



Brussels, 13 May 2015
(OR. en)

8383/15

LIMITE

DATAPROTECT 65
JAI 261
MI 275
DIGIT 27
DAPIX 70
FREMP 90
COMIX 199
CODEC 614

Interinstitutional File:
2012/0011 (COD)

NOTE

| | |
|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| From: | Presidency |
| To: | Permanent Representatives Committee |
| No. prev. doc.: | 7722/15 |
| 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 |

Introduction

1. The Commission adopted on 25 January 2012 a comprehensive data protection package comprising of:
 - abovementioned proposal for a General Data Protection Regulation, which is intended to replace the 1995 Data Protection Directive (former first pillar);
 - a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, which is intended to replace the 2008 Data Protection Framework Decision (former third pillar).

2. The aim of the General Data Protection Regulation is to enhance data protection rights of individuals, facilitate the free flow of personal data in the digital single market and reduce administrative burden.
3. The European Parliament adopted first reading on the proposals for the data protection Regulation and Directive on 12 March 2014.
4. The Council gave priority on achieving progress on the General Data Protection Regulation finding agreement on several partial general approaches between June 2014 and March 2015¹. These partial general approaches are based on the understanding that:
 - nothing is agreed until everything is agreed and future changes to be made to the text of the provisionally agreed Articles to ensure the overall coherence of the Regulation are not excluded;
 - such partial general approaches are without prejudice to any horizontal question; and
 - such partial general approaches do not mandate the Presidency to engage in informal trilogues with the European Parliament on the text.
5. In the context of the Presidency's aim to find agreement in the June Justice and Home Affairs Council on the entire regulation, the Presidency submits for endorsement to the Permanent Representatives Committee the compromise text on Chapter VIII on Remedies, liability and sanctions² that is annexed to this note. This compromise text is the result of intensive discussions in meetings of the Data Protection Working Party (DAPIX) and the Justice and Home Affairs Counsellors³.

¹ A first partial general approach (PGA) was reached on Chapters V (international transfers of data) in June 2014 with other PGAs on Chapter IV (obligations of companies) in October 2014, on the overarching question of the public sector and Chapter IX (Specific data protection situations) in December 2014 and on the One-stop-shop mechanism (Chapters VI and VII) in March 2015.

² The relevant articles are Articles 73 -79b, recitals 111 - 120a.

³ Under Lithuanian Presidency, DAPIX discussed Chapter VIII in its entirety at its meetings on 23/24 September and 28/29 October 2013. The Latvian Presidency took up the examination of Chapter VIII at meetings of DAPIX on 23-24 (7084/15) and 30-31 March (7526/15) and 21 April 2015 (.../15) and the meeting of JHA Counsellors on 8 May 2015..... The recitals 111-113 were part of the partial general approach on the One-Stop Shop that the JHA Council reached at its meeting in March 2015 (6833/15 +COR 1-5 and 6834/15 + COR 1 and 2).

Presidency compromise suggestions

6. Council and its preparatory bodies succeeded in converging views on many provisions of Chapter VIII. However, in relation to this Chapter, the two main outstanding issues are set out below. Further to the DAPIX meeting on 21 April and the JHA Counsellors meeting on 8 May 2015, the Presidency has redrafted the text of Chapter VIII taking into account the comments of the Member States. With a view to solving these issues, the Presidency suggests new compromise suggestions compared to the text discussed by the JHA Counsellors meeting on 8 May 2015 which are marked in **bold underlining**.

Liability - Article 77

7. This article deals with the conditions under which controllers and or processors can be held liable by courts for non-compliance with the Regulation.
8. As most of the obligations in the Regulation, in particular in Chapter IV, rest with controllers, in many cases the controllers will be primarily liable for damages suffered as a consequence of data protection violations. At the DAPIX meeting of 21 April 2015 and the JHA Counsellors meeting of 8 May 2015 a number of delegations appeared to be in favour of a system under which the data subject should lodge a complaint only against a controller, as it is likely to be the only entity that the data subject has knowledge about. It was argued that obliging a data subject to find information about possible processor(s) and their contractual terms with the controller would be putting a too heavy burden on the data subject. Other delegations thought that a data subject which has suffered damages due to unlawful processing should also have the possibility to sue directly the processor in case he knows or has strong reasons to believe the processor and not (only) the controller is in fact liable.

