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**LIMITE**

**DATAPROTECT 45  
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DAPIX 44  
FREMP 41  
COMIX 150  
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**NOTE**

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from: General Secretariat of the Council  
to: Working Party on Information Exchange and Data Protection

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Subject: Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data  
- Chapters VII-X

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Delegations will find below comments on Chapters VII-X, received until 28 March 2014.

Delegations will find the comments of the AT, DE, FR and SE delegations in their native language in addenda 1-4 to this document.

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## **BELGIUM**

GENERAL REMARK: BE has a scrutiny reservation on chapters VII to X as long as the discussions on the Regulation are not ended.

### **CHAPTER VII: CO-OPERATION**

#### **Article 49: Tasks of the European Data Protection Board**

BE asks for a recital saying that the DPA designated by the MS to be a member of the Board in the context of the proposed Directive could be another one than the DPA designated for the Regulation

1. The European Data Protection Board established by Regulation (EU).../2012 shall exercise the following tasks in relation to processing within the scope of this Directive:

(...)

(d) give the Commission ***and the Member states*** an opinion on the level of protection in third countries or international organisations;

Taking into account article 35.1.b) which provides that the Member States' controllers (...) have the possibility to assess all the circumstances surrounding transfer of personal data, the Member States should be informed of the European Data Protection Board's opinion on the level of protection in third countries or international organizations.

BE asks for adding the "and the member states" in point d).

3. The European Data Protection Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission, ***the Member states*** and to the committee referred to in Article 57(1) and make them public.

The complexity of the matters is growing. For this reason the accessibility to the opinions, guidelines, recommendations, and best practices will be a good help for the correct application of the proposed directive by the Member States' controllers.

BE asks to add "member states" in the list of the §3.

## **CHAPTER VIII: REMEDIES, LIABILITY AND SANCTIONS**

### **Article 50: Right to lodge a complaint with a supervisory authority**

1. Without prejudice to any other administrative or judicial remedy, Member States shall provide that each supervisory authority shall deal with complaints lodged by any data subject (...) if he or she considers that the processing of personal data relating to him or her does not comply with provisions adopted pursuant to this Directive.

~~2. For the situation referred to in paragraph 1, Member States may provide for the right of any body, organisation or association which (...) has been properly constituted according to the law of a Member State to lodge the complaint with a supervisory authority on behalf of the data subject (...).~~

BE has no definitive position on the §1 of the article 50.

Taking into account the specificity of the police matters, BE proposes the suppression of the §2 of the article 50.

### **Article 54: Liability and the right to compensation**

1. Member States shall provide that any person who has suffered damage as a result of (...) a processing operation which is non-compliant with the provisions adopted pursuant to this Directive shall have the right to receive compensation from the controller or the processor for the damage suffered.

Concerning 54.1, BE asks for a recital saying that the data subject has to proof the damage, the fact creating the damage and the link between the damage and the fact.

2. Without prejudice to Article 20, where ~~more than~~ **at least** one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage.

Concerning 54.2, BE asks for a recital saying that “*jointly and severally liable*” means that the each liable controller or processor has to pay for all the damage.

BE thinks that the §2 is unclear in a sense that it’s possible to have situations with only one controller and several processors. This case is not cover by the §2. BE proposes the following changes: “where ~~more than~~ **at least** one controller or processor is involved in the processing,(...)”

3. The controller or the processor may be exempted from this liability, in whole or in part, if the controller or processor proves that they are not responsible for the event giving rise to the damage.

#### **Article 55: Penalties**

Member States shall lay down the rules on penalties, applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

BE has no definitive position on the article 55.

#### **CHAPTER IX: (...) IMPLEMENTING ACTS**

BE has no comment on this chapter.

## **CHAPTER X: FINAL PROVISION**

### **Article 60: Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation**

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain **unaffected** ~~in force until amended, replaced or revoked. In accordance with the Treaties, to the extent that such agreements concluded by Member States are not compatible with Union law, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.~~

BE asks to delete the second sentence of art. 60. BE also wants to delete the end of the first sentence to be in line with art. 59 in fine.

Question: If COM decide to withdraw an adequacy decision, do the MS need to renegotiate the agreements?

### **Article 62 Implementation**

1. Member States shall adopt and publish, by [date/ ~~two~~ **five** years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions. They shall apply those provisions from xx.xx.201x [date/ ~~two~~ **five** years after entry into force]. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

BE thinks the delay of 2 years is far too short. Accordingly to art. 61.2 BE asks for a delay of 5 years.

BE would like to know what is meant by ‘regulations and administrative provisions’.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

BE would like to know what is the relationship between the last sentence of the first paragraph of art. 62.1 and art. 62.2?

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## CZECH REPUBLIC

*The comments are made in relation to document 11624/1/13 REV1.*

### Chapter VII

CZ welcomes that this Chapter is not burdened with one-stop-shop rules even with regard to non-state processors. CZ also welcomes that the provisions are relatively straightforward and easy to implement. Nevertheless, CZ would support slightly stronger and more detailed rules on international cooperation in order to safeguard its effectiveness.

#### Article 48

CZ would certainly not object to a list of typical forms of cooperation, to providing for at least indicative deadlines or to providing for at least basic reasons for non-compliance with the request (such as when the action sought cannot be assimilated to legal powers of requested DPA or when concurrent proceedings are ongoing). Article 55(4) of draft General Data Protection Regulation (GDPR) could be used as inspiration.

Article 55(7) of GDPR could be used as inspiration on costs.

#### Article 49

Paragraph 1(a) should read as follows:

(a) advise the Commission on any issue related to the protection **and free movement** of personal data in the Union, including on any proposed amendment of this Directive;

*To correspond with Article 1(2).*

Paragraph 1(b) should read as follows:

(b) examine, on request of the Commission or on its own initiative or of one of its members, any question covering the application of the provisions adopted pursuant to this Directive and issue guidelines recommendations and best practices (...) in order to encourage consistent application of those provisions;

*The word “guidelines” might be read to interfere with the independence of DPAs.*



Paragraph 2 should read as follows:

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

*To align with the Article 66(2) of GDPR; change should better protect the independent nature of the EDPB.*

## Chapter VIII

### Article 50

Paragraph 1 should be further clarified:

Without prejudice to any other administrative or judicial remedy, Member States shall provide that each supervisory authority shall deal with complaints lodged by any data subject (...) if he or she considers that the processing of personal data relating to him or her, for which the supervisory authority is competent, does not comply with provisions adopted pursuant to this Directive.

*New part refers to Article 44(1) and clarifies that no forum shopping is possible.*

*If there is really preference for enabling data subject to address non-competent authorities (such as DPA of his residence) just for the convenience of data subject, then a separate paragraph should establish that each supervisory authority shall forward a complaint, for which it is not competent, to appropriate supervisory authority of relevant Member State, without translation. This is not the same as “dealing with complaints” in substance.*

### Article 51 and 52

CZ leaves **footnote 165**.

**Recital 60** should be amended to clarify that it is possible for the domestic law to first require that data subject exhausts available administrative remedies (such as motion to head of authority in question) before claiming the protection of the court against inaction:

(60) Every data subject should, without prejudice to any other administrative or non-judicial remedy, have the right to lodge a complaint with a supervisory authority (...) and have the right to a judicial remedy **under conditions stipulated by the law of the Member State** if they consider that

their rights under provisions adopted pursuant to this Directive are infringed or, where the supervisory authority does not act on a complaint or does not act where such action is necessary to protect the rights of the data subject.

