



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 March 2014

7464/14

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

LIMITE

**DATAPROTECT 43
JAI 149
MI 256
DRS 36
DAPIX 41
FREMP 40
COMIX 146
CODEC 720**

NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- One-stop-shop mechanism

Delegations will find below comments regarding the one-stop-shop mechanism.

TABLE OF CONTENT

BELGIUM	3
DENMARK	7
POLAND	15
SLOVAK REPUBLIC	19

BELGIUM

DAPIX MEETING – 18-20 February – ONE STOP SHOP – BELGIAN COMMENTS ON THE DOCUMENT 5882/2/14
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GENERAL COMMENT:

BE wants to thank the presidency for the new text and the efforts to find a solution in that particularly important issue.

BE has received the German proposal and will send her comments on it directly to the German delegation.

As already said many times, BE is in favour of a one stop shop mechanism.

The key principle is to get one decision. The way of having this unique decision is another question. Within the text of the presidency, there is already a principle of close cooperation between the lead DPA and the DPA's concerned. A solution may perhaps be to go a little bit further in that cooperation and thus come closer to the codecision mechanism proposed by the French delegation. This would have as advantage of bringing citizens closer to the decision making process.

Lack of time for analysis requires us to put a **SCRUTINY RESERVATION**.

Nevertheless, in order to be constructive, we have some preliminary observations:

Concerning ART. 51a:

§3: *“Paragraph 1 shall not apply where the subject matter concerns only processing carried out in a single Member State and involving only data subjects in that Member State.”*

BE doesn't really understand the added value of this paragraph. This is the basis principle, no need to put it here.

§4: *“This article shall not apply where the processing is carried out by public authorities and bodies, including their processors, of a Member State. The only supervisory authority competent to exercise the powers conferred on it in accordance with this Regulation regarding a Member State's public authorities and bodies shall be the supervisory authority of that Member State”.*

BE welcomes this provision and wants also to cover processors that process the data on demand of public authorities. Proposition to add “including their processors”

Concerning ART. 54a:

BE is in favour of the reintroduction of the §4 which was about the inaction of the lead DPA. The previous version of the §4 was the following: *“Where the supervisory authority of the main establishment of the controller or processor does not act on a draft measure referred to in paragraph 2 of Article 54a, within a period of four weeks after having received the draft measure, the supervisory authority which has referred the matter in accordance with paragraph 1a of Article 51, may submit the matter to European Data Protection Board under the consistency mechanism referred to in Article 57.”*

Concerning ART. 54b:

§2: *“In a case referred to in paragraph 1 or 2 of Article 51a the supervisory authority to which the complaint has been lodged, Within the cases with a transborder dimension, where the subject matter of the complaint concerns only processing activities of an establishment of the controller or processor in one single Member State and the matter does not affect data subjects in another Member State, the supervisory authority to which the complaint has been lodged may, where appropriate, seek an amicable settlement of the complaint. Where such amicable settlement cannot be reached or where such an amicable settlement would not be appropriate, the supervisory authority to which the complaint has been lodged shall refer the matter and the result of its related investigations to the lead supervisory authority, which shall act pursuant to points (b) and (c) of Article 54a(2)”*.

BE is in favour of the introduction of §2. However, BE thinks that this paragraph is not clear enough and needs some improvements. For example, the beginning of the paragraph can be change by adding “within the case with a transborder dimension”.

Two informations need to be add:

1. information of the lead DPA when a local DPA considers that it is a national case: that will allow the lead DPA to check if there are no other similar cases.
2. information of the lead DPA about the terms of the amicable settlement: that will allow the lead DPA to advise or help another local DPA which might encounter the same problem a few years later.

§4: *“Where, in the case referred to in paragraph 2, the concerned supervisory authority to which the complaint has been lodged considers the complaint as unfounded, it shall notify this to the lead supervisory authority. Where the lead supervisory authority objects to such finding, it may refer the case to the consistency mechanism within two weeks after having received the notification. Where a supervisory (lead?) authority concerned has not objected within this period, it is deemed to be in agreement with the draft measure”*.

