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NOTE

From: Austrian Delegation
To: Working Party on Information Exchange and Data Protection (DAPIX)
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Subject: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
– One-stop-shop mechanism

Delegations will find attached the Austrian proposal on the "one-stop-shop" mechanism.

**Austrian proposal on Chapters VI and VIII
of the 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)**

[Recitals]

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) and Article 114(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

Whereas:

[...]

Recitals on Chapter VI:

(xx)¹ 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.² The powers necessary for the effective exercise of these duties include powers to monitor, investigate, issue orders, comment on, authorise and impose sanctions.³ In this regard, the supervisory authorities should be empowered under this Regulation to cooperate across national borders, without the need for any additional agreements between the Member States on the provision of mutual assistance.⁴ Investigative powers of supervisory authorities as regards access to premises should be exercised in accordance with Union law and national law. This concerns in particular the requirement to obtain a prior judicial authorisation.⁵

(xx)⁶ Each supervisory authority should hear complaints lodged by any data subject and should investigate the matter.⁷ In order to facilitate access to justice, the supervisory authority should provide aids for data subjects' complaints, such as complaint submission forms that are also available electronically. In the interests of consistently effective access to justice throughout the Union, the services of each supervisory authority should always be free of charge for the data subject. If services are also provided free of charge to internal data protection officers, there is a greater incentive to appoint such officers.

¹ Replaces recital 100 of the original Commission proposal or recital 97 of the version drawn up under the Lithuanian Presidency.

² Identical to the first part of the first sentence of recital 100 of the original Commission proposal (or of recital 97 of the version drawn up under the Lithuanian Presidency).

³ The second part of the first sentence of recital 100 of the original Commission proposal, or of recital 97 of the version drawn up under the Lithuanian Presidency, adapted to proposed Article 52(1) in Chapter VI.

⁴ See Article 53(2) in Chapter VI.

⁵ Identical to the third sentence of recital 100 of the original Commission proposal or of recital 97 of the version drawn up under the Lithuanian Presidency.

⁶ Replaces the first part of recital 101 of the original Commission proposal or of recital 98 of the version drawn up under the Lithuanian Presidency.

⁷ Identical to the first sentence of recital 101 of the original Commission proposal or of recital 98 of the version drawn up under the Lithuanian Presidency.

(xx)⁸ 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.

(xx)⁹ It would be incompatible with the principle of the independence of the judiciary to place data processing operations carried out in the context of judicial activity under the control of supervisory authorities that are not part of the justice system themselves. Data protection monitoring of these data processing operations should therefore be the responsibility of special supervisory bodies within the justice system.

(xx)¹⁰ 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.

(xx)¹¹ 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.

(xx)¹² 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.

⁸ Identical to the second and third sentences of recital 101 of the original Commission proposal or of recital 98 of the version drawn up under the Lithuanian Presidency.

⁹ See Article 51(7) in Chapter VI. This recital replaces recital 99 of the original Commission proposal. It aims to take account of the concerns of some Member States that the definition of "judicial" data processing operations is too restrictive.

¹⁰ Identical to recital 102 of the original Commission proposal or recital 99 of the version drawn up under the Lithuanian Presidency.

¹¹ Identical to recital 103 of the original Commission proposal or recital 100 of the version drawn up under the Lithuanian Presidency.

¹² Identical to recital 104 of the original Commission proposal or recital 101 of the version drawn up under the Lithuanian Presidency.

(xx)¹³ The supervisory authority of a Member State of the Union should in principle be competent to perform the duties and exercise the powers conferred on it with regard to all data processing operations carried out in the context of an establishment of a controller or processor established in its territory. In addition, the supervisory authority should also be responsible for data processing operations which are in fact attributable to an establishment established in another Member State of the Union, but which infringe on the rights of data subjects within the territory of its own Member State. Ultimately, the definition of the territorial scope in Article 3(2) of this Regulation implies that, under certain conditions, the supervisory authority of a Member State must also be able to perform its duties and exercise its powers over a controller not established in the Union. This applies when any such controller carries out data processing operations which serve either to offer goods or services to data subjects residing in the Union, whether for payment or free of charge, or to monitor their behaviour, provided that this takes place within the Union. For practical reasons the latter case should also include data subjects residing in the Union who leave the territory of the Union for a limited period, for example on a trip, and in this context use services for which they have already registered within the territory of the Union.¹⁴ The territorial jurisdiction of the supervisory authority, as described above, in no way lessens its obligation to comply with the consistency mechanism under Chapter VII of this Regulation.

¹³ See Article 53(1) and (2) in Chapter VI.

¹⁴ A practical example of this is the case of an EU citizen or a citizen established in the EU who uses certain services for which he or she is registered (e.g. Google Mail), and simply continues to use these services with his or her usual account during a holiday or business trip outside the EU. There is no reason why no protection at all should apply to this short period. The service providers are usually aware that these are users who normally use the services within the territory of the EU.

(xx)¹⁵ Special rules on jurisdiction should apply when the processing of personal data takes place in the context of the activities of an establishment of a controller or processor within the Union which is established in more than one Member State, or when the processing is carried out by one of several independent establishments belonging to a group of undertakings which is active in several Member States. In the interests of undertakings that operate across borders, it seems appropriate in such cases to concentrate certain duties and powers with the supervisory authority of the Member State in which the main establishment of any such undertaking is located. To this end, a public register should be set up under the auspices of the European Data Protection Board ("one-stop-shop register"), in which such undertakings or the dominant undertaking in a group of undertakings can apply to register a main establishment. This register allows the national supervisory authorities to make a rapid and reliable judgment on whether they are competent to deal with the matter. At the same time, transparency is increased for data subjects. The secretariat of the European Data Protection Board is responsible for checking the plausibility of the details of the main establishment when it is registered in the one-stop-shop register. The applicant for registration has an obligation to provide proof. Actual changes concerning the main establishment should only be relevant for the purposes of this Regulation from the date of registration.

(xx)¹⁶ The undertakings registered in the one-stop-shop register may submit requests to the supervisory authority in the jurisdiction of their main establishment for authorisation of data processing operations for all their establishments in accordance with Article 34. Furthermore, they can request an extension of the authorisation in accordance with Article 34 of the Regulation to cover another or all Member States of the Union. In this way, the administrative burden for the controllers or processors can be significantly reduced. In addition, this possibility allows for greater planning certainty for undertakings wishing to expand across national borders.

¹⁵ Replaces, together with the following recitals, recitals 97 and 98 of the original Commission proposal or recital 98 of the version drawn up under the Lithuanian Presidency. See also Article 53a(1) in conjunction with Article 54 in Chapter VI.

¹⁶ See Article 53a(2) in Chapter VI.

