supervisory authority by a qualified majority to be laid down in its rules of procedure pursuant to Article 68 of at least two-thirds of its members.</i></p> <p>[Note: See the explanations in the preliminary comments on the consistency mechanism and the footnote thereto.]</p>
	<p><i>12. The electronic communications governed by this article shall be made using the Internal Market Information System provided for in Regulation (EU) No 1024/2012.</i></p> <p>[Note: A reference of this kind could solve the language issue and Article 62(1)(d) could be deleted entirely. To that end, the IMI Regulation should itself be adapted accordingly. In any case it must be ensured that the Commission does not lay down any rules which would prevent German authorities from submitting and dealing with requests in German.]</p>

<p style="text-align: center;"><i>Article 59<sup>1</sup></i> <b><i>Opinion of the Commission</i></b></p> <p>(...)</p>	<p style="text-align: center;"><i>Article 59</i> <b><i>Opinion of the Commission</i></b></p> <p>(...)</p> <p><i>Note: DE welcomes the deletion of this Article.</i></p>
<p style="text-align: center;"><i>Article 60<sup>2</sup></i> <b><i>Suspension of a draft measure</i></b></p> <p>(...)</p>	<p>(...)</p> <p><i>Note: DE welcomes the deletion of Article 60.</i></p>

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<sup>1</sup> [FN. 125] Deleted in accordance with the request from DE. COM reservation on deletion.

<sup>2</sup> [FN. 126] Deleted at the suggestion of DE. COM reservation on deletion.

<p style="text-align: center;"><i>Article 61</i> <b><i>Urgency procedure<sup>1</sup></i></b></p> <p>1. In exceptional circumstances, where <u>the competent</u> supervisory authority considers that there is an urgent need to act in order to protect <u>rights and freedoms</u> of data subjects, (...) <i>it may</i>, by way of derogation from the <u>consistency mechanism</u> referred to in Article 57, immediately adopt provisional measures <u>pursuant to points (a), (b) and (c) of paragraph 1 of Article 53 and points (d), (e) and (f) of paragraph 1b of Article 53</u>, with a specified period of validity. The supervisory authority shall, without delay, communicate those measures <u>and the reasons for adopting them</u>, to the European Data Protection Board and to the Commission.</p>	<p style="text-align: center;"><i>Article 61</i> <b><i>Urgency procedure</i></b></p> <p>1. In exceptional circumstances, where <u>the competent</u> supervisory authority considers that there is an urgent need to act in order to protect <u>rights and freedoms</u> of data subjects, (...) <i>it may</i>, by way of derogation from the <u>consistency mechanism</u> referred to in Article 57, immediately adopt provisional measures <u>pursuant to points (a), (b) and (c) of paragraph 1 of Article 53 and points (d), (e) and (f) of paragraph 1b of Article 53</u>, with a specified period of validity. <b><i>The supervisory authority must suspend any provisional measures as soon as the relevant conditions no longer apply.</i></b> The supervisory authority shall, without delay, communicate those measures <u>and the reasons for adopting them</u>, to the European Data Protection Board and to the Commission. <b><i>Where it intends to adopt a final measure, it must institute the consistency mechanism pursuant to Article 57.</i></b></p> <p>[Note: See Article 55(9) and Article 56(6). <i>The additional text makes it clear that a consistency mechanism is not to be instituted in parallel with the adoption of a provisional measure, since at this time the authority may not yet know whether or not it is planning a final measure, and if so, which one.</i>]</p>
<p>2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion of the European Data Protection Board, giving reasons for requesting such opinion (...).</p>	<p>2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion of the European Data Protection Board, giving reasons for requesting such opinion (...).</p>

<sup>1</sup> [FN. 475] 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 DE, 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.

<p>3. Any supervisory authority may request an urgent opinion where the competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the <u>rights and freedoms</u> of data subjects, giving reasons for requesting such opinion, including for the urgent need to act.</p>	<p>3. Any supervisory authority may request an urgent opinion where the competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the <u>rights and freedoms</u> of data subjects, giving reasons for requesting such opinion, including for the urgent need to act.</p>
<p>4. By derogation from <u>paragraph 7a of Article 58</u>, an urgent opinion referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the European Data Protection Board.</p>	<p>4. By derogation from <u>paragraph 7a of Article 58</u>, an urgent opinion referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the European Data Protection Board.</p>
<p style="text-align: center;"><i>Article 62</i> <b><i>Implementing acts</i></b></p> <p>1. The Commission may adopt implementing acts <u>of general scope</u> for:</p> <ul style="list-style-type: none"> <li>a) <u>ensuring</u> the correct <u>and uniform</u> application of this Regulation (...) in relation to matters communicated by supervisory authorities pursuant to Article <u>57(2)(b)(...)</u><sup>1</sup>.</li> <li>(b) (...);</li> <li>(c) (...)</li> <li>(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 <u>Article 57(6) and (7) and in Article 58(5)</u>.</li> </ul> <p>Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).</p>	<p style="text-align: center;"><i>Article 62</i> <b><i>Implementing acts</i></b></p> <p>(...)</p> <p>[Note: DE maintains a reservation and requests that this Article be deleted. Under Article 42(2)(c), the COM will still be able to recognise the general validity of standard data protection clauses by the procedure referred to in Article 87(2).]</p>

<sup>1</sup> [FN.131] DE reservation: asked for the deletion.

<p>2. On duly justified imperative grounds of urgency relating to the interests of data subjects in the cases referred to in point (a) of paragraph 1, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 87(3). Those acts shall remain in force for a period not exceeding 12 months.</p>	
<p>3. The absence or adoption of a measure under this Section does not prejudice any other measure by the Commission under the Treaties.</p>	
<p style="text-align: center;"><i>Article 63</i> <b><i>Enforcement<sup>1</sup></i></b></p> <p>1. For the purposes of this Regulation, a (...) <b>legally binding</b> measure of a supervisory authority of one Member State <u>which is compliant with the requirements of this Chapter</u> shall be <u>enforceable</u> in all Member States concerned.</p> <p>2. (...).</p>	<p style="text-align: center;"><i>[Article 63</i> <b><i>Enforcement</i></b></p> <p>1. For the purposes of this Regulation, a (...) <b>legally binding</b> measure of a supervisory authority of one Member State <u>which is compliant with the requirements of this Chapter</u> shall be <u>enforceable</u> in all Member States concerned.</p> <p>2. (...).]</p> <p><i>[Note: DE maintains its scrutiny reservation referred to in footnote 132. The provisions are still too general and too vague. DE acknowledges the need for rules to enforce measures adopted by other Member States' authorities. Without provisions of this kind, only measures adopted by German supervisory authorities could be enforced in Germany. However, the proposal still does not provide a sufficient basis for this. Article 63 is too general. None of the important questions, e.g. the documents to be submitted by the requesting authority for the enforcement, the other requirements for enforcement, who bears the cost, the competent jurisdiction, etc., have been settled. The procedures and arrangements need to be clearly defined. For example, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties sets out exhaustive rules in 21 articles. Article 63 therefore needs to be fully reworked.]</i></p>

<sup>1</sup> [FN.132] DE scrutiny reservation.

<p style="text-align: center;"><i>Article 64</i> <b>European Data Protection Board<sup>1</sup></b></p> <ol style="list-style-type: none"> <li>1. A European Data Protection Board is hereby set up.</li> <li>2. The European Data Protection Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor.</li> <li>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.</li> <li>4. The Commission shall have the right to participate in the activities and meetings of the European Data Protection Board and shall designate a representative <u>without voting rights</u>. The chair of the European Data Protection Board shall, <b>communicate</b> the Commission <b>the</b> activities of the European Data Protection Board</li> </ol>	<p style="text-align: center;"><i>Article 64</i> <b>European Data Protection Board</b></p> <ol style="list-style-type: none"> <li>1. A European Data Protection Board is hereby set up.</li> <li>2. The European Data Protection Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor.</li> <li>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.</li> <li>(2) 4. (...) [Note: <i>DE is still examining how far it is possible to transfer to the EDPB the powers to take binding decisions while at the same time applying the principles of the Meroni judgment. In particular, it is considering the extent to which the establishment of the European Insurance and Occupational Pensions Authority (EIOPA) could serve as a model for the expansion of the EDPB.</i>]</li> </ol>
<p style="text-align: center;"><i>Article 65</i> <b>Independence</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall act independently when <u>performing</u> its tasks pursuant to Articles 66 and 67.</li> <li>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 <u>performance of its tasks</u>, neither seek nor take instructions from anybody.</li> </ol>	<p style="text-align: center;"><i>Article 65</i> <b>Independence</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall act independently when <u>performing</u> its tasks pursuant to Articles 66 and 67.</li> <li>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 <u>performance of its tasks</u>, neither seek nor take instructions from anybody.</li> </ol>

<sup>1</sup> [FN. 134] DE 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.

*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<sup>1</sup>:
  - 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<sup>2</sup>, any question covering the application of this Regulation and issue guidelines, recommendations and best practices (...) in order to encourage consistent application of this Regulation;

*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 ***without a request being required in each case*** or at the request of the Commission, in particular:

[Note: *It will be clear from the individual tasks who may take the initiative. An expansion at the COM's request does not seem necessary. The Board should always be able to act on its own initiative, however; this is made clear in the additional text.*]

  - a) advise (...) ***EU bodies*** on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;
  - b) examine (...) any question covering the application of this Regulation ***put by its members, the European Parliament, the Council or the Commission*** and issue guidelines, recommendations and best practices (...) in order to encourage consistent application of this Regulation;

<sup>1</sup> [FN. 141] DE suggested adding the provision of an opinion on the level of data protection in third countries or international organizations.

<sup>2</sup> [FN. 143] DE expressed the thought that, if Commission requests were included here, a similar possibility for the Council and the Parliament should be provided.

<p>(ba) <u>draw up guidelines for supervisory authorities concerning the application of measures referred to in point (c) of paragraph 1 of Article 53 and in paragraph 1b of Article 53 and the fixing of administrative fines pursuant to Articles 79 and 79a;</u></p> <p>c) review the practical application of the guidelines, recommendations and best practices referred to in points (b) and (ba);</p> <p>(ca) <u>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;</u></p> <p><u>(cb) give the Commission an opinion on the level of protection in third countries or international organisations<sup>1</sup>;</u></p>	
<p>d) issue opinions on draft <u>measures</u> of supervisory authorities pursuant to the consistency mechanism referred to in Article 57 (...);</p> <p>e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;</p> <p>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;</p> <p>g) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide;</p>	<p>(ba) <u>draw up guidelines for supervisory authorities concerning the application of measures referred to in point (c) of paragraph 1 of Article 53 and in paragraph 1b of Article 53 and the fixing of administrative fines pursuant to Articles 79 and 79a;</u></p>

<sup>1</sup> DE supports the European Data Protection Board's new task of giving opinions on data protection in third countries or international organisations, and, in connection with point (ca), called for clearer provisions regarding codes of conduct pursuant to Articles 38 and 38a. DE suggested that, rather than merely "encouraging" the drawing-up of such codes of conduct, the European Data Protection Board also be authorised to give opinions as to their substance.

	<p>Note: DE requests clarification as to the legal status to be accorded to the "guidelines" referred to in paragraph (ba).</p> <p>c) review the practical application of the guidelines, recommendations and best practices referred to in points (b) and (ba);</p> <p>(ca) <u>issue opinions on codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Articles 38, 38a and 39;</u></p> <p>(cb) <u>give the Commission an opinion on the level of protection in third countries or international organisations;</u></p> <p>[Note: DE supports the European Data Protection Board's new task of giving opinions on data protection in third countries or international organisations. In connection with point (ca), DE proposes clearer provisions regarding codes of conduct pursuant to Articles 38 and 38a. Rather than merely "encouraging" the drawing-up of such codes of conduct, the European Data Protection Board should also be authorised to give opinions as to their substance.]</p> <p>d) issue opinions on draft <u>measures</u> of supervisory <u>authorities</u> pursuant to the consistency mechanism referred to in Article 57 (...); and adopt binding decisions pursuant to Article 55 (10).</p> <p>e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;</p> <p>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;</p> <p>g) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide;</p>
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<p>2. Where the Commission requests advice from the European Data Protection Board, it may lay out a time limit <u>within which</u> the European Data Protection Board shall provide such advice, taking into account the urgency of the matter.</p>	<p>2. (...)</p>
<p>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.</p>	<p>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.</p>
<p>4. The Commission shall inform the European Data Protection Board of the action it has taken following the opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.</p>	<p>4. The (...) <b><i>EU bodies and the members of the European Data Protection Board</i></b> shall inform the European Data Protection Board of the action it has taken following the opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.</p>
<p style="text-align: center;"><i>Article 67</i> <b>Reports</b></p> <p>1. The European Data Protection Board shall <b>communicate with</b> the Commission about (...) its activities.</p> <p>2. <i>It 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.</i> The report shall be made public and <u>be</u> transmitted to the European Parliament, the Council and the Commission.</p> <p>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).</p>	<p style="text-align: center;"><i>Article 67</i> <b>Reports</b></p> <p>1. The European Data Protection Board shall <b>communicate with</b> the Commission about (...) its activities.</p> <p>2. <i>It 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.</i> The report shall be made public and <u>be</u> transmitted to the European Parliament, the Council and the Commission.</p> <p>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).</p>

<p style="text-align: center;"><i>Article 68</i> <b>Procedure</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall take decisions by a simple majority of its members <u>unless a two-third majority is required pursuant to Article 58(10)</u>.</li> <li>2. The European Data Protection Board shall adopt its own rules of procedure and organise its own operational arrangements. (...) <sup>1</sup>.</li> </ol>	<p style="text-align: center;"><i>Article 68</i> <b>Procedure</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall take decisions by a simple majority of its members <u>unless a two-third majority is required pursuant to Article 58(10)</u>.</li> <li>2. The European Data Protection Board shall adopt its own rules of procedure and organise its own operational arrangements. (...).</li> </ol> <p>[Note: DE can lift its reservation contained in footnote 153.]</p>
<p style="text-align: center;"><i>Article 69</i> <b>Chair</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members (...).</li> <li>2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable <u>once</u>.</li> </ol>	<p style="text-align: center;"><i>Article 69</i> <b>Chair</b></p> <ol style="list-style-type: none"> <li>1. The European Data Protection Board shall elect a chair and <b>at least</b> two deputy chairpersons from amongst its members (...).</li> <li>2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable <u>once</u>.</li> </ol>
<p style="text-align: center;"><i>Article 70</i> <b>Tasks of the chair</b></p> <ol style="list-style-type: none"> <li>1. The chair shall have the following tasks: <ol style="list-style-type: none"> <li>a) to convene the meetings of the European Data Protection Board and prepare its agenda;</li> <li>b) to ensure the timely <u>performance</u> of the tasks of the European Data Protection Board, in particular in relation to the consistency mechanism referred to in Article 57.</li> </ol> </li> <li>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.</li> </ol>	<p style="text-align: center;"><i>Article 70</i> <b>Tasks of the chair</b></p> <ol style="list-style-type: none"> <li>1. The chair shall have the following tasks: <ol style="list-style-type: none"> <li>a) to convene the meetings of the European Data Protection Board and prepare its agenda;</li> <li>b) to ensure the timely <u>performance</u> of the tasks of the European Data Protection Board, in particular in relation to the consistency mechanism referred to in Article 57.</li> </ol> </li> <li>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.</li> </ol>

<sup>1</sup> [FN. 153] DE thought that the majorities by which further decisions shall be taken should be established by the EDPB itself.

<i>Article 71</i> <b>Secretariat</b>	<i>Article 71</i> <b>Secretariat</b>
<p>1. The European Data Protection Board shall have a secretariat. The European Data Protection Supervisor shall provide that secretariat<sup>1</sup>.</p> <p>2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board under the direction of the chair.</p> <p>3. The secretariat shall be responsible in particular for:</p> <ul style="list-style-type: none"> <li>(a) the day-to-day business of the European Data Protection Board;</li> <li>(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;</li> <li>(c) the use of electronic means for the internal and external communication;</li> <li>(d) the translation of relevant information;</li> <li>(e) the preparation and follow-up of the meetings of the European Data Protection Board;</li> <li>(f) the preparation, drafting and publication of opinions and other texts adopted by the European Data Protection Board.</li> </ul>	<p>1. The European Data Protection Board shall have <i>its own</i> secretariat.</p> <p>2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board under the direction of the chair.</p> <p>[Note: <i>DE requests that the Council Legal Service examine the conditions under which an independent secretariat of the European Data Protection Board can be set up.</i>]</p> <p>3. The secretariat shall be responsible in particular for:</p> <ul style="list-style-type: none"> <li>(a) the day-to-day business of the European Data Protection Board;</li> <li>(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;</li> <li>(c) the use of electronic means for the internal and external communication;</li> <li>(d) the translation of relevant information;</li> <li>(e) the preparation and follow-up of the meetings of the European Data Protection Board;</li> <li>(f) the preparation, drafting and publication of opinions and other texts adopted by the European Data Protection Board.</li> </ul>

<sup>1</sup> [FN. 157] DE reservation on entrusting the EDPS with the EDPB secretariat. The risk of conflicts of interest of EDPS staff was also raised.

<p style="text-align: center;"><i>Article 72</i> <b>Confidentiality<sup>1</sup></b></p>	<p style="text-align: center;"><i>Article 72</i> <b>Public access</b></p>
<ol style="list-style-type: none"> <li>1. The discussions of the European Data Protection Board shall be confidential.</li> <li>2. <u>Access to documents</u> submitted to members of the European Data Protection Board, experts and representatives of third parties shall be <u>governed by</u> Regulation (EC) No 1049/2001.</li> <li>3. The members of the European Data Protection Board, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article. The chair shall ensure that experts and representatives of third parties are made aware of the confidentiality requirements imposed upon them.</li> </ol>	<ol style="list-style-type: none"> <li>1. The <i>agendas</i>, discussions <i>and decisions</i> of the European Data Protection Board shall be <i>public</i>. <i>The European Data Protection Board shall lay down in its rules of procedure the justified cases where it may decide to exclude the public, in particular in order to protect data subjects' rights or business secrets (...).</i></li> <li>2. <i>Where the European Data Protection Board has adopted a decision pursuant to the 2nd sentence of paragraph 1, the documents</i> submitted to <i>its</i> members (...), experts and representatives of third parties shall be <u>governed by</u> Regulation (EC) No 1049/2001.</li> <li>3. The members of the European Data Protection Board, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article. The chair shall ensure that experts and representatives of third parties are made aware of the confidentiality requirements imposed upon them.</li> </ol>

<sup>1</sup> [FN. 158] DE 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.

## GREECE

### *CHAPTER VI-INDEPENDENT SUPERVISORY AUTHORITIES*

#### **Article 46-Supervisory authority**

Not any further comment to make.

#### **Article 47- Independence**

In paragraph 1: the phrase “in exercising the duties” needs further clarification because the members of the supervisory authority may have duties with sanctions consequences not the supervisory authority as such.

In paragraph 5: the phrase “adequate...financial resources...” needs further clarification.

#### **Article 48-General conditions for the members of the supervisory authority**

In paragraph 4: we suggest that in the relevant recital (95) a clarification should be included which will refer to the content (i.e.: final or irrevocable) of the decision taken by the national court regarding the member who is guilty of serious misconduct.

In paragraph 5: we suggest that the case of “compulsory retirement” should be added for consistency reasons to para. 3 of the same article.

#### **Article 49-Rules on the establishment of the supervisory authority**

Not any further comment to make.

#### **Article 50-Professional secrecy**

We suggest in the last phrase of the article “official duties” the deletion of the word “official” since professional secrecy should cover all the duties (official or not) of the members and the staff of the supervisory authority with regard to any confidential information.

### **Art 51-Competence**

We would like to suggest that the title of section 2 to be changed into “Jurisdiction and Competences” (instead of “Duties and Powers”). Accordingly, we would like to suggest the title of Art. 51 to be “Jurisdiction” (instead of competence) and the title of Art. 52 to become “Competences” (instead of “Duties”).

In paragraph 2: Within the logic of a need to clarify the definition of main establishment, we would like to suggest clarification in the case when the controller and the processor do not have the same main establishment.

In the same paragraph, we would like to have further clarification regarding the controller’s or processor’s group of undertakings which may have different establishments in the EU. (whereas there is provision for these groups in art. 43 par. 1 (a))

All in all we consider as positive the suggestions made by the Group of Article 29 on the establishment of a lead authority (see doc. 8366/12 p.p. 27-28).

### **Art. 52-Duties**

-Please see above (in Art. 51) our suggestion on the title of the article.

### **Art 53-Powers**

In paragraph 1 point (c): we suggest a more clear wording regarding supervisory authority’s order to the controller and the processor (or the representative) to provide any information relevant for the performance of its duties, for ensuring that the principle of “non self-incrimination” of the controller (processor or the representative).

### **Art 54-Activity report**

Not any further comment to make.

## **CHAPTER VII-CO-OPERATION AND CONSISTENCY**

### **Art 55-Mutual assistance**

In paragraph 8: We consider as necessary the inclusion of the reference to art. 51 (2) as well, to cover also the case of the supervisory authority of the main establishment.