In order to well understand this §, BE asks herself if the reference to supervisory authority in the end of the §4 means the “lead authority”.

Finally, BE considers that the principle of the one-stop-shop, as stated by the presidency, lacks some rules :

- What is the effect of a decision taken by a lead DPA on the other establishments of the same controller?
- What are the guarantees that can ensure that a local DPA or a judge will be able to enforce a decision of a foreign DPA?
- What is the statute of the EDPB?

DENMARK

The one-stop-shop principle in the proposal for a General Data Protection Regulation (GDPR)

Denmark has several times voiced concerns regarding a constitutional problem due to the proposed one-stop-shop principle in the GDPR. The problem has been raised in the DAPIX working party, in Coreper and at Council meetings. The Danish constitutional concerns have been based on the understanding that a decision by a “lead authority” in one Member State would be directly binding for the concerned establishments in all Member States.¹

However, at the DAPIX working party meeting on 18-20 February 2014 the Commission and others clearly stated that a decision by the “lead authority” should be directed towards the “main establishment” and should only be binding for this establishment. It would then be for the “main establishment” – e.g. through internal business/cooperation rules – to implement the decision in subsidiaries in other Member States.

If it is the case that a decision by a “lead authority” in another Member State is not to be binding for e.g. an establishment in Denmark, Denmark will not have a constitutional problem with the one-stop-shop principle. In this case the principle would not entail the transfer of powers from Danish authorities to authorities in other Member States. It is however crucial that there can be no doubt that this is the case. The clarity on this point is not sufficient in the current draft.

On this basis, Denmark puts forward the following amendments and proposals to the relevant recitals and articles²:

(The proposals are based on the Presidency text in **5885/3/14**. New text is marked in **bold**. Text to be deleted is ~~crossed~~.)

¹ For a description of the Danish Constitutional problem, please see written comments dated 25 November 2013, reproduced at the end of this contribution.

² The remarks only refer to the abovementioned subject and are without prejudice to comments on other articles (and recitals) in chapters 6 and 7.

Recital 96a

Where the processing of personal data takes place in the context of the activities of an establishment of a controller or processor in the Union and the controller or processor is established in more than one Member State or where the processing of personal data takes place in the context of the activities of one establishment of a controller or processor in the Union and the processing substantially affects or is likely to affect substantially data subjects in more than one Member State, one single supervisory authority should act as lead authority ~~and decide on measures intended to produce legally binding effects towards the controller or processor.~~ Within its tasks to issue guidelines on any question covering the application of this Regulation, the European Data Protection Board may issue guidelines in particular on the criteria to be taken into account in order to ascertain whether the processing in question substantially affects data subjects in more than one Member State.

A supervisory authority should not act as lead supervisory authority in local cases where the subject matter concerns only processing carried out in a single Member State and involving only data subjects in that Member State. **The provisions on lead supervisory authorities should not apply for processing carried out by public authorities or bodies.** ~~This should also not apply where the processing is carried out by public authorities and bodies of a Member State. In such cases the only supervisory authority competent to exercise the powers conferred to it should be the supervisory authority of that Member State.~~

DK Remark

The last sentence of recital 96a seems to imply that in cases where the processing is carried out by others than public authorities, there will be cases where other supervisory authorities than the one of the Member State in question would be competent to exercise the powers conferred to it. This should however not be the case.

Recital 96b

The lead authority should be competent to decide on measures applying the powers conferred on it in accordance with the provisions of this Regulation. In its capacity as lead authority, the supervisory authority should cooperate with the supervisory authorities concerned.

The decision by the lead authority should be directed towards the main establishment as defined in this Regulation and should only be binding for this establishment.

Article 51

Competence

1. Each supervisory authority shall be competent on the territory of its own Member State to perform the duties and to exercise the powers conferred on it in accordance with this Regulation, ~~without prejudice to Article 51a~~
2. (...)
3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.

