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**NOTE**

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from: Presidency  
to: Working Party on Information Exchange and Data Protection

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COMIX 380 CODEC 1475

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COMIX 61 CODEC 219

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Subject: Proposal for a regulation of the European Parliament and of the Council on the  
protection of individuals with regard to the processing of personal data and on the  
free movement of such data (General Data Protection Regulation)  
– Chapter VIII

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Delegations find below comments on Chapter VIII received at 15 October 2013.

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## GERMANY

### **Position of the Federal Government on Chapter VIII of the Commission proposal for a General Data Protection Regulation (COM(2012) 11 final)**

At the meeting of the DAPIX Working Party on 23-24 September 2013, the Presidency invited Member States to submit their proposals for amendments to Chapter III of the Commission proposal for a General Data Protection Regulation. As time is relatively short and the Presidency has already made changes to the chapters concerned, Germany's proposed amendments and additions are shown using the 21 June 2013 version of the draft Regulation as a basis (11013/13).

#### A. Preliminary remarks

Germany wishes to thank the Presidency for this opportunity to state its position. We explicitly reserve the right to make further comments, including on fundamental matters that are not specific to a single Article. We will comment on the recitals separately. General scrutiny reservations and reservations on individual provisions, as submitted in DAPIX, remain. Germany still needs to discuss and examine Chapter VIII more extensively.

#### B. Comments on Articles 73 to 79b

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| <p style="text-align: center;"><i>Article 73</i></p> <p style="text-align: center;"><b><i>Right to lodge a complaint with a supervisory authority</i></b></p> <p>1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a <u>single</u> supervisory authority, <u>in particular in the Member State of his or her habitual residence</u>, if the data subject considers that the processing of personal data relating to <u>him or her</u> does not comply with this Regulation.</p> | <p><b>Note:</b> <i>Our stance is that data subjects must always be able to turn to the supervisory authority in their own Member State. Further adjustment to Articles 73 et seq. may also be necessary following the discussions on the one-stop-shop system.</i></p> <p><i>We assume that the phrase "single supervisory authority" in the following Articles refers to the authority which is competent pursuant to Article 51. For the sake of clarity, we suggest making that reference explicit.</i></p> <p style="text-align: center;"><i>Article 73</i></p> <p style="text-align: center;"><b><i>Right to lodge a complaint with a supervisory authority</i></b></p> <p>1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with <b><u>the supervisory authority that is competent pursuant to Article 51 or a supervisory authority in the Member State of his or her habitual residence</u></b>, if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation <b><u>or that his or her rights have not been respected</u></b>.</p> |
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| <p>2. <u>In the situation referred to in paragraph 1, the data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State and whose objectives include the protection of data subjects' rights and freedoms with regard to the protection of their personal data, to lodge the complaint on his or her behalf (...).</u></p> | <p><i>Note: A right to give a mandate for the lodging of a complaint is a matter that Germany still needs to discuss and examine more extensively.</i></p>  |
| <p>3. Independently of a data subject's <u>mandate or</u> complaint, any body, organisation or association referred to in paragraph 2 shall have the right to lodge a complaint with <u>the competent</u> supervisory authority (...) if it <u>has reasons to</u> consider that a personal data breach referred to in Article 32(1) has occurred and <u>Article 32(3) does not apply.</u></p>                             | <p><i>Note: A right to give a mandate for the lodging of a complaint is a matter that Germany still needs to discuss and examine more extensively.</i></p>  |
|   | <p><b>4. <u>If the authority with which the complaint is lodged is not competent, it shall forward the complaint to the supervisory authority that is competent pursuant to Article 51.</u></b></p> |

*Article 74*

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

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a decision of a supervisory authority concerning them.

*Article 74*

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

***Note: We still question the overall logic and practicability of this arrangement.***

***We are continuing to work on the assumption that the admissibility criteria for any remedy will be based on national law; that would mean, for example, that the question of whether a preliminary procedure involving the authorities is required would be resolved at national level.***

1. Without prejudice to any other administrative or non-judicial remedy, **each natural or legal person seeking annulment of a supervisory authority's decision<sup>1</sup> that is detrimental to them** shall have the right to an effective judicial remedy.

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<sup>1</sup> This specific statement makes it clear that paragraph 1 deals with proceedings for annulment, while paragraph 2 sets out arrangements for proceedings to compel an authority to issue an administrative act.

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| <p>2. <u>Without prejudice to any other administrative or non-judicial remedy</u>, a data subject shall have the right to a judicial remedy (...) where the supervisory authority does not <u>deal with a complaint or does not</u> inform the data subject within three months on the progress or outcome of the complaint <u>lodged under Article 73</u>.</p> | <p>2. <u>Without prejudice to any other administrative or non-judicial remedy</u>, each data subject shall have the right to a judicial remedy obliging the supervisory authority <b><u>that is competent pursuant to Article 51</u></b> to act on a complaint in the absence of a decision necessary to protect their rights <b><u>where their application to have a measure carried out is refused in whole or in part</u></b>, or where the supervisory authority does not inform the data subject within three months, <b>pursuant to point (b) of Article 52(1)</b>, on the progress or outcome of the complaint <u>lodged under Article 73</u>.</p> <p><i>Note: If provision is made only for proceedings brought for failure to act in reasonable time, the resulting protection would be patchy. A means of bringing proceedings to compel an authority to issue an administrative act is therefore necessary.</i></p> |
| <p>3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.</p>  | <p>3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.</p>   |

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| <p>4. (...)</p> | <p>4. (...)</p> <p><i>Note: Although we take the view that there should not be an obligation to bring proceedings, we would nevertheless request an explanation as to why this provision has been deleted completely. The option of reducing the scope to the minimum that is absolutely necessary should be discussed.</i></p>   |
| <p>5. (...)</p> | <p>5. <b><u>Administrative courts' decisions within the meaning of this Article which are issued and enforceable in one Member State shall be enforceable in all Member States and shall be enforced there under the same conditions as a decision issued in the state of enforcement. The first sentence shall apply, mutatis mutandis, to settlements reached before an administrative court. The enforcement procedure shall follow the law of the state of enforcement.</u></b></p> <p><i>Note: We would ask the Presidency to explain what criteria the enforceability of administrative courts' decisions will follow if paragraph 5 is deleted completely.</i></p> |



*Article 75*

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

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

*Article 75*

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

***Note: There is still some doubt as to how proceedings brought directly (under civil law?) will work in relation to administrative procedures and administrative proceedings. For that reason, Germany enters a scrutiny reservation.***

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

2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller is a public authority acting in the exercise of its public powers.

2. **Where Regulation (EC) No 44/2001 (from 10.1.2015 onwards: Regulation (EU) No 1215/2012) applies to proceedings under paragraph 1, jurisdiction shall be governed by that Regulation. Notwithstanding the previous sentence, proceedings against an authority that has acted in exercising its sovereign powers shall be brought before the courts of the Member State where the authority is established.**

*Note: The rules on jurisdiction proposed by the Commission deviate from the provisions of Regulation No 44/2001 (new: Regulation No 1215/2012) although there is no need for them to do so, as Regulation No 44/2001 also covers data protection under civil law. Regulation No 44/2001 (new: Regulation No 1215/2012) also specifies arrangements for the coordination of parallel proceedings (cf. Article 27 et seq. of Regulation No 44/2001), which have proved effective over many years, and which should not be deviated from. New rules therefore seem necessary only to cover the enforcement of administrative-law rights (i.e. rights of public authorities), as such enforcement does not fall under the scope of Regulation No 44/2001 (new: Regulation No 1215/2012).*

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| <p>3. (...)</p> | <p>3. Where proceedings are pending in the consistency mechanism<sup>1</sup> referred to in Article 58, which concern the same measure, decision or practice, a court may, <b>having heard the parties</b>, suspend the proceedings brought before it, except where the urgency of the matter for the protection of the data subject's rights does not make it possible to wait for the outcome of the procedure in the consistency mechanism.</p> <p><i>Note: We agree that there are problems with the consistency mechanism, but nevertheless believe that provisions are needed here.</i></p> |
| <p>4. (...)</p> | <p>4. <b><u>Decisions falling within the scope of Regulation (EC) No 44/2001 (from 10.1.2015 onwards: Regulation (EC) No 1215/2012) shall be enforced under the provisions of that Regulation. Administrative courts' decisions as described in the second sentence of paragraph 2 shall be enforced in accordance with Article 74(5).</u></b></p>  |