*The purpose of this amendment is not to exclude the judicial remedy in some cases but to preserve established national systems for dealing with these horizontal issues, namely to require that standard administrative remedies or standard remedies in cases damage is caused by public authorities (in CZ the person suffering damage caused by official conduct is required to claim damages against designated authority, such as Ministry of Finance, before going to court) are applied first. The judicial protection cannot be denied, of course, but the existing practical avenues for enforcement of the relevant rights should be preserved.*

**Recital 62** should be amended to clarify that it is possible for the domestic law to first require that data subject exhausts available administrative remedies (such as motion to head of authority in question) before claiming the protection of the court against inaction. Moreover, in the light of discussions on forum shopping related to Article 50(1) CZ wishes to reinstate the second sentence to **Recital 62** (formerly 66) to clarify that forum shopping is not possible in Article 51 a well:  
(66) Each natural or legal person should have **under conditions stipulated by the law of the Member State** the right to a judicial remedy against decisions of a supervisory authority concerning them. **Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established.**

*The purpose of the first amendment is not to exclude the judicial remedy in some cases but to require that standard administrative remedies are applied first. The purpose of the second amendment is to prevent forum shopping.*

Article 54
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The first paragraph should be amended as follows:

Member States shall provide, **in compliance with its general rules on liability for damages**, that any person who has suffered damage as a result of (...) a processing operation which is non compliant with the provisions adopted pursuant to this Directive shall have the right to receive compensation from the controller or the processor for the damage suffered.

Paragraphs 2 and 3 should be deleted.

*This Directive has no business re-inventing the (parts of) damages liability law, such as joint responsibility, statute of limitations, exemptions and exculpations or even more difficult topics. The law of the Member State should simply continue to apply to such modalities.*

*Indeed, national experts on civil law expressed grave doubts on (a) nature of liability; (b) whether the joint liability of processors that are not entrepreneurs should be treated differently than national law provides for and (c) what exactly means the exemption that the controller or processor “is not responsible”. Therefore, simple reference to national law is much preferred in this specialist area.*

## Article 55

This Article should be revised substantially.

CZ notes that future of corresponding Article 79b of the GDPR is completely uncertain.

CZ also notes that (a) certain Member States have difficulties applying sanctions to public authorities – which has been reflected in the GDPR already - and (b) certain provisions of the Directive (and, unavoidably, corresponding provisions of implementing Member State law) will be so imprecise (data protection by design) that general sanctions for non-compliance would be contrary to rule of law.

The text should reflect those considerations and should, as a minimum, establish clearly a conduct that is to be punished (including both offences and non-compliance with requirements stipulated by DPA).

The text should explicitly clarify that both “administrative and/or criminal” penalties may be used by the Member State.

## Chapter X

## Article 59

CZ notes that there will not be a single legal regime for data protection after all. There is not even a list of provisions that remain unaffected.

In effect, the Member States are asked to abolish all exceptions they may have for purely domestic processing in the name of single legal data protection rule set that the Union is not establishing (any time soon, at least, as evident from Article 61).

CZ understands that there may be practical reasons for this very broad, unclear and general provision (accompanied by very broad, unclear and general Recital 72). Such reasons certainly exist in practice for CZ to oppose mandatory inclusion of purely domestic processing in the scope of this Directive (Articles 1 and 2).

CZ joins footnotes 26, 27.

Article 60
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This Article has far-reaching implications. Its wording will have significant impact on final CZ position as regards this Directive.

CZ joins footnotes 173, 174.

The Article should read as follows:

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain **unaffected** in force until amended, replaced or revoked. In accordance with the Treaties, to the extent that such agreements concluded by Member States are not compatible with Union law, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.

*Explanations:*

- 1. It is not sufficient to say that international agreements under the first sentence remain in force until amended, replaced or revoked. Such agreements may well be amended and then the amended wording will remain in force. One could even say that this is the usual result of amending something, at least in the area of international law.*
- 2. Therefore, it is more precise to say that such agreements remain unaffected. (Similarly, Article 26 DPFD said that it is “without prejudice” to relevant obligations and commitments).*
- 3. Since the first sentence provides for *lex specialis* as regards these agreements, second sentence is not necessary.*
- 4. In fact, second sentence contradicts the first one and should be deleted.*

5. CZ is not convinced by references to Article 351 TFEU. Said Article provides for general rule on conflicts between international agreements and Treaties. It does not preclude special rules provided for by relevant EU acquis, including grandfather clauses. The Article simply prohibits the Member State to refer to its international obligations in order to justify breach of Union law.
6. However, as long as the Union law enables the Member State to maintain exceptions, it is not breached. There is no dispute that Union law can do that – otherwise the Commission would not be able to propose 5 years' transitional period for the implementation of duty to eliminate incompatibilities. Moreover, the Article 16(2) TFEU mostly relies on regulations and directives to provide for the specific content of right to data protection; even Guidelines on Article 8 of the Charter refer to such instruments. If the EU has discretion over the extent of data protection (and DAPIX does nothing else for more than two years now) it certainly has discretion over the extent of protection of data transmitted to third parties.
7. Since neither Article 351 TFEU nor Article 60 of the draft Directive provide any transitional period, duty to eliminate incompatibilities would be applicable without delay. Lack of transitional period is therefore a dubious form of flexibility.
8. Since the data protection is complex area, it is quite unclear what “all appropriate steps to eliminate inconsistencies” might entail. Often, an agreement may impose obligations corresponding to some, but not all, requirements of the draft Directive on the third party. If the third party refuses to renegotiate the agreement, it would be terminated and personal data that would still need to be transferred would “enjoy” even lower protections – what is the point? And if it would not be terminated, what is the point again?
9. Since draft Directive establishes a number of rights for natural persons and concerns implementation of a fundamental right, it is uncertain what are the individual rights regarding the duty of Member State to implement this Article. Could the defendant e.g. exclude evidence obtained through agreement with a third country by claiming that such agreement was not free of incompatibilities?

10. *There is a fundamental misunderstanding. The Article 351 TFEU is drafted to cover clear-cut obligations externally between the Member States and third parties. However, data protection rules increasingly concern how Member States or third parties are equipped and structured internally, because that governs what data protection obligations vis-à-vis data subjects (DPA, judicial redress etc.) they may adopt. EU accepts that – the Commission even approaches the negotiations on modernization of Council of Europe Convention No. 108 with the aim to keep its provisions general enough to enable access by many non-EU parties. The situation is in fact more similar to EU suddenly stipulating new and stricter rules (emission, weight etc.) for cars. In such cases the grandfather clauses acknowledge that the older cars that are already around may of course continue to be used.*
11. *The same approach should be taken with regard to old judicial criminal and police cooperation agreements. There is prevailing public interest to do so. Data protection is not an absolute right, after all.*

Article 62
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It goes without saying that CZ maintains the footnote 175.

*Sorting out the rules of this Directive and rules contained in other EU instruments that are not explicitly dealt with and yet may be kept under Article 59 is going to take some more time.*

(end of file)

## FRANCE

**Note from the French delegation on the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.**

### **Chapters VII to X**

#### **Chapter VII – Cooperation**

The French authorities enter a **reservation** on this chapter until such time as the discussions on the proposal for a Regulation have resulted in a consensus in the Council on the corresponding provisions. Indeed, we consider that the provisions of the proposal for a Regulation should be kept consistent with those of the Directive, particularly with regard to the role of the EDPB.

Furthermore, still as a general comment on this chapter, we would reiterate that we should like it to be examined from two other, more general, points of view:

- concerning the exercise of the rights of the data subject where he or she belongs to a Member State other than that of the supervisory authority: in particular, it should not be the case that transposition into national laws leads to inconsistencies or to unequal treatment in this area.