DK Remark

If the decision by the “lead authority” is to be directed towards the “main establishment” and *only* be binding on this establishment, the wording in paragraph 1 “without prejudice to Article 51a” is misleading. The wording would suggest that in some cases a supervisory authority of another Member State would be competent to perform duties and exercise powers on the territory of the Member State mentioned in the article.

Article 51a

Competence for ~~acting as~~ the lead supervisory authority

1. **Without prejudice to Article 51**, where the processing of personal data takes place in the context of the activities of an establishment of a controller or processor in the Union and the controller or processor is established in more than one Member State, the supervisory authority for the main establishment shall act as lead supervisory authority and shall be competent to decide on measures applying the powers conferred on it **in accordance with [Article 53...]**¹.

The lead supervisory authority should comply with the cooperation procedure foreseen in Articles 54a and 54b.

2. **Without prejudice to Article 51**, where the processing of personal data takes place in the context of the activities of one establishment of a controller or processor in the Union and the processing substantially affects or is likely to affect substantially data subjects in more than one Member State, the supervisory authority of that establishment shall act as lead authority and shall be competent to decide on measures applying the powers conferred on it **in accordance with [Article 53...]**².

The lead supervisory authority should comply with the cooperation procedure foreseen in Articles 54a and 54b.

3. Paragraph 1 shall not apply where the subject matter concerns only processing carried out in a single Member State and involving only data subjects in that Member State.
4. This article shall not apply where the processing is carried out by public authorities and bodies of a Member State. ~~The only supervisory authority competent to exercise the powers conferred on it in accordance with this Regulation regarding a Member State's public authorities and bodies shall be the supervisory authority of that Member State.~~

¹ The scope of the one-stop-shop should be further scrutinized in DAPIX.

² Cf. footnote 3.

Article 51b

Decisions by the lead supervisory authority

Decisions by the lead supervisory authority shall be directed towards the main establishment, as defined in Article 4 (13), and shall only be binding for this establishment.

Regarding the Danish Constitution and the one-stop-shop mechanism as proposed in the General Data Protection Regulation (25 November 2013)

During the negotiations of Chapter VI and VII in the General Data Protection Regulation, Denmark has several times voiced concerns regarding the one-stop-shop mechanism which provides that a supervisory authority in one Member State can take decisions that are directly binding in all Member States.

Our primary concern is that the Danish Constitution does not allow for Denmark to submit powers or competences that belong to Danish authorities to authorities in other countries. Denmark can therefore not accept that authorities in other Member States take decisions that are directly binding for citizens or businesses in Denmark as if the decisions were taken by Danish authorities. This gives rise to serious constitutional concerns in Denmark.

Denmark can therefore not support a proposal that provides for powers or competences, e.g. the power of taking binding decisions for citizens and businesses in Denmark, to be transferred to supervisory authorities in other Member States.

The problem is not one of enforcement. It is the mere fact that there is an authority in another country taking decisions that are directly binding for citizens and businesses in Denmark.

The text as it is now (*doc. 16626/13*) leads to the conclusion that decisions from the lead authority will be binding in all Member States. This is confirmed by the text and indeed the latest discussions in the DAPIX Working Party. It was stated that it is the cornerstone of the one-stop-shop mechanism that the decisions by the lead authority be binding for the main establishment, but also have to be followed by subsidiary companies in other Member States. It is for the local/national supervisory authority to ensure that the decision by the lead authority is being followed, because it is binding, and – if the decision is not followed – enforce it on its own territory.

As Denmark will have a constitutional problem if the lead authority in another Member States takes decisions that are directly binding for citizens and businesses in Denmark, it is crucial for us that this will not be the case if the one-stop-shop mechanism is agreed upon. Therefore it must be stated clearly in the text that decisions by the lead authority have to be approved or recognised by the local/national supervisory authority as a precondition for being binding in that Member State.