Also, please see our comments above in art. 51 regarding the establishment of a lead authority.

### **Art 56-Joint operations of supervisory authorities**

In paragraph 2: please see our comments above in Art. 51 regarding the proposal for the establishment of a lead authority.

In paragraph 3: We would like to have a further clarification on the word “responsibility”, what kind of responsibility (civil liability?) and this clarification to be included in the recital of the article.

In paragraph 5: We consider as necessary the inclusion of the reference to Art. 51 (2) as well, to cover also the case of the supervisory authority of the main establishment.

### **Art 57- Consistency mechanism**

Not any further comment to make.

### **Art 58-Opinion by the European Data Protection Board**

In paragraph 2: at the introduction we would like to suggest the deletion of the word “legal” before the “effects” so the phrase could read “...*shall apply to a measure intended to produce effects...*” because a measure may have not only legal but also a technical effects.

In paragraph 6: we would like to suggest the replacement of the word “immediately” with the word “without delay” (as the EDPS suggests).

In paragraph 7: we would like to suggest the extension of the deadline of the opinion’s adoption from one month to at least two months (as the EDPS suggests).

### **Article 59-Opinion by the Commission**

Not any further comment to make.

### **Article 60-Suspension of a draft measure**

Not any further comment to make.

### **Article 61-Urgency procedure**

We would like to have clarification on the measures described in paragraph 1 which refer to the data subject and in paragraph 2 which refer to the controller.

We consider that the Commission's competence as described in Art. 60 and the competence of the supervisory authority as described in Art. 61 could possibly cause unjustifiable delay in the urgent proceedings of matters in the public sector.

### **Article 62-Implementing acts**

Pls see our reply to the Questionnaire doc. 12918/1/12/REV 1/24.9.2012, sent to you by e-mail on d.d.9 November 2012.

We consider that paragraph 3 is superfluous.

### **Article 63-Enforcement**

Not any further comment to make.

### **Article 64- European Data Protection Board and Article 65-Independence**

Not any further comment to make.

### **Article 66-Tasks of the European Data Protection Board**

In paragraph 1 point (c ): Since there is an article dedicated to "Reports" (Art. 67) we suggest the deletion of the phrase "*...an report regularly to the Commission on these*"

### **Article 67-Reports, Article 68-Procedure, Article 69-Chair, Article 70-Tasks of the chair, Article 71-Secretariat**

Not any further comment to make.

### **Article 72-Confidentiality**

Not any further comment to make.

## Chapter (...) VI

### General considerations:

Chapter VI includes a total of 8 articles, divided in two sections. The first section deals with the statute of the supervisory authorities (basically its independence) and the second profiles the rights and duties of these institutions.

As regards to the statute of these authorities, the Regulation does not separate excessively from the Directive. The contrary occurs with the rights and duties of the authorities, especially in what the territorial competence is concerned.

### Commentaries on article 46:

We do not object the contents (...) of this article. The approach of a unique contact point for the States that have more than one supervisory authority seems correct, because otherwise it would introduce excessive difficulties for (...) management. We understand that it does not stop that at a national level, the necessary mechanisms are established so that the supervisory authorities that does not exercise the role of contact point receive all the information that might be of their interest from the authority which is contact point.

Anyhow, the participation of every supervisory authority is ensured in paragraph 2 of this article.

The only amendment we'd like to introduce at this stage deals with the possibility that supervisory authorities could be composed of one or more members. From our point of view this gives further clarification and flexibility enough for those member Estates that do think that colligated bodies may bring additional safeguards to the principle of independence.

*Article 46*

***Supervisory authority***

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application of this Regulation and for contributing to its consistent application throughout the Union, in order to protect the fundamental rights and freedoms of natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the Union. For these purposes, the supervisory authorities shall co-operate with each other and the Commission.

1a. Supervisory authorities may be composed of one or more members

2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which functions as a single contact point for the effective participation of 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.

**Commentaries on article 47:**

We believe that it is convenient to make certain clarifications to this article to ensure the inclusion of all the supervisory authorities that might exist in a Member State in its wording.

Therefore, we propose the following amendments:

*Article 47*

***Independence***

1. The supervisory authorities shall act with complete independence in exercising the duties and powers entrusted to **them**.
2. The members of the supervisory authorities shall, in the performance of **their** duties, neither seek nor take instructions from anybody.

3. Members of the supervisory authorities shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.
4. Members of the supervisory authorities shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.
5. Each Member State shall ensure, **in accordance with their internal distribution of competences**, that the supervisory authorities are provided with the adequate human, technical and financial resources, premises and infrastructure necessary for the effective performance of **their** duties and powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.
6. Each Member State shall ensure, **in accordance with their internal distribution of competences**, that the supervisory authorities have **their** own staff which shall be appointed by and be subject to the direction of the head of the supervisory authorities.
7. Member States shall ensure, **in accordance with their internal distribution of competences**, that the supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure, **in accordance with their internal distribution of competences**, that the supervisory authorities have separate annual budgets. The budgets shall be made public.

#### **Commentaries on article 48:**

In our point of view, this article presents several inadequacies. Firstly, it is necessary to make some amendments so that the wording adapts to those Member States that have more than one supervisory authority.

Secondly, we believe that the actual wording does not solve correctly the different cases of ending of functions.

Thus, we propose the following amendments:

*Article 48*

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

1. Member States shall provide that the members of the supervisory authority **or authorities** must be appointed either by the parliaments or the **organs of government** ~~of the Member State concerned.~~
2. The members shall be chosen from persons whose independence is beyond doubt and whose experience and skills required to perform their duties notably in the area of protection of personal data are demonstrated.
3. The duties of a member shall end in the event of the expiry of the term of office, **supervening incapacity to exercise the duties derived from the office**, resignation, (...), or compulsory retirement ~~in accordance with paragraph 5.~~
4. A member may be dismissed or **removed** ~~deprived of the right to a pension or other benefits in its stead~~ by the competent national **organe**~~court~~, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious **failure to comply their official duties, or for an intentional crime declared in a final judgment.(...)** ~~misconduct.~~
5. Where the term of office expires or the member resigns, the member shall continue to exercise the duties until a new member is appointed.

**Commentaries on article 49:**

It is necessary to adapt the wording of this article to those States that have more than one supervisory authority.

We propose the following amendments:

*Article 49*

***Rules on the establishment of the supervisory authority***

Each Member State shall provide by law within the limits of this Regulation:

- (a) the establishment and status of the supervisory authority **or authorities**;
- (b) the qualifications, experience and skills required to perform the duties of the members of the supervisory **authorities**;
- (c) the rules and procedures for the appointment of the members of the supervisory **authorities**, as well the rules on actions or occupations incompatible with the duties of the offices;
- (d) the duration of the term of the members of the supervisory **authorities** which shall be no 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 **authorities** by means of a staggered appointment procedure;
- (e) whether the members of the supervisory **authorities** shall be eligible for reappointment;
- (f) the regulations and common conditions governing the duties of the members and staff of the supervisory **authorities**;
- (g) the rules and procedures on the termination of the duties of the members of the supervisory **authorities**, including in case that they no longer fulfil the conditions required for the performance of their duties or if they are guilty of serious misconduct.

### **Commentaries on article 50:**

We find no reason to object this article, but for the inclusion of a wording that adapts to those States that have more than one supervisory authority.

Therefore, we propose the following wording:

#### *Article 50*

#### ***Professional secrecy***

The members and the staff of the supervisory authorities shall be subject, both during and after their term of office, to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties.

### **Commentaries on article 51:**

Although the one stop shop principle that derives from this article has been welcomed by different sectors, there are several theoretical and practical problems that might occur when it is applied. The importance of these problems urges us to introduce certain clarifications in the article.

Our starting point is the practical difficulties that might appear when a citizen or a supervisory authority tries to claim against the processing operations developed in another Member State.

In these cases, the management burdens will increase enormously as a consequence of the need of translating the documents, and of the intervention of a national authority in addition to the leader authority, generating therefore important economic and time burdens, harming both citizens and supervisory authorities.

This is why we understand that, as regards to the claims of citizens, it is more adequate to maintain the competence of the national authority when the processor or the responsible have some kind of establishment in the country, leaving the one stop shop system in these cases only for the relations of management between the actors of the processing operations (consults, authorisations, approvals...), facilitating that way the bureaucratic management of these.

To adequately fundament our position, we will reproduce the arguments of the Spanish Data Protection Authority:

*The supervision referred to in article 51.2 includes the relation activities between the actor and the supervisory authority (notifications, authorisations...) and the resolution of citizens' claims. The issues derived from the competent authority system depending on the establishment affect, fundamentally, this second line of actuation and may be resumed as follows:*

- It is uncertain that the protection of a fundamental right such as the protection of personal data can be conferred to administrative authorities that do not belong to the institutions of the country from where the citizen is national.*
- It is frequent to gather criteria from the regulation of other sectors (labour, financial, health...) when it comes to assess behaviours to determine their adequacy or inadequacy to the data protection regulation, although these sectors have not been yet subjected to harmonization at EU level. The tutelage of the right to data protection of a citizen from a Member State from the perspective of the regulation of another Member States will produce incomprehensible decisions for the actors, and incoherent with those adopted by the national authority in the same subject in case it is possible for them to exercise their competences.*
- The decisions of the supervisory authorities may be appealed against the Courts (art. 74.1 and national law). According to the Regulation, these appeals must be brought by the citizens, regardless of their nationality or residence, against the courts of the Member State of the leader supervisory authority (art. 74.3). This, in the practice, is as much as depriving the citizen of his right to an effective judicial tutelage. The Regulation has tried to save this obstacle envisaging that the supervisory authority of the Member State from which the citizen is national may appeal in his name (article 74.4). This possibility still has enormous practical difficulties, not to mention the incoherence of the possibility that two of the authorities that according to the law must co-operate to protect a fundamental right find themselves as different parts in a trial.*

- *The system will generate economic and bureaucratic burdens for the supervisory authorities that are difficult to foresee, and will pose logistic problems that might render it useless. A complaint (and the documents supporting it) of a Spanish citizen about the processing operations of a competent entity, for instance, a Slovenian authority, should be translated to Slovenian (or to a language accepted as common, like English), and after, the eventual decision of the Slovenian authority should be again translated to Spanish before sending it to the citizen. Similar problems will appear in the judicial phases of the procedure.*
- *There might be an interest for the corporations dedicated to the processing of personal data to relocate (“forum shopping”) their principal establishment (either materially or formally) in those Member States that apply the Regulation in the most permissive way, or in the Member State with worse conditions or less resources to effectively control the compliance with the law. Certainly, there are other reasons for a company to decide on the country in which to establish, like the labour, environmental or tax law, but for the companies that majorly develop activities linked to the processing operations of personal data, the regulation of the protection and the way it is applied may become as relevant as any other.*
- *We can presume that the distance between the leader authority and the affected citizens will make its decisions difficult to understand for people who are not familiar with the legal frame of the country where it operates, and might reduce the legitimacy of the instruments of protection of the personal data.*
- *There is no notice of other European policies where this system is applied. On the contrary, in the consumption law, very close to the data protection, the general rule is that the competence to attend the claims of the citizens is granted to the national authorities, regardless of the place where the provider of goods is established.*
- *It should be taken into account that it is extremely difficult to assess the quantitative impact of this mechanism. It seems as if it has been designed thinking of large corporations, especially those linked to the information society services, with activity in all or most of the Member States. Nevertheless, the truth is that this mechanism of competence attribution is applicable to any organization with establishments in two or more Member States.*

- *The system has a weakness in its design: the concepts of establishment and principal establishment are not sufficiently defined in the draft Regulation, what makes it even more difficult to analyse its possible impact in qualitative and quantitative terms.*

Bearing all these arguments in mind, our alternative proposal is based on the consideration that the Regulation's solution, linked to the problems mentioned, has positive elements that can simplify the activity of the corporations and that it is consistent with other mechanisms that are already being applied in different sectors with a high level of harmonization within the UE, and that do not mean a weakening of the protection of citizens' rights.

In this sense, we propose to maintain the concept of principal establishment (with the necessary clarifications to make it a more operative and precise criteria) and the competence of the authority linked to the State of the establishment for those activities of relations between corporations, but to exclude the application of this criteria when it comes to citizens' claims.

Therefore, issues such as consultations and authorisations of processing as well as approval of corporate rules (...) or of other instruments for international transfers (...) would be kept in the scope of competence of the authority of the principal establishment.

Both in these activities and those that respond the claims of citizens, it will still be necessary to submit the decisions that have legal consequences to the consistence mechanism, and the previsions of mutual co-operation between supervisory authorities would also be applicable. This would allow keeping a high level of harmonization in the application of the Regulation, similar to the one achieved by the actual wording, with the only difference that the decisions related to the answer to citizens' claims would be communicated not only by the authority of the State of the principal establishment, but by every authority affected.

The proposal basically consists on adding a sentence to article 51.2 by which the supervisory activities (...) not related to the obligations set in Chapters IV and V are excluded from its scope of application. At the same time, and to keep the consistence of the whole text, several changes in order to suppress the dispositions coherent with the universal scope of the "unique authority" option have been suppressed.

Additionally, paragraph 1 has also been modified to include a provision on the competences of supervisory authorities. The present text simply states that supervisory authorities' powers will be confined to the territories of their respective Member States, but contains no reference to the matters on which those powers will be exercised. The proposal takes into account the fact that the territorial presence of a controller or processor is no longer necessary in order to process data subjects' data, a criterion which is also present in other articles of the Regulation such as articles 3.2, 55.1, 56.2, and 58.2.a.

Therefore, the article will be worded as follows:

*Article 51*

***Competence***

1. Each supervisory authority shall exercise, on the territory of its own Member State, the powers conferred on it in *by this Regulation and shall be competent for processing taking place in the context of the activities of an establishment of a controller or a processor on its territory or affecting its residents.*” (...)
2. Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union, and the controller or processor is established in more than one Member State, the supervisory authority of the main establishment of the controller or processor shall be competent for the supervision of the processing activities of the controller or the processor in all Member States, *processor according to Chapters IV and V, (...)* without prejudice to the provisions of Chapter VII of this Regulation.
3. The supervisory authority shall not be competent to supervise processing operations of courts acting in their judicial capacity.

### **Commentaries on article 52:**

We find no objection to this article. Nevertheless, and bearing in mind the criteria we support in our position in relation to the strengthening of the certification policies, we believe it is important to make reference to the powers of the supervision authorities in relation to these.

We also understand that the text should envisage the possibility of opening an investigation as a result of a police, especially when due to the activities that they might develop, relevant facts that may constitute attacks on persons' privacy could be discovered.

#### *Article 52*

##### ***Duties***

1. The supervisory authority shall:
  - (a) monitor and ensure the application of this Regulation;
  - (b) hear complaints lodged by any data subject, or by an association representing that data subject in accordance with Article 73, investigate, to the extent appropriate, the matter and inform the data subject or the association of the progress and the outcome of the complaint within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;
  - (c) share information with and provide mutual assistance to other supervisory authorities and ensure the consistency of application and enforcement of this Regulation;
  - (d) conduct investigations either on its own initiative or on the basis of a complaint or on request of another supervisory authority **or on the basis of a police report**, and inform the data subject concerned, if the data subject has addressed a complaint to this supervisory authority, of the outcome of the investigations within a reasonable period;
  - (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) be consulted by Member State 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, and in particular dealing with measures that define the nature of processing operations.
  - (g) authorise and be consulted on the processing operations referred to in Article 34;
  - (h) issue an opinion on the draft codes of conduct pursuant to Article 38(2);
  - (i) approve binding corporate rules pursuant to Article 43;
  - (j) participate in the activities of the European Data Protection Board;
  - (k) coordinate the certification policies in their respective territory pursuant to article 39.**
2. Each supervisory authority shall promote the awareness of the public on risks, rules, safeguards and rights in relation to the processing of personal data. Activities addressed specifically to children shall receive specific attention.
  3. The supervisory authority shall, upon request, advise any data subject in exercising the rights under this Regulation and, if appropriate, co-operate with the supervisory authorities in other Member States to this end.
  4. For complaints referred to in point (b) of paragraph 1, the supervisory authority shall provide a complaint submission form, which can be completed electronically, without excluding other means of communication.
  5. The performance of the duties of the supervisory authority shall be free of charge for the data subject.
  6. Where requests are manifestly excessive, in particular due to their repetitive character, the supervisory authority may charge a fee or not take the action requested by the data subject. The supervisory authority shall bear the burden of proving the manifestly excessive character of the request.

### **Commentaries on article 53:**

The wording of this article seems correct, although we include a reference to the possibility of the supervisory authorities to carry out audits or audit planning.

Once amended, the article would stay as follows:

#### *Article 53*

##### ***Powers***

1. Each supervisory authority shall have the power:
  - (a) to notify the controller or the processor of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, order the controller or the processor to remedy that breach, in a specific manner, in order to improve the protection of the data subject;
  - (b) to order the controller or the processor to comply with the data subject's requests to exercise the rights provided by this Regulation;
  - (c) to order the controller and the processor, and, where applicable, the representative to provide any information relevant for the performance of its duties;
  - (d) to ensure the compliance with prior authorisations and prior consultations referred to in Article 34;
  - (e) to warn or admonish the controller or the processor;
  - (f) to order the rectification, erasure or destruction of all data when they have been processed in breach of the provisions of this Regulation and the notification of such actions to third parties to whom the data have been disclosed;
  - (g) to impose a temporary or definitive ban on processing;
  - (h) to suspend data flows to a recipient in a third country or to an international organisation;

- (i) to issue opinions on any issue related to the protection of personal data;
- (j) to inform the national parliament, the government or other political institutions as well as the public on any issue related to the protection of personal data;
- (k) to carry out audits or audit plans related to the protection of personal data.**

2. Each supervisory authority shall have the investigative power to obtain from the controller or the processor:

- (a) access to all personal data, including examination within the premises where they are located, and to all information necessary for the performance of its duties;
- (b) access to any data processing equipment and means, including access to the premises where they are located. (...)

The powers referred to in point (b) shall be exercised in conformity with Union law and Member State law.

3. Each supervisory authority shall have the power to bring violations of this Regulation to the attention of the judicial authorities and to engage in legal proceedings, in particular pursuant to Article 74(4) and Article 75(2).

4. Each supervisory authority shall have the power to sanction administrative offences, in particular those referred to in Article 79(4), (5) and (6).

#### **Commentaries on article 54:**

In this article it is necessary to introduce an amendment so that the wording is also coherent with those countries that have more than one supervisory authority.

*Article 54*  
***Activity report***

Each supervisory authority must draw up an annual report on its activities. The report shall be presented to the ~~national~~ **respective parliament and/or the other authorities designated by the national law** and shall be made available to the public, the Commission and the European Data Protection Board.

**Conclusions:**

The approach on this chapter seems correct in general terms.

The main element of innovation is the one envisaged in article 51, which establishes a system of one stop shop for the exercise of supervision or control powers when the responsible or the processors of personal data have more than one establishment in the EU.

This system has been welcomed by most of the actors involved, because they appreciate the simplification of administrative management and the juridical security. Despite this, from the perspective of the exercise of rights, we believe that the system proposed can produce practical difficulties and an increase of the costs that might become unbearable.

This is why we try to introduce a mid-point solution for the cases in which the responsible or the processor is established in more than one Member State. In these cases, we keep the principle of one stop shop for the activities of management with the corporative sector, which eases the dialogue and the bureaucratic activity. When it comes to citizens' claims, however, the competence is always attributed to the supervisory authority of the state of the citizen who claims, although a co-ordination system with the supervisory authority of the principal establishment of the organization is also envisaged.

It is also important to highlight the regulation of the police report as a possible act that starts an investigation by the supervisory authority included in article 52, which will strengthen the system's capacities and will allow not obviating the important role that the police corps may play in the protection of the privacy as a fundamental right.

We have also proposed to introduce in article 53 a reference to the power of carrying out audits and audit plans granted to the supervisory authorities, in line with what is already envisaged in our law. The rest of the amendments introduced to this chapter obey to the need to adapt the wording of the articles to those Member States that have more than one supervisory authority.

However, it is necessary to continue analyzing thoroughly the possibility of introducing further amendments to this chapter, linked to the important role that the supervisory authorities should play in relation to the certification policy, one of the core elements of our position.

Finally, and in order to allow full understanding of our position on this chapter, we include hereafter the amendments foreseen in Chapter VII, Articles 55 (new Article 55a) and 58.3:

**“Article 55a - Lead Authority**

1. In case of complaints, investigative operations or other enforcement activities with regard to processing operations where the controller or processor is established in more than one Member State or where the processing is dedicated to residents in more than one Member State, any affected supervisory authority will inform other affected supervisory authorities before the opening of any procedure. Any affected supervisory authority may request for additional information, for cooperation with the informing authority in the terms set in articles 55 and 56 or for a coordinated action of all concerned supervisory authorities as set in paragraph 3.

2. The affected supervisory authority will submit to other affected supervisory authorities a draft of the measure and any relevant information, including a summary of the facts and the legal assessment, before it adopts a measure intended to close any procedure opened with regard to complaints, investigative operations or other enforcement activities and to produce legal effects vis-à-vis a controller or a processor or the citizens.

