



Council of the
European Union

Brussels, 13 August 2015
(OR. en)

11251/15

**Interinstitutional File:
2012/0010 (COD)**

LIMITE

**DATAPROTECT 128
JAI 604
DAPIX 136
FREMP 168
COMIX 348
CODEC 1088**

NOTE

From:	Presidency
To:	Working Group on Information Exchange and Data Protection (DAPIX)
No. Cion doc.:	5833/12
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 - Chapter V, VI and VII

Further to the DAPIX meeting on 15 and 16 July, as well as on 22 July 2015, the Presidency has redrafted the text of Chapters V, VI and VII taking into account the comments of Member States.

All changes made to the original Commission proposal are underlined text, or, where text has been deleted, indicated by (...). Where existing text has been moved, this text is indicated in *italics*. The most recent changes are marked in **bold underlining** or where text has been deleted in ~~striketrough~~. When text has been reverted to the Commission proposal such text is marked in **bold**.

The Presidency would like to submit to delegations one specific question and invites delegations to express their view on all other provisions concerning Chapters V, VI and VII.

I. Article 44 (2) – Competence

Following discussions of DAPIX meeting on 15 and 16 July, some Member States questioned whether this article should also apply to independent judicial bodies.

The Presidency considers therefore that 2 options can be examined:

Option 1:

“Member States shall provide that the supervisory authority is not competent to supervise processing operations of courts or other judicial authorities only in so far as it touches on decisions in the independent performance of their judicial tasks.”

Option 2:

Keep paragraph 2 as in the original version:

“Member States shall provide that the supervisory authority is not competent to supervise processing operations of courts when acting in their judicial capacity.”

1)The Presidency asks delegations to indicate whether option 1 or option 2 is preferred.

(45) Member States should ensure that a transfer to a third country or to an international organisation only takes place if it is necessary for the prevention, investigation, detection or prosecution of criminal offences *or the execution of criminal penalties* as well as by the police or other law enforcement authorities for the purposes of ~~maintaining law and order and the safeguarding against and the prevention of threats to~~ public security, and the controller in the third country or international organisation is an authority competent within the meaning of this Directive. A transfer may take place in cases where the Commission has decided that the third country or international organisation in question ensures an adequate level of protection, or when appropriate safeguards have been adduced or when derogations for specific situations apply.

*(45a)¹ Where personal data are transferred from a Member State to third countries or international (...) organisations, such transfer should, in principle, take place only after the Member State from which the data were obtained has given its authorisation to the transfer. The interests of efficient law enforcement cooperation require that where the nature of a threat to the public security of a Member State or a third country or to the essential interests of a Members State is so immediate as to render it impossible to obtain prior authorisation in good time, the competent public authority should be able to transfer the relevant personal data to the third country or international organisation concerned without such prior authorisation.*²

(46) **Where the Commission has not adopted a decision in accordance with Article 41 of Regulation (EU) XXX, ifThe Commission** may decide with effect for the entire Union that certain third countries, or a territory or one or more specified sectors within a third country, or an international organisation, offer an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third countries or international organisations which are considered to provide such level of protection. In these cases, transfers of personal data to these countries may take place without needing to obtain any specific authorisation.

¹ Moved from recital 49a

² DE wanted that it was set out that "prior authorisation" could mean already given authorisation within the EU or generally. CH suggested adding the following sentence in the end of recital 49a: "Furthermore, a transfer of personal data should be lawful if the data subject has given his or her consent to the transfer of his or her personal data for one or more specific purposes."

(47) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should take into account how a given third country respects the rule of law, access to justice, as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law.

(48) The Commission should equally be able to recognise that a third country, or a territory or a specified sector within a third country, or an international organisation, no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country or international organisation should be prohibited unless the requirements of Articles 35-36 are fulfilled. Provision should be made for procedures for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.

(49) Transfers not based on such an adequacy decision should only be allowed where appropriate safeguards have been adduced in a legally binding and enforceable instrument, which ensure the protection of the personal data or where the controller (...) has assessed all the circumstances surrounding the data transfer (...) and, based on this assessment, considers that appropriate safeguards with respect to the protection of personal data exist. Such legally binding instruments could for example be legally binding bilateral agreements which have been concluded by the Member States and implemented in their legal order and may be enforced by their data subjects. Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects, including the right to obtain effective administrative or judicial redress. The controller may take into account cooperation agreements concluded between Europol or Eurojust and third countries which allow for the exchange of personal data when carrying out the assessment of all the circumstances surrounding the data transfer.