As the text is now, Articles 51, (1a) and (1b) (*regarding the exclusive competence of the lead authority*) in conjunction with other Articles such as Article 57 (2) (*“measure aimed at producing effects in more than one Member State”*) and Article 63 (1a) (*“to the controller or processor concerned”*) do not present the sufficient clarity to conclude that the one-stop-shop mechanism will not have serious constitutional concerns in Denmark. The Articles mentioned in their present wording on the contrary lead to the conclusion that decisions taken by a lead authority will indeed be directly binding for citizens and businesses in other Member States.

Therefore Denmark puts forward the following wording for an article to be included in Chapter VI ensuring that decisions taken by the lead authority are not binding in other states without the recognition of the local/national supervisory authority:

Article 51

- 1bb.** Adoption of measures by the supervisory authority competent for the supervision of the main establishment of the controller or processor referred to in [51 (1a) and (1b)] is binding in other Member States as soon as the supervisory authorities in the Member States concerned have recognised the decision without any further formality being required.

To conclude, if there is to be a one-stop-shop mechanism it should be clearly stated that it is a precondition that the decisions by the lead authority are recognised by the local/national supervisory authority. This is crucial for Denmark, because of the above mentioned constitutional concerns.

If it is not the case that decisions taken by the lead authority are to be directly binding for citizens and businesses in other Member States, this should alternatively be made clear in the text in order to exclude any doubt on this issue.

ONE-STOP-SHOP MECHANISM (document 5882/2/14)

Article 51a

Competence for acting as lead supervisory authority

1. Where the processing of personal data takes place in the context of the activities of an establishment of a controller or processor in the Union and the controller or processor is established in more than one Member State **or the processing substantially affects or is likely to affect substantially data subjects in more than one Member State**, the supervisory authority for the main establishment shall act as lead supervisory authority and shall be competent to decide on measures applying the powers conferred on it in accordance with the cooperation procedure foreseen in Articles 54a and 54b.
2. ~~Where the processing of personal data takes place in the context of the activities of one establishment of a controller or processor in the Union and the processing substantially affects or is likely to affect substantially data subjects in more than one Member State, the supervisory authority of that establishment shall act as lead authority and shall be competent to decide on measures applying the powers conferred on it in accordance with Articles 54a and 54b.~~
3. Paragraph 1 shall not apply where the subject matter concerns only processing carried out in a single Member State and involving only data subjects in that Member State.
4. **The paragraphs 1 and 2 of** this article shall not apply where the processing is carried out by public authorities and bodies of a Member State. The only supervisory authority competent to exercise the powers conferred on it in accordance with this Regulation regarding a Member State's public authorities and bodies shall be the supervisory authority of that Member State.

Article 76

Representation of data subjects

1. The data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State and whose statutory objectives include the protection of data subjects' rights and freedoms with regard to the protection of their personal data, to lodge the complaint on his or her behalf and to exercise the rights referred to in Articles 73, 74 and 75 on his or her behalf.
- 1a. ~~Independently of a data subject's mandate or complaint, any body, organisation or association referred to in paragraph 1 shall have the right to lodge a complaint with the supervisory authority competent in accordance with Article 51 if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.~~
2. (...)
3. (...)
4. (...)
5. (...)

CONTRIBUTION OF THE CLS:

Effective judicial protection of data subjects' fundamental rights in the context of the envisaged "one-stop shop" mechanism (document: 18031/13)

PL comments :

- The opinion of EDPS on the one-stop-shop presented in a letter issued on 14th February 2014 should be taken into account while deciding on the future shape of the one-stop-shop model