(xx)¹⁷ The supervisory authority's competence to supervise a controller or processor with a main establishment on the territory of its Member State should additionally cover all tasks and powers it assumes on an ex officio basis. In exercising those responsibilities the supervisory authority is in turn subject to the provisions of the consistency mechanism under Chapter VII of the Regulation. This concentration of responsibilities with the supervisory authority of the main establishment should not, of course, preclude a supervisory authority of an establishment that is not also a main establishment from seeking an acceptable solution with a local controller in keeping with the rights of data subjects.¹⁸

(xx)¹⁹ With a view to ensuring proximity to citizens, the registration of a main establishment should not prevent data subjects from complaining to the supervisory authority of the Member State where they reside. To take into account the interests of third-country nationals or persons living in the EU without a permanent residence, it should be possible, in the absence of a habitual residence, to call on the supervisory authority of the Member State on whose territory a breach of data subjects' rights is alleged to have occurred. As an alternative, however, a data subject should be allowed to call on the supervisory authority in whose jurisdiction the establishment of the controller or processor in question is located. Where a main establishment exists, the data subject's only alternative to the supervisory authority competent for supervising his/her habitual residence should be the supervisory authority of the main establishment. To avoid unnecessary red tape, data subjects' choices for filing complaints are thus restricted to those supervisory authorities located near to either the data subject or the controller or processor.

¹⁷ See 2nd sentence of Article 53a(1) in Chapter VI.

¹⁸ This is intended to take account of the wishes of some Member States to allow the supervisory authority of an establishment that is not a main establishment to reach a mutually agreed solution in cases with "local relevance", even where the "one-stop-shop mechanism" is, in principle, applicable.

¹⁹ See Article 53a(1) in conjunction with Article 53a(3) in Chapter VI.

Recitals on Chapter VIII:

(xx)²⁰ Every data subject who considers that his or her rights under this Regulation have been infringed should have the right to lodge an effective²¹ complaint either to the supervisory authority of the Member State of his or her habitual residence, or – in the absence of such habitual residence – to the supervisory authority of the Member State in which the infringement of the data subject's rights is alleged to have occurred. As an alternative, the data subject should be able to turn to the supervisory authority of the Member State in which the establishment of the controller or processor to whom the subject attributes the infringement is located. Where a main establishment exists, the exception referred to in the previous paragraph applies.²²

²⁰ Amended recital 111 of the original Commission proposal and the version drawn up under the Lithuanian Presidency. The content of this amendment is reflected in Article 73(1) of Chapter VIII in conjunction with Article 53a(3) of Chapter VI. The second element of the original Commission proposal for recital 111, which refers to judicial remedy against decisions of a supervisory authority, is already covered by recital 113 of the original Commission proposal. That part is therefore not addressed here.

²¹ New addition to echo the wording of the subsequent recital on judicial remedy.

²² See the previous recital and Article 73(1) in Chapter VIII in conjunction with the 2nd sentence of Article 53a(3)(b) in Chapter VI.

(xx)²³ Each natural or legal person should have the right to an effective²⁴ judicial remedy where the supervisory authority partially or wholly rejects a complaint²⁵ or does not act on it where such action is necessary to protect the rights of the data subject.²⁶ Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established. Where a judicial appeal is brought against a decision by a supervisory authority which was preceded by a procedure in the consistency mechanism under Chapter VII, it is important to notify the court seised that this is the case and to make available the relevant results. Accordingly, the supervisory authority against which proceedings are brought is expressly required to submit the results of the consistency mechanism to the court seised.²⁷

²³ Amended recital 113 of the original Commission proposal and the version drawn up under the Lithuanian Presidency. For reasons of logical consistency, we propose adding it straight after the original recital 111, since the data subject's rights to judicial remedy should be addressed first, before the possibility of "action by an association" (original recital 112). The content of this recital is reflected in Article 74 of Chapter VIII.

²⁴ The adjective "effective" was added following discussion in the Council Working Party and already appeared in the version drawn up under the Lithuanian Presidency (see recital 113).

²⁵ The clause "partially or wholly rejects" was added in the Council Working Party and already appeared in the version drawn up under the Lithuanian Presidency.

²⁶ This sentence combines the second part of recital 111 and recital 113 of the version drawn up under the Lithuanian Presidency.

²⁷ See Article 74(4) in Chapter VIII.

(xx)²⁸ Where a data subject considers that his or rights under this Regulation are infringed, he or she should have the right to mandate a body, organisation or association which aims to protect the rights and interests of data subjects in relation to the protection of their data and which has been properly constituted according to the law of a Member State, to lodge a complaint on his or her behalf with a supervisory authority.²⁹ Independently of a data subject's complaint, such a body, organisation or association should have the right to lodge a complaint of its own if it considers that a [serious]³⁰ personal data breach has occurred [or that the breach gives rise to a major data protection issue].³¹

(xx)³² Giving data subjects a genuine choice, particularly without any time restrictions, between lodging a complaint with a supervisory authority or with a court would raise insoluble conflicts of jurisdiction. Where a supervisory authority has the power to take binding decisions, a court can be seised only for the purpose of review of a decision by that supervisory authority. Providing direct access to a court, without first requiring the supervisory authority to deal with the matter or to issue a non-binding opinion, only makes sense where a Member State has established its supervisory authority in such a way that it is unable, in certain exceptional circumstances, to take any legally binding decisions for or against the interests of data subjects. Even in such a case, bodies, organisations or associations should be able to lodge a complaint with the competent court on behalf, or independently, of a data subject.³³

²⁸ For the last sentence, see amended recital 112 in the version drawn up under the Lithuanian Presidency.

²⁹ The wording "or exercise the right to a judicial remedy", which was contained in the original Commission proposal and in the text drawn up under Lithuanian Presidency, has been deleted at this point for reasons of internal logic and is included in the next recital.

³⁰ See Article 32(1) of the version drawn up under the Lithuanian Presidency. Here the breach is termed "severe". That formulation may be somewhat too restrictive. Since it is always costly to file complaints it is unlikely that consumer protection organisations will lodge unfounded complaints. So the barrier to taking such measures should not be set too high. The proposed wording of Article 73(3) in Chapter VIII does not (yet) convey the term in square brackets as it is based on the original Commission proposal.

³¹ Provisional consideration. Even a minor infringement of data protection may, when taking a more general view (such as its potential to affect many data subjects), involve an important data protection issue whose resolution would be in the general interest.

³² New recital, the content of which is reflected in Article 75(1) of Chapter VIII.

³³ See Article 76(1) in Chapter VIII.

(xx)³⁴ In proceedings against controllers or processors that are brought directly to court,³⁵ the plaintiff should have the choice of bringing the action before the courts of the Member State where the controller or processor has an establishment or where the data subject has his or her habitual residence. Where there is a main establishment listed in the one-stop-shop register, if the plaintiff does not choose the court of his/her habitual residence, he/she must lodge the complaint with the court with jurisdiction over the main establishment. That will favour those controllers or processors who avail themselves of the option of registering a main establishment. If the controller is a public authority acting in the exercise of its powers, the seat of the authority is the determining factor.³⁶

(xx)³⁷ Where there are indications that parallel proceedings are pending before the courts in different Member States, the courts should be obliged to contact each other. Where the facts are identical, but the complaints are lodged by different persons before different courts, the courts should be able to suspend proceedings.³⁸ Where the same person lodges a complaint about the same facts in several courts, the sole jurisdiction of one court should be determined by the time that the first complaint is lodged.³⁹ Member States should ensure that court actions, in order to be effective, should allow the rapid adoption of measures to remedy or prevent an infringement of this Regulation.