9. A first question therefore is whether the Regulation should explicitly acknowledge the possibility of data subjects to seek compensation from both the controller and the processor or whether the liability regime it establishes should provide for compensation only by the controller (notwithstanding the possibility for a controller who has been condemned to pay damages to a data subject to seek recourse from the processor). Some in favour of such regime have argued that the Regulation would at any rate derogate from the right of the data subject under national law to lodging a complaint against whomever it deems responsible for the damage it has suffered (including the processor). Others have argued that legal certainty demands that the Regulation clearly sets out from whom the data subject can seek compensation and that the data subject should not have to rely upon both the Regulation and national law in this regard.
10. *Delegations are therefore invited to indicate whether they think that the Regulation (Article 77(1)) should allow for the right to seek compensation only from the controller or also from the processor.*
11. The second question is how the Regulation should deal with the possible cumulative liability claims against controllers and/or processors involved in the same processing. **Option 1** of the Presidency text provides for a ***presumption of joint and several liability*** of each controller and/or processor involved in the processing for the entire amount of the damage. Paragraph 4, which establishes the principle of joint and several liability, refers to paragraph 3, under which a controller or processor is exempted from this liability if it demonstrates that it is not responsible for the damage (0% responsibility). There is thus only a joint and several liability for those controllers or processors that are at least partially responsible for non-compliance (however minor, e.g. 5%) with the Regulation, and/or in case of a processor, with the lawful instructions from the controller.

12. An alternative, which is defended by some delegations, is *"full" joint and several liability*, under which any controller and/or processor involved in the processing can be condemned to pay the entire amount of the damage to the data subject regardless of its responsibility (*option 2*). A controller may thus be obliged to pay out compensation to the data subject even when it bears no responsibility at all for the damage (0%). Under such a system, the data subject may recover all the damages from any of the entities involved in conduct which gave rise to damages. The question whether and to which extent each of the controllers and/or processors is responsible comes in only after (one of) the controllers and/or processors has been convicted for the entire amount of damages. It would then have the possibility to claim back from the other controllers and/or processors an amount corresponding to their share of the responsibility. Should delegations prefer such system, paragraph 4 would obviously need to be amended. A proposal for an alternative paragraph 4 is set out in the annex.
13. The choice between the two systems hinges on the following arguments. A system of a rebuttable presumption of joint and several liability is closer to the 'liability follows fault principle' (advocated by a few delegations) under which any controller or processor can be held liable only for the damage caused by its actions towards the data subject. Option 1 is therefore fairer towards the entities involved in the processing as a controller will never be condemned to pay compensation when it bears no responsibility at all for the damage. (However it may still be obliged to pay 100% of the compensation even if it is only responsible for 10% of it.) The drawback of such system is that if the controller manages to demonstrate that it bears no responsibility at all for the damage, the data subject will have to sue the processor, which may be difficult if the latter is established in another Member State or outside the European Union.
14. A system of full joint and several liability has the advantage that it is very data subject friendly in the sense that the data subject will be able to claim compensation for the entire damages from any controller (or processor) involved in the processing, regardless of their responsibility for the event giving rise to the damage. Obviously such a system may be very unfair towards the processing entity, especially if it concerns an SME which may not be able to effectively seek compensation from the processor or another controller which was in breach/violation of the Regulation. That SME will then have been obliged to pay compensation for damage resulting from a data protection violation for which it bears no responsibility at all.