The affected supervisory authority shall not adopt a measure if other concerned supervisory authority objects to this measure within a period of three weeks after submittal of the draft measure. In this case, the issue shall be dealt with by the European Data Protection Board in the terms of Article 58.

3. In case that any affected supervisory authority requests a coordinated action of all concerned supervisory authorities, the supervisory authority of the Member State where the main establishment of the controller or the processor is located shall take the lead and act on behalf of the concerned supervisory authorities and in agreement with them at any stage of supervisory proceedings.

For this purpose, it shall in particular, submit a proposal of measures to the concerned supervisory authorities

4. If a concerned supervisory authority objects to the proposal within a period of three weeks after its submittal, the issue shall be dealt with the European Data Protection Board in the terms of Article 58.
5. In case there is no objection from the concerned supervisory authorities, the proposed decision shall be adopted by all concerned supervisory authorities and enforced at national level.
6. Where the lead authority does not act within one month on request of the concerned supervisory authorities, they shall be competent to take provisional measures and shall submit the matter to the European Data Protection Board in accordance with the procedure referred to in Article 58.

### Art. 58.3

“Any supervisory authority or the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56 or where an affected supervisory authority does not agree with the draft measure proposed by other affected supervisory authority or by the lead authority pursuant to Article 55a”.

## (...) Chapter VII

### General considerations

Chapter VII contains 18 articles, divided in three sections: co-operation between the national authorities, consistency mechanism and European Data Protection Board.

This chapter establishes the key springs to ensure the interpretation and implementation of the Regulation to be as coherent as possible in the whole EU. It also refers to juridical basis for a co-ordinated and collaborative functioning of the supervisory authorities network, which is basic for the effectiveness of the one stop shop principle, and for the strengthening and well functioning of the whole system.

Moreover, the chapter envisages the creation of the Data Protection European Board, both a think tank and a highly operative authority of the institutional framework in data protection.

The amendments we are going to propose to this chapter intend to strengthen the capacities of the Data Protection European Board, to ensure a higher efficiency in the consistency mechanism and the individual and collective independence of the supervisory authorities.

### **Commentaries on article 55:**

The only issue to object (...) to this article is the time established for the supervisory authorities to answer the requests of other authorities. We understand that a period of 30 days may be excessive. To increase the system's celerity and credibility, we propose a 15-day period.

#### *Article 55*

#### ***Mutual assistance***

1. Supervisory authorities shall provide each other 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 prompt information on the opening of cases and ensuing developments where data subjects in several Member States are likely to be affected by processing operations.

2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without delay and no later than ~~one month~~ **fifteen days** after having received the request. Such measures may include, in particular, the transmission of relevant information on the course of an investigation or enforcement measures to bring about the cessation or prohibition of processing operations contrary to this Regulation.
3. The request for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only in respect of the matter for which it was requested.
4. 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 request; or
  - (b) compliance with the request would be incompatible with the provisions of this Regulation.
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 meet the request by the requesting supervisory authority.
6. Supervisory authorities shall supply the information requested by other supervisory authorities by electronic means and within the shortest possible period of time, using a standardised format.
7. No fee shall be charged for any action taken following a request for mutual assistance.
8. Where a supervisory authority does not act within **fifteen days** ~~one month~~ on request of another supervisory authority, the requesting supervisory authorities shall be competent to take a provisional measure 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 procedure referred to in Article 57.

9. The supervisory authority shall specify the period of validity of such provisional measure. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board and to the Commission.
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).

### **New article 55a**

This new article 55a is an important piece of our position on the competence of the supervision authorities when it comes to complaints, investigative operations or other enforcement activities with regard to processing operations where the controller or processor is established in more than one Member State or where the processing is dedicated to residents in more than one Member State. In such cases the one stop shop principle will led to several practical issues and important costs.

According to our point of view, a sound legal framework for a structured collaboration among the authorities, which reads form recent experiences, will prove less problematic and more efficient.

#### **Article 55a**

##### **Lead Authority**

7. In case of complaints, investigative operations or other enforcement activities with regard to processing operations where the controller or processor is established in more than one Member State or where the processing is dedicated to residents in more than one Member State, any affected supervisory authority will inform other affected supervisory authorities before the opening of any procedure. Any affected supervisory authority may request for additional information, for cooperation with the informing authority in the terms set in articles 55 and 56 or for a coordinated action of all concerned supervisory authorities as set in paragraph 3.

8. The affected supervisory authority will submit to other affected supervisory authorities a draft of the measure and any relevant information, including a summary of the facts and the legal assessment, before it adopts a measure intended to close any procedure opened with regard to complaints, investigative operations or other enforcement activities and to produce legal effects vis-à-vis a controller or a processor or the citizens.

The affected supervisory authority shall not adopt a measure if other concerned supervisory authority objects to this measure within a period of three weeks after submittal of the draft measure. In this case, the European Data Protection Board shall deal with the issue in the terms of Article 58.

9. In case that any affected supervisory authority requests a coordinated action of all concerned supervisory authorities, the supervisory authority of the Member State where the main establishment of the controller or the processor is located shall take the lead and act on behalf of the concerned supervisory authorities and in agreement with them at any stage of supervisory proceedings.

For this purpose, it shall in particular, submit a proposal of measures to the concerned supervisory authorities

10. If a concerned supervisory authority objects to the proposal within a period of three weeks after its submittal, the issue shall be dealt with the European Data Protection Board in the terms of Article 58.

11. In case there is no objection from the concerned supervisory authorities, the proposed decision shall be adopted by all concerned supervisory authorities and enforced at national level.

12. Where the lead authority does not act within one month on request of the concerned supervisory authorities, they shall be competent to take provisional measures and shall submit the matter to the European Data Protection Board in accordance with the procedure referred to in Article 58.

## **Commentaries on article 56:**

We find nothing to object to this article, except for suggesting that the period envisaged in paragraph 5 is reduced to 15 days.

The article would remain as follows:

### *Article 56*

#### ***Joint operations of supervisory authorities***

1. In order to step up co-operation and mutual assistance, the supervisory authorities shall carry out joint investigative tasks, joint enforcement measures and other joint operations, in which designated members or staff from other Member States' supervisory authorities are involved.
2. In cases where data subjects in several Member States are likely to be affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in the joint investigative tasks or joint operations, as appropriate. The competent supervisory authority shall invite the supervisory authority of each of those Member States to take part in the respective joint investigative tasks or joint operations and respond to the request of a supervisory authority to participate in the operations without delay.
3. Each supervisory authority may, as a host supervisory authority, in compliance with its own national law, and with the seconding supervisory authority's authorisation, confer executive powers, including investigative tasks on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the host supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their executive powers in accordance with the seconding supervisory authority's law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of members or staff from the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. The host supervisory authority shall assume responsibility for their actions.

4. Supervisory authorities shall lay down the practical aspects of specific co-operation actions.
5. Where a supervisory authority does not comply within **fifteen days** ~~one month~~ with the obligation laid down in paragraph 2, the other supervisory authorities shall be competent to take 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. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board and to the Commission and shall submit the matter in the mechanism referred to in Article 57.

**Commentaries on article 57:**

We have nothing to object to this article.

**Commentaries on article 58:**

In general, it (...) seems, as the consistency mechanism might become an extremely useful tool to ensure a uniform implementation and interpretation of the Regulation throughout the Union.

In the light of the Regulation, it appears that there is a distinction between the subjects that will be sent to the consistency mechanisms and those about which the Council will have to pronounce in the framework of this mechanism.

Article 58.1 lists a series of subjects in which the reference is compulsory, and article 58.2 envisages that the list is extended to any other subject determined by the supervisory or the Commission. Nevertheless, nothing in the Regulation establishes that the Board has to pronounce about each of those subjects. On the contrary, article 58.7 enumerates the cases in which the Board will have to pronounce an opinion.

This difference has a great practical interest. For the moment it is difficult to foresee the real quantity of subjects that will be submitted to the consistency mechanism, but it appears that it will be a high quantity. The obligation in article 58.2.a, which compels to communicate every measure implemented that might produce legal effect and that are referred to processing operations related to the offering of goods or services to citizens of more than one Member State, seem to announce, by itself, a high quantity of subjects. Anyhow, we should also take into consideration that when just one supervisory agency requests it, the subject will be sent to the consistency mechanism too. It is uncertain that the Board can examine adequately and pronounce about such a number of subjects, and in a period that adapts to the national procedure law.

This is why it is important to restrict the obligation that the Board pronounces about every subject that it has been requested to. In this sense, the prevision in article 58.7 can be accepted, but with clarifications.

The actual regulation is not consistent with the final objective of establishing reasonable deadlines to the Board's activity in the consistency mechanism. The requirement that the Board pronounces when it is decided by a majority of its members seem reasonable. This ensures that it will only pronounce opinions when there is a sufficient agreement.

It also seems reasonable that the Commission may request for an opinion, due to the nature of the Board as an adviser organ. On the other hand, it does not make much sense that the will of just one supervisory authority can condition the whole Board's activity. To open this possibility means to risk the viability of the system and does not have a solid justification.

Additionally last part of the paragraph 3 has been amended for consistency with our amendments on chapter V and due to the introduction of new Article 55a.

We therefore propose the following amendments:

*Article 58*

***Opinion by the European Data Protection Board***

1. Before a supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board and the Commission.

2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:
  - (a) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour; or
  - (b) may substantially affect the free movement of personal data within the Union; or
  - (c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or
  - (d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or
  - (e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or
  - (f) aims to approve binding corporate rules within the meaning of Article 43.
3. Any supervisory authority or the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56 *or where an affected supervisory authority does not agree with the draft measure proposed by other affected supervisory authority or by the lead authority pursuant to Article 55a*”
4. In order to ensure correct and consistent application of this Regulation, the Commission may request that any matter shall be dealt with in the consistency mechanism.
5. Supervisory authorities and the Commission shall electronically communicate any relevant information, including as the case may be a summary of the facts, the draft measure, and the grounds which make the enactment of such measure necessary, using a standardised format.

6. The chair of the European Data Protection Board shall immediately 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 chair of the European Data Protection Board shall provide translations of relevant information, where necessary.
7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members ~~or any supervisory authority~~ or the Commission so requests within one week after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. 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 1 and 3, the Commission and the supervisory authority competent under Article 51 of the opinion and make it public.
8. The supervisory authority referred to in paragraph 1 and the supervisory authority competent under Article 51 shall take account of the opinion of the European Data Protection Board and shall within two weeks after the information on the opinion by the chair of the European Data Protection Board, electronically communicate to the chair of the European Data Protection Board and to the Commission whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.

**Commentaries on article 59:**

We propose to rule out the articles that grant the Commission with the competence to control the supervisory authorities' activity. In this issue, we can not find alternative solutions. These authorities should be individually and collectively independent, and should not be conditioned by the behaviour of administrative or political organs. The powers of the Commission as a supervisor of the European law implementation must be unique and exclusively exercised through the channels envisaged in the Treaties.

*Article 59*

***Opinion by the Commission***

- ~~1. Within ten weeks after a matter has been raised under Article 58, or at the latest within six weeks in the case of Article 61, the Commission may adopt, in order to ensure correct and consistent application of this Regulation, an opinion in relation to matters raised pursuant to Articles 58 or 61.~~
- ~~2. Where the Commission has adopted an opinion in accordance with paragraph 1, the supervisory authority concerned shall take utmost account of the Commission's opinion and inform the Commission and the European Data Protection Board whether it intends to maintain or amend its draft measure.~~
- ~~3. During the period referred to in paragraph 1, the draft measure shall not be adopted by the supervisory authority.~~
- ~~4. Where the supervisory authority concerned intends not to follow the opinion of the Commission, it shall inform the Commission and the European Data Protection Board thereof within the period referred to in paragraph 1 and provide a justification. In this case the draft measure shall not be adopted for one further month.~~

**Commentaries on article 60:**

We propose the suppression of this article on the basis of the abovementioned arguments.

*Article 60*

***Suspension of a draft measure***

- ~~1. Within one month after the communication referred to in Article 59(4), and where the Commission has serious doubts as to whether the draft measure would ensure the correct application of this Regulation or would otherwise result in its inconsistent application, the Commission may adopt a reasoned decision requiring the supervisory authority to suspend the adoption of the draft measure, taking into account the opinion issued by the European Data Protection Board pursuant to Article 58(7) or Article 61(2), where it appears necessary in order to:~~

~~(a) reconcile the diverging positions of the supervisory authority and the European Data Protection Board, if this still appears to be possible; or~~

~~(b) adopt a measure pursuant to point (a) of Article 62(1).~~

~~2. The Commission shall specify the duration of the suspension which shall not exceed 12 months.~~

~~3. During the period referred to in paragraph 2, the supervisory authority may not adopt the draft measure.~~

### **Commentaries on article 61:**

We have nothing to object to this article.

### **Commentaries on article 62:**

To ensure the coherence with the amendments of articles 59 and 60, we propose the following amendments:

#### *Article 62*

#### ***Implementing acts***

1. The Commission may adopt implementing acts for:

~~(a) deciding on the correct application of this Regulation in accordance with its objectives and requirements in relation to matters communicated by supervisory authorities pursuant to Article 58 or 61, concerning a matter in relation to which a reasoned decision has been adopted pursuant to Article 60(1), or concerning a matter in relation to which a supervisory authority does not submit a draft measure and that supervisory authority has indicated that it does not intend to follow the opinion of the Commission adopted pursuant to Article 59;~~

- ~~(b) deciding, within the period referred to in Article 59(1), whether it declares draft standard data protection clauses referred to in point (d) of Article 58(2), as having general validity;~~
- (c) specifying the format and procedures for the application of the consistency mechanism referred to in this section;
- (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 58(5), (6) and (8).

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

- 2. ~~On duly justified imperative grounds of urgency relating to the interests of data subjects in the cases referred to in point (a) of paragraph 1, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 87(3). Those acts shall remain in force for a period not exceeding 12 months.~~
- 3. The absence or adoption of a measure under this Section does not prejudice any other measure by the Commission under the Treaties.

### **Commentaries on article 63:**

We have nothing to object to the first paragraph of this article.

As regards to the second paragraph, we believe it lacks of clarity, because according to article 58, it is not always necessary to resort to the consistency mechanism.

We do not introduce a specific amendment, but we reserve the right to do so depending on the results of the Working group.

*Article 63*

***Enforcement***

1. For the purposes of this Regulation, an enforceable measure of the supervisory authority of one Member State shall be enforced in all Member States concerned.
2. Where a supervisory authority does not submit a draft measure to the consistency mechanism in breach of Article 58(1) to (5), the measure of the supervisory authority shall not be legally valid and enforceable.

**Commentaries on article 64:**

Articles (...) 64 to 72 create the Data Protection Board, as a heir institution of the actual article 29 working group. The board will be composed of the head of one supervisory authority of each Member State and the European Data Protection Supervisor.

The Commission shall have the right to participate in the activities and meetings of the European Data Protection Board. The board will act independently when exercising its tasks pursuant articles 66 and 67.

The Board shall have a Chair, chosen amongst its members for a period of five years, and two deputy chairpersons, one of whom shall always be chosen by the European Data Protection Supervisor.

Amongst the tasks of this board, we must highlight that it is the institution in which the consistency mechanism will be developed.

We have nothing to object to this article.

Nevertheless we are of the opinion that the European Data Protection Board should be considered as the main authority at European level concerning personal data protection.

That means that the Commission should not have any kind of power that deals with coherence mechanism and the uniform interpretation of the Regulation. This point of view is fully consistent with Article 8 (3) of the Charter of Fundamental Rights of the European Union.

Additionally the possibility of creating a specialized body could be considered as well, adding then prescriptive competences to it. **We'd like to propose to the Presidency further discussion on its important issue.**

### **Commentaries on article 65:**

We have nothing to object to this article.

### **Commentaries on article 66:**

Attending to the special role that our position confers to the certification policies, we believe that the European Board (...) should have a fundamental part in their design and development

Therefore, we propose the following amendment:

#### *Article 66*

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

1. The European Data Protection Board shall ensure 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:
  - (a) advise the European Parliament, the Council and 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 addressed to the supervisory authorities in order to encourage consistent application of this Regulation;
  - (c) review the practical application of the guidelines, recommendations and best practices referred to in point (b) and report regularly to the Commission on these;
  - (d) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in 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) **develop (...) the guidelines (...) of the european certification policies.**
- (i) **monitoring and evaluate the european certification policies, submitting the results to the Parliament, the Council and the Commission.**

2. Where the Commission requests advice from the European Data Protection Board, it may lay out a time limit within which the European Data Protection Board shall provide such advice, 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.
4. The Commission shall inform the European Data Protection Board of the action it has taken following the opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.

**Commentaries on article 67:**

We have nothing to object to this article.

**Commentaries on article 68:**

We have nothing to object to this article.

**Commentaries on article 69:**

It surprises that one of the deputy chairs is perpetually granted to the European Data Protection Supervisor.

According to Regulation 45/2001, the European Data Protection Supervisor is the supervisory authority for the institutions and organisms of the EU. It envisages a statute and functioning very similar to those attributed by national law to their supervisory authorities.

Certainly, the fact that the supervisory authority has the task to assess on data protection to the European institutions and, particularly, that the Commission has to consult the supervisory authority when adopting any legislative initiative related to data protection (pursuant to article 28.1 of the Regulation 45/2001), puts it in a position of privilege to analyse and explain the EU's norms on data protection. Nevertheless, that position, similar to the one assumed by the national authorities in relation to their norms and institutions, is neither due to nor consequence of the supervisor having some kind of formal or institutional pre-eminence towards the national authorities, even in terms of co-ordination or impulse of their activities.

Therefore, there is no reason to justify the European Data Protection Supervisor having a better right than any other national authority to a permanent deputy chair in the European Data Protection Board.

#### *Article 69*

##### ***Chair***

1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members. ~~One deputy chairperson shall be the European Data Protection Supervisor, unless he or she has been elected chair.~~
2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable.

#### **Commentaries on article 70:**

We have nothing to object to this article.

### **Commentaries on article 71:**

Until now, the Data Protection Unity of the Commission has developed the Secretariat of the Data Protection Supervisory Authorities' Group (Art. 29). Despite this, to strengthen the independence and efficiency of the future Board it is required to establish new arrangements in its secretariat and technical and logistic support to their works.

It seems that the Commission has considered several options and has found no other alternative that to situate the secretariat on the European Data Protection Supervisor. This solution presents numerous obstacles.

The Supervisor is really a supervisory authority whose main (...) functions are related to data protection (...) activities of the institutions and organisms of the Union. Therefore, it lacks the resources to face the tasks involved in being the secretariat of the future Board: availability and management of meeting rooms for plenary sessions and working groups, translation, communication systems between authorities and the Board, web site, trip and meeting organizations... . It is clear that all this issues could be faced with a specific resource assignment to the Supervisor, but this would not resolve the main problem which is precisely that the Supervisor is not an organ with the legal conditions to assume these management tasks.

Furthermore, the Supervisor is a Council member with right to vote. It does not seem admissible that at the same time it runs the secretariat, when among its tasks would be “to provide analytical, administrative and logistical support to the European Data Protection Board” (art. 71.2), “the preparation and follow-up of the meetings of the European Data Protection Board” (art. 71.3.e) and “the preparation, drafting and publication of opinions and other texts adopted by the European Data Protection Board” (art. 71.3.f).

To sum up, as the secretariat the Supervisor would be in conditions of controlling, directing or influencing the works of the Board, which does not seem compatible with its condition of active member of th Board.

Therefore, we understand that it should be the Commission who provides with the reources so that the Board has a secretariat adequate to its tasks, otherwise, if a body is created, the Board will then be able to have its own secretariat. (...)

*Article 71*

***Secretariat***

1. The European Data Protection Board shall have a secretariat. ~~The European Data Protection Supervisor shall provide that secretariat.~~ *The Commission shall provide that secretariat by allocating dedicated staff and resources in such a way as to ensure an efficient and independent fulfilment of its functions under the direction of the Chair”*

(...)2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board under the direction of the chair.

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 and other texts adopted by the European Data Protection Board.

**Commentaries on article 72:**

We have nothing to object to this article.

## **Conclusions:**

Due to the large territorial scope of the present instrument, it is necessary to establish tools to ensure that the interpretation and application by the multiple supervisory authorities is coherent. In our view, the co-operation and coherence mechanisms are fundamental to ensure positive results of the uniformation intended by the Regulation. Furthermore, the viability of the one stop shop principle also requires a solid co-operation between the national authorities.

We believe that the rules proposed to regulate the co-operation between the supervisory authorities are correct in essential; so few amendments have been introduced in this point.

The European Data Protection Board and the consistency mechanism will have an outstanding influence on the activity of the national authorities, and therefore, on the implementation of the regulation on Member States, citizens and organizations. They also constitute a key element for the harmonized implementation of the European norm and the co-operation between supervisory authorities.

We should bear in mind that the Board, in the framework of the consistency mechanism or beyond it, will pronounce on the measures intended to be adopted by the national supervisory authorities, but also on the compliance by these authorities with the duty of mutual co-operation, or, in its role of Commission's assessment organ, with any issue related to the data protection in the EU.