~~(49a) Where personal data are transferred from a Member State to third countries or international (...) organisations, such transfer should, in principle, take place only after the Member State from which the data were obtained has given its authorisation to the transfer. The interests of efficient law enforcement cooperation require that where the nature of a threat to the public security of a Member State or a third country or to the essential interests of a Members State is so immediate as to render it impossible to obtain prior authorisation in good time, the competent public authority should be able to transfer the relevant personal data to the third country or international organisation concerned without such prior authorisation.~~

(49aa) Where no adequacy decision or appropriate safeguards exist, a transfer or a category of transfers could only take place in specific situations if necessary in order to protect the vital interests of the data subject or another person, or to safeguard legitimate interests of the data subject where the law of the Member State transferring the personal data so provides, or where it is necessary for the prevention of an immediate and serious threat to the public security of a Member State or a third country, or necessary in an individual cases for the purposes of prevention, investigation, detection or prosecution of criminal offences *or the execution of criminal penalties as well as for the purposes of or the safeguarding against and the prevention of public security, or necessary in an individual cases* for the establishment, exercise or defence of legal claims.

(49b) Competent authorities of Member States are applying existing bilateral or multilateral international agreements concluded with third countries in the field of judicial co-operation in criminal matters and police co-operation in order to obtain from private parties established in third countries the relevant information to allow them to perform their legally assigned tasks. In principle, this takes place through or at least with the cooperation of the competent authorities of the concerned third countries. However, in exceptional specific individual cases, it may occur that the procedures provided for by the international agreements applicable do not allow to obtain the relevant information in a timely manner, so that competent authorities of Member States have to transfer personal data directly to private parties established in third countries, for example in urgent cases when criminal offences have been committed by means of electronic communication technology like social networks, or where data generated by communication technology are relevant as evidence of the perpetration of a criminal offence. Even if this direct communication between competent authorities and private bodies should remain exceptional and strictly necessary and should only take place in urgent and individual cases, this Directive should provide for specific conditions to regulate these specific cases. These provisions should not be considered as derogations to any existing bilateral or multilateral international agreement in the field of judicial co-operation in criminal matters and police co-operation to the extent that such agreements are compatible with Union law. Furthermore, the competent authorities of the concerned third countries should have authorised the transfers or should at least have had prior knowledge of this transfers and not having objected to it. These specific rules should apply in addition to the other rules of the Directive, in particular to the provisions on the lawfulness of processing and the other provisions of Chapter V.

(...)

(51) The establishment of supervisory authorities in Member States, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of their personal data. The supervisory authorities should monitor the application of the provisions adopted pursuant to this Directive and contribute to its consistent application throughout the Union, in order to protect natural persons in relation to the processing of their personal data. For that purpose, the supervisory authorities should co-operate with each other and the Commission.

(52) Member States may entrust a supervisory authority already established (...) under Regulation (EU).../~~2012~~ **XXX** with the responsibility for the tasks to be performed by the national supervisory authorities to be established under this Directive.

(53) Member States should be allowed to establish more than one supervisory authority to reflect their constitutional, organisational and administrative structure. Each supervisory authority should be provided with (...) financial and human resources, premises and infrastructure, which are necessary for the effective performance of their tasks, including for the tasks related to mutual assistance and co-operation with other supervisory authorities throughout the Union.

(54) The general conditions for the member or members of the supervisory authority should be laid down by law in each Member State and should in particular provide that those members should be either appointed by the parliament or the government or the head of state of the Member State (...).

(54a) The independence of supervisory authorities should not mean that the supervisory authorities cannot be subjected to control or monitoring mechanism regarding their financial expenditure. Neither does it imply that supervisory authorities cannot be subjected to judicial review.

(55) While this Directive applies also to the activities of national courts and other judicial authorities, the competence of the supervisory authorities should not cover the processing of personal data when **they courts** are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks³. However, this exemption should be limited to (...) judicial activities in court cases and not apply to other activities where judges might be involved in accordance with national law.

³ CH suggested replacing "in order to safeguard ...judicial tasks" with the following: "so that it doesn't interfere with national rules on judicial proceedings."