15. *Delegations are invited to indicate whether they prefer a system of "presumed" (option 1) or "full" (option 2) joint and several liability of controllers and/or processors involved in the processing.*

Sanctions

16. Most delegations preferred to maintain the three-fold division of violations, as proposed by the Commission. The Presidency has reinstated the figures for the fines as set out in the Commission proposal.
17. *The Presidency invites delegations to confirm these figures as a basis for negotiations with the EP.*

Conclusion

18. Subject to the understanding listed under point 4, the Committee is invited to endorse the Presidency compromise text on Chapter VIII with a view to enabling the Justice and Home Affairs Council to adopt a General Approach on the entire General Data Protection Regulation on 15 June 2015.
-

111) Every data subject should have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence , and have the right to an effective judicial remedy in accordance with Article 47 of the Charter of Fundamental Rights if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can be completed also electronically, without excluding other means of communication.⁴

112) Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a body, organisation or association which aims to protect the rights and interests of data subjects in relation to the protection of their data and is constituted according to the law of a Member State, to lodge a complaint on his or her behalf with a supervisory authority or exercise the right to a judicial remedy on behalf of data subjects. Such a body, organisation or association should have the right to lodge, independently of a data subject's complaint, a complaint where 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.

⁴ FI suggested to insert a footnote to accommodate its concern that inaction on behalf of an authority was unknown in their legal system, with the following wording: 'In a case of inaction by the supervisory authority under art. 74(2), an effective judicial remedy may be provided by courts, tribunals or other kind of judicial bodies, such as the Chancellor of Justice or the Parliamentary Ombudsman, as far as such remedy will factually lead to appropriate measures.'

113) Any natural or legal person has the right to bring an action for annulment of decisions of the European Data Protection Board before the Court of Justice of the European Union (the "Court of Justice") under the conditions provided for in Article 263 TFEU. As addressees of such decisions, the concerned supervisory authorities who wish to challenge them, have to bring action within two months of their notification to them, in accordance with Article 263 TFEU. Where decisions of the European Data Protection Board are of direct and individual concern to a controller, processor or the complainant, the latter may bring an action for annulment against those decisions and they should do so within two months of their publication on the website of the European Data Protection Board, in accordance with Article 263 TFEU. Without prejudice to this right under Article 263 TFEU, each natural or legal person should have an effective judicial remedy before the competent national court against a decision of a supervisory authority which produces legal effects concerning this person. Such a decision concerns in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints⁵. However, this right does not encompass other measures of supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and should be conducted in accordance with the national procedural law of that Member State. Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it. Where a complaint has been rejected or dismissed by a supervisory authority, the complainant may bring proceedings to the courts in the same Member State. In the context of judicial remedies relating to the application of this Regulation, national courts which consider a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law including this Regulation.

⁵ GR reservation.

Furthermore, where a decision of a supervisory authority implementing a decision of the European Data Protection Board is challenged before a national court and the validity of the decision of the European Data Protection Board is at issue, that national court does not have the power to declare the European Data Protection Board's decision invalid but must refer the question of validity to the Court of Justice in accordance with Article 267 TFEU as interpreted by the Court of Justice in the *Foto-frost* case⁶, whenever it considers the decision invalid. However, a national court may not refer a question on the validity of the decision of the European Data Protection Board at the request of a natural or legal person which had the opportunity to bring an action for annulment of that decision, in particular if it was directly and individually concerned by that decision, but had not done so within the period laid down by Article 263 TFEU.

113a) Where a court seized with a proceeding against a decision of a supervisory authority has reason to believe that proceedings concerning the same processing activities or the same cause of action are brought before a competent court in another Member State, it should contact that court in order to confirm the existence of such related proceedings. If related proceedings are pending before a court in another Member State, any court other than the court first seized should stay its proceedings or may, on request of one of the parties, decline jurisdiction in favour of the court first seized if the latter has jurisdiction over the proceedings in question and its law permits the consolidation of such related proceedings. Proceedings are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

114) (...)

115) (...)

116) For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority acting in the exercise of its public powers.

⁶ Case C-314/85.

