



Informal Justice and Home Affairs Ministers' meeting

18-19 July 2013, Vilnius (Lithuania)

Data Protection Reform

Role of the European Data Protection Board in the consistency mechanism

I. Establishment of the Board and consistency mechanism

A key objective of the proposed General Data Protection Regulation is to ensure a more consistent, coherent and streamlined application of data protection standards across the Union. This would avoid the fragmented transposition of the 1995 Data Protection Directive and do away with the requirement that companies engage with the supervisory authorities of all the Member States in which they operate.

The establishment of a European Data Protection Board (EDPB), comprising the head of a supervisory authority from each Member State and the European Data Protection Supervisor, is one of the institutional tools envisaged to achieve this key objective. Supervisory authorities will be required to cooperate with each other and with the Commission in the EDPB through the 'consistency' mechanism. Supervisory authorities will be required to communicate certain draft measures to the Board and the Commission. In the Commission proposal, these measures cover both measures in individual cases and measures of a general, nature (such as the approval of certification mechanisms or of codes of conduct).

The Board will thereupon issue a non-binding opinion on the matter placed before it. The supervisory authorities concerned are required to take utmost account of the Board's opinion and the requesting supervisory authority must inform the Board and the Commission whether it intends to proceed with the original measure or amend it in line with the opinion.

From a legal point of view it has become clear that the EDPB, which has no legal personality, cannot make any legally binding decisions on supervisory authorities. Even if the EDPB had legal personality, the type of acts which it might adopt should be clearly defined and limited by Regulation. They could not imply the exercise of discretionary power, policy choices, nor be of general application (i.e. no general power to ensure the correct application of the Regulation) and should be subject to the review of the legality of the basis of objective criteria (*Meroni* case law¹).

Furthermore, the Commission cannot be given any powers under the Regulation to block or suspend decisions of supervisory authorities. Obviously the Commission will be able to exercise all powers it has under the Treaties in order to ensure that Member States comply with the Regulation.

¹ Case 9/56; see also CLS opinion, doc. 6941/11.

II. Breadth of application of this mechanism

One of the main questions surrounding the establishment of the EDPB and its role in the consistency mechanism concerns the breadth of application of this mechanism. For reasons of operational workability, costs, effectiveness and subsidiarity, it would appear advisable to limit the scope of cases in which the consistency mechanism should be applied and the cases when the EDPB will be required to give an opinion.

Essentially this can be achieved in two different ways: limiting the inflow of cases and/or providing the EDPB with the possibility of declining to give an opinion in some of the cases submitted to it.

Regarding the first option, it has become clear that the type of cases which the competent supervisory authority will be obliged to submit to the Board will need be further limited.

Ministers are invited to indicate which cases draft measures by a supervisory authority should/could be submitted to the Board by the competent or any other supervisory authority:

- *in all cases of exercise of investigation powers and adoption of provisional measures or of sanctions affecting data subjects in another Member State;*
- *in cases where a (significant) number of data subjects in other (or several) Member States are/might be (substantially) affected by such a measure;*
- *only in cases where the supervisory authority will be competent under the Regulation to take measures regarding data located in the territory of another Member State;*
- *only if there is an objection of another supervisory authority against such a draft measure;*
- *never in individual cases of exercise of investigation powers and adoption of provisional measures or of sanctions, but only in case of measures of a general nature.*

The workload of the EDPB may also be reduced by giving it the power, as the Commission proposal does, to refuse to give an opinion in certain cases submitted to it, for example because the matter is so clear that in reality it requires no EDPB opinion or because the case is similar to a case already decided.

Ministers are invited to indicate whether they can accept this power to refuse giving an opinion:

- *in any case;*
- *only in cases of an individual nature, but not in cases of a general nature;*
- *in cases of a general nature, with the exception of cases in which there are no precedent or cases which present element of novelty.*