(56) In order to ensure consistent monitoring and enforcement of this Directive throughout the Union, the supervisory authorities should have *in each Member State* the same tasks and effective powers, including powers of investigation, **legally binding intervention corrective powers, decisions and sanctions** **and authorisation and advisory powers**, particularly in cases of complaints from individuals, **and without prejudice to the powers of prosecutorial authorities under national law, to bring infringements of this Directive to the attention of the judicial authorities** and/or to engage in legal proceedings. **Such powers should also include the power to forbid the processing on which the authority is consulted.** The powers of supervisory authorities should be exercised in conformity with **appropriate procedural safeguards set out in Union law and Member State law, impartially, fairly and within a reasonable time. In particular each measure should be appropriate, necessary and proportionate in view of ensuring compliance with this Directive, taking into account the circumstances of each individual case, respect the right of every person to be heard before any individual measure which would affect him or her adversely is taken and avoid superfluous costs and excessive inconveniences for the persons concerned. Investigatory powers as regards access to premises should be exercised in accordance with specific requirements in national procedural law, such as the requirement to obtain a prior judicial authorisation. performance of its supervisory tasks . These powers should be exercised in conformity with Union law or Member State law. The powers of intervention should include the delivering of opinions before processing is carried out, and ensuring appropriate publication of such**

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

(57) Each supervisory authority should deal with complaints lodged by any data subject and should investigate the matter. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject.

(58) The supervisory authorities should assist one another in performing their tasks and provide mutual assistance, so as to ensure the consistent application and enforcement of the provisions adopted pursuant to this Directive.

(59) The European Data Protection Board established by Regulation (EU).../~~2012~~ **XXX** should contribute to the consistent application of this Directive throughout the Union, including advising the Commission and promoting the co-operation of the supervisory authorities throughout the Union.

CHAPTER V
TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL
ORGANISATIONS⁴

Article 33

General principles for transfers of personal data

1. Member States shall provide that any transfer of personal data by competent (...) authorities (...) to a third country, or to an international organisation, including further onward transfer to another third country or international organisation, may take place only if:⁵
- (a) the transfer is necessary for the purposes set out in Article 1 (1) ~~prevention, investigation, detection or prosecution of~~⁶ criminal offences [...] ~~the execution of~~⁷ ~~criminal penalties or~~⁸ ~~the~~⁸ safeguarding against and the prevention of threats to public security; and,
 - (b) (...)
 - (c) the controller in the third country or international organisation is an authority competent for the purposes referred to set out in Article 1(1); and
 - (d) in case personal data are transmitted or made available from another Member State, that Member State has given its prior authorisation to the transfer⁹ in compliance with its national law¹⁰ and

⁴ AT, BE, CZ, CY, DE, DK, EE, FI, FR, IT, NL, NO, PL, RO, SI, SK, ES and UK scrutiny reservation on Chapter V. .

⁵ DE suggested to add the following text after "only if" "in addition to the conditions under Article 7" for the sake of legal clarity, including the paragraph 1a (consent by the data subject) suggested by DE

⁶ AT suggested to add "a specific" before criminal offence in order to clarify that transfer may only take place in a specific case and not as a routine transfer.

⁷ AT suggested to add "a specific" before criminal penalty in order to clarify that transfer may only take place in a specific case and not as a routine transfer.

⁸ DE suggested to remove paragraph 1(a) to avoid that the relationship with Article 7 was unclear.

⁹ AT wanted to add "including further onward transfer," after *transfer* to make clear that the consent in also necessary for subsequent transfer.

(e) the Commission has decided pursuant to Article 34 that the third country or international organisation in question ensures an adequate level of protection or in the absence of an adequacy decision pursuant to Article 34, where appropriate safeguards are adduced or exist pursuant to Article 35.¹¹ ~~or in the absence of an adequacy decision pursuant to Article 34 or of appropriate safeguards in accordance with Article 35, where derogations for specific situations apply pursuant to Article 36.~~¹²

2¹³. Member States shall provide that transfers without the prior authorisation by another Member State in accordance with point (d) shall be permitted only if the transfer of the personal data is necessary for the prevention of an immediate and serious threat to public security of a Member State or a third country or to essential interests of a Member State and the prior authorisation cannot be obtained in good time. The authority responsible for giving prior authorisation shall be informed without delay.