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<sup>1</sup> A solution is needed to the problem of how courts are to find out that the consistency mechanism is in operation.

| <p style="text-align: center;"><i>Article 76</i></p> <p style="text-align: center;"><b><u>Representation of data subjects</u></b></p> <p>1. <u>The data subject shall have the right to mandate</u> a body, organisation or association referred to in Article 73(2) to exercise the rights referred to in Articles 74 and 75 on <u>his or her</u> behalf.</p> | <p style="text-align: center;"><i>Article 76</i></p> <p style="text-align: center;"><b><u>Representation of data subjects</u></b></p> <p><b><i>Note: Germany still needs to further discuss and examine the creation of a right for associations or supervisory authorities to represent data subjects.</i></b></p> |
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| 2. (...)   |   |
| 3. (...)   |   |
| 4. (...)   |   |
| 5. (...)   |   |

*Article 77*

***Right to compensation and liability***

1. Any person who has suffered damage as a result of a processing operation which is non compliant with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.

*Article 77*

***Right to compensation and liability***

***Note: As a first step, it is necessary to clarify whether Article 77 definitively settles the issue of liability, or whether complementary rights, derived from national legislation on liability (for example, liability for non-pecuniary losses on the basis of section 823 of Germany's Civil Code (BGB)) may exist in parallel.***

1. Any person who has suffered **pecuniary or non-pecuniary** damage as a result of a processing operation which is non compliant with this Regulation shall have the right to receive compensation from the controller for the damage suffered. **That right shall exist in relation to** the processor **where he or she has deliberately contravened the controller's instructions or has processed the data provided for his or her own purposes.**

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| <p>2. <u>Without prejudice to Article 24(2)</u>, 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.</p> | <p>2. Where more than one controller or <b><u>one controller and one processor share responsibility for the damage</u></b>, they shall be jointly and severally liable for the entire amount of the damage. <b><u>This shall not affect any rights of recourse that exist among them.</u></b></p>  |
| <p>3. The controller or the processor may be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.</p>                    | <p>3a. The controller or the processor may be exempted from their liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.</p> <p>3b. A public body that is the controller of data processed by automated means shall be obliged to pay compensation irrespective of whether it is at fault. The total value of claims in respect of a single event shall not exceed EUR 200 000.</p> <p><i>Note: Germany still needs to examine whether there should be exceptions or relief in respect of liability or the burden of providing evidence and proof in connection with Article 39.</i></p> |
|   | <p>4. <b><u>Any other rights to hold a person liable under the laws of the Union or of the Member States shall remain unaffected.</u></b></p>  |

Germany maintains its reservation on the penalties in Articles 79 to 79b.

The principle of proportionality casts some doubt on the way administrative fines are allocated in the framework set out in Article 79a.

The infringement of data subjects' rights should play a more central role here. Events that have led to an infringement of data subjects' rights should not be subject to lower fines than cases of mere administrative non-compliance that have not necessarily led to an infringement of data subjects' rights (e.g. failure to designate a representative and misuse of data protection seals). Rules should be adopted that distinguish between negligent and deliberate acts where appropriate.

With that in mind, we submit the following comments and proposals for amendments purely as a precaution.

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| <p style="text-align: center;"><i>Article 78</i><br/><b><i>Penalties</i></b></p> <p>(...)</p> | <p style="text-align: center;"><i>Article 78</i><br/><b><i>Penalties</i></b></p> <p>(...)</p> |
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*Article 79*

**General conditions for imposing administrative fines**

1. Each supervisory authority shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation. Such fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Articles 53(1).

*Article 79*

**Administrative sanctions**

1. Each **competent** supervisory authority **within the meaning of Article 51** shall be empowered to impose **administrative sanctions** pursuant to this Article in respect of infringements of this Regulation referred to in Article 79a. (...) Depending on the circumstances of the specific case, fines shall be imposed in addition to, or instead of, measures referred to in Article 53(1). **This power shall not apply in respect of public authorities and bodies.**

*Note: The imposition of fines on public bodies would be contrary to German law. The current system providing for complaints to the highest supervisory authority, which is responsible under the principle of subjection to the law for ensuring the legality of administrative measures within its remit, coupled with the possibility of referral to Parliament, has proved sufficient and effective. As an alternative to the proposed wording Germany could consider a clause giving Member States the option to decide, on their own behalf, whether any, and if so which sanctions should be imposed on public bodies.*



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| <p>2. Administrative <u>fin</u>es imposed pursuant to Article 79a shall in each individual case be effective, proportionate and dissuasive.</p>  | <p>2. The administrative sanctions provided for shall<sup>1</sup> be effective, proportionate and dissuasive. <b><u>All relevant factors shall be taken into account when deciding whether to impose<sup>2</sup> an administrative sanction and when fixing<sup>3</sup> the amount of the fine.</u></b></p>  |
| <p><u>2a.</u> The amount of the administrative fine shall be fixed on a case-by-case basis with due regard to <u>the following</u>:</p> <p>(a) the nature, gravity and duration of the <u>infringement having regard to the nature, scope or purpose of the processing concerned</u>;</p> <p>(b) the intentional or negligent character of the infringement;</p> | <p><u>2a.</u> The amount of the administrative fine shall be fixed on a case-by-case basis with due regard to the following:</p> <p>(a) the nature, gravity and duration of the infringement having regard to the nature, scope or purpose of the processing concerned;</p> <p>(b) the intentional or negligent character of the infringement;</p> |

<sup>1</sup> The wording "in each individual case" could be misunderstood as meaning that a DPA should always impose sanctions. Such decisions should be left to the DPA's discretion, hence the deletion.

<sup>2</sup> The criteria referred to below are not only relevant when fixing the amount of a fine but also when deciding whether or not a sanction should be imposed. The DPA should be given discretion in this regard.

<sup>3</sup> Clarification. The criteria referred to do not apply to the maximum sanctions pursuant to Article 79a but to the imposition of fines by a DPA in individual cases.

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| <p>(c) <u>the number of data subjects affected by the infringement and the level of damage suffered by them;</u></p> <p>(d) <u>action taken by the controller or processor to mitigate the damage suffered by data subjects;</u></p> <p>(e) <u>the degree of responsibility of the controller or processor, having regard to technical and organisational measures implemented by them pursuant to Articles 23 and 30;</u></p> <p>(f) <u>any previous infringements by the controller or processor;</u></p> <p>(g) <u>the financial situation of the controller or processor, including any financial benefits gained, or losses avoided, directly or indirectly from the infringement;</u></p> | <p>(c) the number of data subjects affected by the infringement and the level of damage suffered by them;</p> <p>(d) action taken by the controller or processor to mitigate the damage suffered by data subjects;</p> <p>(e) the degree of responsibility of the controller or processor, having regard to technical and organisational measures implemented by them pursuant to Articles 23 and 30;</p> <p>(f) any previous infringements by the controller or processor;</p> <p>(g) <u>(...)</u> any financial benefits gained, or losses avoided, directly or indirectly from the infringement;</p> |
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| <p>(h) <u>the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;</u></p> <p>(i) <u>the level of cooperation with the supervisory authority during the investigation of the infringement;</u></p> <p>(j) <u>adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39;</u></p> <p>(k) <u>whether a data protection officer has been designated;</u></p> | <p>(h)<sup>1</sup> <b><u>the motivation of the person responsible;</u></b></p> <p>(i) (...) <sup>2</sup></p> <p>(j) (...) <sup>3</sup></p> <p>(k) (...) <sup>4</sup></p> |
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<sup>1</sup> Germany is opposed to point (h) as it contradicts the requirement on avoidance of self-incrimination.