117) (...).⁷

118) Any damage which a person may suffer as a result of unlawful processing should be compensated by [the controller or processor], who should be exempted from liability if they prove that they are not responsible for the damage, in particular where he establishes fault on the part of the data subject or in case of force majeure. The concept of damage should be broadly interpreted in the light of the case law of the Court of Justice of the European Union in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law⁸. (...)

118a) Within the scope of Regulation (EU) No 1215, the provisions on jurisdiction in that Regulation should prevail over those in this Regulation. Where Regulation (EU) No 1215/2012 does not apply, in particular as regards administrative matters, the specific rules on jurisdiction are contained in this Regulation, should apply.

⁷ FR suggested to insert a footnote on contractual clauses as follows: 'Any contractual clause which is not compliant with the right to an effective judicial remedy against a controller or processor, and in particular with the right of the data subject to bring proceedings before the courts of the Member State of its habitual residence shall be null and void.'

⁸ COM scrutiny reservation.

118b) In order to strengthen the enforcement of the rules of this Regulation, penalties and administrative fines⁹ may be imposed for any infringement of the Regulation, in addition to, or instead of appropriate measures imposed by the supervisory authority pursuant to this Regulation. In a case of a minor infringement or if the fine likely to be imposed would constitute an disproportionate burden to a natural person, a reprimand may be issued instead of a fines. Due regard should however be given to the intentional character of the infringement, to the previous infringements or any other factor referred to in paragraph 2a.¹⁰ The imposition of penalties and administrative fines should be subject to adequate procedural safeguards in conformity with general principles of Union law and the Charter of Fundamental Rights, including effective judicial protection and due process. **Where the national law of a Member State does not provide for administrative fines, such Member State may abstain from providing administrative fines for infringements of this Regulation that are already subject to criminal sanctions in their national law ensuring that these criminal sanctions are effective, proportionate and dissuasive, taking into account the level of administrative fines provided for in this Regulation.**

119) Member States may lay down the rules on criminal sanctions for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. These criminal sanctions may also allow for the deprivation of the profits obtained through infringements of this Regulation. However, the imposition of criminal sanctions for infringements of such national rules and of administrative sanctions should not lead to the breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice.

⁹ DK reservation on the introduction of administrative fines in the text as administrative fines – irrespective of their level – raise constitutional concerns.

¹⁰ Further to FI proposal.

120) In order to strengthen and harmonise administrative penalties against infringements of this Regulation, each supervisory authority should have the power to impose administrative fines. This Regulation should indicate offences, the upper limit and criteria for fixing the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the breach and of its consequences and the measures taken to ensure compliance with the obligations under the Regulation and to prevent or mitigate the consequences of the infringement. Where the fines are imposed on persons that are not a commercial undertaking, the supervisory authority should take account of the general level of income in the Member State in considering the appropriate amount of fine¹¹. The consistency mechanism may also be used to promote a consistent application of administrative sanctions. It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines. Imposing an administrative fine or giving a warning does not affect the application of other powers of the supervisory authorities or of other sanctions under the Regulation.

120a) Where this Regulation does not harmonise administrative penalties or where necessary in other cases, for example in cases of serious infringements of the Regulation¹², Member States should implement a system which provides for effective, proportionate and dissuasive penalties. The nature of such penalties (criminal or administrative) should be determined by national law.

¹¹ Further to CZ proposal.

¹² IE thought that it was not necessary to have additional conditions like 'serious' infringements.

CHAPTER VIII

REMEDIES, LIABILITY AND SANCTIONS¹³

Article 73

Right to lodge a complaint with a supervisory authority¹⁴

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 particular¹⁵ in the Member State of his or her habitual residence, place of work or place of the alleged infringement, if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation¹⁶.
2. (...)
3. (...)
4. (...)
5. The supervisory authority to which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 74 (...).

¹³ AT, EE, ES and RO scrutiny reservation.

¹⁴ CY, CZ, LY, and SI scrutiny reservation.

¹⁵ COM, BG, IT, SI and LU though that the data subject should be able to lodge a complaint with any DPA without limitation since the protection of personal data was a fundamental right.