The Board and the consistency mechanism are a necessary complement to the existence of a unique norm with direct effect on the whole EU territory but nevertheless implemented by 27 national authorities. Its decisions are not binding at this stage, but produce a series of effects, and anyhow, will have a great influence, impact and public relevance.

This is why it is of the utmost importance to ensure that the Board and the consistency mechanism function adequately, and that its decisions, adopted by simple majority of its members, are adopted in the best conditions and always safeguarding the principle of independence of the supervisory authorities.

The approach on the regulation of the European Data Protection Board seems adequate, and according to the key role that the certification policy has in our position, we regard the Board as a fundamental organ to design these policies.

(...) Nevertheless, we have clear objections on the Board's composition, and specifically, on the fact that one of the deputy chairs is granted on perpetuity to the European Data Protection Supervisor. We do not agree either with assigning the secretariat of the Board to this organ.

**FINALLY WE WOULD LIKE TO START A DISCUSSION ON THE POSSIBILITY THAT THE BOARD BECOMES A BODY WITH ITS OWN PERSONALITY CAPABLE OF PRESCRIPTIVE RESOLUTIONS.**

## ITALY

The Italian delegation first wishes to draw attention to the proposal it submitted officially to the DAPIX Working Party, in 12879/13, on the consistency mechanism, the "one-stop shop" and the competences of the supervisory authorities. The following comments therefore concern further specific aspects of the individual provisions and are intended as additions to the proposals set out in the aforementioned official document.

### CHAPTER VI – 12929/13

#### **Article 46 – Supervisory authority (DPA)**

No comment.

#### **Article 47 – Independence**

Paragraph 5: we repeat that it would be advisable to provide for a European funding mechanism as well, given that the duties of the supervisory authorities (DPAs) are becoming increasingly "European", possibly by linking it to the national population criterion (for example, a set amount plus a variable amount linked to national population). The text of recital 94 could be amended accordingly.

#### **Article 48 – General conditions for the members of the supervisory authority**

Paragraph 1: it is not clear what is meant by the reference to the possibility that the members may also be appointed by an "independent body" (rather than a constitutional body) entrusted with this task. At the very least, the distinguishing features of this "independent body" should be spelt out, possibly in recital 95, which will have to be amended in any case since it does not currently contain any reference to this additional method of appointment.

Paragraph 2: the current wording of the text appears to be too vague. We therefore propose to reintroduce the reference to the specific area of data protection, by adding the words "including in the data protection area" at the end of the sentence.

### **Article 49 – Rules on the establishment of the supervisory authority**

With regard to point (d), we again suggest considering the possibility of establishing, in addition to the minimum duration, a maximum duration of the term of the members of the supervisory authority (for example, seven years), taking into account national practices.

### **Article 50 – Duty of confidentiality**

We agree that this article should be deleted.

### **Article 51 – Competence**

We maintain a scrutiny reservation on this article pending a comprehensive definition of the division of powers between the supervisory authorities and the respective roles played under the one-stop-shop mechanism and the consistency mechanism.

Paragraph 1a: we agree on the need for cooperation when the supervisory authority acts as the "lead authority"; however, we would point out that the text does not contain any definition of "lead authority" (perhaps a reference could be added to recital 97).

### **Article 52 – Duties**

We would like to make the following comments on these provisions:

Paragraph 1(b), "complaints": the scope of this provision should be clarified by adding a new recital stating that the word "complaints" should be interpreted very widely (i.e. so as to include different kinds of proceedings such as reports, complaints and judicial remedy proper) in the light of applicable national experience. We suggest the following text for the proposed new recital: "Complaint' shall refer to any proceeding whereby data subjects or their representatives may claim their rights and obtain satisfaction before national supervisory authorities in accordance with domestic legislation and traditions." Moreover, the wording of this provision should be better aligned with that of Article 73, since under Article 73(3) even associations which do not represent data subjects can independently lodge "complaints".

Paragraph 1(f): this provision is acceptable if Article 34(7) is maintained in its present form, stipulating that the supervisory authority must be consulted before legislative or administrative measures are drawn up which may have a substantial impact on the privacy of individuals.

Paragraph 1(g): this provision is acceptable, subject to verification of the final text of the provisions to which it refers, in particular Article 34(7a), on the basis of which the supervisory authority must authorise processing where the privacy impact assessment indicates that further measures are needed or that there are specific risks.

Paragraph 1(gc): scrutiny reservation in relation to the reservation we expressed, and still uphold, concerning Articles 39 and 39a of the proposal (certification mechanisms).

Paragraph 1(ha): scrutiny reservation, in particular because, as we have already said, we are opposed to the possibility that third parties other than those which have requested the adoption of a code of conduct jointly with the supervisory authority may, under Article 38a, monitor compliance with such a code.

Paragraph 6: we wish to draw attention once again to our concerns regarding the "manifestly unfounded" nature of a request by the data subject. It would be preferable for the supervisory authority to set general criteria for its own work, including the discretionary power not to act on individual requests, on the basis of transparent and public criteria, possibly through the European Data Protection Board. Alternatively, when the authority claims that a request is manifestly excessive, the burden of justifying that request could be borne by the data subject concerned.

### **Article 53 – Powers**

Generally speaking, we approve of the attempt to draw up a more systematic list of the powers to be conferred on the supervisory authorities, but the categories that have been introduced do not appear to be exhaustive and, in addition, some of the powers listed under a given heading seem inappropriate: for example, the fact of being able to give orders to controllers (see paragraph (1)(a)) hardly counts as "monitoring". We propose that the different categories be deleted and that a simple list of powers be reintroduced.

Paragraph 1b(a) and (b): the distinction between "warnings" in the event of possible future infringements, and "reprimands" in the event of actual infringements is an obscure one. The former (point (a)) appear to be issued in circumstances such as a post-DPIA (Data Protection Impact Assessment) evaluation or similar situations in which there is a high risk associated with the processing of personal data; if that is the case, it would be preferable to make this clear, possibly by including a reference to Article 34. As for point (b), it is unclear what is meant by "reprimands" and what "corrective" effect they might have, given that in such cases there has been an infringement of the provisions of the Regulation. Pending clarification of this point, we wish to enter a scrutiny reservation.

#### **Article 54 – Activity report**

No comment.

## **CHAPTER VII – COOPERATION AND CONSISTENCY– 12929/13**

### **Section 1 – Lead authority and cooperation**

#### **Article 54a: Competence of the lead authority**

We refer to the Italian proposal contained in 12879/13. However, we agree with the introduction of this new article, which establishes the competences of the lead authority in its capacity as the competent authority of the main establishment of the controller, subject to the following comments.

Paragraph 4: this paragraph should be entirely redrafted in the light of the Italian proposal, which provides that a complaint by a data subject should be lodged with the authority of that subject's Member State; the latter must cooperate with the lead authority but is responsible for the final decision (unless the consistency mechanism has been applied as a result of a divergence of views with the lead authority).

Paragraph 5: the first sentence should be amended as follows, in the light of the Italian proposal: "In the situations referred to in paragraphs 1 to **3 [not 4]**, the lead authority shall be the sole supervisory authority competent for deciding on measures (...)".

### **Article 54b – Cooperation obligations of the lead authority**

Paragraph 5: scrutiny reservation to assess the implications in relation to Article 63 and the enforceability of decisions taken on the basis of the mechanism specified therein.

### **Article 55 – Mutual assistance**

Please refer to the Italian proposal for a number of proposed changes to the wording of this article.

Paragraph 10: we reiterate our belief that the procedures for mutual assistance between supervisory authorities should not be specified by the Commission through implementing acts. It would be better if the European Data Protection Board were competent for these issues (formats, procedures).

### **Article 56 – Joint operations of supervisory authorities**

No comment.

## **Section 2 – Consistency**

### **Article 57 – Consistency mechanism**

We enter a general scrutiny reservation, pending the definition of the consistency mechanism, *inter alia* in the light of the proposals submitted by some delegations (France, Italy). We refer in particular to the changes to the wording of this article set out in the Italian proposal.

We would also stress that provision should be made in all instances for the European Data Protection Board to be consulted before the measures in question are adopted (paragraph 2(a)): it is better to introduce a more powerful filter to prevent the Board from being overloaded. To that end, provision could be made (as suggested in the Italian delegation's document) for the Board to give its opinion only when the consultation and cooperation mechanism initiated by the lead authority has not resulted in a joint decision being reached.

### **Article 58 – Opinion by the European Data Protection Board**

We wish to enter a scrutiny reservation, for the reasons stated above. In particular, we would refer to the proposal presented by the Italian delegation concerning the possibility of making the Board's decisions binding, via a request to that effect submitted by the Board to the Commission (by an implementing act adopted under Article 62).

## **Articles 59 and 60**

No comment.

## **Article 61 – Urgency procedure**

No comment; we welcome the amendment to recital 108.

## **Article 62 – Implementing acts**

We wish to reiterate our comments on the inadvisability of providing for implementing acts that may encroach on the independence and freedom of judgment of national authorities; we note, however, that the amendments made considerably restrict the scope of the acts which may unequivocally be adopted by the Commission. Consequently, the text of Article 62 has been appreciably improved and can be supported; however, we wish to enter a scrutiny reservation on the text of paragraph 2, on the definition of the consistency mechanism and on the Commission's powers in this area (see also the proposal submitted by the Italian delegation).

## **Article 63 – Enforcement**

Scrutiny reservation. It is not clear in what cases the measures adopted by a DPA are "legally binding". In the previous version (circulated by the Irish Presidency: 11013/13) the decisions adopted, following the application of the consistency mechanism, were binding; in the current version, Article 54a(5) provides that only the decisions of the lead authority shall be valid (but not "legally binding") in the cases envisaged. The issue calls for further consideration.

## **Section 3 – European Data Protection Board**

We wish to enter a general scrutiny reservation on this section, regarding the need to give further consideration to the possibility of establishing the Board as an autonomous body with legal personality, entirely independent and able to adopt binding decisions – in particular in the context of the consistency mechanism.

## **Article 64 – European Data Protection Board**

No comment.

## **Article 65 – Independence**

No comment.

## **Article 66 – Tasks of the European Data Protection Board**

Paragraph 1(ca): "encourage" is not enough. In our view, the Board's tasks should include mandatorily issuing an opinion on codes of conduct submitted to it, where they have a transnational impact. We therefore propose replacing "encourage" with "encourage and give an opinion on". We also wish to confirm our scrutiny reservation on this point with regard to the definition of certification mechanisms under Article 39.

## **Article 67 – Reports**

No comment.

## **Article 68 – Procedure**

Scrutiny reservation pending a more precise definition of the consistency mechanism, in particular as regards the need for a further opinion under Article 58(10) of the text proposed by the Lithuanian Presidency.

## **Article 69 – Chair**

No comment.

## **Article 70 – Tasks of the chair**

No comment.

## **Article 71 – Secretariat**

No comment.

## **Article 72 – Confidentiality**

In our view, this article requires further examination; we therefore wish to enter a scrutiny reservation. In any case, a distinction should be drawn between the confidentiality of the Board's deliberative process and public access to the documentation used by the Board for its deliberations. We therefore propose that the structure and the title of the article be retained, but with the following amendments:

Paragraph 1: it would be appropriate to take the Rules of Procedure of the Article 29 Working Party as a model, and stipulate that: "The minutes, any draft documents and the discussions of the EDPB shall be confidential, unless the Board decides otherwise".

Paragraph 2: the applicability of Regulation (EC) No 1049/2001 is, as things stand, doubtful to say the least: the Board will not in fact be an EU agency or body, since it will be made up of representatives of the national supervisory authorities, although its secretariat is to be provided (based on the proposal) by the EDPS. This latter circumstance may give rise to conflicts in future, even within the Board. We believe that it would be preferable to include a provision requiring the Board to lay down rules on access ensuring the greatest possible transparency, *inter alia* in accordance with Regulation (EC) No 1049/2001. We therefore propose the following: "The Board shall lay down the rules applicable to access to the documents and records submitted to its members. Such documents and records shall be, in principle, publicly available subject to exemptions in line with both EU and domestic legislation on freedom of information."

## CHAPTER VII - CO-OPERATION AND CONSISTENCY

### Section 1 – Co-operation

#### Article 55 - Mutual assistance

There should be an addition to this article explaining the mutual assistance mechanism in the cases described by Article 51(2), with rules explicitly establishing the role and duties of the "lead authority".

Nevertheless, the Commission cannot define more specific procedural provisions through implementing acts (as provided for in paragraph 10), since this would impinge upon the independence of the supervisory authority, and these provisions would be better specified by the European Data Protection Board.

Specifically:

Paragraph 1: the information to be exchanged should not be limited to that listed in this paragraph, which should not be considered exhaustive (as implied by the phrase "in particular").

In paragraph 4(a), we suggest inserting, after "*it is not competent for the request*", the following: "*in this case it shall provide an explanation of why it does not consider itself competent*".

In paragraph 4(b), we suggest inserting, after "*with the provisions of this Regulation*", the following: "*in this case it shall provide an explanation of why the requested action is considered incompatible*".

Paragraph 10: we do not believe that the Commission should specify these points through implementing acts. It would be better if the European Data Protection Board were competent for these issues (formats, procedures).

#### Article 56 - Joint operations of supervisory authorities

No comment.

### Section 2 – Consistency

#### Article 57 - Consistency mechanism

No comment.

## Articles 58, 59 and 61

In general, there should be a clear and unambiguous explanation of the process of interaction between each national supervisory authority, the European Data Protection Board and the Commission; a process which originates in a request for an opinion. This also applies to the urgency procedure, which allows opinions to be adopted either by the Commission, pursuant Article 59(1), or by the European Data Protection Board, pursuant to Article 61(4), and here again defines various different deadlines and decision-making processes.

### Article 58 - Opinion by the European Data Protection Board

Paragraph 1: we do not agree that the European Data Protection Board should be asked for its opinion in all the cases listed (exhaustively) in paragraph 2. We do not understand why, if the competent authorities have reached an agreement, the Board should also intervene, especially if only two or three Member States are involved. We therefore suggest adding the following, at the end of paragraph 1, "*when the coordination mechanism implemented by the lead authority does not allow a joint solution to be reached*".

Paragraph 2:

- Point (a): the wording is rather general, and thus any activity could potentially be subject to an opinion. Moreover, there should be an explanation of what is meant by "monitoring" of behaviour, as already mentioned in relation to earlier articles (Articles 34 and 35 in particular).
- Point (b): we need to clarify how the significance of the impact is measured.
- It also seems appropriate to add the Board's competence in relation to administrative sanctions as per Article 79 of the proposal, particularly in order to overcome any differences between national authorities in the application of these sanctions (for example, by setting a minimum/maximum amount for the fines referred to in that article).

Paragraph 3: there is a risk that the provision according to which "Any supervisory authority" may request an opinion from the Board would frustrate the Board's efforts to ensure consistency, since the number of requests may create an excessive workload. We could therefore consider a mechanism through which the Board would vote (by majority) on the need for an opinion in the event of such requests.

Paragraph 4: we should clarify which "matters" are covered by this provision. The term probably refers to the matters mentioned in preceding paragraphs 2 and 3 of this article. The consistency mechanism should therefore be understood as being limited specifically to measures "*intended to produce legal effects*", or indeed to issues connected to a lack of mutual assistance. The Commission should provide further clarification.

Paragraph 6: we suggest greater flexibility in the requirement for the chair to inform the members of the Board, including with regard to translations; we propose replacing "immediately" with "*without delay*".

Paragraph 7: the same applies to the deadlines indicated here. This provision is excessively prescriptive.

Paragraph 8: the supervisory authorities and lead authorities are to "take account" of the Board's opinion. This provision seems too weak to guarantee the effectiveness of the lead authority's coordination, or in any case that of the supervisory authority (in the system suggested by the Commission in Article 51(2)). On the basis of a suitable voting mechanism for the Board, and the obligation to co-operate established in Article 52(1)(c), the opinion given by the Board could be binding and enforceable with regard to all the supervisory authorities concerned (i.e. those involved in the consistency mechanism), but also the other national supervisory authorities, should the same problem recur. Given the above, we enter a scrutiny reservation on this paragraph.

#### **Article 59 - Opinion by the Commission**

Paragraph 1: the opinion by the Commission, as currently structured, falls outside the consistency mechanism and the powers of the European Data Protection Board. This seems to create an overlap with the opinion by the Board, as well as with the competence of the national supervisory authorities.

It should be established that the Commission may adopt an opinion on the issue raised in accordance with Article 58 (through an opinion by the Board) or Article 61 (urgent measures decided on by the supervisory authority "in exceptional circumstances" by way of derogation from Article 58) only if the procedure referred to in Article 58 has not been successful.

Paragraph 2: the supervisory authority is to take "*utmost account*" of the Commission's opinion. Further explanation of this provision is needed.

Paragraph 4: the obligation to declare an intention not to follow the opinion of the Commission brings about the "suspension" of the specific measure, in accordance with Article 60. Since this suspension seems highly questionable, we enter a scrutiny reservation linked to the outcome of discussions on Article 60.

#### **Article 60 - Suspension of a draft measure**

Together with Article 62, this provision unduly and excessively interferes with national supervisory authorities' powers and impinges upon their actual independence. This article allows the possibility of suspending a specific measure, that is to say a measure adopted on the basis of "specific" requests from controllers / processors / data subjects. Amongst other issues, a suitable legal basis would be lacking and could not be found in the Treaties (unlike for the Commission's antitrust powers, which seem to have been inappropriately used as a model for this provision). We therefore suggest removing or completely rewriting this article. In any case, we enter a general scrutiny reservation.

#### **Article 61 - Urgency procedure**

No comment.

#### **Article 62 - Implementing acts**

In general, these should be rejected in their entirety, since they go significantly beyond the rationale for the adoption of such instruments on the basis of the Treaties. In all the cases mentioned, the involvement of the European Data Protection Board and/or the consistency mechanism (suitably amended in line with our comments above) would be more appropriate, and would better respect the independence of the national supervisory authorities.

#### **Article 63 - Enforcement**

No comment.

## CHAPTER VII - CO-OPERATION AND CONSISTENCY

### Section 3 – European Data Protection Board

#### Article 64 - European Data Protection Board

Paragraph 4: we have various doubts about the role of the Commission in the European Data Protection Board's activities. These relate to both the lack of symmetry in the information provided, compared to the other European institutions, and the excessive nature of the obligations this paragraph imposes on the chair of the Board. If a Commission representative sits on the Board itself, we fail to understand why the chair must inform the Commission "without delay" on "all activities" of the Board which, in some cases, may be of no particular interest to the institution.

#### Article 65 - Independence

No comment.

#### Article 66 - Tasks of the European Data Protection Board

This article is modelled, at least in part, on Article 30 of Directive 95/46/EC. However, we would like to broaden the list of tasks of the Board, in the light of our comments on earlier articles of the proposed Regulation. More specifically, in relation to paragraph 1:

- For all cases in which recourse to delegated acts adopted by the Commission is not considered appropriate, it should be indicated that guidelines from the Board would be preferable. This could be achieved by amending the text of paragraph 1(b) so that the "*guidelines, recommendations and best practices*" would address not only the "supervisory authorities" but to anyone.
- For all cases in which recourse to implementing acts adopted by the Commission is not considered appropriate, it should be indicated that guidelines from the Board would be preferable. This could be achieved by amending the text of paragraph 1(b) so that the "*guidelines, recommendations and best practices*" would address not only the "supervisory authorities" but to anyone.
- For decisions relating to the consistency mechanism (Articles 57 and 58): decisions taken by the Board should be binding upon all the supervisory authorities involved in the consistency mechanism. Point (d) of paragraph 1 could therefore be amended to establish this. Upstream, this would entail an institutional change, assigning legal personality to the Board and establishing its powers and tasks in greater detail.

- The Board should be involved in the adoption of European codes of conduct (Article 38) and the establishment of EU certification systems (Article 39).

Paragraph 3 could expressly state that the information referred to should be made public on an autonomous website, which should be easy for all users to consult, not just the Commission.

#### **Article 67 - Reports**

No comment.

#### **Article 68 - Procedure**

No comment.

#### **Article 69 - Chair**

Paragraph 1: there needs to be clarification of why one of the two deputy chairpersons should always be the European Data Protection Supervisor, particularly given the provisions of Article 71, which appoints the Supervisor to provide the Board's secretariat. These provisions could lead to an inappropriate overlap of duties, with a risk that the secretariat would not be neutral.

With regard to paragraph 2, we suggest considering the possibility of setting a limit on the number of times the chair and two deputy chairpersons of the European Data Protection Board may be reappointed.

#### **Article 70 - Tasks of the chair**

No comment.

#### **Article 71 - Secretariat**

Our comments on Article 69 apply here.

#### **Article 72 - Confidentiality**

Paragraph 1: it seems necessary to explain what is meant by the "confidential" nature of the "discussions". The paragraph should probably be interpreted as meaning that the discussion procedure takes place in camera.

Paragraph 2: The implications of the application of Regulation (EC) No 1049/2001 should be given further consideration, especially given the proposal to establish the Board's secretariat under the auspices of the European Data Protection Supervisor.

## LUXEMBOURG

The general remarks made in earlier written comments remain valid.