<sup>2</sup> Germany opposes point (i) for the reason given in footnote 6.

<sup>3</sup> Germany opposes point (j), because if the approved rules are complied with there can, by definition, be no breach of the Regulation.

<sup>4</sup> Germany opposes point (k) as the DPO has nothing to do with this; above all, the situation should be avoided whereby the DPO is only called on, ultimately, in order to secure lower fines.

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| <p>(l) <u>whether the controller or processor is a public authority or body;</u></p> <p>(m) <u>any other aggravating or mitigating factor applicable to the circumstances of the case.</u></p>   | <p>(l) <u>(...)</u><sup>1</sup></p> <p>(m) any other aggravating or mitigating factor applicable to the circumstances of the case.</p>  |
| <p>3. (...)</p>  | <p>3. If it is decided, <b><u>based on the criteria mentioned in paragraph 2,</u></b> that a particular case constitutes a <b><u>less serious</u></b> infringement of this Regulation, it can give rise to a written warning instead of a sanction.</p> |
| <p>[3a. <u>Where a representative has been designated by a controller pursuant to Article 25, the administrative fines may be imposed on the representative without prejudice to any proceedings which may be taken against the controller.</u>]</p> | <p>[3a. Where a representative has been designated by a controller pursuant to Article 25, the administrative fines may be imposed on the representative without prejudice to any proceedings which may be taken against the controller].</p>           |

<sup>1</sup> Germany opposes point (l) for the reasons given in the comment on Article 79(1).

3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

4. The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process.

3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

4. The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process.

*Article 79a*  
**Administrative fines**

1. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) turnover, on a controller who, intentionally or negligently:
  - (a) does not (...) respond within the period referred to in Article 12(2) to requests of the data subject;
  - (b) charges a fee (...) in violation of Article 12(4).

*Article 79a*  
***Administrative fines***

***N.B.: Because a considerable number of questions regarding Article 79a remain unresolved, Germany is entering a scrutiny reservation. In particular, there is a need for further consideration of the types of circumstances which will incur the risk of an administrative fine, and which type of fine will be applicable in each case. In addition, the level of the fine is still open to discussion (in particular, profits should be forfeited in cases where economic benefits are accrued as a result of the infringement).***

1. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) **worldwide** turnover **over the preceding financial year**<sup>1</sup>, on a controller who, intentionally or negligently:
  - (a) does not (...) respond within the period referred to in Article 12(2) to requests of the data subject;
  - (b) charges a fee (...) in violation of Article 12(4), **first sentence**<sup>2</sup>.

<sup>1</sup> Without such a reference the provision would be unclear.

<sup>2</sup> This clarifies that no administrative fine will be incurred in the case of fees for requests which are manifestly excessive, in particular if the controller was mistaken about the excessive character of the request. The provision would otherwise be unclear.

3. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) turnover, on a controller or processor who, intentionally or negligently:

(c) does not provide the information, or (...) provides incomplete information, or does not provide the information in a sufficiently transparent manner, to the data subject pursuant to Articles 14 and 14a;

2. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) **worldwide** turnover **over the preceding financial year**, on a controller or processor who, intentionally or negligently:

(a) does not provide the information, **or provides incorrect information**, or provides incomplete information, or does not provide the information **in good time**<sup>1</sup>, to the data subject pursuant to **(Article 12(3))** and Article 14<sup>2</sup>;

***N.B.: Germany requests that the Presidency explain the reasons for the deletion of Article 12(3).***

<sup>1</sup> The criterion "does not provide [...] in a sufficiently transparent manner" is unclear and should therefore be deleted.

<sup>2</sup> The substantive provision contained in Article 14(1)(h) of the proposal for a Regulation ("any further information") is unclear and should therefore be revised; in the event of any doubt, it should be deleted in its entirety. Moreover, it should be made clearer throughout Article 14 that the controller is obliged to provide information to the data subject at the place of the latter's domicile. Article 14(7) (delegated Commission acts) leads to uncertainty regarding the substantive rules referred to therein.

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| <p>(b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 or does not <u>comply with the rights and obligations pursuant to Articles 17, 17a, 17b, <b>18</b> or 19</u>;</p> <p>(c) (...);</p> <p>(d) (...);</p> | <p>(b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15<sup>1</sup> and 16<sup>2</sup> or does not comply with the rights and obligations pursuant to Articles 17<sup>3</sup>, 17a, 17b, <b>18</b><sup>4</sup> or 19<sup>5</sup>;</p> <p>(c) (...);</p> <p>(d) (...);</p> |
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<sup>1</sup> Article 15(1)(g) in conjunction with paragraph 3 (delegated acts) is unclear. The criteria ought to be laid down in the Regulation (in that connection, see the proposals contained in Germany's comments concerning Article 15). Moreover, the wording of paragraph 1(h) is vague and unclear.

<sup>2</sup> Article 16 is vague and unclear in parts, e.g. the meaning of the right to obtain completion of data, which exists alongside the right to rectification.

<sup>3</sup> Article 17 needs to be thoroughly reworked as it is unclear. For example, there is considerable uncertainty as to the persons to whom it is addressed and their obligations. In principle, however, Germany does see a need to sanction infringement of the rights to erasure, insofar as those rights are regulated with sufficient legal certainty.

<sup>4</sup> As proposed by the Commission, Article 18 also fails to provide a legally certain basis for rules concerning sanctions and therefore needs to be thoroughly reworked. As a general rule applicable to all areas, the right to data portability is disproportionate and may lead to risks from the point of view of data protection law. Moreover, many concepts are vague and unclear.

<sup>5</sup> For various reasons, the right to object pursuant to Article 19 needs to be thoroughly reworked.



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| <p>(e) does not or not sufficiently determine the respective responsibilities with <u>joint</u> controllers pursuant to Article 24;</p> <p>(f) does not or not sufficiently maintain the documentation pursuant to Article 28 <u>and</u> Article 31(4);</p> <p>(g) (...)</p> | <p>(e) does not or not sufficiently determine the respective responsibilities with joint controllers pursuant to Article 24<sup>1</sup>;</p> <p>(f) does not or not sufficiently maintain the documentation pursuant to Article 28 and Article 31(4);</p> <p>(g) <b><i>N.B.: Germany requests that the Presidency explain the reasons for the deletion of Article 79a(2)(g).</i></b></p> |
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<sup>1</sup> Article 24 is vague and unclear. In addition to other unclear points, there is a lack of procedural rules, rules relating to the settlement of disputes and rules applicable in case of doubt, for example; there is also no indication of how the joint controllers are to reach agreement and what should be done if agreement cannot be reached.

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| <p>3. The supervisory authority <u>may</u> impose a fine <u>that shall not exceed</u> [...] EUR, or in case of an <u>undertaking</u> [...] % of its <u>total</u> annual (...) turnover, <u>on a controller or processor</u> who, intentionally or negligently:</p> <p>(a) processes personal data without any or sufficient legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6, 7, 8 <u>and</u> 9;</p> <p>(b) (...);</p> <p>(c) (...);</p> | <p>3. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) <b><u>worldwide</u></b> turnover <b><u>over the preceding financial year</u></b>, on a controller or processor who, intentionally or negligently:</p> <p>(a) processes personal data without any or sufficient legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6<sup>1</sup>, 7<sup>2</sup>, 8<sup>3</sup> and 9<sup>4</sup>;</p> <p>(b) (...);</p> <p>(c) (...);</p> |
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<sup>1</sup> Article 6 is not structured clearly. This provision must be reworked as a matter of urgency, in particular with a view to creating the necessary degree of flexibility for data protection in this specific area.

<sup>2</sup> Article 7 needs to be reworked. In particular, the term "significant imbalance" in paragraph 4 needs to be clarified as it is too vague. It also needs to be clarified whether categories can be designated in respect of which there is a rebuttable presumption that consent is not given freely by the data subject. Germany therefore welcomes the Presidency's proposal that Article 7(4) be deleted.

<sup>3</sup> Article 8 does not contain any explanation in terms of technical implementation. Moreover, empowering the Commission to adopt delegated acts to further specify criteria and requirements will lead to uncertainty.