3. Member States shall provide that in the absence of an adequacy decision pursuant to Article 34 or of appropriate safeguards in accordance with Article 35, a transfer may only take place where derogations for specific situations apply pursuant to Article 36 and the conditions laid down in points (a), (c) and (d) of paragraph 1 and in paragraph 2 of this Article are complied with.

¹⁰ AT suggested to insert another principle after point (d) that transfers may take place only if and insofar as provided for in national law.

¹¹ NL suggested to insert *consent* to be able to use the data for all purposes. FI, supported by BE, meant that, in line with Article 34, a territory or specified sector within a specific third country should be mentioned in paragraph (e).

¹² DE suggested to insert a paragraph 2 with the following wording: "(2) Member States shall provide that the recipient shall be informed of any processing restrictions and be notified that the personal data may be used only for the purposes for which they are transferred. The use for other purposes shall be allowed only with the prior authorisation of the transmitting member state and, in case personal data had been transmitted or made available from another member state to the transmitting member state, the prior authorisation of the other member state too, or in cases where the requirements of Article 36a are fulfilled". DE had taken this text from removed Article 37 because it found it important as it is a general principle for transfer to third countries, however the part on *reasonable steps* had been deleted. DE found it also important that use for other purposes could only be carried out with the consent of the transferring MS, maybe also the MS from where the data originated (like in Article 33.1 (d)).

¹³ Moved from Article 36a

Article 34

Transfers with an adequacy decision¹⁴

1. Member States shall provide that a transfer¹⁵ of personal data to a third country or a territory or one or more specified sectors within a third country or an international organisation may take place where the Commission has decided in accordance with Article 41 of Regulation (EU) ~~....~~/**2012 XXX** or in accordance with paragraph 3 of this Article that the third country or a territory or specified sector within that third country, or the international organisation in question ensures an adequate level of protection. Such transfer shall not require any specific authorisation.¹⁶

2¹⁷ Where no decision adopted in accordance with Article 41 of Regulation (EU) ~~....~~/**2012 XXX** exists, the Commission shall assess the adequacy of the level of protection, **giving consideration in particular taking into account** ~~to~~ the following elements:

- (a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, data protection rules (...) including concerning public security, defence, national security and criminal law as well as (...) security measures, including rules for onward transfer of personal data to another third country or international organisation, which are complied with in that country or by that international organisation; as well as the existence of effective and enforceable data subject rights and effective administrative and judicial redress for data subjects (...) whose personal data are being transferred;

¹⁴ DE scrutiny reservation. DE, supported by SK, meant that transfers under Article 34-36 should be considered as being on equal footing and not that Article 35 and 36 be exceptions to Article 34.

¹⁵ BE and FR suggested to talk about “any transfer or set of transfer”.

¹⁶ DE meant that since *authorisation* could lead to misunderstandings it should be deleted and the following wording be added: " additional assessment in respect of the level of data protection. Decisions taken by the Commission under sentence 1 shall not result in an obligation of Member States to transfer data". With this wording DE also wanted to make clear that there is no obligation to transfer data.

¹⁷ BE reservation on Article 34(2) because it should be based on the GDPR and not on police cooperation or cooperation in criminal matters.

- (b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility (...) for ensuring and enforcing compliance with the data protection rules including adequate sanctioning powers for assisting and advising (...) data subjects in exercising their rights and for co-operation with the supervisory authorities of the Union and of Member States¹⁸; and
- (c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

- 2a. The European Data Protection Board shall give the Commission an opinion for the assessment of the adequacy of the level of protection in a third country or international organization, including for the assessment whether a third country or the territory or the international organization or the specified sector no longer ensures an adequate level of protection.
- 3. The Commission after assessing the adequacy of the level of protection, may decide, within the scope of this Directive that a third country or a territory or one or more specified sectors within that third country or an international organisation ensures an adequate level of protection within the meaning of paragraph 2. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority(ies) mentioned in point (b) of paragraph 2. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 57(2).
- 4. (...)
- 4a. The Commission shall monitor the functioning of decisions adopted pursuant to paragraph 3 ~~and decisions ...~~Article 25(6).

¹⁸ Cion scrutiny reservation.