### **Detailed comments / suggestions**

One of the main administrative burdens for controllers resulting from the 1995 directive is the fragmentation of rules relating to data protection across the internal market. This creates legal uncertainty as to the applicable legislation and the competent authority, making it difficult for business to identify the law to comply with. At the same time, European data subjects cannot benefit from a fully harmonized level of protection of personal data across the EU.

According to Luxembourg, the introduction of a one-stop-shop for controllers would remove one of the main obstacles and burdens of the 1995 directive. One single DPA should be competent for the supervision of all data processing activities operated by one controller under its responsibility in any Member State of the EU. This single competent authority is based on the notion of “main establishment”, which should be defined through clear and objective criteria. Having a single competent DPA echoes the same internal market logic as the necessity for controllers or processors to designate a main establishment.

The consistency mechanism should be triggered for cases where the expertise of the EDPB and its guidance creates a clear added value in terms of coherent application of rules where fundamental questions of personal data protection across the EU are at stake. It should be avoided to overburden the EDPB, thereby compromising its efficiency.

### **Chapter I – General provisions**

#### **Article 4 – Definitions**

Luxembourg believes it is important to provide for clear objective criteria when defining the notion of “main establishment”. The notion of “in the context of the activities” in the Directive 1995/46/EC has already given rise to many ambiguities and should be avoided. It is also crucial to explicitly state who determines the “main establishment” of a controller or processor. In order to avoid potentially conflicting claims for jurisdiction by multiple DPAs, Luxembourg supports the definition as voted by the ITRE committee (amendment 86). In addition, a gradation of the criteria to determine the main establishment should be inserted.

Luxembourg strongly supports a clarification that the controller or processor may determine themselves their main establishment, in accordance with the objective legal criteria provided for in the definition.

« (13) 'main establishment' means *the location as determined by the data controller or data processor on the basis of the following transparent and objective criteria: the location of the group's European headquarters, or, the location of the company within the group with delegated data protection responsibilities, or, where such location cannot be determined, the main establishment means the location of the company which is best placed (in terms of management function and administrative capability) to address and enforce the rules as set out in this Regulation, or, the place where the main decisions as to the purposes of processing are taken for the regional group; »*

## Chapter VI

### Article 47 – Independence

In Luxembourg, staff of the DPA may be State personnel recruited according to general rules for civil servant recruitments. This should be allowed for in paragraph 6.

6. Each Member State shall ensure that the supervisory authority has its own staff which shall be ~~appointed by~~ **recruited in accordance with national law** and be subject to the direction of the head of the supervisory authority.

### Article 48 – General conditions for the members of the supervisory authority

According to Luxembourg, paragraph 1 falls under the principle of subsidiarity and is a matter of national sovereignty that should not be regulated by this Regulation. Luxembourg has similar concerns for paragraph 4 and 5 which should also be deleted: this is a matter of national law.

Article 48

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

~~1. Member States shall provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned.~~

[...]

~~[4. A member may be dismissed, **in accordance with national law**, or deprived of the right to a pension or other benefits in its stead by the competent national court, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.]~~

~~5. Where the term of office expires or the member resigns, the member shall continue to exercise the duties until a new member is appointed.~~

Article 50 – Professional secrecy

According to Luxembourg, no confidential information which the members and staff of a DPA may receive in the course of their official duties may be used for a different purpose than the one it was initially received for. Luxembourg also suggests to clarify the language: professional secrecy is a legal obligation.

The member and the staff of the supervisory authority shall be **bound** subject, both during and after their term of office, **by the obligation for** ~~to a duty~~ of professional secrecy with regard to any confidential information in **conformity with national legislation and practice** which has come to their knowledge in the course of their performance of their official duties.

## Article 51 – Competence

Luxembourg insists on clarifying that the main establishment, where the controller or processor have establishments in more than one Member State, is designated by the controller or processor itself (cf. changed definition of “main establishment”). This is crucial for avoiding competing claims of jurisdiction by DPAs and therefore legal certainty.

It is important that the competent supervisory authority is clearly defined as the supervisory authority where the controller or processor has its main establishment. The competent supervisory authority shall be able to take measures producing legal effects (eg. sanctions) for the controller or processor. The data subject shall continue to be able to address any complaint or request to his/her own supervisory authority (or any other supervisory authority) which shall then cooperate with the competent supervisory authority if the main establishment of the controller or processor concerned is in another Member State. The mutual assistance should then come into play. It shall be clear that the competent authority is always the lead authority, otherwise the one-stop-shop does not have any added value for controllers compared to the 1995 directive.

[...]

2. Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union, and the controller or processor **has designated a main establishment in accordance with Article 4(13)**, the supervisory authority of the main establishment of the controller or processor shall be **solely** competent for the supervision of **all** the processing activities of the controller or the processor in all Member States, without prejudice to the provisions of Chapter VII of this Regulation.

**3. Subject to paragraph 4, each supervisory authority shall receive and transmit to the competent supervisory authority as defined in paragraph 2 any request sent to it by a data subject resident of that Member State and whose data are processed or likely to be processed by a controller or a processor established in another Member State. The competent supervisory authority shall inform and cooperate with the supervisory authority of the data subject in accordance with Articles 55.**

**4. The only data protection authority competent for operations processed by a Member State's public authorities shall be the supervisory authority established in that Member State.**

**3.5.No supervisory authority shall be competent to supervise** processing operations of courts acting in their judicial capacity.

Article 55 – Mutual assistance

Luxembourg wonders what happens if a request for assistance is refused for one of the reasons stipulated in paragraph 4(a) or (b), and the requesting DPA disagrees with this decision. May the requesting DPA then take a provisional measure on the basis of paragraph 8? May the requesting DPA submit the matter to the board? Or may the requesting DPA adopt a definite measure?

Paragraph 8 may lead to incoherence particularly in cases where a controller has several establishments in the Union. A provisional measure will only apply to one establishment (within the jurisdiction of the DPA) but not to other establishments, among them possibly the main establishment. The competent DPA (based on the main establishment) is not bound by the provisional measure taken by the other DPA and may overrule it. What happens if the provisional measure (which could be a temporary suspension of processing activities) has caused a prejudice to the controller? May he ask for compensation, is the DPA that took the provisional measure held liable? Paragraph 8 should therefore be deleted, or at least nuanced.

Article 56 – Joint operations of supervisory authorities

For Luxembourg, the corollary of the one-stop-shop means that joint operations should not result in the seconding DPA substituting itself to the competent DPA (based on the main establishment).

Carrying out joint operations does not mean that the seconding DPA can exercise the same powers, on the competent DPA's territory (= "host" DPA), as the competent DPA. Joint investigative tasks or operations are carried out under the responsibility of the competent DPA (= "host" DPA) as the last sentence in paragraph 3 indicates. It is therefore logical that the competent DPA retains all sovereign decision-making power and carries out the operations. The seconding DPA is present during these joint operations, but final decision is left to the competent DPA. A competent DPA cannot have its powers conditioned in its own jurisdiction by the presence in a joint operation of another DPA. The term "joint" may indeed be misleading as it suggests that the seconding DPA has the same powers, on the territory of the competent DPA, as the competent DPA itself. This is the logical corollary of the competent DPA assuming all responsibility for actions by secondary DPAs (last sentence of §3).

Luxembourg prefers to avoid confusion between terms: the "host" DPA is always the competent DPA within the meaning of Article 51(2).

Luxembourg also considers that the trigger for joint operations is formulated too vastly ("in cases where data subjects in several Member States are likely to be affected by processing operations") and may compromise the added value of the one-stop-shop.

1. In order to step up co-operation and mutual assistance, the supervisory authorities ~~shall~~ **may** carry out joint investigative tasks, joint enforcement measures and other joint operations, in which designated members or staff from other Member States' supervisory authorities are involved.
2. In cases where **a significant number of** data subjects in several Member States are likely to be **adversely** affected by processing operations, a supervisory authority of each of those Member States shall have the right, **upon request**, to participate in the joint investigative tasks or joint operations, as appropriate. ~~The competent supervisory authority shall invite the supervisory authority of each of those Member States to take part in the respective joint investigative tasks or joint operations and respond to the request of a supervisory authority to participate in the operations without delay.~~

3. ~~Each~~ **The competent** supervisory authority may, as a host supervisory authority, in compliance with its own national law, and with the seconding supervisory authority's authorisation, confer executive powers, including investigative tasks on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the ~~host~~ **competent** supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their executive powers in accordance with the seconding supervisory authority's law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of members or staff from the ~~host~~ **competent** supervisory authority. The seconding supervisory authority's members or staff shall be subject to the ~~host~~ **competent** supervisory authority's national law. The ~~host~~ **competent** supervisory authority shall assume responsibility for their actions.

#### Article 58 – Opinion by the European Data Protection Board

The consistency mechanism should be triggered for cases where the expertise of the EDPB and its guidance creates a clear added value in terms of coherent application of rules where fundamental questions of personal data protection across the EU are at stake. The EDPB should also not be required to intervene when DPAs agree among themselves on a solution to a particular issue. It should be avoided to overburden the EDPB, thereby compromising its efficiency. Luxembourg therefore considers it important to limit the scope when the EDPB can be seized.

Luxembourg believes that if no opinion is adopted after the one-month-period referred to in paragraph 7, the draft measure may be adopted.

#### *Article 58*

##### ***Opinion by the European Data Protection Board***

1. Before a **competent** supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board and the Commission **if the coordination mechanism implemented by the competent authority does not allow for a solution to be reached.** *[inspired by IT proposal]*

2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:

- (a) relates to processing activities which are **likely to adversely affect a significant number** of data subjects in several Member States, ~~or to the monitoring of their behaviour;~~ or
- (b) may substantially affect the free movement of personal data within the Union; or
- (c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or
- (d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or
- (e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or
- (f) aims to approve binding corporate rules within the meaning of Article 43.

~~3. Any supervisory authority or the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.~~

[...]

4. In order to ensure correct and consistent application of this Regulation, the Commission may request that any matter shall be dealt with in the consistency mechanism **if the coordination mechanism implemented by the competent authority does not allow for a solution to be reached.**

[...]

7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members or any supervisory authority or the Commission so requests within one week after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. 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 1 and 3, the Commission and the **competent** supervisory authority ~~competent under Article 51 of the opinion~~ and make it public. **If within one month the European Data Protection Board does not adopt an opinion, the supervisory authority may adopt its draft measure.**

8. The supervisory authority referred to in paragraph 1 and the **competent** supervisory authority ~~competent under Article 51~~ shall take account of the opinion of the European Data Protection Board and shall within two weeks after the information on the opinion by the chair of the European Data Protection Board, electronically communicate to the chair of the European Data Protection Board and to the Commission whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.

#### Article 63 – Enforcement

Paragraph 2 is disproportionate according to Luxembourg : the mere fact of not submitting a draft measure to the consistency mechanism does not automatically mean that the draft measure would be in violation with the regulation and should therefore not be legally valid. This seems a rather harsh sanction. If the paragraph cannot be deleted (preferred option), then it should at least be conditioned:

2. Where a supervisory authority does not submit a draft measure to the consistency mechanism in breach of Article 58(1) to (5), **and where there is concrete evidence that the draft measure is likely to result in an inconsistent application or a violation of the regulation,** the measure of the supervisory authority shall not be legally valid and enforceable.

## Article 68 – Procedure

Luxembourg suggests that the rules of procedure of the EDPB be adopted unanimously.

2. The European Data Protection Board shall adopt **by unanimity**, its own rules of procedure and organise its own operational arrangements. In particular, it shall provide for the continuation of exercising duties when a member's term of office expires or a member resigns, for the establishment of subgroups for specific issues or sectors and for its procedures in relation to the consistency mechanism referred to in Article 57.

## NETHERLANDS

### RECITALS TO BE CHANGED OR DELETED

(94) (...)

(97) The competent authority, providing such one-stop shop, should be the supervisory authority of the Member State which has the most obvious links to the activities. Where more than one supervisory authority is competent a lead authority should be designated, if necessary through the consistency mechanism.

(103) Each supervisory authority should have the right to participate in joint operations between supervisory authorities. (...)

(104) In order to ensure the consistent application of this Regulation throughout the Union, a consistency mechanism for co-operation between the supervisory authorities themselves (...) should be established. This mechanism should in particular apply where a supervisory authority intends to take a measure as regards processing operations that are related to the offering of goods or services to data subjects in several Member States, , or to the monitoring such data subjects, or that might substantially affect the free flow of personal data. It should also apply where any supervisory authority (...) equests that the 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.

(106) (...)

(109) At Union level, a European Data Protection Board should be set up. 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 and of the European Data Protection Supervisor. Upon the invitation of the Board, the Commission may participate in its activities, in order to ensure a consistent application of the Regulation. The European Data Protection Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission and promoting co-operation of the supervisory authorities throughout the Union. The European Data Protection Board should act independently when exercising its tasks.

**CHAPTER VI**  
**INDEPENDENT SUPERVISORY AUTHORITIES**  
**SECTION 1**  
**INDEPENDENT STATUS**

*Article 46*

***Supervisory authority***

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application of this Regulation and for contributing to its consistent application throughout the Union, in order to protect the fundamental rights and freedoms of natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the Union. For these purposes, the supervisory authorities shall co-operate with each other and the Commission.
2. Where in a Member State more than one supervisory authority are established, that Member State shall designate the supervisory authority which functions as a single contact point for the effective participation of 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.

*Article 47*

***Independence***

1. The supervisory authority shall act with complete independence in exercising the duties and powers entrusted to it.

2. The members of the supervisory authority shall, in the performance of their duties, neither seek nor take instructions from anybody.
3. Members of the supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.
4. Members of the supervisory authority shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.  
  
(...).<sup>1</sup>
6. Each Member State shall ensure that the supervisory authority has its own staff which shall be appointed by and be subject to the direction of the head of the supervisory authority.
7. Member States shall ensure that the supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that the supervisory authority has an<sup>2</sup> annual budget. The budget shall be made public.

*Article 48*

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

1. Member States shall provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned.
2. The members shall be chosen from persons whose independence is beyond doubt and whose experience and skills required to perform their duties notably in the area of protection of personal data are demonstrated.
3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement (...).

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<sup>1</sup> NL believes budgetary powers to be an area of national competence.

<sup>2</sup> A requirement to separate budgets has constitutional implications in NL.

4. A member may be dismissed (...) by the competent national court, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.
5. (...).

*Article 49*

***Rules on the establishment of the supervisory authority***

Each Member State shall provide by law within the limits of this Regulation:

- (a) the establishment and status of the supervisory authority;
- (b) the qualifications, experience and skills required to perform the duties of the members of the supervisory authority;
- (c) the rules and procedures for the appointment of the members of the supervisory authority, as well the rules on actions or occupations incompatible with the duties of the office;
- (d) the duration of the term of the members of the supervisory authority which shall be no 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;
- (e) whether the members of the supervisory authority shall be eligible for reappointment;
- (f) the regulations and common conditions governing the duties of the members and staff of the supervisory authority;
- (g) the rules and procedures on the termination of the duties of the members of the supervisory authority, including in case that they no longer fulfil the conditions required for the performance of their duties or if they are guilty of serious misconduct.

*Article 50*

***Professional secrecy***

The members and the staff of the supervisory authority shall be subject, both during and after their term of office, to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties.

**SECTION 2  
DUTIES AND POWERS**

*Article 51*

***Competence***

1. Each supervisory authority is competent to supervise all data processing operations on the territory of its own Member State, and where residents of that Member State are affected by other processing operations by a data controller inside or outside the Union, within the scope of this Regulation. In doing so, the supervisory authority shall exercise on the territory of its own Member State the powers conferred on it by this Regulation.<sup>1</sup>
2. (...).
2. The supervisory authority shall not be competent to supervise processing operations of courts acting in their judicial capacity.

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<sup>1</sup> NL supports the ideas brought forward by the WP 29 on competence and the powers of lead authorities.

*Article 52*

***Duties***

1. The supervisory authority shall:

- (a) monitor and ensure the application of this Regulation;
- (b) hear complaints lodged by any data subject, or by an association representing that data subject in accordance with Article 73, investigate, to the extent appropriate, the matter and inform the data subject or the association of the progress and the outcome of the complaint within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;
- (c) share information with and provide mutual assistance to other supervisory authorities and ensure the consistency of application and enforcement of this Regulation;
- (d) conduct investigations either on its own initiative or on the basis of a complaint or on request of another supervisory authority, and inform the data subject concerned, if the data subject has addressed a complaint to this supervisory authority, of the outcome of the investigations within a reasonable period;
- (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) be consulted by Member State 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, in particular in the preparation of a legislative measure to be adopted by the national parliament which defines the nature of the processing or of a measure based on such a legislative measure<sup>1</sup>;
  - (g) authorise and be consulted on the processing operations referred to in Article 34;
  - (h) issue an opinion on the draft codes of conduct pursuant to Article 38(2);
  - (i) approve binding corporate rules pursuant to Article 43;
  - (j) participate in the activities of the European Data Protection Board.
2. Each supervisory authority shall promote the awareness of the public on risks, rules, safeguards and rights in relation to the processing of personal data. Activities addressed specifically to children shall receive specific attention.
  3. The supervisory authority shall, upon request, advise any data subject in exercising the rights under this Regulation and, if appropriate, co-operate with the supervisory authorities in other Member States to this end.
  4. For complaints referred to in point (b) of paragraph 1, the supervisory authority shall provide a complaint submission form, which can be completed electronically, without excluding other means of communication.
  5. The performance of the duties of the supervisory authority shall be free of charge for the data subject.

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<sup>1</sup> Copied from Article 34(7). CZ, ES, MT and LT reservation on this measure, which they considered as an interference with the legislative process. Other delegations (CH, DE, FI, LU, SI) did not have problems with this obligation, which already existed under the data protection Directive 46/95.

6. Where requests are manifestly excessive, in particular due to their repetitive character, the supervisory authority may charge a fee or not take the action requested by the data subject. The supervisory authority shall bear the burden of proving the manifestly excessive character of the request. A fee shall be provided for by Member State law.

*Article 53*

***Powers***

1. Each supervisory authority shall have the power:
- (a) to notify the controller or the processor of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, order the controller or the processor to remedy that breach, in a specific manner, in order to improve the protection of the data subject;
  - (b) to order the controller or the processor to comply with the data subject's requests to exercise the rights provided by this Regulation;
  - (c) to order the controller and the processor, and, where applicable, the representative to provide any information relevant for the performance of its duties;
  - (d) to ensure the compliance with prior authorisations (...) referred to in Article 34;
- (...) <sup>1</sup>;

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<sup>1</sup> Since a warning or admonishment lacks any or any clear legal consequences, there is no urgent need to regulate these instruments.

(f) to order the rectification, erasure or destruction of all data when they have been processed in breach of the provisions of this Regulation and the notification of such actions to third parties to whom the data have been disclosed;

(...) <sup>1</sup>;

(h) to suspend data flows to a recipient in a third country or to an international organisation, if the data flow violates the conditions set out in the Articles 41, 42, 43 or 44;

(i) to issue opinions on any issue related to the protection of personal data;

(j) to inform (...) the government or other political institutions as well as the public on any issue related to the protection of personal data.

2. Each supervisory authority shall have the investigative power to obtain from the controller or the processor or any third party:

(a) access to all personal data and to all information necessary for the performance of its duties;

(b) access to any of its premises, including to any data processing equipment and means, where there are reasonable grounds for presuming that an activity in violation of this Regulation is being carried out there.

3. The powers referred to in paragraphs (1) and (2) shall be exercised in conformity with Union law and Member State law. Union or Member State law must provide for adequate substantial and procedural safeguards for the exercise of those powers<sup>2</sup>.

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<sup>1</sup> A ban on processing interferes with the freedom of expression.

<sup>2</sup> Since the Regulation lacks proper substantial and procedural safeguards Union or Member State law should provide these additional safeguards.

4. Each supervisory authority shall have the power to bring violations of this Regulation to the attention of the judicial authorities and to engage in legal proceedings, in particular pursuant to Article 74(4) and Article 75(2).
5. Each supervisory authority shall have the power to sanction administrative offences, in particular those referred to in Article 79(4), (5) and (6).

*Article 54*

***Activity report***

Each supervisory authority must draw up an annual report on its activities. The report shall be presented to the national parliament and shall be made available to the public, the Commission and the European Data Protection Board.

**CHAPTER VII**

**CO-OPERATION AND CONSISTENCY**

**SECTION 1**

**CO-OPERATION**

*Article 55*

***Mutual assistance***

1. Supervisory authorities shall provide each other 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 prompt information on the opening of cases and ensuing developments where data subjects in several Member States are likely to be affected by processing operations.

2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without undue delay (...) after having received the request. Such measures may include, in particular, the transmission of relevant information on the course of an investigation or enforcement measures to bring about the cessation or prohibition of processing operations contrary to this Regulation.
3. The request for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only in respect of the matter for which it was requested.
4. 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 request; or
  - (b) compliance with the request would be incompatible with the provisions of this Regulation.
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 meet the request by the requesting supervisory authority.
6. Supervisory authorities shall supply the information requested by other supervisory authorities by electronic means and within the shortest possible period of time, using a standardised format.
7. No fee shall be charged for any action taken following a request for mutual assistance.
8. Where a supervisory authority does not act within a reasonable period of time on request of another supervisory authority, the requesting supervisory authorities shall be competent to take a provisional measure 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 procedure referred to in Article 57.