<sup>4</sup> Article 9 is unclear, in particular as regards points 2(h) and (i). It is also unclear how Article 81 relates to Article 9(2)(h).

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| <p>(d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20;</p> <p>(e) does not (...) <u>implement</u> appropriate <u>measures</u> or <u>is not able to demonstrate</u> compliance pursuant to Articles 22 (...) and 30;</p> <p>(f) does not designate a representative <u>in violation of</u> Article 25;</p> <p>(g) processes or instructs the processing of personal data in violation of (...) Article 26;</p> | <p>(d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20<sup>1</sup>;</p> <p>(e) does not (...) implement appropriate measures or is not able to demonstrate compliance pursuant to Articles 22, <b>23</b> and 30<sup>2</sup>;</p> <p>(f) does not designate a representative in violation of Article 25<sup>3</sup>;</p> <p>(g) processes or instructs the processing of personal data in violation of (...) Article 26<sup>4</sup>;</p> |
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<sup>1</sup> Article 20 needs to be reworked. The concepts of profiles and profiling themselves need to be clarified and further defined, possibly with a view to differentiation on the basis of data categories (e.g. data which are generally available and sensitive data). A definition could provide greater legal certainty in that respect. There is a need to clarify those aspects of this provision which are unclear.

<sup>2</sup> Pursuant to Article 22(4), Article 23(3) and Article 30(3), it is the Commission which lays down the controller's responsibilities in the form of delegated acts. This provision is too vague and needs to be reviewed.

<sup>3</sup> The categorisation of this breach of obligation as subject to the most serious penalties ought to be reconsidered because of doubts as to proportionality. It is punishable by a considerable fine even if it does not lead to any infringement of data subjects' rights.

<sup>4</sup> Article 26 does not make the allocation of duties to the controller and processor sufficiently clear. Some provisions are impracticable. In addition, pursuant to paragraph 3 it is the Commission which lays down those obligations in the form of delegated acts; such an arrangement is too vague.

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| <p>(h) does not alert on or notify a personal data breach or does not timely or completely notify the data breach to the supervisory authority or to the data subject <u>in violation</u> of Articles 31 and 32;</p> <p>(i) does not carry out a data protection impact assessment in violation of Article 33 or processes personal data without prior consultation of the supervisory authority in violation of Article 34(1);</p> <p>(k) misuses a data protection seal or mark in the meaning of Article 39 <u>or does not comply with the conditions and procedures laid down in Articles 38a and 39a</u>;</p> | <p>(h) does not alert on or notify a personal data breach or does not timely or completely notify the data breach to the supervisory authority or to the data subject in violation of Articles 31 and 32<sup>1</sup>;</p> <p>(i) does not carry out a data protection impact assessment in violation of Article 33<sup>2</sup> or processes personal data without prior<sup>3</sup> consultation of the supervisory authority in violation of Article 34(1);</p> <p>(k) misuses<sup>4</sup> a data protection seal or mark in the meaning of Article 39 or does not comply with the conditions and procedures laid down in Articles 38a and 39a;</p> |
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<sup>1</sup> Pursuant to Article 31(5) and Article 32(5), criteria and requirements are laid down by the Commission in the form of delegated acts. This is too vague and needs to be reviewed.

<sup>2</sup> In the interests of a risk-based approach, Article 33 needs to be thoroughly reworked and clarified. If responsibility for laying down criteria is left to the Commission in the form of delegated acts, this will lead to uncertainty.

<sup>3</sup> The deletion of the words "without prior authorisation" follows on from the revision of Article 34 as proposed by Germany.

<sup>4</sup> The categorisation of this breach of obligation as subject to the most serious penalties ought to be reconsidered because of doubts as to proportionality. It is punishable by a considerable fine even if it does not lead to any infringement of data subjects' rights.

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| <p>(l) carries out or instructs a data transfer to a <u>recipient</u> in a third country or an international organisation <u>in violation of</u> Articles 40 to 44;</p> <p>(m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) <u>or does not provide access in violation of Article 53(2)</u>.</p> <p>(n) (...)</p> <p>(o) (...)</p> | <p>(l) carries out or instructs a data transfer to a recipient in a third country or an international organisation in violation of Articles 40 to 44;</p> <p>(m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) or does not provide access in violation of Article 53(2).</p> <p>(n) (...)</p> <p>(o) (...)</p> |
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4. [The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.]

4. **The administrative fine must exceed the economic benefit which the controller has derived from the infringement. Where the maximum amounts referred to in paragraphs 1, 2 and 3 do not suffice for that purpose, they may be exceeded.**

*N.B.: Through the addition of these sentences, the economic benefit can be 100 % absorbed. This would have a significant impact precisely on those individuals who ought to be penalised. In such cases, there would be no upper limit on the amount of the administrative fine. This corresponds to the current legal position in Germany pursuant to Section 43(3), second and third sentences, of the Federal Data Protection Act and Section 17(4) of the Administrative Offences Act.*

*Article 79b*

**Penalties**

1. *For infringements of the provisions of this Regulation not listed in Article 79a Member States shall lay down the rules on penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). Those penalties must be effective, proportionate and dissuasive.*

*Article 79b*

**Criminal penalties**<sup>1</sup>

1. The Member States **may** lay down the rules on **criminal** penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. **The application of such penalties must not result in an infringement of the Regulation being penalised more than once**<sup>2</sup>.

<sup>1</sup> Article 79 of the proposal for a Regulation cannot achieve the objective of full harmonisation of administrative penalties unless such penalties are removed from the scope of Article 79b. If this provision is left as in the Commission proposal, it would mean full flexibility for the Member States, which would not be appropriate in the context of a regulation.

<sup>2</sup> Legislative formalisation of the *ne bis in idem* principle.

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| <p>2. (...).</p>   | <p>2. <b><u>Criminal penalties may be imposed on natural or legal persons. The Member States may determine the circumstances under which criminal penalties may be imposed on legal persons.</u></b></p>  |
| <p>3. <i>Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.</i></p> | <p>3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.</p> |



## SPAIN

The Spanish delegation considers chapter VIII as a main pillar of the envisaged regulation.

Chapter VIII deals with the enforcement of the whole system and from our prospective here harmonization is paramount.

That being said, as the drafting moves forward we're concerned about the direction that the instrument takes in this crucial point. In this sense, when the working party started its discussion on sanctions two main approaches raised, namely: a) the strong harmonization based on a general description of actions and sanctions accompanied by a procedure fully supported by the due process principles, and b) what we would call a directive oriented enforcement framework.

According to our point of view it seems to us that the later is now the orientation behind the current draft.

The directive oriented approach is not itself intrinsically good or bad, but it leads to less harmonization and this at the same time raises the concern of forum shopping.

To be brief: to us harmonization should act at the same level in the different parts of the instrument, otherwise the envisaged goals could be jeopardized. Thus, we would prefer a more regulation friendly approach for this chapter, and that means at least:

- More exhaustive description of actions (infractions) with less room for manoeuvre for member states. Infractions and sanctions associated should be almost the same in the whole EU. We should avoid a scenario in which the costs of infringements differ from country to country.
- More robust and efficient toolbox for sanctioning, which should be the same for all member states. That means that the instrument should clearly recognize warnings, reprimands and corrective actions as sanctions, and should establish clear rules in order to allow an efficient use of the different alternatives. Some time for example a fine could be imposed as a corrective action subsidiary measure (if the corrective action is not properly fulfilled, the fine is enforced and on the contrary if a corrective action is full accomplished the subsidiary fine is not enforced)
- A harmonized solution for public sector focused on non financial measures

One of the most problematic points in this chapter is how to establish the maximum amount of fines, or for better saying, how to establish the quantitative segments for fines.

Until now the commission has given no clear explanations on the objective basis taken into account in the proposal in order to establish the maximum amounts or the maximum percentages.

The current draft sets the problem aside for a latter discussion.

But the question is, on which basis would like the presidency to establish the discussion?