- concerning the link between the rules that must be respected by the Member States in order to exchange data with third countries and the rules that must be observed by the European Union agencies on this question. In fact, most of the data held by the agencies was transmitted to them by the Member States. It is therefore necessary to ensure that the same personal data cannot be subject to different legal systems depending on whether they are exchanged by a Member State or by a European Union agency. Thus, it is necessary to ensure a link between the rules set out in this proposal for a Directive and the two instruments under revision concerning Europol and Eurojust.

### **Article 48 – Mutual assistance**

We are in favour of the principle of this Article. However, we wonder about its scope and the type of obligations it aims to put in place (obligation in terms of resources? in terms of results?).

We should also like clarifications concerning paragraph 1 and how it links up with the following two paragraphs: does the first paragraph determine the scope of paragraphs 2 and 3? We would like examples of the consequences attached in the event of failure to comply with paragraphs 2 and 3, as these points are still not set out in a footnote.

### **Article 49 – Tasks of the European Data Protection Board**

We would reiterate our **reservation** on this Article which refers to the proposal for a Regulation until such time as the text of the Articles to which reference is made is consolidated. In particular, we point out that we asked for the Working Party on Information Exchange and Data Protection to examine the question of the EDPB's powers and of the role to be conferred upon it under the proposal for a Regulation.



## **Chapter VIII – Remedies, liability and sanctions**

### **Article 50 – Right to lodge a complaint with a supervisory authority**

We should like to make the following two comments on this Article:

- as regards the first paragraph, we do not think data subjects should be able to lodge their complaints with any Union authority, and we consider that these possibilities of redress should be limited to the supervisory authorities of the controller's Member State only. With regard to the proposal for a Regulation, a consensus was reached concerning the derogation from the one-stop shop mechanism laid down for public authorities. In the proposal for a Directive, which is geared mainly to public authorities, such a derogation should be the rule;
- with regard to the second paragraph, we would point out that we have entered a reservation on the introduction of this type of remedy in the proposal for a Regulation. The French authorities therefore enter a **reservation** on this provision of the proposal for a Directive which aims to enable associations or other bodies to represent data subjects in their appeals before the supervisory authorities.

### **Article 51 – Right to a judicial remedy against a supervisory authority**

We feel that that the three-month period provided for in paragraph 2 does not seem realistic. We therefore request that **it be extended**.

### **Article 52 – Right to a judicial remedy against a controller or processor**

No comments.

### **Article 53 – Common rules for court proceedings**

We welcome the deletion of this Article, which raised a number of problems.

### **Article 54 – Liability and the right to compensation**

We would point out that the question of sharing liability between the controller and its processor(s) has not yet been decided in respect of the proposal for a Regulation. We also reiterate that we consider it inadvisable to include the processor in the joint liability of controllers. We therefore request the **deletion** of the reference to the processor in this Article.

### **Article 55 – Penalties**

No comments.

## **Chapter V – Implementing acts**

### **Article 56 – Exercise of the delegation**

### **Article 57 – Committee procedure**

We stress that the discussions on the committee procedure and on the use of delegated acts have been suspended in the context of the proposal for a Regulation and postponed until the end of the discussions on the text.

We therefore draw attention to our **reservation** on Article 57.

## **Chapter IV – Final provisions**

### **Article 58 – Repeals**

No comments.

### **Article 59 – Relationship with previously adopted acts of the Union for judicial cooperation in criminal matters and police cooperation**

No comments.

### **Article 60 – Relationship with previously concluded international agreements in the field of judicial cooperation in criminal matters and police cooperation**

We recall the link between this provision and Chapter V of the proposal for a Directive.

We also note that, while the new draft of the article does not contain the five-year time limit originally envisaged for renegotiating such agreements, it introduces an obligation for Member States to make their international agreements compatible with the provisions of the Directive without stipulating any time limit.

This wording would therefore entail an even more immediate obligation for Member States to denounce and renegotiate their agreements should they not be compliant (which, in practice, will be the case...).

Consequently, we still find this provision problematic, in fact even more so than before. An obligation to denounce agreements concluded by the Member States would entail very difficult, if not impossible, renegotiations with the third countries party to those agreements, particularly if this is to be achieved within an even shorter time limit than the originally envisaged five-year period.

Even a longer time frame for renegotiating agreements would pose problems:

- The denunciation of the agreements would not necessarily be followed by new agreements;
- As is probably the case for a lot of other Member States, France has a large number of bilateral agreements in the areas of police, judicial, financial, tax and customs cooperation. Renegotiating these agreements would lead to increased requirements in terms of equipment and personnel;
- There are also many multilateral agreements on information and data exchange within the context of police, judicial, financial, tax and customs activities which would be covered by Article 60. These would have to be denounced by all the Member States of the EU, entailing highly complex and not necessarily feasible renegotiations.

We therefore request again that **this Article provide only for a "grandfather clause" in order to preserve the Member States' operational exchange channels**, and a written opinion from the Council Legal Service since it referred to Article 351, which only concerns agreements concluded before 1 January 1958.

We would stress once again that, if the Member States were to denounce the existing agreements and apply rules prohibiting exchanges in the field of prevention, detection, investigation and prosecution of criminal offences or the enforcement of penalties, this would contribute to creating "crime havens". The simultaneous promotion of strict rules in Chapter V and the obligation to denounce agreements pursuant to Article 60 would lead to the prohibition of data exchanges which are essential for legitimate public interest aims.

Alternatively, we would nevertheless be able to agree to retain this Article as it is, subject to the deletion of the last sentence of the Article.

### **Article 61 – Evaluation**

No comments.

### **Article 62 – Implementation**

We would like the time limit for transposition to be three years.

### **Article 63 – Entry into force and application**

### **Article 64 – Addressees**

No comments.

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**Comments by the Federal Republic of Germany**

**on Articles 50 through 64**

**of the Proposal presented by the Commission on 25 January 2012 for a**

**Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data**

**in the version revised by the Presidency (Doc. 11624/13)**

**Overview:**

- I. Major need for amendment and especially significant issues
- II. Scrutiny reservation

**I. Major need for amendment and especially significant issues**

- **Article 50 must not lead to general competence for all supervisory authorities in all Member States. Every form of *forum shopping* must be avoided.** Also because the supervisory authorities – quite rightly – are supposed to base their checking on the standard of the national acts implementing the Directive, it seems inconceivable that, for example, a German supervisory authority should check the data processing operations of the French judiciary. The competent supervisory authority must therefore be determined by national Member State law. The data subject's legitimate claim to effective judicial remedy can be accommodated by requiring that any non-competent supervisory authority called on must forward the complaint to the competent supervisory authority.

- Article 54 should clarify whether and to what extent **non-material damage** is to be compensated. Germany is not fundamentally opposed to such liability, but it must be moderate.
- We welcome the Irish Presidency's revisions to Article 60, but they do not go far enough. **Article 60 still actively questions the legal foundation of international police and judicial cooperation.** It threatens to create legal uncertainty and reopen labour-intensive negotiations of an unforeseeable number of bi- and multilateral international agreements which could result in worse conditions than under the existing agreements or even total failure of negotiations. **Existing agreements should therefore not be touched**, as also called for in Article 26 of Council Framework Decision 2008/977/JHA.

## **II. Scrutiny reservation**

Germany finds it essential to review the draft Directive and give its consent with the necessary care and attention to detail. In addition, final assessment of certain provisions will have to wait for the results of the negotiations on the Regulation, which are being conducted in parallel. Germany therefore maintains a **scrutiny reservation** for all provisions of the proposal.