9. The supervisory authority shall specify the period of validity of such provisional measure. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board(...).
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).

*Article 55a*

**Lead Authority**

1. Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union, and the controller or processor is established in more than one Member State, the supervisory authority of the main establishment of the controller or processor shall act as a single point of contact for the controller or processor and ensure coordination with the other supervisory authorities involved.
2. Where it is unclear from the facts of the case or where the competent supervisory authorities do not agree on which supervisory authority shall act as single contact point, the European Data Protection Board shall on request of a competent authority designate a supervisory authority as single contact point.
3. Where the controller is not established in the Union, but residents of different Member States are affected by processing operations within the scope of this Regulation, the European Data Protection Board may designate a supervisory authority which shall act as a single contact point for the controller and ensure coordination with other supervisory authorities involved.

4. Where necessary, the supervisory authority referred to in paragraphs 1, 2 and 3 shall decide in accordance with the consistency mechanism set out in Article 58.<sup>1</sup>

*Article 56*

***Joint operations of supervisory authorities***

1. In order to step up co-operation and mutual assistance, the supervisory authorities shall carry out joint investigative tasks, joint enforcement measures and other joint operations, in which designated members or staff from other Member States' supervisory authorities are involved.
2. In cases where data subjects in several Member States are likely to be affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in the joint investigative tasks or joint operations, as appropriate. The competent lead authority, referred to in Article 55a, shall invite the supervisory authority of each of those Member States to take part in the respective joint investigative tasks or joint operations and respond to the request of a supervisory authority to participate in the operations without undue delay.
3. Each supervisory authority may, as a host supervisory authority, in compliance with its own national law, and with the seconding supervisory authority's authorisation, confer executive powers, including investigative tasks on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the host supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their executive powers in accordance with the seconding supervisory authority's law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of members or staff from the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. The host supervisory authority shall assume responsibility for their actions.

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<sup>1</sup> NL supports the proposal made by the WP 29 on lead authorities.

4. Supervisory authorities shall lay down the practical aspects of specific co-operation actions.
5. Where a supervisory authority does not comply within a reasonable period of time with the obligation laid down in paragraph 2, the other supervisory authorities shall be competent to take 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. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board (...) and shall submit the matter in the mechanism referred to in Article 57.

## **SECTION 2**

### **CONSISTENCY<sup>1</sup>**

#### *Article 57*

#### ***Consistency mechanism***

For the purposes set out in Article 46(1), the supervisory authorities shall co-operate with each other (...) through the consistency mechanism as set out in this section.

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<sup>1</sup> NL believes that complete independence of DPA's working by itself or in cooperation with other DPA's calls for a redesign of the relations between the consistency mechanism and the powers of the Commission under the Treaties. Complete independence implies an independent working of the CM. However, the EDPB should allow itself to establish close working relations with the Commission in order to achieve consistency in the application of the Regulation.

*Article 58*

***Opinion by the European Data Protection Board***

1. Before a supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board (...).
2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:
  - (a) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour; or
  - (b) may substantially affect the free movement of personal data within the Union; or
  - (c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or
  - (d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or
  - (e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or
  - (f) aims to approve binding corporate rules within the meaning of Article 43.
3. Any supervisory authority or the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.

4. In order to ensure correct and consistent application of this Regulation, the European Data Protection Board and the Commission shall at regular intervals conduct contact meetings.
5. Supervisory authorities (...) shall electronically communicate any relevant information, including as the case may be a summary of the facts, the draft measure, and the grounds which make the enactment of such measure necessary, using a standardised format.
6. The chair of the European Data Protection Board shall immediately electronically inform the members of the European Data Protection Board (...) of any relevant information which has been communicated to it, using a standardised format. The chair of the European Data Protection Board shall provide translations of relevant information, where necessary.
7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members or any supervisory authority (...) within one week after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. 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 1 and 3, (...) and the supervisory authority competent under Article 51 of the opinion and make it public.
8. The supervisory authority referred to in paragraph 1 and the supervisory authority competent under Article 51 shall take account of the opinion of the European Data Protection Board and shall within two weeks after the information on the opinion by the chair of the European Data Protection Board, electronically communicate to the chair of the European Data Protection Board (...) whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.

*Article 59*

***Opinion by the Commission***

(...)

*Article 61*

***Urgency procedure***

1. In exceptional circumstances, where a supervisory authority considers that there is an urgent need to act in order to protect the interests of data subjects, in particular when the danger exists that the enforcement of a right of a data subject could be considerably impeded by means of an alteration of the existing state or for averting major disadvantages or for other reasons, by way of derogation from the procedure referred to in Article 58, it may immediately adopt provisional measures with a specified period of validity. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board (...).
2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion of the European Data Protection Board, giving reasons for requesting such opinion, including for the urgency of final measures.
3. Any supervisory authority may request an urgent opinion where the competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the interests of data subjects, giving reasons for requesting such opinion, including for the urgent need to act.
4. By derogation from Article 58(7), an urgent opinion referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the European Data Protection Board.

*Article 62*  
***Implementing acts***

(...)

*Article 63*  
***Enforcement***

1. For the purposes of this Regulation, an enforceable measure of the supervisory authority of one Member State shall be enforced in all Member States concerned. Member State law shall provide for the enforceability of such measures in their domestic legal system.
2. Where a supervisory authority does not submit a draft measure to the consistency mechanism in breach of Article 58(1) to (5), the measure of the supervisory authority shall not be legally valid and enforceable.

**SECTION 3**  
**EUROPEAN DATA PROTECTION BOARD**

*Article 64*  
***European Data Protection Board***

1. A European Data Protection Board is hereby set up.
2. The European Data Protection Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement in accordance with Member State law, referred to in Chapter VI, Section 1, of this Regulation.

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. Upon invitation of the Board the Commission shall have the right to participate in the activities and meetings of the European Data Protection Board and shall designate a representative. The chair of the European Data Protection Board shall, (...) inform the Commission on all activities of the European Data Protection Board.

#### *Article 65*

#### ***Independence***

1. The European Data Protection Board shall act independently when exercising its tasks pursuant to Articles 66 and 67.
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, neither seek nor take instructions from anybody.

#### *Article 66*

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

1. The European Data Protection Board shall ensure 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:
  - (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 and any proposed delegated or implementing act referred to in Article 86;

- (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 addressed to the supervisory authorities in order to encourage consistent application of this Regulation;
- (c) review the practical application of the guidelines, recommendations and best practices referred to in point (b) and inform the Commission on these;
- (d) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in 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.

(...)

2. Prior to the adoption of the guidelines, recommendations and best practices on the application of the Regulation, referred to in paragraph 1(b), the European Data Protection Board shall conduct public stakeholder meetings in which the Board shall seek the advice and opinions of representatives of interested data controllers, processors and data subjects. Guidelines, recommendations and best practices shall set out the underlying reasoning.<sup>1</sup>

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<sup>1</sup> In order to achieve more solid ground for the proper application of the Regulation, the EDPB should allow itself to establish more contacts with representatives of data controllers, processors, data subjects and other interested parties.

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.
4. The Commission shall inform the European Data Protection Board of the action it has taken following the opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.

#### *Article 67*

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

1. The European Data Protection Board shall(...) draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Union and in third countries.

The report shall include the review of the practical application of the guidelines, recommendations and best practices referred to in point (c) of Article 66(1).

2. The report shall be made public and transmitted to the European Parliament, the Council and the Commission.

#### *Article 68*

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

1. The European Data Protection Board shall take decisions by a simple majority of its members.
2. The European Data Protection Board shall adopt its own rules of procedure and organise its own operational arrangements. In particular, it shall provide for the continuation of exercising duties when a member's term of office expires or a member resigns, for the establishment of subgroups for specific issues or sectors and for its procedures in relation to the consistency mechanism referred to in Article 57.

*Article 69*

***Chair***

1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members. (...)
2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable for one other consecutive term of five years.

*Article 70*

***Tasks of the chair***

1. The chair shall have the following tasks:
  - (a) to convene the meetings of the European Data Protection Board and prepare its agenda;
  - (b) to ensure the timely fulfilment 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.

*Article 71*

***Secretariat***

1. The European Data Protection Board shall have a secretariat. The European Data Protection Supervisor shall provide that secretariat.
2. The secretariat shall provide analytical, administrative and logistical support to the European Data Protection Board under the direction of the chair.

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 and other texts adopted by the European Data Protection Board.

*Article 72*

***Confidentiality***

1. The discussions of the European Data Protection Board shall be confidential.
2. Documents submitted to members of the European Data Protection Board, experts and representatives of third parties shall be confidential, unless access is granted to those documents in accordance with Regulation (EC) No 1049/2001 or the European Data Protection Board otherwise makes them public.
3. The members of the European Data Protection Board, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article. The chair shall ensure that experts and representatives of third parties are made aware of the confidentiality requirements imposed upon them.

## **PORTUGAL**

### **Article 46 - Supervisory authority**

In the Portuguese version of the proposal of Regulation, instead of referring to article 91, refers to article 92 (article 46 (3)).

### **Article 47 - Independence**

Portugal believes that there may be some inconsistency between paragraph 3 of this Article, which determines that the members of the supervisory authority may not perform any professional activity whether paid or unpaid, with Article 49. (Rules on the establishment of the supervisory authority ), pursuant to which each Member State shall establish by law, within the limits of this Regulation, the "rules relating on actions or occupations incompatible with the duties of the office" [c)]. It is assumed that the first regards those members who already hold positions and the second aims ineligibilities.

In general the rules / requirements applied to the supervisory authorities have a great parallel with the system of the independent administrative authorities.

### **Article 48 – General conditions for the members of supervisory authority**

We propose the following wording for paragraph 1:

"The members of the supervisory authorities are designated by the organs of sovereignty in accordance with the Constitution and the legal traditions of each Member State."

With regard to paragraph 4, it should compete to the law of each Member State to determine the aspects listed there.

## **Article 64 - European Data Protection Board**

It should be considered the inclusion of a reference regarding the (possible) collaboration of the European Data Protection Board with ENISA, given their role in the security of networks and information.

## **Article 66 – Tasks of the European Data Protection Board**

With regard to paragraph 2, it is not acceptable that the Commission may impose to the European Data Protection Board, which is an independent body, deadlines for reply. It is clear that the Commission must point out the urgent consideration of a given subject. It may even mark the deadline for the desirable response. What is not acceptable is that it can impose deadlines to an independent body.

The only deadlines that really count, imposing themselves on all bodies, are those resulting directly from the law. Thus, we propose the following wording:

“Whenever the Commission request to the European Data Protection Board an advice with an urgent nature, such nature shall be communicated, and a time limit be requested. The European Data Protection Board must take into account the urgent nature of a request for advice.”

## **Article 71 - Secretariat**

With regard to paragraph 1, it would be preferable that the European Data Protection Board could have its own secretariat, taking into account its independence and the different nature and specific features of the European Data Protection Supervisor.

## FINLAND

The FI delegation welcomes the opportunity to submit written comments on Chapters VI and VII. The remarks made in this contribution are subject to further comments and scrutiny reservation. Many of the issues addressed in these chapters need to be further and more detailed analysed before more final comments and suggestions can be made.

### Chapter VI

#### Article 47

##### General remarks

FI is of the opinion that this Article is too detailed. Paragraphs 3 and 4 should be moved to the recitals.

#### Article 48

##### General remarks

Also this Article contains very detailed provisions. Paragraphs 3 and 4 should be deleted or redrafted.

#### Article 49

##### General Remarks

FI considers, that also this Article contains an unnecessary degree of detailed provisions, for example (f) and (g), that should be deleted. We would also welcome a clarification on what is meant by “within the limits of this Regulation”.

## Article 51

### General Remarks

The functionality of the mechanism proposed in 51(2) needs clarifying. The starting point has to be that there is one main answerable competent data protection authority in every cases. It is important that the criteria of the competent authority are clearly defined in the Regulation in order to avoid confusions of the interpretation of this provision. One significant question is the competence of this data protection authority in the territory of another member state.

## **Chapter VII**

### Articles 55 and 56

#### General remarks

Articles 55 and 56 should be further clarified. Also some details of the said Articles ought to be considered, such as the time limits given in the Articles. Furthermore, FI is not convinced that the co-operation between supervisory authorities prior to consistency mechanism should be regulated in such detail.

General remarks

FI is in favour of strengthening the co-operation between European data protection supervisory authorities by setting procedural framework for such co-operation. However, FI finds it of utmost importance that such mechanism will function also in practise. This is why FI underlines the necessity to carefully consider the criteria for the cases brought to the consistency mechanism. Unless this is thoroughly considered there appears to be a risk of the mechanism getting congested.

The first intent in paragraph 2 should be further specified by adding a substantive requirement. Besides the fact that the data processing activities are taking place in several member states, the matter should also be significant with the view of ensuring the consistent and coherent application of the Regulation. Such a substantive criteria would exclude some minor cases from the scope of this Article. Furthermore, the possibility to refer any case to the consistency mechanism in paragraphs 3 and 4 is rather excessive. Further criteria for this should be defined. Such criteria could for instance be similar to those listed in paragraph 2. There are some initial proposals how such criteria could be further specified below in Article 58.

As for some more detailed remarks, it seems unnecessary to refer to the European Data Protection Board in Article 58(3) when any supervisory authority may request that a matter is dealt with in the consistency mechanism. Furthermore, it seems appropriate to allow European Data Protection Supervisor to refer cases to the consistency mechanism as well. This is the case in particular if the institutions will fall within the scope of Data Protection Regulation.

In Article 58(5) it should be specified to whom supervisory authorities and Commission should communicate the relevant information.

Furthermore, the given time limit in point 7 seems a little too optimistic. It would be more realistic to set the time limit for 2 or 3 weeks.

## Article 57

### ***Consistency mechanism***

For the purposes set out in Article 46(1), the supervisory authorities shall co-operate with each other and the Commission through the consistency mechanism as set out in this section.

## Article 58

### ***Opinion by the European Data Protection Board***

1. Before a supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board and the Commission.
2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:
  - (a) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour and the matter is significant for ensuring correct and consistent application of this Regulation; or
  - (b) may substantially affect the free movement of personal data within the Union;or
  - (c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or
  - (d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or
  - (e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or
  - (f) aims to approve binding corporate rules within the meaning of Article 43.
3. Any supervisory authority or European Data Protection Supervisor (...) may request that (...) a matter shall be dealt with in the consistency mechanism, (...) where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.

4. In order to ensure correct and consistent application of this Regulation, the Commission may request that (...) shall be dealt with in the consistency mechanism.
5. Supervisory authorities and the Commission shall electronically communicate any relevant information to the European Data Protection Board, including as the case may be a summary of the facts, the draft measure, and the grounds which make the enactment of such measure necessary, using a standardised format.
6. The chair of the European Data Protection Board shall immediately 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 chair of the European Data Protection Board shall provide translations of relevant information, where necessary.
7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members or any supervisory authority or the Commission so requests within 2-3 weeks (...) after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. 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 1 and 3, the Commission and the supervisory authority competent under Article 51 of the opinion and make it public.
8. The supervisory authority referred to in paragraph 1 and the supervisory authority competent under Article 51 shall take account of the opinion of the European Data Protection Board and shall within two weeks after the information on the opinion by the chair of the European Data Protection Board, electronically communicate to the chair of the European Data Protection Board and to the Commission whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.

### Articles 59, 60 and 62

#### General remarks

It should be clarified whether Commission can adopt an opinion pursuant to Article 59, which is in contradiction with European Data Protection Board's opinion and eventually suspense national data protection authority's draft measure based on Article 60 accordingly.

While FI sees that Commission's contribution in consistency mechanism is valuable, FI is not convinced that the right balance is found in Articles 59, 60 and 62. FI is of the view that the whole content of the above Articles should still be addressed in more detail. For example, the question whether the given framework provides sufficient means to appeal the decisions taken based on Article 62 should be further addressed.

### Articles 64 – 71; European Data Protection Board

#### General remarks

Further comments on European Data Protection Board can be made once the content of the consistency mechanism will become clearer. FI considers it important to create a well-functioning framework for the cooperation between the independent national supervisory authorities.

### Article 72

#### General remarks

Public access to documents should be the basis of this Article and simple reference clause to Regulation 1049/2001 could be inserted. The access to document can be denied based on Regulation 1049/2001 if disclosure of the information would endanger some of the interests protected by the exemptions laid down in Article 4 of the Regulation. In case the functioning of the European Data Protection Board contains such functions which are not covered by these exemptions, this is an issue which should be addressed separately. Generally, the exemptions laid down in Regulation 1049/2001 cover a wide range of activities and should suffice as such to protect the different interests in this case as well.

## SWEDEN

### Introduction

The Presidency has invited delegations to send in proposals for amendments or comments regarding Chapters VI and VII of the General Data Protection Regulation. Sweden welcomes the Presidency's initiative and presents in this paper some comments and proposals for amendments, in addition to those already put forward at the meetings of the working party.

We would like to underline that the comments and proposals are preliminary and that we maintain a general scrutiny reservation and a reservation regarding the legal form of the instrument. We may provide new comments and suggestions when the working party revisits these articles.

***Bold italics*** indicate proposed new text.

**~~Strikethrough~~** indicates proposed deletions.

**[Bold in brackets]** indicates provisions that need further consideration.

[...]

### Article 47

1. The supervisory authority shall act with complete independence in exercising the duties and powers entrusted to it.
2. The ***head and if relevant the*** members of the supervisory authority shall, in the performance of their duties, neither seek nor take instructions from anybody.

<p><b>Comment:</b> It should be clarified that Member States may decide whether the DPA shall be managed by a director or by a board of members (or a combination of both). Corresponding changes should be made throughout this Chapter.</p>
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- ~~3. **Members of the supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.**~~

- ~~4. Members of the supervisory authority shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.~~

**Comment:** These provisions should be deleted or moved to the recitals.

5. Each Member State shall ensure that the supervisory authority is provided with the adequate human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.
6. Each Member State shall ensure that the supervisory authority has its own staff which shall be appointed by and be subject to the direction of the head of the supervisory authority.
7. Member States shall ensure that the supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that the supervisory authority has separate annual budgets. The budgets shall be made public.

#### Article 48

1. Member States shall provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned.
2. The members shall be chosen from persons whose independence is beyond doubt and whose experience and skills required to perform their duties notably in the area of protection of personal data are demonstrated.
- ~~3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement in accordance with paragraph 5.~~
- ~~4. A member may be dismissed or deprived of the right to a pension or other benefits in its stead by the competent national court, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.~~

~~5. Where the term of office expires or the member resigns, the member shall continue to exercise the duties until a new member is appointed.~~

**Comment:** These provisions contain an unnecessary degree of detail and may come into conflict with national labour law. They should, therefore, be deleted or substantially redrafted.

#### Article 49

Each Member State shall provide by law within the limits of this Regulation:

- (a) the establishment and status of the supervisory authority;
- ~~(b) the qualifications, experience and skills required to perform the duties of the members of the supervisory authority;~~
- ~~(c) the rules and procedures for the appointment of the members of the supervisory authority, as well the rules on actions or occupations incompatible with the duties of the office;~~

**Comment:** These provisions contain an unnecessary degree of detail and should be deleted or substantially redrafted.

- (d) the duration of the term of the members of the supervisory authority which shall be no 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;
- (e) whether the members of the supervisory authority shall be eligible for reappointment;
- ~~(f) the regulations and common conditions governing the duties of the members and staff of the supervisory authority;~~

~~(g) the rules and procedures on the termination of the duties of the members of the supervisory authority, including in case that they no longer fulfil the conditions required for the performance of their duties or if they are guilty of serious misconduct.~~

**Comment:** These provisions contain an unnecessary degree of detail and may come into conflict with national labour law. They should, therefore, be deleted or substantially redrafted.

[...]

### Article 51

1. Each supervisory authority shall exercise, on the territory of its own Member State, the powers conferred on it in accordance with this Regulation.
2. **[Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union, and the controller or processor is established in more than one Member State, the supervisory authority of the main establishment of the controller or processor shall be competent for the supervision of the processing activities of the controller or the processor in all Member States, without prejudice to the provisions of Chapter VII of this Regulation.]**

**Comment:** Sweden shares the Commission's ambition to reduce administrative burdens for companies by providing a single contact point in relation to the DPAs. However, there is a need for an in-depth analysis as regards article 51.2. We therefore welcome the Presidency's intention to discuss this issue at the 27 March DAPIX meeting.

3. The supervisory authority shall not be competent to supervise processing operations of courts acting in their judicial capacity.

[...]

#### Article 54

Each supervisory authority must draw up an annual report on its activities. The report shall be presented to the national parliament *and the national government* and shall be made available to the public, the Commission and the European Data Protection Board.

**Comment:** In order to take account of differences in constitutional and administrative traditions the report should also be presented to the national government. This would be in line with art. 48.1.