5. The Commission may decide within the scope of this Directive that a third country or a territory or a specified sector within that third country or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2, and may, where necessary, repeal, amend or suspend such decision without retro-active effect. The (...) implementing acts shall be adopted in accordance with the examination procedure referred to in Article 57(2), or, in cases of extreme urgency, in accordance with the procedure referred to in Article 57(3).
- 5a.** *~~At the appropriate time,~~ The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.*
6. Member States shall ensure that where a decision pursuant to paragraph 5 is taken, such decision (...) shall be without prejudice to transfers of personal data to the third country, or the territory or the specified sector within that third country, or the international organisation in question pursuant to Articles 35 and 36 (...).
7. The Commission shall publish in the *Official Journal of the European Union* a list of those third countries, territories and specified sectors within a third country and international organisations in respect of which decisions have been taken pursuant to paragraphs 3, ~~3a~~ and 5.
8. (...)

Article 35

Transfers by way of appropriate safeguards

1. (...) In the absence of a decision pursuant to paragraph 3 of Article 34, Member States shall provide that ~~a controller or processor may~~ a transfer ~~of~~ personal data to a third country or an international organisation ~~may take place~~ where:
- (a) appropriate safeguards with respect to the protection of personal data¹⁹ have been adduced in a legally binding and enforceable²⁰ instrument; or
 - (b) the controller (...) has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with respect to the protection of personal data²¹. Such an assessment may take into account the existing cooperation agreements between Europol and/or Eurojust and third countries which allow for the exchange of personal data.²²

23

2. (...)

¹⁹ DE meant that it was important that the criteria in Article 34(2) be applied as well and suggested adding the following text after *personal data* "taking account of the criteria set out in Article 34 (2),"

²⁰ DE raised concerns, supported by CY, about *enforceable* and found that it was a too high requirement and wanted more flexibility.

²¹ AT scrutiny reservation on Article 35.1(b). HU, supported by NL, requested the deletion of Art. 35 para 1. b) HU because it believed that it was not an appropriate safeguard if the controller may, on his own, assess the circumstances before transferring the data. HU meant that the assessment prior to the transfer should be linked to objective criteria; as an alternative solution, HU suggested the insertion of prior authorisation by the SA in the receiving country.

²² DE scrutiny reservation on paragraph (1)(b). Cion scrutiny reservation on paragraph (1)(b) linked to the fact that to it was not aware of any adequacy decision taken on the basis of Article 13 of DPFD.

²³ FR suggested adding a subparagraph (c) with the following wording: "the transfer is necessary in the framework of a police or judicial cooperation in criminal matters, provided that the legal basis for such cooperation includes data protection provisions".

Article 36

Derogations for transfer in specific situations

- 1.** (...) In the absence of an adequacy decision pursuant to Article 34 or appropriate safeguards pursuant to Article 35, Member States shall provide that, a transfer or a category of transfers of personal data to a third country or an international organisation may take place only on condition that:
- (a) the transfer is necessary in order to protect the vital interests of the data subject or another person; or
 - (b) the transfer is necessary to safeguard legitimate interests of the data subject **relating to the purposes set out in Article 1 (1)** where the law of the Member State transferring the personal data so provides; or
 - (c) the transfer of the data is necessary for the prevention of an immediate and serious threat to public security of a Member State or a third country; or
 - (d) the transfer is necessary in an individual cases for the purposes **set out in Article 1 (1) of prevention, investigation, detection or prosecution of criminal offences, the execution of criminal penalties or the safeguarding against and the prevention of threats to public security**; or
 - (e) the transfer is necessary in an individual cases²⁴ for the establishment, exercise or defence of legal claims relating to **the purposes set out in Article 1 (1) the prevention, investigation, detection or the safeguarding against and the prevention of threats to public security or prosecution of a specific criminal offence or the execution of a specific criminal penalty.**²⁵

²⁴ UK, supported by BE, feared that *individual cases* could be interpreted narrowly and therefore suggested to delete these words and explain in the recitals.

²⁵ CH suggested inserting a paragraph (f) with the following text: "(f) the data subject has given his or her consent to the transfer of his or her personal data for one or more specific purposes." (this could be used when the transfer is in the interest of the victim). FR suggested a paragraph (f) with this wording: "The transfer is necessary to safeguard legitimate prevailing interests, especially important public interests".