³⁴ Amended version of recital 116 of the original Commission proposal, which has so far not been amended in the Council Working Party. The content of this recital is reflected in Article 75(1) and (2) of Chapter VIII.

³⁵ Addition, for clarification purposes, of the phrase "that are brought directly to court". Background: generally speaking (with the exception of claims for compensation), proceedings against a controller or processor will only be brought directly to court where a supervisory authority is unable, exceptionally, to issue any binding decision in the case. See also the comment on the heading of Article 75 in Chapter VIII.

³⁶ Redraft resulting from an amendment to the previous sentence in the original text.

³⁷ Amended version of recital 117 of the original Commission proposal. The content of this recital is reflected in Article 76 of Chapter VIII.

³⁸ Amended second sentence of recital 117 of the original Commission proposal. See also the explanatory comments on Article 76 in the Annex on Chapter VIII.

³⁹ New sentence.

(xx)⁴⁰ Any damage which a person may suffer as a result of unlawful processing should be compensated by the controller or processor, who may be exempted from liability if they prove that they are not responsible for the damage, in particular where the data subject is at fault or in a case of force majeure. Territorial jurisdiction for action for compensation shall depend on the law of the Member State.⁴¹

[Legislative Part]

CHAPTER I GENERAL PROVISIONS

[...]

Article 4

Definitions

For the purposes of this Regulation, the term

(5) "controller"⁴² means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes, conditions and means of the processing of personal data; where the purposes, conditions and means of processing are determined by Union law or Member State law, the controller or the specific criteria for the controller's nomination may be designated by Union law or by Member State law;

⁴⁰ Expanded recital 118 of the original Commission proposal. The content of this proposal refers to Article 77 of Chapter VIII.

⁴¹ Newly added. See last sentence of Article 77(1) in Chapter VIII.

⁴² To simplify drafting in the following reworded Chapter VI (in particular Articles 52 and 53a), it is suggested that in the German language version the terms "der für die Verarbeitung Verantwortliche" and "der Verantwortliche" may be taken to be synonymous. A corresponding addition to the definition in Article 4(5) would be required and is proposed here in the form of an explanatory parenthesis.

[...]

Chapter VI

[...]

SECTION 2

DUTIES, POWERS AND COMPETENCE⁴³

Article 51 new^{44 45}

Duties

1. The duty of the supervisory authorities is to monitor and ensure the application of this Regulation.⁴⁶ Articles 53 and 53a lay down the territorial area within which the duties of the various supervisory authorities are performed.
2. Supervision will involve:
 - (a) monitoring and review of controllers' and processors' activities with regard to the accuracy of their data processing operations,
 - (b) in the exercise of the duty referred to in (a) above, promoting controllers' and processors' awareness of their obligations under this Regulation,⁴⁷

⁴³ In the light of discussions hitherto, we have attempted to create as clear as possible a logical structure and achieve a fair balance between individuals' right to legal protection and certain simplifications for undertakings. As many passages as possible of the existing text have been retained.

⁴⁴ The content of the existing Article 51 has been moved for reasons of logical consistency, and is dealt with in the recast Article 53.

⁴⁵ Covers content from existing Article 52 and develops it further.

⁴⁶ This general definition of duties would seem more appropriate than the clause "without prejudice to other duties [...]" in the Lithuanian proposal, which merely leaves the reader uncertain. In addition, it should cover the content of Article 52(1)(k) of the Lithuanian Presidency's text. The Lithuanian Presidency's wording of Article 52(1)(k) however is much too vague and therefore not acceptable.

⁴⁷ Corresponds to Article 52(1)(a)(ac) of the version drawn up under the Lithuanian Presidency.

- (c) hearing complaints lodged by any data subject, or by an association representing that data subject in accordance with Article 73, investigating the matter to the extent appropriate and informing 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,⁴⁸
- (d) cooperation⁴⁹ with and mutual assistance to other supervisory authorities with a view to ensuring the consistency of application and enforcement of this Regulation,
- (e) conduct of investigations on the application of this Regulation, either on its own initiative, in response to a complaint⁵⁰ or on the basis of information from another supervisory authority or other public body,
- (f) monitoring 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,⁵¹
- (g) promoting 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,⁵²
- (h) upon request, advising data subjects concerning the exercise of their rights under this Regulation and, if appropriate, cooperating with the supervisory authorities in other Member States to this end,⁵³

⁴⁸ Corresponds to Article 52(1b) of the version drawn up under the Lithuanian Presidency.

⁴⁹ Identical to Article 52(1)(d) of the original Commission proposal or of the version produced under the Lithuanian Presidency, apart from the replacement of the narrower concept of "sharing information" by the broader one of "cooperation".

⁵⁰ Adds the case of the "complaint"; otherwise identical to the Lithuanian Presidency's version.

⁵¹ Corresponds to Article 52(1)(e) of the version drawn up under the Lithuanian Presidency.

⁵² Corresponds to Article 51(1a)(aa) of the version drawn up under the Lithuanian Presidency or Article 52(2) of the original Commission proposal.

⁵³ Corresponds to Article 52(1a) (ad) of the version drawn up under the Lithuanian Presidency or Article 52(3) of the original Commission proposal. For reasons of logical consistency it is better to include this duty of advice in the list; it does not need to be in a separate paragraph of its own.

- (i) advising national parliaments and Member States' governments, 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,⁵⁴
 - (j) advising on and authorising the processing operations referred to in Article 34,⁵⁵
 - (k) issuing an opinion on the draft codes of conduct pursuant to Article 38(2),⁵⁶
 - (l) approving binding corporate rules pursuant to Article 43,⁵⁷
 - (m) participating in the activities of the European Data Protection Board.^{58 59}
3. To facilitate the submission of complaints, the supervisory authority shall provide aids for the complaints referred to in paragraph 2(c), which may also be accessed electronically, such as a complaint submission form.⁶⁰
4. The performance of the duties of each supervisory authority shall be free of charge for the data subject and for internal data protection officers⁶¹.

⁵⁴ Corresponds to Article 52(1)(a)(ab) of the version drawn up under the Lithuanian Presidency or Article 52(1)(f) of the original Commission proposal.

⁵⁵ Corresponds to Article 52(1)(g) of the original Commission proposal.

⁵⁶ Corresponds to Article 52(1)(h) of the original Commission proposal.

⁵⁷ Corresponds to Article 52(1)(i) of the original Commission proposal.

⁵⁸ Corresponds to Article 52(1)(j) of the version drawn up under the Lithuanian Presidency or Article 52(1)(j) of the original Commission proposal.