#### Article 55

- 1. Supervisory authorities shall provide each other 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 prompt information on the opening of cases and ensuing developments where data subjects in several Member States are likely to be affected by processing operations.**
- 2. Each supervisory authority shall take all appropriate measures required to reply to the request of another supervisory authority without delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the course of an investigation or enforcement measures to bring about the cessation or prohibition of processing operations contrary to this Regulation.**
- 3. The request for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only in respect of the matter for which it was requested.**

4. **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 request; or**
  - (b) **compliance with the request would be incompatible with the provisions of this Regulation.]**

**Comment:** The scope of the obligation to carry out supervisory measures at the request of DPAs in other Member States needs to be analysed further. It is for example not evident that it should be possible for a DPA in one Member State to force a DPA in another to carry out a prior authorisation or consultation. It also needs to be discussed whether the grounds for refusal in article 55.4 are sufficient.

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 meet the request by the requesting supervisory authority.
6. Supervisory authorities shall supply the information requested by other supervisory authorities by electronic means and within the shortest possible period of time, using a standardised format.
7. No fee shall be charged for any action taken following a request for mutual assistance.
8. Where a supervisory authority does not ***act provide information in accordance with paragraph 5*** within one month on request of another supervisory authority, the requesting supervisory authorities shall be competent to take a provisional measure 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 procedure referred to in Article 57.

**Comment:** At DAPIX 9-10 January 2013 the Commission explained – to our understanding – that the time limit set out in paragraph 8 regards information and not supervisory measures. The drafting suggestions aim at clarifying this.

9. The supervisory authority shall specify the period of validity of such provisional measure. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board and to the Commission.
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).

### **Article 56**

1. In order to step up co-operation and mutual assistance, the supervisory authorities shall carry out joint investigative tasks, joint enforcement measures and other joint operations, in which designated members or staff from other Member States' supervisory authorities are involved.
2. **[In cases where data subjects in several Member States are likely to be affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in the joint investigative tasks or joint operations, as appropriate. The competent supervisory authority shall invite the supervisory authority of each of those Member States to take part in the respective joint investigative tasks or joint operations and respond to the request of a supervisory authority to participate in the operations without delay.]**

<p><b>Comment:</b> It is necessary to limit the obligation to invite DPAs from other Member States in order not to overburden the host DPA and to avoid delaying the supervisory measures. The suggested criteria appear to cover a vast number of cases.</p>
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3. Each supervisory authority may, as a host supervisory authority, in compliance with its own national law, and with the seconding supervisory authority's authorisation, confer executive powers, including investigative tasks on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the host supervisory authority's law permits, allow the seconding supervisory authority's members or staff to exercise their executive powers in accordance with the seconding supervisory authority's law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of members or staff from the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the host supervisory authority's national law. The host supervisory authority shall assume responsibility for their actions.
4. Supervisory authorities shall lay down the practical aspects of specific co-operation actions.
5. Where a supervisory authority does not comply within one month with the obligation laid down in paragraph 2, the other supervisory authorities shall be competent to take 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. This period shall not exceed three months. The supervisory authority shall, without delay, communicate those measures, with full reasons, to the European Data Protection Board and to the Commission and shall submit the matter in the mechanism referred to in Article 57.

[...]

#### **Article 58**

1. Before a supervisory authority adopts a measure referred to in paragraph 2, this supervisory authority shall communicate the draft measure to the European Data Protection Board and the Commission.

2. The obligation set out in paragraph 1 shall apply to a measure intended to produce legal effects and which:

**[(a) relates to processing activities which are related to the offering of goods or services to data subjects in several Member States, or to the monitoring of their behaviour; or]**

**Comment:** It is essential to reserve the consistency mechanism for issues of substantial importance for the internal market. Otherwise, the mechanism will be overloaded. Art 58.1 (a) seems to cover too many cases.

- (b) may substantially affect the free movement of personal data within the Union; or
- (c) aims at adopting a list of the processing operations subject to prior consultation pursuant to Article 34(5); or
- (d) aims to determine standard data protection clauses referred to in point (c) of Article 42(2); or
- (e) aims to authorise contractual clauses referred to in point (d) of Article 42(2); or
- (f) aims to approve binding corporate rules within the meaning of Article 43.

3. **[Any supervisory authority or]** the European Data Protection Board may request that any matter shall be dealt with in the consistency mechanism, in particular where a supervisory authority does not submit a draft measure referred to in paragraph 2 or does not comply with the obligations for mutual assistance in accordance with Article 55 or for joint operations in accordance with Article 56.

**Comment:** As stated above, it is essential to limit the number of cases referred to the consistency mechanism for cases with substantial implications for the internal market. It should therefore be considered to limit the possibility to refer matters to the mechanism to DPAs with a substantial interest in the matter and the Commission.

4. In order to ensure correct and consistent application of this Regulation, the Commission may request that any matter shall be dealt with in the consistency mechanism.
5. Supervisory authorities and the Commission shall electronically communicate any relevant information, including as the case may be a summary of the facts, the draft measure, and the grounds which make the enactment of such measure necessary, using a standardised format.
6. The chair of the European Data Protection Board shall immediately 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 chair of the European Data Protection Board shall provide translations of relevant information, where necessary.
7. The European Data Protection Board shall issue an opinion on the matter, if the European Data Protection Board so decides by simple majority of its members or any supervisory authority or the Commission so requests within one week after the relevant information has been provided according to paragraph 5. The opinion shall be adopted within one month by simple majority of the members of the European Data Protection Board. 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 1 and 3, the Commission and the supervisory authority competent under Article 51 of the opinion and make it public.
8. The supervisory authority referred to in paragraph 1 and the supervisory authority competent under Article 51 shall take account of the opinion of the European Data Protection Board and shall within two weeks after the information on the opinion by the chair of the European Data Protection Board, electronically communicate to the chair of the European Data Protection Board and to the Commission whether it maintains or amends its draft measure and, if any, the amended draft measure, using a standardised format.

## Article 59

- [1. Within ten weeks after a matter has been raised under Article 58, or at the latest within six weeks in the case of Article 61, the Commission may adopt, in order to ensure correct and consistent application of this Regulation, an opinion in relation to matters raised pursuant to Articles 58 or 61.**
- 2. Where the Commission has adopted an opinion in accordance with paragraph 1, the supervisory authority concerned shall take utmost account of the Commission's opinion and inform the Commission and the European Data Protection Board whether it intends to maintain or amend its draft measure.**
- 3. During the period referred to in paragraph 1, the draft measure shall not be adopted by the supervisory authority.**
- 4. Where the supervisory authority concerned intends not to follow the opinion of the Commission, it shall inform the Commission and the European Data Protection Board thereof within the period referred to in paragraph 1 and provide a justification. In this case the draft measure shall not be adopted for one further month.**

## Article 60

- 1. Within one month after the communication referred to in Article 59(4), and where the Commission has serious doubts as to whether the draft measure would ensure the correct application of this Regulation or would otherwise result in its inconsistent application, the Commission may adopt a reasoned decision requiring the supervisory authority to suspend the adoption of the draft measure, taking into account the opinion issued by the European Data Protection Board pursuant to Article 58(7) or Article 61(2), where it appears necessary in order to:**
  - (a) reconcile the diverging positions of the supervisory authority and the European Data Protection Board, if this still appears to be possible; or**
  - (b) adopt a measure pursuant to point (a) of Article 62(1).**

2. **The Commission shall specify the duration of the suspension which shall not exceed 12 months.**
3. **During the period referred to in paragraph 2, the supervisory authority may not adopt the draft measure. ]**

**Comment:** *Non-binding* opinions by the EDPB could be a useful tool to ensure consistent application of the Regulation. Further, it appears appropriate that the Commission participates in the work of the EDPB as foreseen in art. 64.4, in order to ensure that the internal market aspect is properly taken into account. However, the Commission's powers according to art. 59-60 are difficult to reconcile with the independence of national DPAs and the EDPB. Further, it is essential that the interpretation of the Regulation is ultimately decided in courts of law after proceedings in accordance with art. 47 of the Charter and art. 6 ECHR. Consistent application by the courts will be ensured by preliminary rulings from the ECJ as foreseen by the treaties.

[...]

## Article 62

1. The Commission may adopt implementing acts for:
  - ~~(a) deciding on the correct application of this Regulation in accordance with its objectives and requirements in relation to matters communicated by supervisory authorities pursuant to Article 58 or 61, concerning a matter in relation to which a reasoned decision has been adopted pursuant to Article 60(1), or concerning a matter in relation to which a supervisory authority does not submit a draft measure and that supervisory authority has indicated that it does not intend to follow the opinion of the Commission adopted pursuant to Article 59;~~
  - (b) deciding, within the period referred to in Article 59(1), whether it declares draft standard data protection clauses referred to in point (d) of Article 58(2), as having general validity;

- (c) specifying the format and procedures for the application of the consistency mechanism referred to in this section;
- (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 58(5), (6) and (8).

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

~~2. On duly justified imperative grounds of urgency relating to the interests of data subjects in the cases referred to in point (a) of paragraph 1, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 87(3). Those acts shall remain in force for a period not exceeding 12 months.~~

3. The absence or adoption of a measure under this Section does not prejudice any other measure by the Commission under the Treaties.

**Comment:** The correct application and interpretation of the Regulation, especially as regards individual cases handled by national DPAs, should be determined by national courts and the ECJ and not through implementing acts.

### Article 63

**[1. For the purposes of this Regulation, an enforceable measure of the supervisory authority of one Member State shall be enforced in all Member States concerned.]**

**Comment:** Measures, which shall be enforceable in other Member States should be clearly specified in this provision. Further, it should be considered whether grounds for refusal of enforcement are necessary.

2. ~~Where a supervisory authority does not submit a draft measure to the consistency mechanism in breach of Article 58(1) to (5), the measure of the supervisory authority shall not be legally valid and enforceable.~~

**Comment:** This provision would create legal uncertainty for data subjects and controllers as they would not be able to rely on the validity of decisions taken by national DPAs. Further, the proposal would create an incentive to over-use the consistency mechanism in order to avoid the risk of legal invalidity.

[...]

### Article 69

1. The European Data Protection Board shall elect a chair and two deputy chairpersons from amongst its members. ~~One deputy chairperson shall be the European Data Protection Supervisor, unless he or she has been elected chair.~~
2. The term of office of the chair and of the deputy chairpersons shall be five years and be renewable.

**Comment:** Both positions as vice chair should be open for election.

[...]

### Article 72

1. The discussions 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 confidential, unless access is granted to those documents in accordance with~~ shall be governed by Regulation (EC) No 1049/2001 ~~or the European Data Protection Board otherwise makes them public.~~

**Comment:** There is no reason to deviate from the rules of regulation 1049/2001.

3. The members of the European Data Protection Board, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out in this Article. The chair shall ensure that experts and representatives of third parties are made aware of the confidentiality requirements imposed upon them.

## UNITED KINGDOM

### Article 46: Supervisory Authority

#### General Comments

We strongly support the principle of the independence of national supervisory authorities and resist, unequivocally, any attempts to dilute their independent decision-making powers. In this regard, we consider that the Commission must recognise the independence of national supervisory authorities. Independence, by definition cannot be partial and the power of the Commission in the proposals to essentially overturn the decision of a supervisory authority risk undermining this principle, which is a cornerstone of data protection legislation.

#### Detailed Comments

46(1) – We don't understand what a duty to co-operate entails and what would happen if the Commission considered that a supervisory authority was not co-operating. This has the potential to undermine the supervisory authority's independence. The duty imposed on supervisory authorities to cooperate with one another is superfluous. The relationship between supervisory authorities is dealt with under Article 55. We think it is confusing to mention this here too.

4(2) The drafting here is very unclear. On the one hand this paragraph appears to set out the administrative system for allowing supervisory authorities to participate in the EDPB. On the other hand there is a rather opaque duty on the Member State to set out the mechanism "to ensure compliance by the other authorities with the rules relating to the consistency mechanism". It is not clear whether such compliance should be achieved through the designated (presumably lead) supervisory authority or through some other mechanism. But more importantly it is not clear how ensuring compliance is compatible with independence. Is the "lead" supervisory authority meant to police the other authorities? We have concerns about this.

## Article 47: Independence

We agree with the reference that “the supervisory authority shall, in the performance of their duties, neither seek nor take instructions from anybody. However, this should include the Commission on the grounds of the points previously raised. It is not clear how this principle is compatible with the consistency mechanism.

It is unclear whether the reference to ‘members’ is meant to mean the head of the supervisory authority or includes other staff employed to discharge the functions of the supervisory authority. There seems to be inconsistent and confusing use of this terminology throughout this Chapter. We note that **members** of the supervisory authority must be appointed by the Parliament or Government of the Member State concerned (see 48(1)) but at Article 50 for example talks about **members and staff**. Is there a difference between a member of a supervisory authority and staff? There is also mention of the “head of the supervisory authority” (see Article 47(6)).

We think that paragraphs 3 and 4 encroach on the area of employment law. Further, the requirement of independence is sufficient to capture the idea that the supervisory authority should not behave in a way which gives rise to conflicts of interest. This can all be dealt with in far greater detail in national law or possibly in the relevant employee’s contract of employment. This is another example of over-legislating.

We support the principle of maintaining a properly resourced independent Data Protection Authority: However we are very concerned about the impact that this Regulation general will have on supervisory authorities.

This is because there will be new and additional burdens in order to deal with;

- An expected significant increase in data breach notifications
- pre-approval of contracts and binding corporate rules for third country transfers
- increased use of administrative sanctions as there is less discretion for supervisory authorities to specify a proportionate resolutions and remedies
- increased support for data controllers as they attempt to come to grips with this unwieldy Regulation
- the increased demands of participating in the proposed consistency mechanism.

#### Article 48: General conditions for the members of the supervisory authority

Paragraph 1 is problematic from our perspective because in the UK it is the Queen who appoints the Supervisory Authority (referred to domestically as the Information Commissioner) on advice from the Prime Minister. We consider that Member States should be able to legislate to appoint the supervisory authority in a manner which is compatible with Member State practice. This is not an area which requires harmonisation.

It is not clear whether Member States are required to legislate to transpose Article 48 in national law. The need for national legislation is suggested at paragraph 1 but none of the other paragraphs. We consider that the content of Article 48 should properly be set out in Member State legislation.

There is some overlap between Articles 48 and 49 (see for example Article 48(2) and 49(b) on the experience and skills of the members of the supervisory authority), which may mean that the two should be amalgamated.

We question the requirement under Article 48(2) that the Members shall be chosen from persons “whose experience and skills required to perform their duties notably in the area of protection of personal data are demonstrated.” The Information Commissioner considers that those without previous experience in data protection law can be invaluable in providing a fresh perspective and it is unnecessary to preclude this possibility.

#### Article 49: Rules on establishment of the supervisory authority

The concept of “within the limits of this Regulation” is not clear.

#### Article 50: Professional secrecy

We consider that Member States should be able to set out how the duty of professional secrecy should operate in national law. As it stands, the drafting here is far too absolute. Confidentiality is not an absolute concept. There may be valid reasons why it should not apply, such as where disclosure is needed for court proceedings or in the public interest. The obligation of professional secrecy as currently drafted could seriously impede legitimate processing from taking place.

## Article 51: Competence

The principle at 51(1) makes sense, but it appears to be contradicted in several places in this Chapter.

We do not understand how the system set out in Article 51(2) will work. Our strong impression when this was explained in the working group was that it contained serious flaws. We think that it is a good idea to have a lead authority where there is an investigation spanning several Member States, but this should be an **administrative matter** only.

There is insufficient clarity in the current definition of 'main establishment'. Firstly, it is not clear who makes the decision as to which is the main establishment. There is no procedure outlined to decide in cases of disagreement. In a situation where two or more supervisory authorities each claim that they are leading, there is no means provided to reconcile the situation. This could lead to disputes.

There could also be disagreements between supervisory authorities and controllers. For example, if an organisation has a controller based in both France and Germany and a processor based in both the UK and Ireland, where would the main establishment be? Under Article 4(13), the main establishment for the controller would be where the main decisions as to the purposes, [conditions] and means of processing of personal data are taken. The main establishment for the processor would be the place of its central administration. It is not clear from Article 4(13), however, which would take precedence as the overall main establishment; controllers and processors are given equal weight in the definition. If there is to be a definition of main establishment it should be centred on the controllers since they are the ones that make the decisions. We actually have a broader concern that the Regulation generally gives equal weight to obligations on controllers and processors. For example, where the controller is located outside the EU, the main establishment is where the processor is located. We do not see the purpose in placing so many requirements on processors when they are only acting under the direction of a controller who determines the purposes, means and conditions of processing.

There appears to be some inconsistency in the relationship between the definition of 'main establishment' as set out in Article 4(13) and the text in Recital 27. Article 4(13) suggests that a controller can be responsible for the processing of personal data in the EU even if no control is exercised over that processing. Recital 27 appears to sit in contradiction. This Recital indicates that there must be some management control of the processing made at the establishment in order for it to be a "main establishment".

It is not clear what "competent" in Article 52(2) actually means. Would the main supervisory authority be able to exercise all the powers set out at Article 53 in other jurisdictions? Article 56(3) seems to suggest otherwise. It states that executive powers can be conferred, including for joint investigations, but only "in so far as the host supervisory authority's law permits". So the instrument seems to accept that supervisory authorities cannot have powers in a jurisdiction where they have not been given them in national law. It is therefore far from clear that they can properly supervise processing taking place outside their own jurisdiction.

By contrast, the fact that the "main establishment" is in another jurisdiction does not necessarily absolve a supervisory from exercising its powers in relation to processing taking place in its jurisdiction. For example if my main establishment is in the UK but there is a complaint about my processing in France nothing in the Regulation appears to preclude the French Supervisory authority from regulating that processing. Indeed a failure to act would open the supervisory authority up to a complaint being made against it Article 73(1) or alternatively proceedings could be brought against the supervisory authority under Article 74(1).

An inadvertent consequence of the "one stop shop" is a certain lack of accountability on the part of the supervisory authority. Article 48(1) gives powers to the national parliament or government of a Member state to appoint, and by implication remove, a supervisory authority. However, national governments would have no powers to hold accountable a supervisory authority from another Member State.

Further, the “one stop shop” undoubtedly makes the system far less transparent for data subjects: it benefits only business, but arguably to a less significant degree than one might think: firstly it seems to us that that a business operating under the one stop shop will still have to consider the law of each of the Member States in which they are processing. This is because parts of the Regulation make space for national law, in particular Article 80 and Article 21. Each national law will be slightly different. Secondly, subsidiary companies are separate legal entities for the purposes of regulation and taxation. They would be subject to the regulations and taxation system of the Member State in which they are based. They would therefore each have their own supervisory authority and the main establishment rule would not apply. Since many companies operate through a subsidiary model, the scope of Article 51(2) is considerably limited.

On 51(3) we have been in discussion with our judicial offices about the application of the Regulation to judges operating in their judicial capacity and this paragraph is relevant. We would like to consider this topic further, by way of a horizontal discussion.

#### Article 52 – Duties

We are not clear why these matters are characterised as “duties” rather than “powers”. “Duties” suggests a requirement to take all the relevant steps. This is unrealistic, expensive and disproportionate. We were struck by the Commission saying (in relation to the sanctions regime) that a supervisory authority might undertake an investigation and find that a controller had breached the requirements of the instrument, but fine the controller one Euro. This is a wasteful way to regulate.

In terms of the powers which the supervisory authority should have, we consider that what is set out here is fairly comprehensive. However, there is always a risk with this kind of list that it becomes outdated or misses something out. There is a further significant problem, though, which is that what is here is wholly inadequate as a regulatory regime. For example, in relation to conducting investigations there is no test set out as to when a matter merits investigation or not. If there is no threshold of seriousness then the burdens here will be disproportionate. It may be that the Commission ‘s intention was to allow supervisory authorities to exercise discretion here. This is problematic when these are characterised as “duties” and the instrument is supposed to be directly applicable. There is also a tension between the exercise of discretion and the consistency mechanism. These are real and serious flaws which need to be tackled.

On 52 (b) we recognise the complaint handling function is important. However, we would prefer an emphasis on complaint resolution rather than hearing complaints. A commitment to hear complaints could potentially be very burdensome on data protection authorities.

On 52 (f) the extent of this obligation is not clear. Does it extend to specific data protection proposals or does it also cover wider proposals which have data protection measures within them? It is important that consultation by institutions is at the right time, usually in a pre-legislative stage, rather than towards the end of a policy development process.

We would also be concerned if there was completely unfettered access to advice without some qualification to reject trivial or vexatious requests, or those which lack merit in addition to those that are excessive and repetitive. It is not clear in 52(6) whether this exemption refers just to requests for complaints to be heard or also general requests for advice or other forms of contact.

#### Article 53 – Powers

This list of powers is insufficiently detailed to ensure that these powers are exercised in a clear, evidence-based and transparent manner. For example, ordering a temporary or definitive ban on processing would potentially have a serious effect on the controller. For a commercial enterprise this would inevitably result in loss of revenue. For bodies whose primary function is not commercial, such as hospitals, imposing a ban on processing could result in very serious consequences for individuals. This is an extreme example, but it shows that the lack of any framework or guidance as to how decisions are taken and interests balanced, this could have very serious consequences and shows a problematic lack of detail and practical approach in the instrument. There is no appeal mechanism set out, and nothing to indicate what the grounds of appeal might be. Article 74(1) is skeletal and totally devoid of anything but the barest detail, and does not provide an adequate remedy. The powers (and crucially how they should be exercised) should be set out in Member State law. It would be impossible to set these out in the Regulation in any event, due to the difference in Member State legal systems.