From our prospective this is a crucial issue and cannot be addressed without having different models or simulations for different cases and types of controllers in order to see how the system works.

At the same time the parameters used in order to calculate the maximum amount of the fines should be clear enough to avoid legal uncertainty and workable in practice. Currently we still have many doubts on the operational capacity of the total annual turnover. The main reasons of this conclusion are:

- The total turn over is not itself an indicator of benefit; therefore it could operate as an erroneous indicator of economical capacity. In such cases proportionality could be challenged.
- In the context of big companies or holdings running different brands and divisions applying the total turn over without any possibility of flexibility could lead to disproportionate sanctions when the infraction is located at the very heard of one of those brands or divisions. The practical example could be a car manufacturer that produces luxury and fashion products as well.

In conclusion, we believe that there are still many crucial issues to be addressed in chapter VIII. We try to tackle some of them in these comments but more time is needed in order to get reasonable solutions for the whole system. The Spanish delegation remains committed to achieve a good result soon. Meanwhile for the above mentioned reasons we would like to maintain our scrutiny reservation on the chapter.

### Article 73.3

Independently of a data subject's mandate or complaint, any body, organisation or association referred to in paragraph 2 shall have the right to lodge a complaint with the competent supervisory authority (...) if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.

#### Amendment

Independently ~~of a data subject's mandate or complaint~~, any body, organisation or association referred to in paragraph 2 shall have the right to lodge a complaint with the competent supervisory authority (...) **in order to protect collective or diffuse citizen's interests.** ~~if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.~~

#### Reason

The Spanish delegation does not understand why the Regulation should establish a special legal standing for the cases of data breach. In our view, it should be possible for the organizations that promote privacy rights to lodge claims in defence of collective or diffuse interests, even when it is not a specific case of data breach. This, however, should not be understood as a legal standing to defend individual rights. We propose this amendment to establish a clear difference between the defence of collective or diffuse interests, and the defence of individual rights.

### Article 74.1

Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a decision of a supervisory authority concerning them.

#### Amendment

Scrutiny reservation

#### Reason

The term “effective” is interesting, but it should be linked to the final solutions on one-stop shop. Scrutiny reservation until the one-stop shop mechanism is clarified.

## Article 74.2

### Amendment

Scrutiny reservation

### Reason

This is linked to the one-stop mechanism too. We would accept it, as long as the data subjects' claims are decided by the supervisory authority of the country where they lodge the claim.

## Article 75.1

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

### Amendment

Scrutiny reservation

### Reason

The inclusion of a direct appeal does not worry as itself; we are, however, concerned about the impact that this direct appeal might have on the one-stop shop mechanism, and the lack of provisions as regards to the necessary articulation between the administrative and judicial procedures. As a principle, it is not unusual to establish direct judicial actions to protect a fundamental right. The problem is that if the one-stop shop mechanism prospers, it might produce a deviation of the administrative procedure (which has proved to be very effective) to the judicial procedure (which is slower, expensive and is not specialised). Furthermore, it is not clear how both procedures are going to be connected when they are not consistent: the judicial procedure establishes the jurisdiction of the court of the State where the citizen that claims has his or her domicile; but the administrative procedure (if the one-stop shop stays as it is at the moment) establishes the competence according to the main establishment of the controller.

## Article 76.1

The data subject shall have the right to mandate a body, organisation or association referred to in Article 73(2) to exercise the rights referred to in Articles 74 and 75 on his or her behalf.

### Amendment

Scrutiny reservation

### Reason

This article establishes a general law principle, which should already be envisaged in national civil or general private law. Is it necessary?

Furthermore, this article may produce competence issues on the judicial procedure. If the data subject mandates an association to act in his or her name, this association will normally use its own lawyers. If the association does not charge fees for these services, it might produce a competition problem with the specialised lawyers of the sector. This has already happened in consumer law. The alternative is that the data subject is a member of these associations, and that the membership includes the right to use the legal service of the association for free to protect individual rights.

## Article 77.1

Any person who has suffered damage as a result of a processing operation which is non compliant with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.

### Amendment

Any person who has suffered damage as a result of a processing operation which is non compliant with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered. **Therefore, the data subject shall have the right to exercise a direct action in order to receive this compensation.**

### Reason

Currently, corporations and organizations are already ensuring the risks of possible damages derived from data processing operations. It is therefore necessary to establish the data subjects' right to a direct action.

## Article 79.1

Each supervisory authority shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation. Such fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Articles 53(1).

### Amendment

Each supervisory authority shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation. Such fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Articles 53(1). **The supervisory authority shall also be empowered to decide whether if when these measures are imposed in addition to administrative fines, the compliance with the measures referred to in Article 53(1) may exempt from the administrative fine.**

### Reason

We believe that it is necessary to clarify:

- That the measures referred to in article 53(1) are sanctions too.
- That these measures may be adopted in addition to or instead of administrative fines.
- That it is possible for the supervisory authority to establish the compliance with the measures imposed according to article 53(1) as a condition to become exempt of the corresponding administrative fine. This way, corporations will be induced to correct their processing operations without suffering the burdens and costs of administrative fines.

## **Article 79.2aj**

Adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39;

### **Amendment**

### **Reason**

This should be considered a "mixed circumstance": attending to the circumstances, it might aggravate or moderate the responsibility.

## **Article 79.3b**

Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

### **Amendment**

**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.**

### **Reason**

We understand that the current wording of this article seems to be flexible enough. Nevertheless, we consider that it might become an utterly rigid principle.

## Article 79a

### Amendment

Scrutiny reservation

### Reason

It is impossible to determine whether we support or not this article without the information about the percentages. Anyway, we do not support that sanctions have a range from zero to infinite. There should be a criterion, so we should discuss which. The original proposal of the Commission included certain percentages, but we calculate that they would be excessive.

Although we find that the new wording is better (at least until the final percentages are established), we would like to point out the following:

- It seems as if the new proposal intends to establish a fixed amount for corporations and citizens, and a variable amount for groups of undertakings, depending on the total annual turnover. This solution would not allow adjusting the administrative fine to the size of the company, unless the fine is imposed on an undertaking. Therefore, it is important to take into consideration that if the quantity of the fine is high enough to be dissuasive for big corporations, they might also be too high for small and medium corporations.
- According to the Regulation, what is a group of undertakings? There is no exact definition.

## Article 79.b

### Amendment

Scrutiny reservation

### Reason

We could accept this article, but we have a doubt. We assume that the paragraphs that have been removed to be included in other parts of the Regulation. If that is the case, we have trouble imagining what other behaviours may constitute infractions that require a criminal regulation (naturally more severe than any administrative sanction). Furthermore, it might become troublesome for the Member States to search for behaviours that could be regulated as criminal behaviours just to inform the Commission in the deadlines established in paragraph 3 in order to avoid an unfulfilment procedure.



*Art. 73 - Right to lodge a complaint with a supervisory authority***Comments:**

- In art. 73 paragraph 2 Poland suggests addition of the word „*statutory*” before „*objectives*”;
- Poland is in favour of deletion of art. 73 paragraph 3. Although the scope of this paragraph has been already narrowed, we still believe that a body, organisation or association referred to in art. 73 paragraph 2 should not have the right to lodge a complaint with the competent supervisory authority regarding possible data protection breach. We think that it is enough to inform the competent supervisory authority about a possible breach and the above-mentioned right is not needed. This right may, if introduced, lead to large numbers of vexatious complaints being filed by organisations set up especially with this in mind. The locus standi is also a matter to be determined by national procedural law and as such should not be covered by the Regulation at all.

**Proposed wording:**

## Article 73

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

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a single supervisory authority, in particular in the Member State of his or her habitual residence, if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation.
2. In the situation referred to in paragraph 1, the data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State and whose **statutory** objectives include the protection of data subjects’ rights and freedoms with regard to the protection of their personal data, to lodge the complaint on his or her behalf (...).
3. **(...)**

*Art. 74 - Right to a judicial remedy against a supervisory authority*

**Comments:**

- In art. 74 paragraph 3 Poland suggests addition of the word „*competent*” before „*supervisory*”, so we can avoid possible ambiguity.