2. Personal data shall not be transferred, if the transferring competent authority determines that *no*-rights or legitimate interests of the data subject concerned override the public interest if in the individual case the data subject has protectable interests, especially data protection interests, in the exclusion of the transfer, which override the public interest in the transfer set out in points (d) and (e) of paragraph 1.²⁶

Article 36a

(...)

²⁶ IE, AT, PT, CY scrutiny reservation. UK wanted to delete the paragraph.

Transfer of data to private parties

1. **By way of derogation to Article 33 (1) (c) and without prejudice to any international agreement referred to in paragraph 2, Union or Member State law may provide that the competent authorities may, in individual and exceptional-specific cases, transfer personal data directly to private parties established in third countries, only if the other provisions of this Directive are complied with and the following conditions are fulfilled:**
 - (a) **the transfer is essential and strictly necessary for the performance of a task of the competent authority as provided for by Union or Member State law for the purposes referred to set out in Article 1(1); and**
 - (b) **the transfer is considered as urgent by the relevant competent authorities of the Member State; and**
 - (c) **the competent authorities of the relevant third country have authorised the transfer, or have at least had prior knowledge of this transfer and not having objected to it; and**
 - (d) **the transferring competent authority determines that no rights or legitimate interests of the data subject concerned override the public interest necessitating the transfer in the case at hand.**

2. **An international agreement referred to in paragraph 1 shall be any bilateral or multilateral international agreement in force between Member States and third countries in the field of judicial co-operation in criminal matters and police co-operation to the extent that such agreements are compatible with Union law.**

²⁷ FR, FI, SK, UK, AT, HR and Cion scrutiny reservation.

Article 37

Specific conditions for the transfer of personal data

Article 38

International co-operation for the protection of personal data

(...)

CHAPTER VI
INDEPENDENT SUPERVISORY AUTHORITIES

SECTION 1
INDEPENDENT STATUS

Article 39

Supervisory authority

1. **Each Member State** shall provide that one or more independent public authorities are responsible for monitoring the application of the provisions adopted pursuant to this Directive.
- 1a. Each supervisory authority shall contribute to the consistent application of this Directive throughout the Union. (...) For this purpose, the supervisory authorities shall co-operate with each other and the Commission **in accordance with Chapter VII**.
2. Member States may provide that a supervisory authority established (...) under Regulation (EU) ~~.../2012~~ **XXX** assumes responsibility for the tasks of the supervisory authority to be established under paragraph 1 of this Article.
3. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which (...) shall represent those authorities in the European Data Protection Board.

Article 40

Independence

1. Member States shall ensure that each supervisory authority acts with complete independence in performing the tasks and exercising the powers entrusted to it.
2. (...) Member States shall provide that the member or ~~the~~ members of ~~the~~ each supervisory authority, in the performance of their ~~duties~~ tasks and exercise of their powers in accordance with this Directive, remain free from external influence, whether direct or indirect and neither seek nor take instructions from anybody.
3. (...) ²⁸
4. (...) ²⁹
5. (...) Member States shall ensure that each supervisory authority is provided with the (...) human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers including those to be carried out in the context of mutual assistance, co-operation and active participation in the European Data Protection Board.
6. (...) Member States shall ensure that each supervisory authority must have its own staff which shall ~~be appointed by and~~ be subject to the direction of the member or ~~the~~ members of the supervisory authority.
7. Member States shall ensure that each supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that each supervisory authority has separate, public, annual budgets which may be part of the overall state or national budget. ~~and shall be made public.~~

²⁸ Cion reservation against deletion. DE also preferred to reinstate paragraph 3, but using the singular or plural for the members.

²⁹ Cion reservation against deletion. DE also preferred to reinstate paragraph 4 but using the singular or plural for the members.

Article 41

General conditions for the members of the supervisory authority

1. Member States shall provide that the member or ~~the~~ members of each supervisory authority must be appointed either by the parliament and/or the government or the head of State of the Member State concerned **or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure.**
2. The member or members shall have the qualifications, experience and skills required to perform their duties and exercise their powers.
3. ~~(...)~~³⁰ The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement **in accordance with the law of the Member State concerned.**
4. (...)³¹
5. (...)³²

³⁰ Cion scrutiny reservation against deletion.