¹⁶ DE suggested adding "when its rights are not being respected".

Article 74

Right to an effective¹⁷ judicial remedy against a supervisory authority¹⁸

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 legally binding decision of a supervisory authority concerning them.¹⁹
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to an effective judicial remedy where the supervisory authority competent in accordance with Article 51 and Article 51a does not deal with a complaint or does not inform the data subject²⁰ within three months or any shorter period provided under Union or Member State law²¹ on the progress or outcome of the complaint lodged under Article 73²².
3. (...) Proceedings against a (...) supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.

¹⁷ *Effective* has been added, in line with Article 47 in the Charter. In particular recital 113 illustrates what an effective legal remedy means in this context: 'Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it'.

¹⁸ SI reservation. UK scrutiny reservation.

¹⁹ DE, supported by CZ, IE and SE, suggested adding: 'by which it is adversely affected'. FI thought that *concerning them* was too vague and suggested *addressed to them or*: (drafting is taken from Article 263 TFEU). However this criterion for ECJ litigation may not be necessarily be valid for remedies before national courts, the admissibility of which will be determined by national law.

²⁰ FI and SE indicated that the right to a judicial remedy if an authority did not take action was unknown in their legal system. FI suggested a recital to solve this issue (footnote under recital 111).

²¹ SI indicated that under its law the DPA was obliged to reply within two months.

²² SE scrutiny reservation. NO wanted to delete paragraph 2 since a court review would endanger the independency of the DPA.

- 3a. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the European Data Protection Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.
4. (...)
5. (...)²³

Article 75

***Right to an effective judicial remedy against a controller or processor*²⁴**

1. Without prejudice to any available administrative or non-judicial remedy²⁵, including the right to lodge a complaint with a supervisory authority under Article 73, data subjects 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.²⁶

²³ COM reservation on deletion of paragraphs 4 and 5. DE scrutiny reservation on deletion of paragraphs 4 and 5.

²⁴ DE, PL, PT, SI and SK scrutiny reservation. ES reservation. FR, supported by BE, suggested to introduce a recital (new recital 117) stating that contractual clauses that do not respect Article 75 would be void. FR indicated that Facebook had been convicted in France for having inserted such a clause in a contract.

²⁵ SI wanted to delete *non-judicial remedy*.

²⁶ AT said that the possibility of parallel proceedings about the same object was not provided under its legal system and proposed to limit the possibility of a judicial remedy to cases where the DPA cannot take a decision. FR thought that it was necessary to clarify that the processor might be responsible independently of the controller, *e.g.* pursuant to Article 30 or according to a certification.

2. **Where Regulation (EU) No 1215/2012 does not apply,** 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 (...) ²⁷. 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 or processor ²⁸ is a public authority acting in the exercise of its public powers ²⁹.
3. (...)
4. (...)

²⁷ In view of the concerns raised, the reference to national law has been kept only in recital 113.

²⁸ FR wanted to delete *processor*: in its opinion a processor cannot be a public authority.

²⁹ UK scrutiny reservation: found the second part of the paragraph unusual. DE, supported by PL and SI, suggested to add text in the end of the paragraph with a reference to the Brussels I Regulation indicating that the provisions of the present Regulation took precedence over the provisions of the Brussels I Regulation.

Representation of data subjects

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 behalf³¹ and to exercise the rights referred to in Articles 73, 74 and 75 on his or her behalf³².
- 1a. (...) ³³

³⁰ DE, ES, PT, RO and SI scrutiny reservation. CZ, EE, MT, NL, SI and UK thought this article was superfluous.

³¹ NL had serious concerns with paragraph 1 because it feared that a system with class action like in the US would be introduced and pointed to the links with Articles 75 and 77. NL therefore suggested to add 'this body, organisation or association does not have the right to claim damages on his/her behalf', but mentioned that this text could go into a recital.