**Proposed wording:**

*Article 74*

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

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a decision of a supervisory authority concerning them.
2. Without prejudice to any other administrative or non-judicial remedy, a data subject shall have the right to a judicial remedy (...) where the supervisory authority does not deal with a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged under Article 73.
3. Proceedings against a **competent** supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.
4. (...)
5. (...)

*Art. 75 - Right to a judicial remedy against a controller or processor*

**Comments:**

- Poland is in favour of deletion of this article, as we think that this issue is already regulated on the national level and there is no need to mention it in the regulation. As each Member State has its own mechanisms that protect democracy and ensure right to a judicial remedy we see no added value in this article;
- If art. 75 remains however Poland suggests removing the adjective “effective” in paragraph 3, as this term is very vague and may lead to subjective assessment of judicial remedies.

**Proposed wording:** deletion

*Art. 76 - Representation of of data subjects*

**Comments:**

- Poland is of the opinion that representation rules should be assessed from the perspective of national laws of Member States. Consequently, this article seems to be redundant and possibly conflicting with national legislation governing administrative and/or civil procedure. It is unjustified to make special sectoral exceptions by way of EU regulation **which affect** member state-level legal acts of a general, procedural nature and we have doubts on whether there is sufficient legal basis for such action.

**Proposed wording:** deletion

*Art. 77 - Right to compensation and liability*

**Comments:**

- In art. 77 paragraph 3. We would like to have word "may" replaced with word "shall"
  - an entity that demonstrates that it is not responsible for the incident that led to the injury should always be exempted from liability.

**Proposed wording:**

*Article 77*

***Right to compensation and liability***

1. Any person who has suffered damage as a result of a processing operation which is non compliant with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.
2. Whithout prejudice to Article 24(2), 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 **shall** be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.

*art. 79 - General conditions for imposing administrative fines*

**Comments:**

- The current wording of this provision takes into account many different factors that various data protection authorities may interpret in different manners; therefore the need for EDPB guidelines in this respect has to be underlined. This issue, if unresolved, may lead to discrepancies in the application of the rules by various DPAs and possibly to forum shopping;
- We are in favour of keeping art. 79 paragraph 3a. In our view a data protection authority should be able to choose whether to impose an administrative sanction on a controller or on its representative. A representative must be aware that he/she can be held liable;
- As regards art. 79 paragraph 4 we see no added value in this paragraph. In each Member State there are procedural safeguards that guarantee proper exercise by a supervisory authority of its powers. Nevertheless, this article may stay in the regulation;
- With respect to art. 79 paragraph 2a we are in favour of **dividing the described factors into two groups: (i) aggravating factors and (ii) mitigating factors**. For example we are not sure whether we should qualify as aggravating or mitigating factors such as: (i) whether a data protection officer has been designated; (ii) whether the controller or processor is a public authority or body or (iii) adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39.
- Conditions for imposing administrative fines have to be clear and transparent, so data controllers and processors could be sure what consequences they can face for a particular violation.

**Proposed wording:**

*Article 79*

***General conditions for imposing administrative fines***

1. Each supervisory authority shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation. Such fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Articles 53(1).
  2. Administrative fines imposed pursuant to Article 79a shall in each individual case be effective, proportionate and dissuasive.
- 2a. The amount of the administrative fine in each individual case shall be fixed with due regard to the following:
- 2aa. mitigating factors:**
    - a.
    - b.
    - c. (...)
  - 2ab. aggravating factors:**
    - a.
    - b.
    - c. (...)
3. (...)
  - 3a. Where a representative has been designated by a controller pursuant to Article 25, the administrative fines may be imposed on the representative without prejudice to any proceedings which may be taken against the controller.
  - 3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.
  4. The exercise by a supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process

### *art. 79a - Administrative fines*

#### **Comments:**

- We would like to have this article as simple as possible. Data controllers and processors need simple rules in order to know for what they can be held liable. Therefore a simple provision, allowing for the imposition of fines up to a given amount for all infractions, seems like an optimal solution;
- We see a need for unified application of provisions regarding administrative fines in all Member States;
- The proposed sanctions on one hand might be too high for small and medium enterprises, on the other hand – too low for multinational corporations; The specific amounts should be determined at the political level, but generally an approach based on percentages, rather than fixed sums, seems more flexible and appropriate.
- From our perspective, art. 79a paragraph 4 may remain in the text..

#### **Questions:**

- Poland would like to clarify what will happen in situation when a data controller violates simultaneously provisions of paragraph 1, paragraph 2 and paragraph 3, will the sanctions cumulate or for example only the highest one will be imposed? If the distinction between three different categories will be kept, we think that it should be clarified in the regulation what happens in case of cumulating sanctions from art. 79a paragraph 1, paragraph 2 and paragraph 3.

#### **Proposed wording:**

##### Article 79a

##### **Administrative fines**

1. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) turnover, on a controller who, intentionally or negligently:
  - (h) does not (...) respond within the period referred to in Article 12(2) to requests of the data subject;

- (i) charges a fee (...) in violation of Article 12(4).
2. The supervisory authority may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total annual (...) turnover, on a controller or processor who, intentionally or negligently:
- (j) does not provide the information, or (...) provides incomplete information, or does not provide the information in a sufficiently transparent manner, to the data subject pursuant to Articles 14 and 14a;
- (k) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 or does not comply with the rights and obligations pursuant to Articles 17, 17a, 17b, 18 or 19;
- (l) (...);
- (m)(...);
- (n) does not or not sufficiently determine the respective responsibilities with joint controllers pursuant to Article 24;
- (o) does not or not sufficiently maintain the documentation pursuant to Article 28 and Article 31(4).
- (p) (...)
3. The supervisory authority may impose a fine that shall not exceed [...] EUR or, in case of an undertaking, [...] % of its total annual turnover, on a controller or processor who, intentionally or negligently:
- (a) processes personal data without any or sufficient legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6, 7, 8 and 9;
- (b) (...);
- (c) (...);
- (d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20;

- (e) does not (...) implement appropriate measures or is not able to demonstrate compliance pursuant to Articles 22 (...) and 30;
- (f) does not designate a representative in violation of Article 25;
- (g) processes or instructs the processing of personal data in violation of (...) Articles 26;
- (h) does not alert on or notify a personal data breach or does not timely or completely notify the data breach to the supervisory authority or to the data subject in violation of Articles 31 and 32;
- (i) does not carry out a data protection impact assessment in violation of Article 33 or processes personal data without prior consultation of the supervisory authority in violation of Article 34(1);
- (k) misuses a data protection seal or mark in the meaning of Article 39 or does not comply with the conditions and procedures laid down in Articles 38a and 39a;
- (l) carries out or instructs a data transfer to a recipient in a third country or an international organisation in violation of Articles 40 to 44;
- (m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) or does not provide access in violation of Article 53(2).
- (n) (...)
- (o) (...)

**3a. If a controller or processor intentionally or negligently violates several provisions of this Regulation, that qualify for fines under paragraphs 1, 2 or 3, the total amount of the fine may not exceed the amount specified for the most grievous of the violations.**

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.



*art. 79b – Penalties*

**Comments:**

- We support the previous wording of this article. We are against introduction of limitation “for infringements of the provisions of this Regulation not listed in Article 79a” – such limitation is unnecessary and leads to lack of clarity.

**Questions:**

- Poland would like to ask the Presidency whether Member States, under the current wording of art. 79b, may still penalize infringements listed in article 79a of the regulation? As we believe criminal liability cannot be harmonized under the EU law, so no limitations can apply. Alternatively we would welcome a better clarification of the actual natures of penalties foreseen by this regulation.
- Generally this article has drawn much controversy and needs to be elucidated in a dedicated recital in order to dispel any misunderstandings.

**Proposed wording:**

Article 79b

**Penalties**

1. **(...)** Member States shall lay down the rules on penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). Such penalties shall be effective, proportionate and dissuasive.
2. (...).
3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.