Further, Germany reserves the right to make additional comments on the recitals, of which only selected points have so far been mentioned. In our view, discussing the recitals makes sense only after the legislative text has taken a more final form.

# CHAPTER VII

## CO-OPERATION

### *Article 48*

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

1. Member States shall provide that supervisory authorities provide each other with mutual assistance in order to implement and apply the provisions adopted pursuant to this Directive (...) and shall put in place measures for effective co-operation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out (...) inspections and investigations.
2. Member States shall provide that a supervisory authority takes all appropriate measures required to reply to the request of another supervisory authority.
3. **The request for assistance shall contain all the necessary information, including the purpose of the request and reasons for the request. Information exchanged shall be used only in respect of the matter for which it was requested.<sup>1</sup>**
4. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress or the measures taken in order to meet the request by the requesting supervisory authority.
5. **Member States shall provide that supervisory authorities supply the information requested by other supervisory authorities by electronic means and within the shortest possible period of time, using a standardised format.<sup>2</sup>**
6. **Member States shall provide that no fee is charged for any action taken following a request for mutual assistance.<sup>3</sup>**

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<sup>1</sup> Inclusion of the useful parallel provision from Article 55 (3) of the Regulation.

<sup>2</sup> Inclusion of the useful parallel provision from Article 55 (6) of the Regulation.

<sup>3</sup> Inclusion of the useful parallel provision from Article 55 (7) of the Regulation.



*Article 49*

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

1. The European Data Protection Board established by Regulation (EU).../2012 shall exercise the following tasks in relation to processing within the scope of this Directive:
  - (a) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Directive;
  - (b) examine, on request of the Commission or on its own initiative or of one of its members, any question covering the application of the provisions adopted pursuant to this Directive and issue guidelines, recommendations and best practices (...) in order to encourage consistent application of those provisions;
  - (c) review the practical application of guidelines, recommendations and best practices referred to in point (b) (...);
  - (d) give the Commission **and the Member States** an opinion on the level of protection in third countries or international organisations;
  - (e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;
  - (f) promote common training programmes and facilitate personnel exchanges between the supervisory authorities, as well as, where appropriate, with the supervisory authorities of third countries or of international organisations;
  - (g) promote the exchange of knowledge and documentation with data protection supervisory authorities worldwide, including data protection legislation and practice.

2. Where the Commission requests advice from the European Data Protection Board, it may lay out a time limit within which the European Data Protection Board shall provide such advice, taking into account the urgency of the matter.
3. The European Data Protection Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 57(1) and make them public.
4. The Commission shall inform the European Data Protection Board **and the Member States** of the action it has taken following opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.

## CHAPTER VIII

### REMEDIES, LIABILITY AND SANCTIONS<sup>4</sup>

#### *Article 50*

##### *Right to lodge a complaint with a supervisory authority*

1. Without prejudice to any other administrative or judicial remedy, Member States shall provide that each of its supervisory authorities shall deal with complaints lodged by any data subject (...) if he or she considers that the processing of personal data relating to him or her does not comply with the Member States' provisions adopted pursuant to this Directive. If the supervisory authority is not competent for the controller or processor mentioned in the complaint, Member States shall provide that the supervisory authority shall hand the complaint over to the competent supervisory authority.<sup>5</sup>
2. For the situation referred to in paragraph 1, Member States may provide for the right of any body, organisation or association which (...) has been properly constituted according to the law of a Member State to lodge the complaint, if it is with a supervisory authority representing and duly mandated by<sup>6</sup>~~on behalf of~~ the data subject (...).
3. (...)

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<sup>4</sup> In Germany's view, there are many reasons for the provisions in this chapter to correspond in principle to those planned in Chapter VIII of the General Data Protection Regulation. At the same time, however, the special features of the police and justice area should be taken into account, along with the differences between the legislative instruments (regulation vs. directive). For this reason, it would make sense to address this in greater detail after the discussion of the General Data Protection Regulation has been completed; only then will it be possible to examine whether the solutions there are appropriate for the area of police and justice.

<sup>5</sup> In our view, it is necessary to make clear that only the supervisory authority competent under national law for the controller or processor mentioned in the complaint is to review the matter and take any necessary action. Every form of forum shopping must be avoided. The data subject's legitimate claim to effective judicial remedy can be accommodated by requiring that any non-competent supervisory authority called on must forward the complaint to the competent supervisory authority.

<sup>6</sup> Linguistic revision in line with Article 45 (1) (b) to improve clarity.

*Article 51*

***Right to a judicial remedy against a supervisory authority***

1. Without prejudice to any other administrative or non-judicial remedy, Member States shall provide for the right to a judicial remedy against decisions of a supervisory authority.
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a judicial remedy where the supervisory authority does not deal with the complaint (...) or does not inform the data subject within three months on the progress or outcome of the complaint lodged under Article 50.

(...)

*Article 52*

***Right to a judicial remedy against a controller or processor***

Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority under Article 50, Member States shall provide for the right of data subjects to a judicial remedy if they consider that their rights laid down in provisions adopted pursuant to this Directive have been infringed as a result of the processing of their personal data in non-compliance with these provisions.<sup>7</sup>

*Article 53*

***Common rules for court proceedings***

(...)

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<sup>7</sup> Germany could imagine reinserting the provision from Article 53 (3) of the Commission draft (preliminary judicial remedy).

*Article 54*

***Liability and the right to compensation***

1. Member States shall provide that any person who has suffered damage as a result of (...) a processing operation which is non compliant with the provisions adopted pursuant to this Directive shall have the right to receive compensation from the controller or the processor<sup>8</sup> for the damage suffered<sup>9</sup>.
2. Without prejudice to Article 20, where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage.
3. The controller or the processor may be exempted from this liability, in whole or in part, if the controller or processor proves that they are not responsible for the event giving rise to the damage.

*Article 55*

***Penalties***

Member States shall lay down the rules on penalties, applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

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<sup>8</sup> Germany believes further review is necessary to determine whether mandatory liability of the processor is necessary, appropriate and useful as a binding provision of the Directive. The Member States are supposed to be given some discretion here. And the controller is already liable and solvent, so that at least from the perspective of judicial remedy additional liability of the processor does not seem advisable. Further, liability of the processor might lead to unjust results if the processor was acting on the instructions of the controller.

<sup>9</sup> It is necessary to clarify in the text of the Directive or at least in a recital whether the term “damage” also refers to non-material damage. In any case, the Directive should not provide for unlimited liability also for non-material damage. If Article 54 also includes non-material damage, the Member States should at least have the discretion to specify the liability.

## CHAPTER IX

### (...) IMPLEMENTING ACTS

*Article 56*  
*Exercise of the delegation*

(...)

*Article 57*  
*Committee procedure*

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. **The Commission shall not adopt the draft implementing act where no opinion of the committee is delivered.**<sup>10</sup>
- ~~3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.~~<sup>11</sup>

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<sup>10</sup> The Commission should not be allowed to adopt implementing acts (in the scope of the Directive, these are only adequacy decisions and their suspension (Article 34)) without the committee's opinion. In order to achieve this goal and in view of Article 5 (4) (b) of Regulation EU No 182/201, the addition made by Germany is needed.

<sup>11</sup> Paragraph 3 has been deleted as a result of the deletion of text in Article 34 (5), as no other provision of the draft Directive refers to Article 57 (3). Within the scope of the Directive, there is no need for immediately applicable implementing acts.