³² DE parliamentary reservation; EE and FI reservation and HU scrutiny reservation. EE, supported by HU and SE, thought that the data subject could choose anybody to represent her/him so this drafting was a limitation so a reference to national law was needed. Support from SE. FI, supported by ES, suggested to add in the end of the paragraph 'in accordance with criteria laid down in national law'. FI also suggested to start paragraph 1 as follows: 'Any body ...may lodge a complaint when the data subject has mandated it, ...behalf in accordance with national law. FI explained that this was to clarify that no body/organisation had an obligation to act which went too far for FI; support from ES that preferred to leave that for national law.

³³ FR asked for its reinsertion. BG welcomed its deletion.

2. Member States may³⁴ provide that any body, organisation or association (...) shall have the right to lodge a complaint with the supervisory authority competent in accordance with Article 51 and 51a³⁵ 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.³⁶
3. (...)
4. (...)³⁷

³⁴ COM reservation. COM and FR wanted to replace *may* with *shall*. CZ, EE, ES, NL could in a spirit of compromise accept paragraph 2; NL on condition that *may* remained. BG, DE, HU, EL, IE, MT also supported *may*. HU suggested to broaden the scope of the Article to cover all kinds of non-compliance of the Regulation.

³⁵ COM reservation on limitation to competent supervisory authority. COM said that the added value of the was that an organisation that had been recognised in on MS could mandate such an organisation in another MS.

³⁶ IE, RO, UK supported new paragraph 2. FR asked for the reinsertion of former paragraph 2. EL thought that is should be for national law to set out such possibilities. FR joined EL in that if the right for a body to lodge a complaint was not compulsory (shall) there was no need for the provision and the MS could set it out in their national law. BG wanted to introduce text allowing the data subject to confirm its interest in the action or withdraw its interest.

³⁷ COM scrutiny reservation on deletion of paragraphs 3 to 5. FR reservation on the deletion of paragraphs 3 to 4.

Article 76a

Suspension of proceedings³⁸

1. Where a competent court of a Member State has information³⁹ on proceedings concerning the same processing (...) are pending in a court in another Member State, it shall⁴⁰ contact that court in the other Member State to confirm the existence of such proceedings.
2. Where proceedings concerning the same processing (...) are pending in a court in another Member State, any competent court other than the court first seized may suspend⁴¹ its proceedings.⁴²
- 2a. Where these proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

³⁸ AT, BE, CY, DK, EE, ES, FI, FR, PL, PT, SE and SI scrutiny reservation. PL, supported by FI, wanted it to be explained what *same processing activities* thought: same scope or also related cases. ES thought that *lis pendens* necessitated the same persons, same proceeding, same object of dispute and same claim and that that could be difficult to establish. UK, supported by FR, cautioned against having a too prescriptive text, support from FR. SE thought that GDPR should not regulate *lis pendens*, but left to the DPAs and courts to decide. NO and FR asked how this text related to Regulation No 44/2001 and the Lugano Convention FI considered that it was necessary to have rules on this question in GDPR. MT found the text too prescriptive.

³⁹ FR suggested to say *is informed* instead of *has information* to clarify that the parties had to inform the court.

⁴⁰ LU supported by EL and MT, suggested to replace "shall" with "may". FR suggested to add *at the request of a party* clarifying that the court was not supposed to act of its own motion.

⁴¹ PL and SK thought that it was difficult to force courts to stay proceedings waiting for another court to decide. HU supported by SK, asked how it was possible for a court to know that another case was going on elsewhere. HU asked how it would be established which court was first seized if several courts in several Member States were seized on the same day.

⁴² FR suggested adding in the end of the paragraph: *provided that such suspension respects the procedural rights of the parties to the proceedings.*

3. Paragraphs 1 to 2a shall not apply to proceedings falling within the scope of Regulation (EU) No 2015/2012. In that case, the provisions of section 9 of Chapter 2 of that Regulation shall apply.