## ROMANIA

### GENERAL REMARK

RO introduces scrutiny reservation on Chapter VIII. It is necessary that the national financial impact be assessed

#### Art. 74 par. (3)

3. *Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.*

##### Comments:

We propose to add the expression „according to national law”, so as the legal proceedings against a supervisory authority be carried out according to national law.

#### Art. 75 par. (2)

2. *Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller is a public authority acting in the exercise of its public powers.*

We propose to add the expression „according to national law of the Member State”, so as the legal proceedings against a controller or a processor be carried out according to national law of the Member State.

#### Art. 78

RO agrees moving the provision of art. 78 at art. 79b.

## Art. 79

RO maintains its scrutiny reservation on this article. It is very difficult to establish the advantage obtained in case of violation of a right of data subjects.

**art. 79 par. 3b** – We support the provision regarding the possibility given to the Member States to provide in the national law whether to impose fines to public authorities, taking into account that the public sector does not carry out activities with gainful interest.

## Art. 79a, par 4

We consider that COM should not be empowered to adopt delegated acts in order to adjust the maximum amounts of the administrative fines in all Member States, even if this adjustment would be based on clear criteria. We consider that the fines values should be flexible, but in the same time their amount sufficiently big to discourage the practice of breaching the provisions of the regulation. In the same time we consider that the amount of the fines should be established by the supervisory authority.

## SLOVENIA

### Some temporary positions of the Republic of Slovenia

#### I. Chapter VIII (Remedies, Liability and Sanctions)

I.1. Slovenia proposes that paragraph 3 of Article 73 should be deleted. It is unclear what shall be meant as "complaints of any body, association..." and how to officially proceed in such cases (the provision seems to be totally directly applicable, but some additional guidelines seem to be missing). The proposed provision is contrary to principles of legal security and good administration and may encourage some special type of "forum shopping". Also, the result, when such associations file a complaint, without the mandate of the data subject(s) concerned, could be an introduction of some special type of liability of supervisory authorities and Member States that cannot be assessed.

I.2. Slovenia is of the opinion that paragraph 2 of Article 77 could be deleted. Matters of assigning civil liability should be left to national civil law. Concerning paragraph 3 we note that there should be a provision inserted that could provide for strict liability for the state as a public law entity (if the state is a data controller).

I.3. Slovenia is of the opinion that amounts of fines or percentages of any annual turnover should not be provided in Article 79.a. The Draft Regulation should not be guided in this respect by thinking only of "big players" (multinational IT companies), it should take into account the principle of proximity and assessment on proper amounts of fines should be provided by Member States.

I.4. Slovenia is of the opinion that Article 79.b is still unclear, but is of the opinion that it denotes criminal offences as are established or shall be established (determined) by national Criminal Codes.

## II. Chapter IX (Provisions relating to specific data processing situations)

### II.1. General comment

Slovenia supports the decision to have several Articles with respect to former Article 83.

II.2. Concerning Article 80 Slovenia is of the opinion that it cannot be simply stated that protection of personal data and freedom of expression shall be reconciled by national law. "Reconcilement" is most probably not an adequate solution, it would be better to state, that Member States shall apply their national law to guarantee both freedom of expression as well as data protection. The recent Judgment of the European Court of Human Rights in the case of *ELFI AS v. Estonia*, No. 64569/09, 10 October 2013 is a good example that we need to have a wider balance determined in the Draft Regulation (see especially paras. 87.to 94. of that Judgment, especially para. 91), especially since this case seems to show a conflict between the Council of Europe law with the European Union law.

II.3. Slovenia is of the opinion that new Article 83.a on processing of personal data for historical purposes should also explicitly cover private bodies that are recognised by public law as "archives" or "historical institutions" (like private faculties and institutes in the area of social sciences). Secondly, historical purposes should be primarily mentioned, then archives and other institutions should follow, and also genealogical research as defined by Member States legislation. Thirdly, it is definitely not a permanent or convincing (legitimate) solution to state that personal data from archives cannot be "processed for any other purposes or used in support of measures or decisions regarding any particular individual" - because they definitely can be re-processed (such as for retirement purposes, re-opening of some proceedings). Therefore it would be better to leave this solution on re-use of personal data in archives to national law (as is stated in Article 80).

II.4. Slovenia opines that provisions of new Article 83.b should start from the viewpoint that statistics procedures (researches) are completely compatible with data protection rules on purpose processing (so it should be stated in affirmative manner - "is compatible"), similar to the situation with respect to Article 80. We reserve the right of further comments until this issue is resolved.

II.5. Slovenia opines that provisions of new Article 83.c on scientific purposes seem to go in the right direction, but it is premature to comment upon them. However, exceptionally, paragraph 2 should probably have an additional legal ground - "if the law requires this in the public interest"?

## SLOVAK REPUBLIC

### Articles 73 Paragraph 1 and 2

We support the present wording and we have no other substantial comments.

### Article 73 Paragraph 3

*Independently of a data subject's mandate or complaint, anybody, organisation or association referred to in paragraph 2 shall have the right to lodge a complaint with the competent supervisory authority (...) if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply. **Body, organisation or association according paragraph 2 are not authorised to lodge a complaint in behalf of data subject to the competent supervisory authority without mandate according paragraph 2; such lodging of complaint has no influence on right to lodge a complaint by data subject according paragraph 1.***

### Justification

We can identify with deepening possibilities of personal data protection of data subject through the lodging of complaints by bodies, organisations and associations according paragraph 2 also without mandate from the data subject when the personal data breach is likely to severely affect the rights and freedoms of the data subject. We perceive these provisions as a certain preventive mechanism, which could be use e.g. by data controllers who recognise, that their outsourcing of processing the personal data is performed by unreliable processor or processors and there are also complicated contractual relations and the controllers are afraid of possible failure of personal data protection on the side of processor. However we consider it important, that in case of lodging a complaint by other subject than data subject it should be clear, that such entity doesn't defend the particular right and legal interest of data subject, but a general interest on personal data protection. In our point of view it is not advisable to create space for a sort of self-appointed law enforcement possibilities for subject stated in paragraph 2. If the data subject wants to defend its rights, he/she should do it alone or with a representative chosen in compliance of law order of applicable Member state.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 74 Right to a judicial remedy against a decision of the supervisory authority**

We support the text of the provisions of this Article but we agree with delegations which stand for a deeper research of connection and influences of set of these provisions on Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) regards to determining the jurisdiction of a particular court of a member state as well as an examination of a stronger need of differentiation of administrative and civil remedy decision of the supervisory authority.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 75 Right to a judicial remedy against a decision of the controller or the processor**

We do not have any substantial comments to Paragraph 1. To the Paragraph 2 we are exercising the scrutiny reservation – we need more time to examine the potential impacts after the settling of the One Stop Shop.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 76 Representation of data subjects**

We support the reduction of Article 76 into the present form.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 77 Right to compensations and liability**

**3a The joint controllers under Article 24 shall be found responsible for the damage caused as a result of processing operation which is not in accordance with this regulation jointly and severally unless agreed otherwise in a separate written agreement.**

#### *Justification*

*We consider the above proposed amendment to Article 77 necessary for the reason that we perceive the co-controllers under the Article 24 of the draft of the Regulation differently from the situation which covers the Paragraph 2 in cases when more controllers are involved the data processing.*

In general SK welcomes the set of proposed provisions as a complex which effectively helps to interconnect the data protection area which is usually ranked as the administrative law with civil law. Due to a different understanding of legal remedies in case of damage causing across the legal systems of Member States we would welcome the detailed elaboration of the damage at level of material and nonmaterial damage caused to the data subject by the unlawful conduct of the controller or processor, the mechanism of the damage occurred, the burden of proof, limitation period or the conditions of exculpation of responsible controller or processor as well as the rights of the data subject due to the harmonization of legislation in this specific legal area. We accept Paragraphs 1 and 2 and we do not have any substantial comments in regard to them.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 78**

No comments

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 79**

In general

SK supports the concept of sanctions that will be based on “risk base approach” adequate, effective and disincentive especially in relation to financially “powerful players” who benefit mostly from the processing of personal data processing in the online environment (e.g. data mining, web tracking, behavioural analysis, app stores or app developers) and from their status as legal entities which is set beyond the jurisdiction of the European supervisory authorities. It is the setting of effective sanction mechanisms with regard to the controllers such as Facebook, Google, Apple, Microsoft etc. which we found as the key added value of the whole draft of the Regulation.