We have concerns about a list of powers, which is likely not to be sufficiently comprehensive, particularly in such a fast-moving environment as data processing. Further, there are certainly powers which are missing. For example, in order to give effect to Article 78 and the ability of Member States to legislate to provide for criminal sanctions for breaches of data protection law, supervisory authorities will need powers to make this possible. Again, in order to assist the coherence of the law in this area it makes sense to set out all of the powers of the supervisory authority in national law.

#### Article 55: Mutual Assistance

We are in support of the principle of mutual co-operation between supervisory authorities, however, this is another example of over-legislating. Mutual assistance is perfectly possible at the moment without this kind of framework.

We think the one month timeframe in paragraph 2 is likely to cause problems, particularly for a complex matter.

Paragraph 8 is confusing. The reference to Article 51(1) suggests that the intention is to allow a supervisory authority to exercise powers only on the territory of its own Member State, but the drafting is ambiguous and it could be read either way.

#### Article 56: General Joint operations of supervisory authorities

We don't see the need for Article 56 and we think it could cause really significant problems. Whilst co-ordination and co-operation can and should take place on an administrative level, this Article goes much further.

On the one hand there is a possibility that supervisory authorities could be given powers to conduct investigations in another Member State. But there is no obligation to do this (note the word "may" in the first line of paragraph 3). Indeed, to confer these kinds of powers contradicts Article 51(1) and could cause significant problems. Each jurisdiction deals with investigations in different ways. There will be different offences available in domestic law, and different evidence requirements and judicial procedures. The approach in this article assumes a degree of harmonisation of legal systems which simply does not exist. We don't what is suggested in this Article is practical.

Investigations are usually very heavily regulated. The consequences of getting an investigation wrong because of a lack of familiarity with the relevant domestic law could prejudice an entire investigation.

Further, where a particular Member State decides not to provide for supervisory authorities from other Member States to exercise powers within its territory then this calls into question the whole point of Article 56 and in particular the obligation under paragraph 2. If the seconding supervisory authority has no jurisdiction and no powers outside its own Member State then it is impossible to see how they could have the right to participate in joint investigations or joint operations. This is a serious flaw.

We do not understand how paragraph 5 is to work. If it is intended to allow a supervisory authority to exercise power in another jurisdiction, then this is contradicted by Article 51(1).

### **The Consistency Mechanism**

#### **General points**

If the instrument was carefully and clearly drafted, underpinned by practical and helpful codes of conduct under Article 38, then a consistency mechanism may be unnecessary.

One significant difficulty with the mechanism, is that the restrictions under Article 21 and the exemptions or derogations under Article 80 mean that data protection law will be different in each member state. Further, there are differences in civil and administrative law which will mean that there cannot be consistency in the legal framework for data protection in each Member State.

The consistency mechanism is so cumbersome and so broad that it has the potential to undermine the very purpose of the instrument: enabling the free movement of data. Further, it creates problems for data controllers and data subjects alike, who have no mechanism of appeal and no means of redress whilst the mechanism is in train. Again, this has the potential to undermine the functioning of the internal market.

As a mechanism for co-operation between supervisory authorities we are not convinced that it will be effective. Firstly it could easily be abused, with “tit for tat” referring of decisions by supervisory authorities, thus causing difficulties in relationships and exerting pressure which could serve to undermine the independence of those supervisory authorities whose decisions are subject to referrals to the mechanism.

In terms of the role of the Commission in the mechanism, we consider the Commission’s power to suspend the draft measure of a supervisory authority to be completely at odds with the concept of independence. We also note that the supervisory authority is granted independent status at Article 47(1). The EDPB is made up of independent supervisory authorities (see Article 64(2)) and is granted independence in relation to its tasks under Article 66 and 67, but not in relation to its role in the consistency mechanism. We think that partial independence is a contradiction in terms: any possibility of exerting pressure in one area undermines independence across the board.

We think that if the decisions of an independent body can essentially be overturned (as opposed to being subject to the supervisions of the courts) then this undermines that independence. The power to give a binding determination which may not be altered by a non-judicial authority is an essential component of the independence required by Article 6(1) of the ECHR (see *Van der Hurk v Netherlands* (1994) 18 EHRR 481 (para 45). In *Bryan v United Kingdom* (1995) 21 EHRR 352 (para 38) the Court held that the “very existence” of a power available to the Secretary of State to “call in” and revoke the jurisdiction of a planning inspector to decide an appeal was “enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice...and irrespective of whether its exercise was or could have been at issue in the present case”. In *Van der Hurk* the relevant legislation allowed the Crown to decide that a judgment of the Industrial Appeals Tribunal should not be implemented. The power had never been exercised, and was due to be repealed. The Court found that the mere existence of this power gave rise to a violation of Article 6(1). This was in spite of the fact that it had not been referred to in the proceedings and despite the fact that there was “nothing to indicate that it had any influence on the way the tribunal decided and handled the cases which came before it.” We consider that the powers of the SoS in *Bryan v United Kingdom* and of the Crown *Van der Hurk* are analogous to the powers of the Commission in the consistency mechanism (in particular the fact that the supervisory authority’s powers are effectively removed in Article 60(3) and 63(2)), and that therefore there is a real question as to whether they are compatible with independence.

However, there is a further complication posed by the mechanism in the context of the relationship between the consistency mechanism and the jurisdiction of national courts. For example, in a case which is referred to the consistency mechanism a court in one jurisdiction may have ruled on an aspect of the case, for example whether data flows between jurisdictions should be suspended or not, pursuant to a decision of the supervisory authority to exercise powers under Article 58(1)(g) or (h). If the matter is subsequently referred to the consistency mechanism by the Commission a supervisory authority could find themselves under pressure from the Commission to act contrary to the ruling of the court. Further, the Commission in legislating under Article 62 might create considerable uncertainty by effectively changing the ground on which the ruling by the court stands. This creates uncertainty for all parties concerned and a very complex relationship between the Commission and national courts. It is also important to explore whether the Commission's power to interfere with the court's jurisdiction (albeit indirectly) could also undermine the independence of the national court. This seems to us to be problematic and something which is worth considering very carefully.

Insofar as a mechanism for achieving consistency is necessary, we think this should be the task of the EDPB, who have the operational experience and expertise in data protection to ensure that consistency is achieved. We consider that in particular in relation to new technology there may well be uncertainty as to how the relevant concepts apply, and that a consistency in approach would be useful. However this could be done using guidance at pan-European level.

Further, Supervisory authorities are currently co-operating, for example in the Google case, which the CNIL operating as the lead data protection authority. We see no reason why legislation is necessary to achieve such consistency as may be necessary where it is already taking place in the absence of any formal mechanism.

#### Article 57: Consistency mechanism

Whilst we support the principle of consistent application of rules where appropriate, the duty to co-operate with the Commission is incompatible with the principle of the independence of national supervisory authorities.

We also think that there is a possibility that supervisory authorities could indirectly exert pressure on one another. For example one supervisory authority could make a point of referring a large number of a particular authorities' decisions to the consistency mechanism. There is no threshold which needs to be reached before a matter can be referred under Article 58(3). Any mechanism which is put in place in this area must ensure that this kind of practice cannot happen.

#### Article 58: Opinion of the European Data Protection Board (EDPB)

In our view, the consistency mechanism is much too far reaching. Supervisory authorities, the EDPB and Commission are each allowed to refer to it “any matter” which they see fit.

Furthermore, it is far from clear from the present drafting how the mechanism would work. In particular, it is uncertain which measures supervisory authorities are obliged to refer to it under paragraphs 1 and 2 of Article 58. First, the meaning of “legal effects” in paragraph 2 is unclear. Second, it is not evident what would be covered by 'monitoring of their behaviour' in subparagraph 2(a). It appears that an extra obligation is being placed on data controllers that want to provide services across EU borders. We are concerned about the negative impact which this provision could have on the internal market. Third, we do not understand what is meant by “may substantially affect the free movement of personal data within the Union” as drafted in subparagraph 2(b).

As for subparagraph (c), which relates to prior authorisation, we do not think that the consistency mechanism is necessary. We think that prior authorisation should only be required under Article 34 where a data controller considers that despite all of the mitigating steps that have been taken, it is likely that the intended processing would result in serious harm to the rights and freedoms of data subjects. Article 34 would therefore only apply in a very small number of cases. It is not clear why the consistency mechanism would necessarily be needed for them, particularly where the controller already has the added requirement of consulting the supervisory authority.

We consider that subparagraphs (d), (e) and (f) ought to be removed. As we have stated in our written comments on Chapter V, we consider that Article 44 contains the core of Chapter V. We think it sets out circumstances in which data should be able to be transferred outside the EEA as a rule, rather than on an exceptional basis. We don't consider that further safeguards as set out at Article 42(2) would be necessary in most cases, bearing in mind that the controller is already subject to the substantive requirements in the Regulation and is liable for any processing under it in any event (see Article 5(f)).

Article 42 as it stands creates significant risks of paralysing data transfers outside the EEA, and the consistency mechanism is likely to consider substantially to this paralysis. Of course the answer for many controllers may simply be to rely on the derogations in any event, thus circumventing Article 42.

In relation to Article 43, the same points apply. We consider the core of Chapter V is in Article 44. If the emphasis of Chapter V is changed to reflect this, then Article 43 will need to be reconsidered. As stated above, our view is therefore that subparagraphs (d), (e) and (f) should be deleted.

Paragraphs 5 and 6 impose detailed obligations on both supervisory authorities and the EDPB in terms of communication of information. The effect feels very bureaucratic. Furthermore, the deadline in paragraphs 7 and 8 for the EDPB to issue an opinion appears unrealistically tight. We note the difference in timeframes between Article 58 under which the EDPB has one month to adopt an opinion and Article 59 under which the Commission has ten weeks.

It is unclear from paragraph 8 what would happen in the event that a national supervisory authority disagreed with the opinion of the EDPB.

### Article 59: Opinion of the Commission

We are concerned that the Commission's opinion appears to carry more weight than that of the EDPB. The requirement in Article 59(3) is for Member States to take "utmost account" of the Commission's opinion compared to the requirement in Article 58(8) to merely "take account" of the opinion of the EDPB. Moreover, it is not clear how supervisory authorities can ever be certain that they have complied with these requirements. A failure to accept the Commission's opinion could lead to the draft measure being suspended for up to twelve months. There is therefore a strong risk that supervisory authorities will feel compelled to accept the Commission's opinion in order to be sure to escape the suspension. As set out above, this has a significant effect on both the independence of the supervisory authority but also the appearance of independence.

It is interesting to note that a justification under Article 59(4) is only required where the supervisory authority does not follow the opinion of the Commission. Under UK law public authorities can be challenged for failure to provide reasons for taking particular steps. It is anticipated that if the supervisory authority does not provide proper reasons for accepting the Commission's view that such a challenge could be brought. There is of course an added complication in the interaction between national law and the instrument in the principles of UK administrative law may require the supervisory authority to take more steps than are set out on the face of the instrument, thus creating fragmentation in the operation of the consistency mechanism itself.

Similarly, it is not inconceivable that a challenge could be brought by an individual on the basis that a decision which was taken against them was taken as a result of perceived pressure on the supervisory authority from the Commission and not because of the merits of the case.

### Article 60 – Suspension of a draft measure

We do not think that it is appropriate for the Commission to suspend a draft measure of the supervisory authority. Again, this is incompatible with independence.

The grounds for suspension are not at all clear. For example “serious doubts” under paragraph 1 is not a straightforward concept. It is not clear whether the seriousness of the doubts has anything to do with the type of processing itself. Where the Commission has doubts about the correct application of the Regulation but those doubts are not serious it would seem that the power does not arise, but it is not clear how the threshold of “serious doubts” is decided upon, nor is the data subject, data controller or supervisory authority able to take issue with this decision.

Further, the concept in paragraph 1 of “would otherwise result in its inconsistent application” seems to be a lower test which has no seriousness threshold attached and could apply even in the context of a matter that was fairly trivial.

In deciding whether to suspend the supervisory authority’s draft measure the Commission must first take account of the EDPB’s opinion but interestingly the higher threshold of “utmost account” (see Article 59(2)) does not have to be met. This is noteworthy, particularly as it is the EDPB which has the greater operational expertise on data protection matters. Further, the opinion of the EDPB under Article 58(7) must be made public. In contrast, neither the opinion of the Commission under Article 58(2) nor the reasoned justification under Article 60(1) need to be made public. The Commission’s reasons are therefore potentially subject to a lower level of scrutiny.

The exercise of the power under Article 60(1) arises in two situations: in order to reconcile diverging positions of the supervisory authority and the EDPB, where that appears possible, or to adopt a measure pursuant to Article 62(1)(a). This is interesting, because it is not entirely clear that there would be a disagreement between the EDPB and the supervisory authority in the first place. It is possible that they might agree at the point set out in Article 58(8) but that they both disagree with the Commission. However, the instrument does not allow for this possibility, or the possibility that the diverging position of the Commission could be reconciled with that of the supervisory authority and the EDPB. This is strange, bearing in mind that the supervisory authority and the EDPB are those with the operational expertise in data protection. Instead, the Commission is able to legislate to decide on the correct application of the Regulation.

## Article 61 – Urgency procedure

We are not clear that the consistency mechanism is helpful. The fact that data subjects' rights in the process can only be considered on an exceptional basis exemplifies the problem of placing consistency above a properly functioning system by independent supervisory authorities. We therefore remain unconvinced about the system and therefore also about the merits of Article 61. Further, it is unclear what circumstances fall within the category of “exceptional circumstances” under paragraph 1. For example “averting major disadvantages for other reasons” is so wide that it could include any situation, including where a business simply doesn't have the funds to hold off functioning until the consistency mechanism has gone through its process (which could take over a year). In that case the mechanism under Article 61 might apply more often than in “exceptional circumstances”. In a genuine emergency this system seems cumbersome, and the urgent opinion of the EDPB has to be delivered in a very tight timeframe. Even a relatively small number of “exceptional circumstances” every year could paralyse the EDPB. This is clearly not a tenable solution.

## Article 62 – Implementing acts

This is not a correct use of the power to adopt an implementing act. Under Article 291 the power to adopt implementing acts can be conferred on the Commission or the Council where uniform conditions are needed to implement a legally binding act. An example where such a power would be needed would be where a basic act imposes an obligation on Member States to provide the Commission with statistical information. The Commission may be given the power to establish, by implementing act, a common format for Member States to use for the submission of the information. This goes way beyond that. It entitles the Commission to decide on the correct application of the Regulation using implementing acts. This is clearly not what they were designed for, and potentially opens the door for every EU instrument which is a harmonising measure to have one.

It is unclear how this implementing act would interact with the usual situation where Member States have incorrectly interpreted obligations under EU law, namely proceedings under Article 258 (infraction proceedings). This is implicitly alluded to at Article 62(3) which states that the absence or adoption of a measure under this Section does not prejudice any other measure by the Commission under the Treaties. The difficulty with the use of implementing acts as a means of interpreting the instrument (notwithstanding the fact that we do not consider this compatible with Article 291) is that it cuts out the role of the ECJ, which is the proper forum for interpreting EU law. Further, the lack of a role for the ECJ exacerbates the problem of interpretation for domestic courts, which arguably have to consider legal acts brought forward under Article 291 as a means of interpreting EU law. This turns the hierarchy of the basic act and the implementing act upside down, and gives supremacy to the implementing act, something which plainly runs contrary to the hierarchy set out in the treaties.

We strongly oppose the power proposed for the Commission to bring forward immediately applicable implementing acts, which remain in force for a period not exceeding 12 months (see Article 62(2)).

#### Article 63 – Enforcement

There is no mechanism set out here for enforcing measures across the EU, so Article 63(1) is not sufficiently detailed to be directly applicable. Further, it would be impossible to do this because of the different nature of the legal frameworks in which each of the supervisory authorities is operating. Article 63(1) is very broadly drafted, and looks as if it might apply wider than merely in circumstances where the consistency mechanism has been used, but this is not clear.

We do not consider that Article 63(2) is compatible with the independence and the powers of supervisory authorities.

## Article 64 – European Data Protection Board

Generally we support the principle of the European Data Protection Board, but have concerns about the way in which it has been recast. The two underpinning principles of the Article 29 working party: that it had advisory status and that it was independent have been to a large extent swept away. We are concerned about this.

It is not clear who is a member of the EDPB and therefore who is allowed to vote and whether or not the votes would be weighted. Is the Commission also a member? If so we have significant concerns about this, and the effect that the Commission's vote will have. Could voting against the Commission could be seen to be in breach of the duty of co-operation in Article 46(1) and Article 57 (if these remain)? This would be worrying, to say the least.

We are also unclear why the Commission should have the right to attend EDPB meetings and the implications for independence.

## Article 65 – Independence

The broad principle of independence as afforded to the A29 working party is no longer here. Instead, independence of the EDPB is qualified. It applies only in relation to Articles 66 and 67 (although arguably it is compromised in Articles 66 and 67 – see comments below), but not to the consistency mechanism, where co-operation is required instead (see Article 57). Bearing in mind that the EDPB is made up of supervisory authorities, this potentially jeopardises the independence afforded to them at Article 47(1).

## Article 66 – Tasks of the European Data Protection Board

We have concerns that the list of tasks at paragraph 1 is very extensive and very difficult for supervisory authorities to manage, along with all of the other tasks which they have been given under the Regulation.

We are concerned about paragraph 2. Whilst there are time limits set out in the consistency mechanism, no such limits are set out at Article 66(2), neither is there anything which says that they must be reasonable. If very short time limits are imposed on the EDPB by the Commission, then this could potentially end up being a source of pressure which is incompatible with the concept of independence (see case C518/07 *European Commission v Federal Republic of Germany* at paragraph 18.).

#### Article 67 – Tasks of the European Data Protection Board

We do hold some general concerns with this article and the ambiguity in its drafting. For example; “The European Data Protection Board shall regularly and timely inform the Commission about the outcome of its activities” it is unclear what this actually means and the level of detail which is required. We view this as a potential source of pressure, which is incompatible with the independence of the board. There is no reason why the Board should not simply be able to draw up an annual report in the same way as the Article 29 working party under Article 30(6) of the '95 Directive.

#### Article 68 – Procedure

We reiterate our concern about membership and whether the Commission will be a member of the EDPB.

#### Article 69 – Chair

Whilst we appreciate the value the European Data Protection Supervisor (EDPS) can add to the EDPB we do not think that EDPS need to automatically be one of the two vice chairs of the EDPB. This rather defeats the idea of having an election.

## Article 72 – Confidentiality

We recognise the need for confidentiality to ensure legal certainty of the decision making process and “thinking space” for the EDPB. But we think that there needs to be a greater emphasis on transparency too. Arguably this is something which has been missing from the procedures of the Article 29 Working Party.

We consider that the obligation of confidentiality needs more thought. At present it is too absolute. There should be specified “gateways” to allow for disclosure in particular situations.

## SUISSE

Switzerland thanks the Presidency for the opportunity to comment on chapters V-VII of the proposal for a General Data Protection Regulation. A differentiation between provisions for the public sector and provisions for the private sector in these chapters is of our major concern. Therefore we would welcome solutions which take into account the specifics of processing of personal data by public authorities. In our view – and as an example - Article 42 paragraph 4 should not be applicable for data processing by public authorities. A transfer of personal data by public authorities to a third country should not be subject to prior authorization from the supervisory authority. Article 58 paragraph 2 is of a similar kind. In our understanding any measure according to Article 58 paragraph 2 is limited to data processing by private actors. This fact should be pointed out more explicitly in the text of the Regulation.

## **NORWAY**

### **ARTICLE 46 TO 50: INDEPENDENT SUPERVISORY AUTHORITIES**

We believe that the requirements set out in these articles are too detailed and that they should be simplified. We are worried that the requirements set out in Article 48 paragraph 2 to 5 will interfere with national labour law and with the right to a pension, which in Norway has constitutional protection.

Moreover we think the meaning of the expression «member of the supervisory authority» should be clarified in the legal text.

### **ARTICLE 60: SUSPENSION OF A DRAFT MEASURE**

We think the article should be deleted. In our view it is problematic that the Commission is given competence to suspend a measure set out by a national supervisory authority.

### **ARTICLE 64: EUROPEAN DATA PROTECTION BOARD**

We believe that the associated states' right to participate in the European data protection board should be spelled out directly in the article.

### **ARTICLE 69: CHAIR**

In our view the term of office should be shorter than 5 years. A shorter term of office would make it easier for a head of a national supervisory authority to take on the position, without having to worry that his or her national term of office will expire.

### **ARTICLE 72: CONFIDENTIALITY**

We believe that the provision should take the opposite starting point, and state that documents are public unless there is a specific need for confidentiality. More specific rules on when confidentiality is needed could be spelled out in the article.