⁵⁹ Article 52(1)(k) of the version drawn up under the Lithuanian Presidency ("issue opinions" [...]) is more a "means" of fulfilling a duty than a "duty" in itself; we therefore suggest setting out this aspect in the following Article 52(1)(d).

⁶⁰ Modified version of the corresponding paragraph in Article 52 of the original Commission proposal/Article 52(4) of the version drawn up under the Lithuanian Presidency.

⁶¹ Extending free services to data protection officers within authorities and undertakings offers an additional incentive to appoint such officers.

5. Where requests are manifestly excessive, in particular due to their repetitive character,⁶² 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.⁶³
6. Each supervisory authority shall draw up an annual report on its activities. The report shall be transmitted to the government⁶⁴ and the national parliament and shall be made available to the public, the Commission and the European Data Protection Board.
7. The supervisory authority shall not be competent to supervise processing operations of courts acting in their judicial capacity. This includes processing operations which are required to ensure the independence of the judiciary. Supervision of these data processing operations shall be entrusted to specific bodies within the judicial system, which shall carry out the duties referred to in paragraph 2(a), (b) and (c).⁶⁵

⁶² No addition appears necessary in the German version.

⁶³ Corresponds to Article 52(6) of the original Commission proposal.

⁶⁴ Corresponds to Article 54 of the version drawn up under the Lithuanian Presidency, which unlike the original Commission proposal also lists "the government".

⁶⁵ See, on this, Article 51(3) of the version drawn up under the Lithuanian Presidency and Article 51(3) of the original Commission proposal, together with the notes to Chapter VI point 2.1 in the Annex.

Article 52

Powers

1. Each supervisory authority shall have the powers to monitor, investigate, issue orders, comment on, authorise and impose sanctions on a controller or his representative⁶⁶ and processors which are necessary to perform the duties referred to in Article 51. These include
 - (a) Monitoring powers,
 - (aa) to carry out data protection audits of controllers and processors,
 - (ab) to order controllers and processors to provide any information it requires for the performance of a particular duty;⁶⁷
 - (b) Investigatory powers,
 - (ba) to obtain, from the controller or the processor, access to all personal data and processing material⁶⁸ required,⁶⁹
 - (bb) to obtain access to the premises of the controller or processor as well as 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;⁷⁰

⁶⁶ Unlike footnote 434 to Article 53(1)(a) in the version drawn up under the Lithuanian Presidency, the term "representative" is here used only in connection with the "controller", as the processor has no representative (within the meaning of Article 25).

⁶⁷ Corresponds to Article 53(1)(a) of the version drawn up under the Lithuanian Presidency or Article 53(1)(c) of the original Commission proposal. Instead of the non-specific term "information" in the Lithuanian proposal, the more precise term "processing material" is used.

⁶⁹ Corresponds - apart from the use of the term "processing material" instead of "information" - to Article 53(1a)(a) of the version drawn up under the Lithuanian Presidency or Article 53(2)(a) of the original Commission proposal.

⁷⁰ Corresponds to Article 53(1a)(b) of the version drawn up under the Lithuanian Presidency or Article 53(2)(b) of the original Commission proposal (with the addition of the "processor").

(c) powers to issue orders, namely:

- (ca) 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;⁷¹
- (cb) 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; to order, in particular, the rectification, erasure or destruction of data pursuant to Articles 16, 17a and 17; and to order that the third parties to whom the data have been disclosed be notified pursuant to Article 17(2a) and Article 17b;⁷²
- (cc) to impose a temporary or definitive ban on processing;⁷³
- (cd) to suspend data flows to a recipient in a third country or to an international organisation;⁷⁴

(d) powers to make comments and issue authorisations, namely:

- (da) to issue information and authorisations in the context of the prior consultation of the supervisory authority under Article 34;⁷⁵
- (db) to issue an opinion on the draft codes of conduct pursuant to Article 38(2);⁷⁶

⁷¹ Corresponds to Article 53(1)(b) of the version drawn up under the Lithuanian Presidency and of the original Commission proposal.

⁷² Corresponds to an amended version of Article 53(1b)(d) of the version drawn up under the Lithuanian Presidency or an amendment to the content of Article 53(1)(a) in conjunction with Article 53(1)(f) of the original Commission proposal.

⁷³ Corresponds to Article 53(1)(g) of the original Commission proposal.

⁷⁴ Corresponds to Article 53(1b)(f) of the version drawn up under the Lithuanian Presidency or Article 53(1)(h) of the original Commission proposal.

⁷⁵ Corresponds to Article 53(1c)(a) of the version drawn up under the Lithuanian Presidency or Article 53(1)(d) of the original Commission proposal.

⁷⁶ Logical pendant to Article 52(1)(h) of the original Commission proposal.

- (dc) to authorise standard data protection clauses referred to in point (c) of Article 42(2);⁷⁷
 - (dd) to authorise contractual clauses referred to in point (d) of Article 42(2);⁷⁸
 - (de) to approve binding corporate rules pursuant to Article 43;⁷⁹
 - (df) to provide comments on planned legislative measures to the competent public institutions and to publish reports on the status of data protection within the supervisory authority's area of competence⁸⁰; and
- (e) powers to impose sanctions, namely:
- (ea) to warn or admonish a controller or processor because intended processing operations are likely to infringe provisions of this Regulation;⁸¹
 - (eb) to admonish a controller or processor whose processing operations have infringed provisions of this Regulation;⁸²
 - (ec) to impose other administrative sanctions pursuant to Article 79 or Article 79a, in addition to or instead of other measures referred to in this paragraph, depending on the circumstances of the individual case.⁸³

⁷⁷ Corresponds to Article 53(1c)(b) of the version drawn up under the Lithuanian Presidency or Article 34(1) of the original Commission proposal.

⁷⁸ Corresponds to Article 53(1c)(c) of the version drawn up under the Lithuanian Presidency. See also Article 42(2)(d) in conjunction with Article 42(4) and Article 34(1) of the original Commission proposal.

⁷⁹ Corresponds to Article 53(1c)(d) of the version drawn up under the Lithuanian Presidency.

⁸⁰ Logical pendant to Article 51(2)(g) and (i).

⁸¹ Corresponds to Article 53(1b)(a) of the version drawn up under the Lithuanian Presidency. See Article 53(1)(a) and (e) of the original Commission proposal.

⁸² Corresponds to Article 53(1b)(b) of the version drawn up under the Lithuanian Presidency. See Article 53(1)(a) and (e) of the original Commission proposal.

⁸³ Is intended to replace Article 53(4) of the original Commission proposal.