To Paragraph 2: SK supports the possibility to clearly divide the individual criteria of aggravating and mitigating circumstances as well as the maintaining of the obligatory comprehensive approach to evaluating of these circumstances by the supervisory authority in imposing sanctions. SK prefers the model of determination of the amount of the fine by the interval determining the minimal level of the fine and the maximal level of the fine. Such a model should be by the identifying of specific amounts of specific penalties take into account the significant economic differences between the Member States and could also bring sufficient flexibility during the correct reasoning of supervisory authority when imposing a fine while maintaining the criteria of effectiveness, proportionality and discouraging from the violations of protection of personal data laws. Based on the principles of national criminal law, SK will welcome if it has been possible to impose a fine more than 2/3 of the possible amount of the fine for the corresponding administrative offense if the aggravating circumstances are in the prevalence of mitigating circumstances. On the contrary, with the prevalence of mitigating circumstances over aggravating the fine should be imposed under 1/2 of the possible amount of the fine for corresponding administrative offense. Regarding to the criterion provided in Paragraph 2 Point (k) (the fact if the Data Protection Officer has been appointed) we understand as too neutral and we believe that it should not feature amongst the mitigating and aggravating circumstances in the case if PRES acceded to the differentiation of criteria provided in the Paragraph 2a.

SK will also welcome the supplement of the provisions which will add into the Article 79 so called “early warning system” which will provide the possibility of prevent warning or a reprimand by the supervisory authority before the very imposing of sanction. This system should be designed on an optional basis in favour of the supervisory authority. The supervisory authority should freely and independently decide whether choose or not choose prior notice or warning before imposing of sanctions. In this system we also see an increase in the flexibility of penalty provisions of the Draft of the Regulation, respectively space to soften of too tough sanctioning procedure in appropriate individual case.

SK strongly welcomes and supports the provisions of Paragraph 3a as well as the provisions of the Paragraph 3b. SK has currently the possibility to impose fines to the public authorities in area of personal data protection and also has the interest in preservation of this possibility because even when it comes to transfers of finances within public finances the fined public authority is by this fining directly adversely affected which creates the desired effect of sanction which is a very essential part of the educational effect in the context of a future administrative and lawful processing of personal data. Of course we respect the different approach of other Member States so we can support the current wording of Paragraph 3b.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 79a**

In general we consider the setting of a penalty system based on a progressive model of administrative punishment as acceptable but due to a fact that there are currently no percentage rates set we would like to express the scrutiny reservation.

Despite the assurances of COM that the existing legislation regulated in competition law will be applied when calculating of administrative penalty imposed under the Article 79a will be used we would appreciate more specific expression of this fact in the preliminary provisions.

## **Chapter VIII Remedies, Liability and Sanctions**

### **Article 79b**

In terms of harmonization and the chosen legal instrument the SK would rather like to see a revision of this provision so that provided specific penalties specified by the interval of their minimal and maximal amounts for the specific administrative offenses would be set.

We also see a space for a wider drafting of sanction mechanism such only as fines in this Article and for this reason we are for further elaboration of imposing of measures, warnings, reprimands, or disclosure of breaches of data protection rules to corresponding of penalty provisions with the wording of Article 53. It is the disclosure of breaches of data protection rules of specific controller which can have a very suitable preventive effect on the entrepreneurs who cannot afford such negative publicity within of their PR so we would appreciate the extension of scope of powers of the DPA in Article 53 of the option to impose to the controllers or processors an appropriate measures under which they would be obliged to disclose the information about the violation of data protection at their own expense. We believe that the defamatory effect may be not only a great repressive effect but also an effective preventive effect in relation to other responsible subjects.

## **NORWAY**

### **1. INTRODUCTION**

Reference is made to your request 24 September 2013 for written comments on the proposed Chapter VIII of the General Data Protection Regulation. We thank you for this opportunity to express our view on some of the provisions in the Chapter.

Please note that Norway is expecting a change of government shortly, and that all views expressed in this document are subject to approval by the forthcoming government.

### **2. COMMENTS ON SELECTED PROVISIONS OF CHAPTER VIII**

#### **2.1 Article 73 (right to lodge a complaint with a supervisory authority)**

In general, we support a right to lodge a complaint with a supervisory authority as set out in the Article 73. We do however believe that its paragraph 1, as currently worded, brings about some legal uncertainty. It is unclear to us whether it has any legal effects to lodge a complaint with a supervisory authority in another Member State than that of one's own habitual residence. It should be specified how such complaints will be handled, i.e. whether they will be rejected, forwarded to the appropriate authority or handled by the recipient authority. In our opinion, this is crucial in order to ensure sufficient predictability to data subjects.

In paragraph 3, we question the link between organisations' right to complain and the controller's obligation pursuant to Article 32 to notify the data subject in case of a data breach. In particular, the conditions in Article 32 paragraph 3 little c and d are not necessarily appropriate as indicators of whether an organisation should be able to lodge an independent complaint. We would therefore request an evaluation of the situations in which organisations should be allowed to lodge an independent complaint, and that appropriate conditions are set out in the text of Article 73 itself.

## 2.2 **Article 74 (right to a judicial remedy against a supervisory authority)**

According to Article 74 paragraph 2, the data subject should have a right to a judicial remedy where the supervisory authority does not deal with a complaint or does not give information to the data subject within three months. We find this provision problematic. The supervisory authority's expertise on the field of data protection makes it particularly competent to assess how to react to complaints received, including whether or not to take action in a given case. The supervisory authority's choices in this respect may not uncommonly depend on its workload or other circumstances not easily known to others. It therefore hardly seems appropriate that the supervisory's professional judgment on this point should be overruled by another judicial body. Moreover, such interference may be detrimental to the supervisory authority's independence. To avoid such problems, we propose a deletion of paragraph 2 of Article 74.

We furthermore support the deletion of paragraphs 4 and 5 of Article 74.

## 2.3 **Articles 75 (right to a judicial remedy against a controller or processor) and 76 (representation of data subjects)**

We support the deletion of paragraphs 3 and 4 of Article 75 and paragraphs 2 to 6 of Article 76.

## 2.4 **Article 77 (right to compensation and liability)**

We support the general idea behind the provision, but have some doubts as to the details. Processing of personal data in a manner non-compliant with the Regulation will regularly not manifest itself in a provable pecuniary loss for the data subject or any other persons involved. Regardless of this, however, the processing may result in considerable gains for the controller or the processor. Irrespective of any financial loss or gains, the non-compliant processing may often be perceived by the claimant as a substantial violation of his or her rights. Due to these circumstances, it should be made clear that the relevant persons may claim compensation for both economic and non-economic loss. We accordingly propose that Recital 118 be amended as follows:

*“... The compensation may cover both economic and non-economic loss.”*

Paragraph 3 of Article 77 corresponds to existing paragraph 2 of Article 23 in the 1995 Directive. In the context of a regulation however, the implications of the provision are somewhat unclear. Whereas current Article 23 is directed towards Member States, which may provide national rules on exemption from liability, the proposed Article 77 will have direct effect in national legal systems. Thus, the latter appears as a guideline for national courts in mitigating responsibility for damage arising from non-compliant processing. We believe that the exact rules on mitigation of responsibility should be left to Member States, taking into account the various modalities of compensation law. It should therefore be set out, e.g. in a recital, that Member States may themselves provide rules on this matter.

## 2.5 **Article 79a (administrative fines)**

We strongly support the replacement of the term “shall” by “may” in Article 79a paragraph 1, as we believe it is best left to the supervisory authority’s expertise to decide on the appropriateness of imposing an administrative fine in a given case. We would furthermore take the opportunity to express our support for a reduction of the amounts originally proposed.