Article 77

Right to compensation and liability⁴³

1. Any person who has suffered **material or immaterial**⁴⁴ damage⁴⁵ as a result of a processing which is not in compliance with this Regulation shall have the right to receive compensation from the controller [**and/or the processor**] for the damage suffered.
2. Any controller (...) involved in the processing shall be liable for the damage caused by its processing which is not in compliance with this Regulation. A processor shall be liable for violations of this Regulation only where it has not complied with obligations of this Regulation specifically directed to processors or acted outside or contrary to lawful instructions of the controller.

⁴³ IE and PL reservation. Several Member States (DE, NL and UK) have queried whether there was an EU concept of damage and compensation or whether this was left to Member State law. IT suggested specifying that these rules are to be applied according to national law, support from CZ, NL, RO and SI. COM thinks that it has to be left to ECJ to interpret these rules and concepts. FR scrutiny reservation; FR questioned the division of responsibilities and the link to Articles 24 and 25 and national law in this field as well as the principle of subsidiarity. IE asked from whom the data subject could seek compensation, since paragraphs 2 and 3 were contradictory. Nor UK liked the *joint* and *separately* responsibility and paragraphs 2 and 3 were contradictory. FI supported IE and UK and said that the processor had too much responsibility.

⁴⁴ DE, HU, NO, SE and SK suggestion.

⁴⁵ BE asked whether a violation of the principles of the Regulation was enough to constitute a damage or whether the data subject had to prove a specific damage (*obligation de moyens ou de résultat*). COM said that the data subject had to prove the damage.

Option 1 (paras 3 and 4):

3. The controller or the processor **shall** be exempted from liability, (...) if the controller or the processor proves that they are not responsible for the event giving rise to the damage.
4. Where more than one controller or processor or a controller and a processor are **liable for the same damage pursuant to the conditions laid down in paragraphs 2 to 3**, each controller or processor shall be jointly and severally liable for the entire amount of the damage. This is without prejudice to recourse claims between controllers and/or processors.

Option 2 (paras 3 and 4):

3. (...)
4. Where more than one controller or processor or a controller and a processor are **liable for the same damage pursuant to the conditions laid down in paragraph 2**, each controller or processor shall be jointly and severally liable for the entire amount of the damage. This is without prejudice to recourse claims between controllers and/or processors, *if the controller or the processor proves that they are not responsible for the event giving rise to the damage.*
- 5.** Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under national law of the Member State referred to in paragraph 2 of Article 75.

Article 78

Penalties

(...)⁴⁶

Article 79

General conditions for imposing administrative fines

1. Each supervisory authority shall (...) ⁴⁷ ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in Article 79a (...) shall in each individual case be effective, proportionate and dissuasive. ⁴⁸
2. (...)
- 2a. Administrative fines shall ⁴⁹ , depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (f) of paragraph 1b of Article 53 ⁵⁰. When deciding whether to impose an administrative fine (...) ⁵¹ and ⁵² deciding on the amount of the administrative fine in each individual case due regard shall ⁵³ be given (...) to the following: ⁵⁴

⁴⁶ This Article was moved to Article 79b. Scrutiny reservation by SK, RO and PT.

⁴⁷ It was pointed out (FI) that the empowerment for Member States to provide for administrative sanctions and measures was already covered by Article 53(1b).

⁴⁸ Moved from paragraph 2. FI thought that paragraph 2 was not necessary since paragraph 2a provided concrete content for the general wording of paragraph 2.

⁴⁹ CZ, FR, SE and UK suggested to change *shall* to *may*.

⁵⁰ Some delegations thought that the corrective measures of Article 53 (1b) should be listed rather here.

⁵¹ Deleted further to FI suggestion.

⁵² Some delegations (EE, SK, PL) thought that aggravating circumstances should be distinguished from mitigating circumstances. SK suggested laying down exact thresholds (e.g. more than 2/3 of the maximum fine in case of aggravating circumstances).

⁵³ UK suggested to insert *as appropriate*. DE was generally happy with the text since the list in was open and not all aspects needed to be considered. COM pointed at point (m) confirming that it was an open list.