# CHAPTER X

## FINAL PROVISIONS

### *Article 58*

#### ***Repeals***

1. Council Framework Decision 2008/977/JHA is repealed.
2. References to the repealed Framework Decision referred to in paragraph 1 shall be construed as references to this Directive.

### *Article 59*

#### ***Relationship with previously adopted acts of the Union for judicial co-operation in criminal matters and police co-operation***

The specific provisions for the protection of personal data with regard to the processing of personal data by competent public authorities for the purposes (...) referred to in Article 1(1) in acts of the Union adopted prior to the date of adoption of this Directive regulating the processing of personal data between Member States and the access of designated authorities of Member States to information systems established pursuant to the Treaties within the scope of this Directive remain unaffected.

*Article 60*

***Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation***

International agreements involving the transfer of personal data **processed by competent authorities for the purposes referred to in Article 1(1)**<sup>12</sup> to third countries or international organisations which were concluded by Member States prior to the entry into force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain **unaffected** in force until amended, replaced or revoked. **To In accordance with the Treaties, to the extent that such agreements concluded by Member States are not compatible with this Directive** Union law, the Member State or States concerned shall **take-make all appropriate efforts** steps to eliminate the incompatibilities established<sup>13</sup>

*Article 61*

***Evaluation***

1. The Commission shall evaluate the application of this Directive.

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<sup>12</sup> Clarification of the scope of the provision.

<sup>13</sup> The first sentence has been revised in line with Article 59 and the second sentence has been revised so that existing international agreements do not have to be renegotiated and in particular not terminated, as this could lead in practice to diplomatic complications and to an unmanageable burden with unforeseeable results.



2. The Commission shall review within **four**<sup>14</sup> ~~five~~ years after the entry into force of this Directive other acts adopted by the European Union which regulate the processing of personal data by competent public authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, in particular those acts adopted by the Union referred to in Article 59, in order to assess the need to align them with this Directive and make, where appropriate, the necessary proposals to amend these acts to ensure a consistent approach on the protection of personal data within the scope of this Directive. **The Commissions proposals shall ensure that the data protection provisions applicable to institutions, bodies, offices and agencies of the European Union within the scope of Article 1(1) at least correspond to the standard set by this Directive.**<sup>15</sup>
3. The Commission shall submit reports on the evaluation and review of this Directive pursuant to paragraph 1 to the European Parliament and the Council at regular intervals. The first reports shall be submitted no later than four years after the entry into force of this Directive. Subsequent reports shall be submitted every four years thereafter. The Commission shall submit, if necessary, appropriate proposals with a view of amending this Directive and aligning other legal instruments. The report shall be made public.

#### *Article 62*

#### ***Implementation***

1. Member States shall adopt and publish, by [date/ **four** ~~two~~ years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions.

They shall apply those provisions from xx.xx.201x [date/ **four** ~~two~~ years after entry into force].

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<sup>14</sup> It seems necessary to revise the other European legislation as soon as possible in line with the standards set by the Directive.

<sup>15</sup> Clarification that the same minimum standards must apply to the EU bodies as to the Member States.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 63*

***Entry into force and application***

This Directive shall enter into force on the first day following that of its publication in the *Official Journal of the European Union*.

*Article 64*

***Addressees***

This Directive is addressed to the Member States.

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## **IRELAND**

### **Chapter VII**

#### ***General***

This Chapter should be consistent with the corresponding provisions in the Proposal for a General Data Protection Regulation, subject to the need to take account of the specific requirements of the police and judicial authorities in the area of criminal justice. Furthermore, the fact that this is a Directive and thus does not require the same level of detail as the proposed Regulation should also be taken into account.

#### ***Article 48***

This article should include provisions

- (a) to require the requesting supervisory authority to provide all necessary information, including the purpose of the request and the reasons for the request;
- (b) to limit the use of information provided under this article to the purpose for which it was requested; and
- (c) to enable a supervisory authority to refuse a request for mutual assistance in specified circumstances, in particular where compliance with the request would be incompatible with Union or Member State law to which the supervisory authority receiving the request is subject.

### **Chapter VIII**

#### ***General***

See general comment in relation to Chapter VII above.

#### ***Article 50***

Notwithstanding article 45(1)(b) and for the avoidance of doubt, this article should be amended to specify that a supervisory authority is competent only for complaints concerning competent authorities in the supervisory authority's own Member State. In other words, it should not be possible for a data subject to lodge a complaint with any supervisory authority. Where a complaint is made to a supervisory authority that is not competent for the matter, the supervisory authority's role should be confined to directing the data subject to the competent supervisory authority or passing on the complaint and informing the data subject accordingly.

We support the discretion given to Member States in paragraph 2 in relation to the right of bodies, organisations or associations to lodge a complaint with the supervisory authority on behalf of a data subject.

***Article 52 and 54***

While the question of the application of the Directive to judges needs to be considered as a horizontal issue, we are of the view that articles 52 and 54 should not apply to judges when exercising judicial functions. This is consistent with our comments on Chapter III.

***Article 54***

We share the concerns, raised by other Member States at the DAPIX meeting on 26 February, in relation to the shared liability of controllers and processors.

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## SPAIN

### **PRELIMINARY REMARKS**

The Spanish delegation would like to underline once more the important concerns arising by this instrument. Principles of subsidiarity and proportionality, as well as legal basis, are at stake. This becomes fully clear when it comes to certain aspects of Chapters VII, VIII and IX. Therefore, we maintain our general reservation on this file.

### **PRELIMINARY REMARKS TO CHAPTER VII**

Spain does not oppose the general conception underlying in Chapter VII. In general terms this chapter seems to be in line with the approach of the Regulation. Nevertheless, our delegation believes that greater consistency with the Regulation should be pursued.

#### **CHAPTER VII CO-OPERATION**

##### *Article 48*

##### ***Mutual assistance***<sup>16</sup>

1. Member States shall provide that supervisory authorities provide each other with mutual assistance in order to implement and apply the provisions adopted pursuant to this Directive (...) and shall put in place measures for effective co-operation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out (...) inspections and investigations.<sup>17</sup>
2. Member States shall provide that a supervisory authority takes all appropriate measures required to reply to the request of another supervisory authority.

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<sup>16</sup> SI reservation. DE and FR scrutiny reservation. EE said that MS would not want to share data relating to national security. At CH request for clarity on Schengen aspects the Chair informed that Schengen aspects would be dealt with later.

<sup>17</sup> DE thought that Article 48.1 could create problems since the instrument is a Directive.

3. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress or the measures taken in order to meet the request by the requesting supervisory authority.

Our delegation supports the idea of establishing a mutual assistance obligation in this article, for it will allow a certain level of harmonization and will reduce the current asymmetries that enable certain actors to decline or delay collaboration.

## CHAPTER VIII

### *Article 50*

#### *Right to lodge a complaint with a supervisory authority*<sup>18</sup>

1. Without prejudice to any other administrative or judicial remedy, Member States shall provide that each supervisory authority shall deal with complaints lodged by any data subject (...) if he or she considers that the processing of personal data relating to him or her does not comply with provisions adopted pursuant to this Directive.<sup>19</sup>
2. For the situation referred to in paragraph 1, Member States may provide for the right of any body, organisation or association which (...) has been properly constituted according to the law of a Member State to lodge the complaint with a supervisory authority on behalf of the data subject (...).

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<sup>18</sup> SI objected Article 50 since it would lead to forum shopping. EE said that this provision was against their law. Cion stated that a SA would not be operating in another MS but would only be operating in its MS so there would be no forum-shopping.