³¹ Cion scrutiny reservation against deletion.

³² Cion scrutiny reservation against deletion.

Article 42

Rules on the establishment of the supervisory authority

1. ~~Each~~ Member States shall provide by law for:

- (a) the establishment of each supervisory authority (...);
- (b) ~~(...)~~ the qualifications (...) required to perform the duties of the members of the supervisory authority;
- (c) the rules and procedures for the appointment of the member or members of each supervisory authority (...);
- (d) the duration of the term of the member or members of each supervisory authority, which shall be no less than four years, except for the first appointment after entry into force of this Directive, part of which may take place for a shorter period **where this is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure;**
- (e) whether and, if so, for how many terms, the member or members of ~~the~~ each supervisory authority shall be eligible for reappointment;
- (f) the (...) conditions governing the **obligations employment** of the member or members and staff of each supervisory authority, **prohibitions on actions and occupations incompatible therewith during and after the term of office** and rules governing the cessation of employment.
- (g) (...)

1a. *Member States shall provide that the member or members and the staff of each supervisory authority **shall, in accordance with Union or Member State law, be** subject to a duty of professional secrecy ***both during and after their term of office***, with regard to any confidential information which has come to their knowledge in the course of the performance of their (...) duties **or exercise of their powers.***

Article 43

Professional secrecy

~~Member States shall provide that the member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office with regard to any confidential information which has come to their knowledge in the course of the performance of their duties or exercise of their powers, (...).~~

SECTION 2

TASKS AND POWERS

Article 44

Competence

1. Member States shall provide that each supervisory authority shall be competent to perform the tasks and to exercise (...) the powers conferred on it in accordance with this Directive on the territory of its own Member State.
2. Member States shall provide that the supervisory authority is not competent to supervise processing operations of independent judicial bodies³³ courts when acting in their judicial capacity^{34, 35}

³³ CH preferred the wording of recital 55, CH, AT, BE, IT suggested to replace *independent judicial bodies* with "national courts or other judicial authorities".

³⁴ ES suggested adding "and other matters assigned to bodies or authorities of the judiciary related to their judicial capacity." ES meant that such wording was necessary to ensure the independence of the judiciary enshrined in the Constitutions of the MS, so that all treatments related to the judicial capacity fell outside the administrative control, and remained within the judiciary.

³⁵ DE and HU scrutiny reservation. SI considered that the prosecution office and the police should be put on equal footing with the judiciary and be excluded for the SA supervision..

Article 45

Tasks

1. Member States shall provide that **each** supervisory authority shall **on its territory**:
 - (a) ~~monitors and enforces~~ the application of the provisions adopted pursuant to this Directive and its implementing measures;
 - (aa) ~~promotes public awareness and understanding of the~~ **of the risks, rules, safeguards and rights in relation to the processing of personal data;**
 - (ab) **advise, in accordance with national law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of data subjects' rights and freedoms with regard to the processing of personal data;**
 - (ac) ~~promotes the awareness of controllers and processors of their obligations under the provisions adopted pursuant to this Directive;~~
 - (ad) ~~upon request, provides information to any data subject concerning the exercise of his or her rights under the provisions adopted pursuant to this Directive and, if appropriate, co-operates with the supervisory authorities in other Member States to this end;~~
 - (b) ~~deals with~~ complaints lodged by ~~any~~ data subject, or ~~by a~~ body, organisation or association representing **and duly mandated by a data subject** in accordance with Article 50, and investigates, to the extent appropriate, the subject matter of the complaint and ~~informs~~ the data subject or the body, organisation or association of the progress and the outcome of the investigation within a reasonable period, in particular where further investigation or coordination with another supervisory authority is necessary;
 - (c) ~~checks~~ the lawfulness of data processing pursuant to Article 14, and ~~informs~~ the data subject within a reasonable period on the outcome of the check or on the reasons why the check has not been carried out;

- (d) cooperates with, including sharing information, and provides mutual assistance to other supervisory authorities with a view to ensuring the consistency of application and enforcement of the provisions adopted pursuant to this Directive;
- (e) conducts investigations on the application of the provisions adopted pursuant to this Directive either on its own initiative, including on the basis of a information received from another supervisory or other public authority, or in response to a a complaint (...);
- (f) monitors 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; new technologies, mechanisms or procedures involving specific risks for the rights and freedoms of individuals;**
- ~~(g) responds to consultation requests by Member State institutions and bodies on legislative and administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data;~~
- ~~(h) gives advice on processing operations referred to in Article 26;~~
- (i) contributes to the activities of the European Data Protection Board.