- [2. Each supervisory authority shall have the power, in accordance with Chapter VIII,⁸⁴ to bring infringements of this Regulation by controllers or processors to the attention of the judicial authorities and to engage in legal proceedings.]⁸⁵
3. Each supervisory authority shall have the right to communicate directly with the other Member States' supervisory authorities, and to address requests for mutual assistance to them and provide mutual assistance at their request.⁸⁶

*Article 53*⁸⁷

Territorial competence

1. Each supervisory authority shall, on the territory of its own Member State, exercise the duties and powers conferred on it in accordance with this Regulation.⁸⁸ It shall do so in relation to data processing that:
- (a) is carried out in the context of an establishment of a controller or processor on the territory of that supervisory authority's Member State;⁸⁹ or
 - (b) although attributable to an establishment of the controller in another Member State of the Union, affects the rights of data subjects on the territory of the supervisory authority's Member State;⁹⁰ or
 - (c) is carried out by a controller not established in the Union, but produces the effects referred to in Article 3(2) on the territory of the supervisory authority's Member State.⁹¹

⁸⁴ See the explanatory comments on Chapter VIII.

⁸⁵ This paragraph could be deleted if the system were consistently structured in such a way that data protection supervisory authorities themselves were able to take enforceable decisions. See also the explanatory comments on Chapter VIII.

⁸⁶ This provision is intended to allow cross-border cooperation without the need for complementary agreements on mutual administrative or legal assistance between the Member States.

⁸⁷ Replaces the current Article 51; the addition of "territorial" in the heading makes the subject-matter clear.

⁸⁸ Corresponds to Article 51(1) of the original Commission proposal or the first part of Article 51(1) in the version drawn up under the Lithuanian Presidency.

⁸⁹ Corresponds to Article 51(1)(a) of the version drawn up under the Lithuanian Presidency.

⁹⁰ Corresponds to Article 51(1)(b) of the version drawn up under the Lithuanian Presidency.

⁹¹ Corresponds to Article 51(1)(c) of the version drawn up under the Lithuanian Presidency.

2. In exercising its competence as described in paragraph 1 of this Article, each supervisory authority shall at all times comply with the obligation established in Chapter VII to cooperate with the other supervisory authorities in the Union, particularly in the form of the consistency mechanism under Section 2 of Chapter VII.

*Article 53a*⁹²

Special rules for controllers or processors with a main establishment in the Union

1. By way of derogation from points (a) and (b) of Article 53(1), where several establishments of a controller or processor established under private law, or several independent establishments belonging to a group of undertakings, exist within the Union, the supervisory authority of the Member State on whose territory the main establishment ("one-stop-shop") is located shall be competent. This shall apply to duties of the supervisory authority performed either *ex officio* or at the request of the controller or processor. A further prerequisite shall be that a main establishment has been entered into the register for the one-stop-shop system kept by the European Data Protection Board pursuant to Article 54.⁹³
2. Where a supervisory act is carried out at the request of a controller or processor, a request may be made for the applicability of the measure to be extended to other Member States. Any such supervisory act shall be subject to the condition that all supervisory authorities concerned have given their consent via the consistency mechanism.

⁹² This Article deals with the "one-stop-shop" concept. Following the policy course set by the Council of the European Union, it is designed to implement both "proximity to citizens" (i.e. enabling citizens to appeal to their own "home authority") and simplifications for undertakings that operate across borders (possibility of EU-wide authorisations).

⁹³ This provision replaces the arrangement set out in Article 51(2) of the Commission proposal or Article 51(1a) of the version drawn up under the Lithuanian Presidency.

3. Data subjects may lodge a complaint with the supervisory authority in the Member State in which either:
 - (a) the data subject has his or her habitual residence or, failing that,⁹⁴ in which the infringement of his or her rights is alleged to have taken place, or
 - (b) the establishment of the controller or processor accused of the infringement is located. If that establishment is associated with a legal entity registered in the one-stop-shop register, the complaint must be lodged with the supervisory authority which is competent for the registered office of the main establishment.

The act of lodging a complaint with one of the supervisory authorities referred to in point (a) or (b) shall establish that authority's exclusive competence for the relevant complaints procedure.

Article 54

One-stop-shop register⁹⁵

1. The European Data Protection Board shall keep a public register on the Internet, accessible to anyone for consultation free of charge, of the legal entities governed by private law whose establishments in the Union are subject to the one-stop-shop procedure.

⁹⁴ A typical case of there being no habitual residence would be that of tourists from third countries. See also point 3.2.c of the explanatory comments on Chapter VI annexed hereto.

⁹⁵ In line with the changes to Article 54, an additional point (h) should be inserted in Article 66 ("Tasks of the European Data Protection Board") to complete the list of tasks there (see below: point (h) of Article 66(1)).

2. Controllers/processors established under private law may, if they maintain non-independent establishments in several EU Member States, request that a main establishment be entered in the register referred to in paragraph 1. Likewise, the dominant undertaking in a group of undertakings with several legally independent establishments in the Union may enter its main Union establishment in the register. In accordance with the consistency mechanism, the decision as regards registration shall be taken by the supervisory authority which is competent for supervision in the place of the main establishment as specified by the applicant.
3. In its request, the applicant shall list distinctly and correctly⁹⁶ all its Union establishments to which the one-stop-shop procedure is to apply, and shall provide evidence of the existence of a main establishment in the place specified. In the case of a group of undertakings, the applicant shall also provide evidence of its dominant position in respect of the undertakings covered by the one-stop-shop procedure.

[...]

Article 66

Tasks of the European Data Protection Board

1. The European Data Protection Board shall ensure that this Regulation is applied consistently. To this effect, the European Data Protection Board shall, on its own initiative or at the request of the Commission, in particular:
[...]
 - (h) maintain the register of controllers, processors and groups of undertakings authorised to participate in the one-stop-shop procedure;⁹⁷

⁹⁶ This aims to provide a basis for the obligation to designate an establishment in accordance with the provisions governing inclusion in the business register which are applicable at the place of establishment.

⁹⁷ Logical addition to the tasks of the European Data Protection Board following the introduction of the one-stop-shop register pursuant to Article 54.

- (i) maintain a collection of the decisions taken by supervisory authorities and courts in connection with the consistency mechanism pursuant to Section 2 of Chapter VII, and make that file publicly available on the Internet.⁹⁸

[...]

CHAPTER VIII REMEDIES, LIABILITY AND SANCTIONS⁹⁹

Article 73

Right to lodge a complaint with a supervisory authority

1. Every data subject shall have the right to lodge a complaint with a supervisory authority in any Member State which is competent¹⁰⁰ in accordance with Article 53a(3)¹⁰¹, if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation.

⁹⁸ This register may be consulted by all supervisory authorities and therefore, pending possible introduction of a consistency mechanism, already serves to provide a uniform interpretation of the General Data Protection Regulation and to avoid unnecessary parallel proceedings.

⁹⁹ The proposals below follow on logically from the proposals concerning Chapter VI (in particular as regards Article 53a(3)). In addition, there is a substantive link to the newly proposed point (i) of Article 66(1).