<sup>19</sup> The Chair stated that Article 50.1 provided for the possibility to lodge a complaint in any MS. AT considered it important to clarify so as to avoid forum shopping. In the same vein DE asked to clarify which SA was competent. Support from CH, CZ, EE.

3. (...)

It is necessary to reduce the scope of Article 50.2 by establishing that the body, organisation or association must be duly and expressly mandated to be allowed to act on behalf of the individual affected by the processing operation. We suggest not only to introduce this in the recitals, but to lay it down in the article itself.

*Article 55*

***Penalties***<sup>20</sup>

Member States shall lay down the rules on penalties, applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

In coherence with our commentaries on the Regulation, we defend that the possibility of adopting financial corrective actions against public sector should be expressly excluded. These actions imply a mere budgetary transfer between public bodies, so they do not have a dissuasive effect. We propose the following wording to be added in a second paragraph to this article:

**Only non-financial corrective actions may be adopted on public authorities and bodies established in a Member State. Each Member State may lay down the rules on whether these actions may be adopted.**

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<sup>20</sup> DE scrutiny reservation. EE opposed this Article because EE law did not allow for penalties on public bodies. EE reservation. Cion stated that Article 55 existed in the Regulation as well and was a standard provision.

## CHAPTER IX

### Article 60

#### *Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation*<sup>21</sup>

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain in force until amended, replaced or revoked. In accordance with the Treaties, to the extent that such agreements concluded by Member States are not compatible with Union law, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.<sup>22</sup>

Spain could accept the new wording of this article, although from our perspective removing the second sentence of the article would improve it. Member States will not have the legal obligation to negotiate the modification of international treaties and thus, they will be in a better negotiating position.

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<sup>21</sup> CH and DE scrutiny reservations. For the UK Article 60 as it was drafted here was unacceptable. SI said that DPFJ was more acceptable and that the text contained no element of flexibility.

<sup>22</sup> AT considered the Article inflexible. CY scrutiny reservation. BE, CH, IT objected Article 60. CH asked what would happen when there it was need to revoke the agreement but that another Party to the agreement would refuse to renegotiate it.



*Article 62*

***Implementation***

1. Member States shall adopt and publish, by [date/ two years<sup>23</sup> after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions.

They shall apply those provisions from xx.xx.201x [date/ two years after entry into force].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Although it is premature to determine the deadline by which the Member States shall have implemented the new Directive when it is not yet clear the final content of this instrument or even whether if it is going to be finally passed, the Spanish competent authorities have pointed out that it would be impossible to implement the Directive in two years.

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<sup>23</sup> For DE two years was too short. CZ preferred three or four years.

## AUSTRIA

Austria would like to thank the Presidency for the opportunity to comment on Chapters VII to X of the above proposal. The following comments constitute a supplement to the comments already expressed orally during the meetings of the Council Working Party on Information Exchange and Data Protection.

### Re Article 48:

Article 48 should be more closely aligned with Article 55 of the draft General Data Protection Regulation. In particular, there are no rules on the time-limit for the supervisory authorities to comply with requests for mutual assistance and/or provide information (see Article 55(2) of the draft Regulation) or stipulating in what cases and/or under what conditions mutual assistance may be refused (see Article 55(4) of the draft Regulation). Nor is there a purpose limitation provision (see Article 55(3) of the draft Regulation) or a rule stipulating who bears the costs (see Article 55(7) of the draft Regulation).

As regards setting a time-limit, the Republic of Austria suggests including the phrase "*without undue delay*" at the end of paragraph 2 and expanding paragraph 3 as follows: "The requested supervisory authority shall, *without undue delay and no later than within one month after having received the request*, inform...".

### Re Article 49:

In order to make it clear that the European Data Protection Board is entitled to give an opinion when the Commission adopts adequacy decisions pursuant to Article 34, the Republic of Austria suggests supplementing point (d) of Article 49(1) as follows: "give the Commission an opinion on the level of protection in third countries or international organisations, *especially with regard to the adoption of an adequacy decision pursuant to Article 34*". This could also be incorporated in recital 68.

Since data protection levels in third countries and international organisations - apart from the few cases in which an adequacy decision has been issued - are usually assessed by the Member States, the opportunity to give an opinion pursuant to point (d) of Article 49(1) should be extended to the Member States (as last suggested by Germany), not restricted to the Commission.

Re Article 50:

Article 50(1) still fails to make clear which supervisory authority is competent. In Austria's opinion, the current wording is inappropriate as well as unacceptable as it encourages "forum shopping" and makes it possible for the supervisory authority of one Member State to examine whether the transposition provisions of another Member State have been infringed. Since under the Directive the data controller will usually be the police or the public prosecution authorities - which also include the courts - the competence of the supervisory authority should be linked to the data controller, particularly as otherwise serious constitutional problems could arise.

The Republic of Austria could support a solution - one that affords legal protection to the data subject - that makes it possible to lodge a complaint with any data protection authority but does not oblige the latter to forward it to the competent data protection authority.

Paragraph 2 as currently worded is acceptable because while it is left to the Member States ("may") to arrange for associations to be able to lodge a complaint, it is also made clear - in conjunction with point (b) of Article 45(1) - that this does not involve a "genuine" class action (in the sense that it is brought in its own name) but a complaint that can be lodged solely on behalf of the data subject and with the latter's authorisation. The scrutiny reservation in footnote 165 is therefore withdrawn.

#### Re Article 54:

According to the statement by Council Legal Service at the meeting of the Working Party on Information Exchange and Data Protection on 26 February 2014, the compensation arrangement in its current form in Article 54 provides for the strict liability of the data controller and the processor if the data subject has suffered damage due to an infringement of the transposition provisions, i.e. the burden of proof as regards the occurrence of the damage, the unlawfulness of the act and the causality (paragraph 1) lies with the data subject. In this regard the data subject is free to point to the data controller or a processor as jointly and severally liable - thus each to the full extent - in respect of the data subject (paragraph 2). If the data controller or the processor can prove that they have not acted unlawfully or that their act did not cause the damage to occur, liability can be ruled out (paragraph 3).

The Republic of Austria takes the view that substantive arrangements regarding compensation should not be regulated in detail in the Directive but left to the Member States, since the general compensation schemes in the Member States differ considerably. For example, Austrian compensation law as laid down in the Administrative Liability Act provides that in the case of unlawful acts by an authority, it is its legal entity - i.e. the federal authorities or the respective federal state - not the acting authority itself (which would be the data controller within the meaning of the Directive) that is obliged to pay compensation. In order to take sufficient account of the various ways in which this area of law is organised, all that needs to be provided for is a general rule to the same effect as Article 19 of Framework Decision 2008/977/JHA that provides for liability to lie with the data controller "or other authority competent under national law."

In contrast to the statement by the Council Legal Service to the effect that Article 54 provides for strict liability, the Republic of Austria's point of departure is that this provision regulates fault-based liability with a reversal of the burden of proof as regards fault, i.e. the data subject has to prove that damage occurred and that the act was unlawful and demonstrate causality (paragraph 1) and the data controller (and/or the processor) may be exempt from this liability if it shows that it is not at fault. This is also in line with Article 23 of Data Protection Directive 95/46/EC, which is worded along the same lines, and should if necessary be clarified in Article 54 itself or in a recital; for Austria, strict liability - in particular on the part of the processor - would not be feasible.

Furthermore, Austria would point out that, based on the wording, paragraph 2 provides only for joint and several liability within a group of several data controllers and/or several processors, not joint and several liability between one data controller and one processor.

Re Article 55:

The Republic of Austria favours the retention of Article 55 as the level of protection should not fall below that provided by Framework Decision 2008/799/JHA (Article 24).