- Opinion of the CLS does not relate to the current legal situation and the situation of data subjects under the provisions of Directive 95/46. In our view the solutions proposed by draft Regulation are more advantageous for the data subjects than the situation under current Directive, where the data subject may only complain to the DPA which is competent due to the establishment or location of equipment of the controller or processor concerned, what creates a situation in which data subject must seek protection of their rights in a foreign legal system and in a foreign language. The draft regulation gives data subject the right to lodge a complaint with the supervisory authority in any Member State (Article 73 par. 1) as well as the right to bring legal proceedings against controller or processor before the courts of the Member States where the data subject has his or her habitual residence (Article 75 par. 2), which is a major improvement of data protection rights of individuals compared to the Directive 95/46.
- The competence of a lead authority is not exclusive, and its decision is preceded by the procedure of cooperation and consistency procedure, including the right of the DPAs concerned to object to the draft measure (Article 54a par. 3 and Article 54b par. 4). Decision-making in matters covered by the mechanism of one-stop -shop therefore takes place with the full involvement and cooperation of the DPAs concerned.
- In fact, the one-stop-shop principle would apply in a limited number of cases: where the processing takes place in the context of the activities of an establishment of a controller or processor in the Union and the controller or processor is established in more than one Member State or the processing substantially affects or is likely to affect substantially data subjects in more than one Member State (in accordance with art. 51a) . The one-stop-shop will therefore not be a standard mechanism for the implementation of powers of the DPAs.

- Poland supports a strong position of the European Data Protection Board – it is a vital element of an effective consistency mechanism. We do not oppose giving the EDPB legal personality and the power to adopt legally binding decisions in the consistency mechanism. The CLS proposal to have the EDPB hear direct complaints is however unrealistic. Neither the Board nor the General Court would be able to handle such a case load. This idea also doesn't solve the problem of the “duality” of proceedings – civil and administrative. This solution would not ensure the better “proximity” of the legal proceedings to the citizens - all proceedings would be brought in Brussels/ Luxembourg, which would not be beneficial not only from the point of view of the data subjects but also for the entrepreneurs.
- Furthermore, since the decision of the EDPB would be subject only to judicial review by the CJEU (i.e. only one instance) there will be no possibility to appeal its final judgment. This may be in violation of the right to a judicial appeal guaranteed by the Polish Constitution.

SLOVAK REPUBLIC

One-stop-shop mechanism

SK and some other delegations repeatedly presented constitutional problem with the current layout of OSS mechanism. This problem also arises in the Slovak legislation and conflicts with the principle of sovereignty which does not allow for the decision of a foreign state to be applicable on the territory of the Slovak Republic. This is not a problem of primary application of the legislation of the European Union but a problem of awarding the power to a foreign state body to apply its decisions on the territory of another sovereign state. According to the Art. 14 of the Constitution of the Slovak Republic obligations may be imposed:

- a) by or pursuant to an Act, within its limits while preserving fundamental rights and freedoms,
- b) by an international treaty under Art. 7(4) which directly imposes rights and obligations to the natural persons or legal persons, or,
- c) by a Government regulation pursuant to Art. 120(2).

Abovementioned clearly states that the Constitution of the Slovak Republic does not allow the application of a decision of a foreign state which imposes obligations on its territory or to its citizens and therefore current layout of a one-stop-shop mechanism which proposes application of such decisions is unacceptable for us. We do not agree with the opinion of COM that the legislation of the European Union has priority over the national legislation in this case.

However after latest discussion where KOM and Presidency stated that the decision of lead DPA shall be binding only towards the controller of the main establishment and who shall be responsible for following of this decision by all of other establishments of the controller we are forced to reevaluate our opinion. Situation where the decision shall not be applied on the territory and towards the citizen of SK would be acceptable for us.

Nevertheless our opinion is that the aforementioned is not represented in the current text of the Regulation and therefore it is not possible to clearly deduce such application of the OSS mechanism. It is crucial for the text of the proposal to state such application in a clear and comprehensible manner which shall not cause apprehension and uncertainty of collision of the provisions of the Regulation and Constitutions of Member States.

Therefore we propose following amendment of Art. 51:

1aa. Measures of each Member State's supervisory authority referred to in paragraph 1 of Art. 51 shall be binding for the controllers or processor with main establishment on the territory where the supervisory authority is competent for the supervision exclusively.

We would like to join those delegations which expressed a need to elaborate provision on deciding of the lead DPA. We fully support the proposal of UK where such decision would be based on the same principle as it is in Working Document Establishing a Model Checklist Application for Approval of Binding Corporate Rules (WP 108) in point 3.3.