¹⁰⁰ Here, the proposals concerning Chapter VII (and in particular Article 53a(3)) make it possible to define precisely the authority responsible for complaints lodged by a data subject by referring back to Article 53(3)(a). The wording contained in both the original Commission proposal and Article 73(1) of the version drawn up under the Lithuanian Presidency ("without prejudice to any other administrative or judicial remedy") should be dropped here as the relationship between the right to lodge a complaint with the supervisory authority and any right to lodge a complaint with a court is dealt with in Article 75. For further comments concerning the subject of parallelism, please see the explanatory comments on Article 75 in the Annex.

¹⁰¹ The proposed new paragraph 3 of Article 53a reads as follows: "Data subjects may lodge a complaint with the supervisory authority at the place in the Union in which either:
(a) the data subject has his or her habitual residence or, failing that, in which the infringement of his or her rights is alleged to have taken place, or
(b) the establishment of the controller or processor accused of the infringement is located. If that establishment is associated with a legal entity registered in the one-stop-shop register, then the complaint must be lodged with the supervisory authority which is competent for the registered office of the main establishment.
The act of lodging a complaint with one of the supervisory authorities referred to in point (a) or (b) shall establish that authority's exclusive competence for the relevant complaints procedure."

2. Any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data and which has been properly constituted according to the law of a Member State shall have the right to lodge a complaint with a supervisory authority in any Member State which is competent¹⁰² pursuant to Article 53a(3) on behalf of one or more data subjects if it considers that a data subject's rights under this Regulation have been infringed as a result of the processing of personal data.¹⁰³
3. Independently of a data subject's complaint, any body, organisation or association referred to in paragraph 2 shall have the right to lodge a complaint with a supervisory authority in any Member State, if it considers that a personal data breach has occurred.¹⁰⁴ Article 53a(3)(a) shall apply, with the proviso that the registered office of the body lodging the complaint shall determine the territorial jurisdiction of the supervisory authority.¹⁰⁵

Article 74

Right to a judicial remedy against a supervisory authority

1. Each natural or legal person shall have the right to a judicial remedy against binding¹⁰⁶ decisions of a supervisory authority concerning them.¹⁰⁷

¹⁰² This amendment follows on logically from the rules concerning jurisdiction as proposed in Article 53a(3).

¹⁰³ With the exception of the added text (reference to Article 53a(3)), this corresponds to Article 73(2) of the original Commission proposal.

¹⁰⁴ Corresponds to Article 73(3) of the original Commission proposal.

¹⁰⁵ Logical addition which takes account of the rules concerning jurisdiction as laid down in Article 53a(3).

¹⁰⁶ The addition of this clarification has a twofold effect: 1. It makes it clear that the right to appeal presupposes an (unfavourable) legally binding decision directed against an individual data subject. Depending on the circumstances, this may be either a citizen or an undertaking (as the controller) whose request for EU-wide approval (cf. Article 53a(2)) has been refused. 2. In addition, the emphasis on the word "binding" strengthens the distinction from the case referred to in Article 75(1).

¹⁰⁷ Apart from the addition of the word "binding", this corresponds to Article 74(1) of the original Commission proposal.

2. Each natural or legal¹⁰⁸ person shall have the right to a judicial remedy where a supervisory authority does not decide¹⁰⁹ on a request and does not inform the data subject thereof within [four] months^{110, 111}.
3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.¹¹²
4. Where a judicial appeal is brought against a decision by a supervisory authority which was preceded by a procedure in the consistency mechanism, the relevant supervisory authority shall forward the results of said procedure to the court seised.¹¹³ The court shall notify the European Data Protection Board of the outcome of the proceedings.¹¹⁴
5. [...] ¹¹⁵

¹⁰⁸ In view of the possible requests (see again, in particular, Article 53a(2)), it can be logically inferred that undertakings, as "controllers", must also be able to lodge a complaint against failure to act.

¹⁰⁹ This wording is "neutral" and is intended to cover cases concerning both data subjects (citizens) and undertakings (as controllers).

¹¹⁰ It goes without saying that the precise time-limit can and should be the subject of further discussion. The deadline suggested here is one month longer than that proposed by the Commission.

¹¹¹ Modified version of Article 74(2) of the original Commission proposal/Article 74(2) of the version drawn up under the Lithuanian Presidency.

¹¹² Unchanged from Article 74(3) of the original Commission proposal. The reference to a "decision" of the supervisory authority, as in the version drawn up under the Lithuanian Presidency, is too narrow as account must also be taken of cases involving failure to act by a supervisory authority.

¹¹³ This is to ensure that the data protection-related expertise obtained from the consistency mechanism pursuant to Chapter VII is not lost, but is incorporated into the facts on which the court bases its decision.

¹¹⁴ This provides the information for the proposed establishment by the European Data Protection Board of a collection of decisions taken by supervisory authorities and courts in connection with the consistency mechanism (cf. Article 66(1)(i) in our proposal for Chapter VI. This could read as follows: "[...] (i) maintain a collection of the decisions taken by supervisory authorities and courts in connection with the consistency mechanism pursuant to Section 2 of Chapter VII, and make that file publicly available on the Internet").

¹¹⁵ The content of this point has been moved to Article 76(5).

Article 75

Right to a direct¹¹⁶ judicial remedy against a controller or processor

1. Insofar as a supervisory authority with territorial competence pursuant to Article 53a(3) cannot itself take a binding decision on a complaint,¹¹⁷ every natural person shall have the right to a direct judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation. Data subjects may avail themselves of such a judicial remedy either instead of the proceedings before the supervisory authority or during or after those proceedings.¹¹⁸
2. The courts' territorial jurisdiction in respect of a direct judicial remedy shall be based on the jurisdiction of the supervisory authorities pursuant to Article 53a(3).¹¹⁹
3. Where proceedings are pending in the consistency mechanism referred to in Article 58, which concern the same measure, decision or practice, a court may suspend the proceedings brought before it, except where the urgency of the matter for the protection of the data subject's rights makes it impossible to wait for the outcome of the procedure in the consistency mechanism.¹²⁰
4. [...] ¹²¹

¹¹⁶ This is intended to take account of cases where a Member State establishes its national supervisory authority in such a way that in certain exceptional circumstances it is unable to take any legally binding decisions for or against the interests of data subjects. This is the **only** instance in which there is any point in providing direct access to a court without the supervisory authority having to act in the first instance or issue a (non-binding) decision. However, where this does not apply, full parallelism between the legal protection afforded by the supervisory authorities and the courts is not logically conceivable. For further details, see the explanatory comments on Article 75 in the Annex.

¹¹⁷ See the comment concerning the heading of Article 75. See also the explanatory comments on Article 75 in the Annex.

¹¹⁸ This makes clear that data subjects do not have to take their case to an ombudsman or await the outcome of any proceedings before the ombudsman before bringing a court case.

¹¹⁹ As a logical consequence of the objectives expressed in Article 53a(3) ("proximity to citizens"), this transfers the rules concerning jurisdiction as laid down in that provision to (subsidiary) jurisdiction, as provided for here.

¹²⁰ Corresponds to Article 75(3) of the original Commission proposal.