Re Article 60:

Even though the five-year period for the renegotiation of agreements no longer applies, the core problem - i.e. dependence on the relevant third countries - remains unresolved. In this regard intermediate solutions, such as the setting of priorities and generally discontinuing renegotiations vis-à-vis third countries which have received a positive adequacy decision from the Commission under Article 34, should be examined.

In principle, however, the aim should still be to adapt as soon as possible agreements that do not conform to the provisions of the Directive, since the creation of a comprehensive and uniform level of protection is at the heart of the new data protection law framework and is mandatory under Article 16 TFEU and Article 8 of the Charter of Fundamental Rights. The Republic of Austria therefore proposes that this basic objective be incorporated in a recital. Models for possible solutions should also be mentioned in the recitals.

Re Article 62:

It is not clear from the proposed wording whether and/or to what extent the obligation to communicate the text of national law provisions in Article 62(2) goes beyond that in paragraph 1. The Republic of Austria considers that paragraph 2 could be omitted and not replaced.

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## ROMANIA

### **Proposals of Romania regarding Chapters II-X**

of the *Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*

#### **Article 51 par. (2)**

##### ***Right to a judicial remedy against a supervisory authority***

(...)

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a judicial remedy where the supervisory authority does not deal with the complaint (...) or does not inform the data subject, **or by case, the body, organisation or association from art. 50(2)**, within three months on the progress or outcome of the complaint lodged under Article 50

RO would like the paragraph regarding the lack of information from the supervisory authority to be completed with the following wording „or by case, the body, organisation or association from art. 50(2)”, according to the provisions from article 50.

#### **Article 54 par. (2)**

##### ***Liability and the right to compensation***

(...)

2. Without prejudice to Article 20, where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage, **according to the national law.**

RO would like to add „according to the national law”.

## **Article 54**

### ***Penalties***

*Member States shall lay down the rules on penalties, applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.*

RO enters a scrutiny reservation on this article in relation to national law.

## **Article 62**

### ***Implementation***

1. *Member States shall adopt and publish, by [date/ two years after entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions.*

*They shall apply those provisions from xx.xx.201x [date/ two years after entry into force].*

*When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.*

2. *Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.*

RO supports CZ proposal to extend the period necessary for transposal of the Directive (3 or 4 years).

## **FINLAND**

Finland maintains its general reservation on the whole proposal.

FI considers that the Directive should be as much as possible in line with the General Data Protection Regulation. The exact wording of the provisions should be decided on after the negotiations on corresponding provisions in the Regulation have been finished.

### **FI PROPOSALS FOR AMENDMENTS TO CHAPTERS VII-X**

#### **CHAPTER VII CO-OPERATION**

##### **Article 48**

##### **General Comments:**

Article 55 in the proposed General Data Protection Regulation is more extensive than article 48 in the Directive. Partially this is understandable when taking into account the scope of the proposed Directive. Nevertheless FI is of the opinion that article 48 would be clarified by lining it more closely with article 55 in the Regulation in the following way:

- setting a time limit in para. 2 for replying to the request of another supervisory authority (art. 55.2 in the Regulation)
- adding a new para. 3 stipulating what the request for assistance should contain and that the information can be used only for the purpose it was asked for (art. 55.3 in the Regulation)
- adding a new para. 4 stipulating when it is possible to refuse to comply to the request (art. 55.4 in the Regulation)
- replacing the present article 48.3 with a new para 5 with a wording consistent with article 55.5. in the Regulation
- adding a new para 48.6. providing in which way the information shall be supplied (art. 55.6 in the Regulation)
- adding a new para 48.7 about the costs of the assistance (art. 55.7 in the Regulation)



- adding a new para 48.8 about the Commission's role in specifying the format and procedures for the exchange of information similar to art. 55.10 in the Regulation

*Article 48*

***Mutual assistance***

1. Member States shall provide that supervisory authorities provide each other with mutual assistance in order to implement and apply the provisions adopted pursuant to this Directive (...) and shall put in place measures for effective co-operation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out (...) inspections and investigations.
2. Member States shall provide that a supervisory authority takes all appropriate measures required to reply to the request of another supervisory authority **without undue delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation.**
3. **Member States shall provide that the request for assistance shall contain all the necessary information, including the purpose of the request and the reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.**
4. **Member States shall provide that a supervisory authority to which a request for assistance is addressed may not refuse to comply with it unless:**
  - (a) **it is not competent for the subject-matter of the request or for the measures it is requested to execute; or**

**(b) compliance with the request would be incompatible with the provisions of this Directive or with Union or Member State law to which the supervisory authority receiving the request is subject**

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress or the measures taken in order to **respond to** the request by the requesting supervisory authority. **In cases of refusal under paragraph 4, it shall explain its reasons for refusing the request.**
6. **Supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means , using a standardised format.**
7. **No fee shall be charged for any action taken following a request for mutual assistance. Supervisory authorities may agree with other supervisory authorities rules for indemnification by other supervisory authorities for specific expenditure arising from the provision of mutual assistance in exceptional circumstances.**
8. **The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, in particular the standardised format referred to in paragraph 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 57.2.**

## **Article 49**

### **General Comments:**

Although article 49 is largely consistent with article 66 in the Regulation, there are some small differences that should be amended:

- point 1.d should be amended with a clause similar to the addition made to art. 66 para. 1 point cb in the Regulation. The opinion of the European Data Protection Board is essential especially when the Commission is making an adequacy decision.

- point 1 g: the content is the same as in art. 66 para 1 point g in the proposed Regulation. To ensure the consistency the text in point g should be unified with the text of the Regulation.

- point 2: the wording in this point should be unified with article 66.2 of the proposed Regulation by replacing the words “lay out” with the word “indicate”.

*Article 49*

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

1. The European Data Protection Board established by Regulation (EU).../2012 shall exercise the following tasks in relation to processing within the scope of this Directive:
  - (a) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Directive;
  - (b) examine, on request of the Commission or on its own initiative or of one of its members, any question covering the application of the provisions adopted pursuant to this Directive and issue guidelines recommendations and best practices (...) in order to encourage consistent application of those provisions;
  - (c) review the practical application of guidelines, recommendations and best practices referred to in point (b) (...);
  - (d) give the Commission an opinion on the level of protection in third countries or international organisations, **in particular in the cases referred to in article 34;**
  - (e) promote the co-operation and the effective bilateral and multilateral exchange of information and practices between the supervisory authorities;
  - (f) promote common training programmes and facilitate personnel exchanges between the supervisory authorities, as well as, where appropriate, with the supervisory authorities of third countries or of international organisations;

- (g) promote the exchange of knowledge and documentation ~~with data protection supervisory authorities worldwide, including~~ on data protection legislation and practice **with data protection supervisory authorities worldwide.**
2. Where the Commission requests advice from the European Data Protection Board, it may ~~lay out~~ **indicate** out a time limit within which the European Data Protection Board shall provide such advice, taking into account the urgency of the matter.
3. The European Data Protection Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 57(1) and make them public.
4. The Commission shall inform the European Data Protection Board of the action it has taken following opinions, guidelines, recommendations and best practices issued by the European Data Protection Board.

## CHAPTER VIII

### REMEDIES, LIABILITY AND SANCTIONS

#### Article 50

##### General Comments:

Only the competent supervisory authority should be legitimate to deal with complaints lodged by data subjects. However the data subject should have the right to lodge the complaint to any supervisory authority within EU. If the complaint has been lodged to a supervisory authority not competent, it should transmit the complaint ex officio to the supervisory authority which is competent under Article 39.