2. (...)

3. (...)

4. ~~(...)~~ **Each** supervisory authority shall facilitate the submission of *complaints referred to in point (b) of paragraph 1, **by measures such as providing*** a complaint submission form which can be completed **also** electronically, without excluding other means of communication.

5. Member States shall provide that the performance of the tasks of ~~the~~ **each** supervisory authority shall be free of charge for the data subject **and for the data protection officer, if any.**

6. Where requests are manifestly unfounded or excessive, in particular ~~due to~~ **because of** their repetitive character, the supervisory authority may refuse to act on the request³⁶. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

Article 46

Powers

- (1)** **Each Member State shall provide by law that each its supervisory authority shall have at least the following investigative powers:**
- (a) ~~powers (...);~~ **to order the controller and the processor, and, where applicable, the controller's representative to provide any information it requires for the performance of its tasks;**
- (aa) to notify the controller or the processor of an alleged infringement of the provisions adopted pursuant to this Directive;**
- (ab) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;**
- (ac) to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in conformity with Union law or Member State procedural law.**
- (1a)** **Each Member State shall provide by law that each its supervisory authority shall have corrective powers such as, for example at least the following corrective powers:**
- (a) **to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions adopted pursuant to this Directive;**

³⁶ CH suggested to add *can charge a fee* and to delete the last sentence.

~~(b) — to issue reprimands to a controller or processor where processing operations have infringed provisions adopted pursuant to this Directive;~~

~~(c) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Directive;~~

~~(d) to order the controller or processor to bring processing operations into compliance with the provisions adopted pursuant to this Directive, where appropriate, in a specified manner and within a specified period; in particular by ordering the rectification, restriction or erasure of data pursuant to Article 15;~~

~~(e) to impose a temporary or definitive limitation on processing;~~

f) to order the suspension of data flows to a recipient in a third country or to an international organisation.

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

(a) to advise the controller in accordance with the prior consultation procedure referred to in Article 26;

(aa) to issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with national law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data;

2. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter of Fundamental Rights of the European Union.

~~(b) — effective powers of interventions (...);~~

~~(e)(3). Each Member State shall provide by law that its supervisory authority shall have the power to ~~where the provisions adopted pursuant to this Directive have been infringed~~ ~~or to~~ bring ~~this~~ infringements of provisions adopted pursuant to this Directive to the attention of judicial ~~or other relevant~~ authorities and, where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions adopted pursuant to this Directive.~~

Article 47

Activities report

Member States shall provide that each supervisory authority draws up an annual report on its activities. The report shall be transmitted to the national Parliament, the government and other authorities as designated by national law. It shall be made available to the public, the European Commission and the European Data Protection Board.

CHAPTER VII CO-OPERATION

Article 48

*Mutual assistance*³⁷

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 (~~...~~) prior consultations, 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.

2a.³⁸ Member States shall provide that 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 for the purpose for which it was requested.

2b.³⁹ 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 adopted pursuant to this Directive or with Union or Member State law to which the supervisory authority receiving the request is subject.

³⁷ SI reservation. DE and FR scrutiny reservation.

³⁸ NL scrutiny reservation

³⁹ NL scrutiny reservation

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~~ **respond to the request by the requesting supervisory authority. In cases of a refusal under paragraph 2b, it shall explain its reasons for refusing the request.**
- 3a. Supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means, using a standardised format.**
- 3b. 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.**
- 3c.⁴⁰ The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 3a. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 57(2).**

⁴⁰ NL scrutiny reservation

Article 49

Tasks of the European Data Protection Board

1. The European Data Protection Board established by Regulation (EU)..../~~2012~~ XXX 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 its own initiative or on request of one of its members or on request of the Commission*, 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;
(ba) draw up guidelines for supervisory authorities concerning the application of measures referred to in paragraph 1, 1b and 1c of Article 46;
 - (c) review the practical application of **the** guidelines, recommendations and best practices referred to in point (b) **and ba** (...);
 - (d) give the Commission 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 *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** 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.
-