¹²¹ Content has been moved to Article 76(5).

Article 76

Common rules for court proceedings

1. Any body, organisation or association referred to in Article 73(2) shall have the right to exercise the rights referred to in Articles 74 and 75 on behalf of one or more data subjects.¹²²
2. Each supervisory authority shall have the right, in matters in which it does not itself have the power to take binding decisions,¹²³ to engage in legal proceedings and bring an action to court, in order to enforce the provisions of this Regulation or to ensure consistency of the protection of personal data within the Union. The territorial jurisdiction of the court to be seised follows the division of jurisdiction for complaints pursuant to Article 53a(3).¹²⁴
3. Where a competent court of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent court in the other Member State to confirm the existence of such parallel proceedings.¹²⁵ Where the facts, plaintiffs and defendants are identical, the courts concerned shall decide on their jurisdiction pursuant to Article 74(3) and Article 75(2).¹²⁶ Where such parallel proceedings in another Member State concern the same measure, decision or practice, but different plaintiffs, the court may suspend the proceedings.¹²⁷

¹²² Corresponds to Article 76(1) of the original Commission proposal.

¹²³ This restriction is necessary in order to avoid parallel jurisdictions of supervisory authorities and courts and resulting parallel proceedings. See also the comments on Article 76 in the Annex.

¹²⁴ The court's jurisdiction intentionally replicates the conception of the supervisory authorities' jurisdiction pursuant to Article 53a(3), so as to create a consistent system.

¹²⁵ Corresponds to Article 76(3) of the original Commission proposal.

¹²⁶ Added to avoid loopholes.

¹²⁷ Corresponds to Article 76(4) of the original Commission proposal.

4. Member States shall ensure that court actions available under national law allow for the rapid adoption of measures including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.¹²⁸
5. The Member States shall enforce final decisions by the courts referred to in Articles 74 and 75.¹²⁹

Article 77

Liability and right to compensation

1. Any person who has suffered damage as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.¹³⁰ This right shall be asserted by making a claim to the court with jurisdiction for compensation claims under national law.¹³¹
2. Where more than one controller or processor is involved in the processing, externally each controller or processor shall bear undivided liability for the entire amount of the damage, with the total damage being compensated only once. Internally, each party held liable shall have right of recourse against the other parties liable to pay compensation, to the extent of the actual causing of the damage.¹³²
3. The controller or the processor may be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.¹³³

¹²⁸ Corresponds to Article 76(5) of the original Commission proposal.

¹²⁹ The content of Articles 74(5) and 75(4) of the original Commission proposal is condensed into this paragraph.

¹³⁰ Corresponds to Article 77(1) of the original Commission proposal.

¹³¹ Newly added. See the comments on Article 77 in the Annex.

¹³² Amendment of Article 77(2) of the original Commission proposal for a neutral, functional paraphrase.

¹³³ Corresponds to Article 77(3) of the original Commission proposal.

Annex
Comments on Chapter VI

1. Structure of the Chapter

In the previous draft, the terms "duties" and "powers" and their relationship to each other are unclear. We would suggest using "duties" to mean **what** the supervisory authorities should **achieve** and "powers" to mean the **means** that are available to them to perform these duties. Accordingly, the duties should be determined first (Article 51) and then the powers should be listed in Article 52.

Territorial jurisdiction for carrying out duties should only be determined once the duties have been determined in general. We have therefore moved it to Article 53. In order to clearly separate the basic rules on territorial jurisdiction from the special rules in this regard, we have laid down the basic rules in Article 53, while the special rules are set out in their own Article 53a.

We have moved the previous regulatory content of Article 54 to the new Article 51 ("duties") as paragraph 6. This frees up Article 54, which we use to make provision for the "one-stop shop register" (see below).

2. Proposed amendments concerning "duties" and "powers" (*Article 52*)

2.1 Through the general rewording of the duties of the supervisory authorities in Article 51(1) we intend to allow greater flexibility in the interpretation of "duties", including with respect to any future developments.

In paragraph 2 of Article 51 we took into consideration the amendments considered during the Lithuanian Presidency (reasons for departing from these amendments are to a large extent given in footnotes).

Paragraph 7 of Article 51 addresses the issue of special supervision of judicial bodies/judicial processing operations. During discussions in the Working Party, a number of Member States expressed concern that the Commission proposal defines "judicial" data processing operations too narrowly.¹³⁴

2.2 For "powers", too, we feel it would be beneficial to start with a general definition (paragraph 1) so as to be able to better provide for future developments. The powers are then listed by category (points (a) to (e)).

The (new) paragraph 2 is bracketed because it is only needed if the previous system, which does not allow the supervisory authorities to take enforceable decisions *themselves* in all cases, is maintained. (For further details see comments on Chapter VIII).

Paragraph 3 concerns cross-border cooperation between supervisory authorities. Given that specific legal bases such as agreements on mutual assistance are usually necessary for this, it seems advisable to make special mention of them under "powers".

3. Territorial competence(Articles 53 and 53a)

3.1 The basic territorial competence of a supervisory authority (Article 53(1)) ties in with the cases of applicability of the Regulation specified in Article 3. Points (a) and (b) relate to Article 3(1), with due consideration given to the cross-border impact of data processing operations, discussed in the Working Party on Data Protection and Exchange of Information (DAPIX) at the end of 2013. Point (c) relates to Article 3(2).

Article 53(2) clarifies that territorial competence in no way removes the obligation to comply with the consistency mechanism.

¹³⁴ The question of whether there should be cooperation in this area in the European Data Protection Board, and what form that cooperation should take, still needs to be discussed.

3.2 Article 53a makes provision for various special cases of territorial competence:

(a) The **one-stop shop principle**

As provided for in the Commission proposal, the one-stop shop principle should apply **only to the private sector**.

The other requirements for the applicability of this principle in specific cases should be **set out in more detail than in the Commission proposal**, however.

Our proposal specifies which types of organisational units can be subject to the one-stop shop procedure and requires them to be entered in a special register (provided for in Article 54), in order to provide **clarity on the exact designation** of the eligible legal entities and organisational units **and on the place** of the main establishment.

Furthermore, it specifies that, *on the basis of Article 53a(1)*, the lead authority is responsible only for supervisory measures which are to be implemented:

- on an ex officio basis or
- at the request of the controller or processor (*i.e. not at the request of the data subject!*).

(b) Supervisory activities at the request of the controller or processor (especially ***authorisations***) ***with extended validity***

The national supervisory authority with territorial competence or, if the one-stop shop procedure is applicable in a specific instance, the lead authority, should be able for example to issue authorisations which extend beyond the area of territorial competence of that decision-making authority and apply to the area of some additional Member States or even to all Member States of the EU (or EEA). This may also be relevant for a lead authority if the request includes Member States for which no establishment is yet entered in the one-stop shop register. This creates better planning conditions for undertakings and saves the supervisory authorities conducting similar proceedings in several Member States. The prerequisite for this is of course the consent of all the supervisory authorities concerned in the European Data Protection Board.

c) **complaint procedure** at the request of a data subject:

Data subjects should have the right to choose where to lodge their complaint. However, this right should **be confined to supervisory authorities which are located near to either the data subject or the controller/processor**. This should **avoid an unnecessary administrative burden for the authority when carrying out the proceedings**.