The exact wording of article 50 should be decided on after the negotiations on corresponding provisions in the Regulation have been finished (present art. 73 in the Regulation).

**Article 53**

FI approves of the removal of this article.

**Article 54**

Based on the formulation of this article read together with article 3 (7) which defines “processor” it should be made clear that a natural person in the capacity of an individual employee of a public authority ( e.g. the police forces), agency or any other body is excluded from the liability of damages which occur in the course of the regular activities of that body.

**Article 60**

As it now stands, the article is very ambiguous. FI waits for the compromise text promised by the Presidency.

**Article 62**

FI considers the time allocated for implementation far too short, regardless of the outcome of the negotiations of the Directive.

## **SWEDEN**

### **CHAPTER VI**

#### **General**

At a general level, Sweden has some understanding of the need to bring about further harmonisation of the rules for supervisory authorities. However, there are major differences in their administrative organisation in the different Member States, and the Member States must therefore be given sufficient room for manoeuvre. Some parts of the proposal are still far too detailed. Sweden also believes that, even in future, it would be desirable to allow there to be several supervisory authorities with different tasks and mandates. It is important that a supervisory authority should be allowed scope to make an independent assessment of whether or not a complaint should lead to further measures, so that the authority is able to prioritise its resources and target them on issues that are particularly sensitive or far-reaching as regards data protection. Rules of this type should be left to the Member States.

On the whole, the wording of Articles 39 to 43 matches that of the General Data Protection Regulation. Uniformity should be sought between the provisions of the Regulation and the Directive where there are no particular grounds for special rules in view of the scope of the Directive. Since the corresponding discussions regarding the Regulation have not been completed, we think that it is too early to present our definitive comments on Chapter VI.

### **CHAPTER VII**

#### ***Article 48***

The article is new in relation to the Data Protection Framework Decision, and provides for a new form of mutual assistance between supervisory authorities. A similar provision is found in the Data Protection Regulation. However, in that provision, technical grounds for refusal have been included.

We question whether a supervisory authority in one Member State should be able to oblige a supervisory authority in another Member State to carry out inspections and investigations (paragraph 1). If there is to be a right to demand such measures, then both technical and substantive grounds for refusal should also be introduced.

## **CHAPTER VIII**

### ***Article 50***

It should be clarified that the article does not impose an obligation for a supervisory authority to accept complaints which it is not competent to handle (see Article 44). Sweden endorses Austria's observation in footnote 163.

### ***Article 51***

Paragraph 2 proposes the introduction of a form of proceedings against the supervisory authority for failure to act. In view of the subsidiarity principle, there are no grounds for harmonising the Member State's procedural law by establishing proceedings for failure to act. Paragraph 2 should therefore be deleted.

The heading of the article could perhaps be amended as follows: Right to a judicial remedy against a decision by a supervisory authority

### ***Article 54***

The wording of paragraph 1 is not clear. It should be clarified whether the provision covers both economic and immaterial damage (see footnote 544 in the Data Protection Regulation).

In paragraph 2, the implications of joint and several liability and of the burden of proof rule need to be analysed in more detail. A change in the allocation of responsibility can have major effects. Since the assistant only processes personal data on instructions from the data controller, it would appear logical for the latter to have sole responsibility for its processing. It should be clarified whether joint and several liability is limited to cases where several controllers have together *caused* damage. The proposed wording of this article is not sufficiently clear on this point, since it merely states that "more than one controller or processor is involved in the processing".

## **CHAPTER IX**

### ***Article 59***

What is meant by *specific provisions* should be clarified. If necessary, particular agreements and cooperative arrangements should be referred to.

### ***Article 62***

Two years is not a sufficiently long implementation period, given the extensive changes to the law and conversion of IT systems which the Directive could require.



## **SWITZERLAND**

### **Proposals of SWITZERLAND for amendments of chapters VII to X of the Data Protection Directive (Document dated October 2, 2013 / 11624/1/13/ REV 1)**

Switzerland's proposals for wording are in bold:

#### **CHAPTER VII CO-OPERATION**

##### **Article 48**

##### **Mutual assistance**

**4. A supervisory authority to which a request for assistance is addressed may refuse to comply with it when:**

- (a) it is not competent for the subject-matter of the request or for the measures it is requested to execute; or**
- (b) compliance with the request would be incompatible with the provisions of this Directive or with Union or Member State law to which the supervisory authority receiving the request is subject.**

We are of the opinion that Article 48 should also regulate the cases where the supervisory authority can refuse a request for assistance from another supervisory authority. We propose to provide for a similar regulation as in Article 55 paragraph 4 of the Regulation.

## *Article 49*

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

Please add the following footnote for Article 49:

CH refers to the letter of the Mission of Switzerland dated 28.08.2013 to the Legal Service of the General Secretariat of the Council of the European Union. CH considers that it should be entitled to take part in the European Data Protection Board (EDPB) established by the Data Protection Regulation even if the General Data Protection Regulation will not be an integral part of the Schengen acquis, as it is a common body of the Regulation and the Directive. Should the composition of the EDPB differ according to the questions discussed (General Data Protection Regulation - Data Protection Directive), CH considers it should be entitled to take part wholly in the composition treating questions of the Data Protection Directive. The participation of CH in this board shall be guaranteed in the same extent as it is the case for the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 Directive 95/46/CE) and the Data Protection Comitology Committee (Article 31 Directive 95/46/CE).

## **CHAPTER VIII REMEDIES, LIABILITY AND SANCTIONS**

### **Article 50**

#### **Right to lodge a complaint with a supervisory authority**

**par .1** Without prejudice to any other administrative or judicial remedy, Member States shall provide that **each supervisory authority can be requested by any person to investigate a claim concerning a violation of the provisions adopted pursuant to this Directive with regard to the data processing within its competence.**

We are of the opinion that forum shopping must be avoided. Therefore, we propose to provide for a similar regulation as in Article 12bis paragraph 3 of the propositions of modernisation dated December 18, 2012 of the Convention for the protection of individuals with regard to automatic processing of personal data (ETS no. 108).

## Article 51 par. 2

### Right to a judicial remedy against a supervisory authority:

(...) or does not inform the data subject within a **reasonable deadline** on the progress or outcome of the complaint lodged under Article 50.

CH is of the opinion that three months are too short and it also depends of the particular case. Therefore, we propose to substitute "within three months" by "within a reasonable deadline".

## Article 55

### Penalties

#### Footnote 169

DE scrutiny reservation. EE **and CH** opposed this Article because **their respective national law** did not allow for penalties on public bodies. EE **and CH** reservations. ....

Please note the modification of FN 169.

## CHAPTER X FINAL PROVISIONS

#### Footnote 170

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The footnote 170 can be deleted. Switzerland has only a reservation on Article 60.

## **Article 60**

### ***Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation***

International agreements involving the transfer of personal data to third countries or international organizations which were concluded by Member States prior to the entry into force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain in force until amended, replaced or revoked.

CH reservation

Switzerland is of the opinion that the requirement pursuant to which the Member States shall take all appropriate steps in order that the agreements concluded with third countries or international organizations be in compliance with the Directive is excessive. Indeed it can not be excluded that a third country refuse to start new negotiations so that the Member State would be obliged to denounce the agreement concluded with the third country to the detriment of the police and judicial cooperation in criminal matters.

Therefore, Switzerland proposes to delete the second sentence.

An alternative solution would be to provide for the same regulation as in Article 26 of the Framework Decision.

## **Article 62**

### **Implementation**

FN 175

For DE **and** CH two years are too short.

Please note the modification of FN 175.