Since the Regulation promises *everyone* protection, a solution must also be provided for data subjects **who do not have a habitual residence in the Union (e.g. US citizens)**.

If the data subject chooses to lodge his or her complaint at the registered office of the controller/processor, the one-stop-shop principle applies, if there is a corresponding entry for the controller/processor in the one-stop-shop register.

It seems particularly important that, when a complaint is lodged with one of the authorities which can be chosen pursuant to paragraph 3 of Article 53a, **territorial jurisdiction is established definitively and exclusively**. As a result, parallel proceedings are prevented by law. In order to prevent them in practice as well, the European Data Protection Board could also consider establishing a register of proceedings.

3.3. **One-stop-shop register** (Article 54)

In order **to avoid procedural chaos**, it is **essential** to keep a **register** of the legal entities governed by private law and their organisational units which claim the status of main establishment. This is the only way that national supervisory authorities can make a **rapid and reliable** judgment on whether they are competent to deal with the matter. Data subjects must also be able to find out easily where they can lodge a complaint at the registered office of the controller/processor. This register is the only way to create transparency in respect of the location of the main establishment. The plausibility of the details of the main establishment is to be checked upon entry in the register (the applicant for registration is under obligation to provide proof) and any change is legally relevant only once it has been entered.

Comments on Chapter VIII

1. Complaint to the supervisory authority (*Article 73*)

The rewording of Articles 53 and 53a makes it possible for the supervisory authority competent to deal with complaints by data subjects to be identified precisely by reference to Article 53(3).

2. Judicial remedy (*Article 74*)

There should be judicial protection against the content of decisions by supervisory authorities and against failure to act by supervisory authorities. Further discussions are needed on the time limit for decisions by supervisory authorities.

A proposal to incorporate the outcome of a procedure under the consistency mechanism better into the judicial appeal proceedings is made in a new paragraph 4. A register of court decisions in the wake of procedures under the consistency mechanism would help to make decision-making more consistent.

3. Right to a direct judicial remedy against a controller or processor (*Article 75*)

3.1 Basic considerations in respect of duplication of judicial protection:

According to Article 73, everyone has the right to lodge a complaint with a supervisory authority if a processing operation does not comply with the General Data Protection Regulation, and can appeal to the court which has jurisdiction against decisions or failure to act by the supervisory authority (*Article 74*).

According to Article 75, as proposed by the Commission, the right to bring an action before a court must also be provided ("without prejudice to any available administrative remedy"), specifically where data subjects' rights have been infringed as a result of processing which does not comply with the Regulation.

Why this duplication?

Excursus: Current legal situation:

Directive 95/46/EC:

"Article 22 Remedies

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question."

This article appears to indicate that proceedings at the supervisory authority **may** be provided for **before the case is brought before a court** ("prior to referral to the judicial authority"), but that in any case there must always be the possibility of a judicial remedy before a court.

In Austria, this provision in the Directive has long been understood to the effect that various possibilities for implementation are available to the Member States. A Member State may

- establish the data protection authority itself as a "court" (e.g. previously in Austria), **or**
- provide a court (with full knowledge of the facts) as an authority above the supervisory authority (at present in Austria for the public sector, roughly speaking) **or**
- establish the supervisory authority as an ombudsman-like body which does not "decide", such that referral to a court does not create any conflict with existing legal acts, but is necessary when a legally binding, enforceable decision is to be obtained (at present in Austria for the private sector).

However, the rules in the Directive have not so far been understood to require that provision must also be made for recourse to a court of law in cases where the supervisory authority has the power to take decisions. This would also be illogical, since it would cause an insoluble conflict between legal acts issued on one hand by the supervisory authority and on the other hand by the court seised. Proposed future legal situation (Article 75 of the General Data Protection Regulation).

"Article 75

Right to a judicial remedy against a controller or processor

1. Without prejudice to any available administrative remedy, including the right to lodge a complaint with a supervisory authority as referred to in Article 73, every natural person shall have the right to a judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation."

The wording of this provision is somewhat different from that of Article 22 of the Data Protection Directive 95/46/EC. However, we know of no reason why this provision in the General Data Protection Regulation should be intended to achieve a different result from that of Article 22 of the Directive, especially as Article 75 of the General Data Protection Regulation, if understood to offer the right to genuine choice between the different judicial remedies, without any time restrictions, would create the insoluble conflict described above.

Therefore, it must instead be assumed that this provision, despite being worded somewhat differently from Article 22 of the Data Protection Directive, is to be understood to precisely the same effect as Article 22, i.e.:

- where a supervisory authority has the power to take binding decisions, a court can be seised only for the purpose of review of the decision by the supervisory authority;

- where the supervisory authority deals with a case without having the power to take a binding decision, the data subject is in fact free to choose whether to bring a court action immediately (instead of) or during or after the end of the proceedings before the supervisory authority.

When Articles 74 and 75 are understood in this way, genuinely parallel proceedings are avoided. As regards the territorial jurisdiction of the courts, it seems best to follow the special division of jurisdiction pursuant to Article 53a(3) in relation to complaints. This would ensure consistency between the systems of legal protection. The amendments to Article 75 proposed above are to be understood in this sense.

4. Common rules for court proceedings (Article 76)

The new paragraph 2 attempts to prevent multiple judicial proceedings which could result from the two parallel sets of proceedings pursuant to Articles 74 and 75. Where the same person lodges a complaint about the same facts in several courts, the time the first complaint is lodged should determine the *exclusive* jurisdiction of one court.

This should be distinguished from cases where the facts are the same, but different plaintiffs appear before different courts. Only for such cases should the suspension of one set of proceedings until a decision is taken by the other court, as provided for in the Commission proposal, be considered.

5. Compensation (Article 77)

It would be useful to indicate where claims for compensation are to be made (second sentence of Article 77(1)).

The proposed rewording of paragraph 2 of Article 77 is based on the consideration that the term "jointly and severally" is slightly ambiguous and in this respect it is not certain that the term will be understood in the same way throughout the EU. A functional, somewhat more detailed paraphrase is therefore proposed.

6. Penalties (*Articles 78 and 79*)

1. The relationship between penalties pursuant to Article 78 and those pursuant to Article 79 is still so unclear that no proposals can be made in this regard.

2. As regards the much discussed *exclusive* competence of the lead authority to impose penalties on a controller/processor having a corresponding main establishment, it follows from the allocation of duties in Article 53a that penalties resulting from a complaint procedure should logically be decided on by the authority which has responsibility for the complaint procedure. However, if the need for penalties arises from e.g. a data protection audit, the lead authority would be responsible for imposing penalties.