⁵⁴ PL and FR suggested that guidelines by the Board could be useful here or at least in a recital.

- (a) the nature, gravity and duration of the infringement having regard to the nature scope or purpose of the processing concerned as well as *the number of data subjects affected and the level of damage suffered by them*;
- (b) the intentional or negligent character of the infringement,
- (c) (...);
- (d) action taken by the controller or processor to mitigate the damage suffered by data subjects;
- (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;
- (f) any relevant previous infringements by the controller or processor;
- (g) (...);⁵⁵
- (h) 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 infringement⁵⁶;
- (i) in case measures referred to in point (b) and (c) of paragraph 1 and points (a), (d), (e) and (f) of paragraph 1b of Article 53, have previously been ordered against the controller or processor concerned with regard to the same subject-matter⁵⁷, *compliance with these measures* ;

⁵⁵ Deleted further to DK, ES, FR, FI and SI reservation.

⁵⁶ CZ and SE were concerned that this factor might amount to a violation of the privilege against self-incrimination.

⁵⁷ IT thought this paragraph should refer more generally to previous incidents. DE and FR pleaded for its deletion.

(j) adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39⁵⁸;

(k) (...);

(l) (...);

(m) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. (...) ⁵⁹

3a. (...) ⁶⁰

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 State⁶¹.

4. The exercise by the 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.

⁵⁸ CZ, FR, EE and SI reservation: DE pointed out that non-adherence to approved codes of conduct or approved certification mechanisms could as such not amount to a violation of the Regulation. IT found this point problematic and said that if the chapeau was reworded point (j) could be deleted.

⁵⁹ COM reservation on deletion; linked to reservation on Article 79a.

⁶⁰ COM reservation on deletion.

⁶¹ DE would prefer to rule out this possibility in the Regulation. ES thought it should be provided that no administrative fines can be imposed on the public sector. FR strongly supported paragraph 3b.

5. Member States may **abstain from providing** rules for administrative fines as referred to in paragraphs 1, 2 and 3 of Article 79a where the infringements referred to therein are already subject to criminal sanctions in their national law by [date referred to in Article 91(2)].

Where they so decide, Member States shall notify, to the Commission, the relevant parts of their criminal law⁶².

⁶² This paragraph builds upon a similar provision in Article 30(1) of the 2014 Market Abuse Regulation (EU) No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ 12.06.2014, L 173, p. 1. AT, HU scrutiny reservation. DE, DK, E, NL, EE and SE supported the text whereas FR, IE and PL could not accept it.. COM suggested text setting out that ‘ where national law of the MS don’t provide for administrative sanctions ...’ COM also suggested setting. DK thought that the legal basis (Article 16 TFEU) does not allow for the harmonisation of criminal law.

Article 79a

Administrative fines^{63 64}

1. The supervisory authority (...) may impose a fine that shall not exceed [250 000] EUR, or ⁶⁵ in case of an undertaking [0,5] %⁶⁶ of its total worldwide annual turnover ⁶⁷ of the preceding financial year, on a controller who, intentionally or negligently:

⁶³ DK reservation on the introduction of administrative fines in the text as administrative fines – irrespective of their level – raise constitutional concerns. DE, EE, ES, IE and PT scrutiny reservation. FI and SI reservation. COM reservation on replacing ‘shall’ by ‘may’. DE wanted the risk-based approach to be made clearer. DE thought that proportionality was important because Article 79a concerned fundamental rights/rule of law and deemed it disproportionate that a supervisory authority could impose a fine that the data subject was unaware of. DE said that it was necessary to set out the fines clearly and that the one-stop shop principle did not allow for exceptions being set out in national law. IE thought the gravity of offences was not sufficiently illustrated, *e.g.* infringement in para. 3(m), which according to IE is the most serious one. FR reservation: the strictness of the text may impinge on the independence of the DPA. ES also wanted to give flexibility to the DPA.

⁶⁴ A majority of Member States (BE, CY DE, EE, ES, FI, IT, LV, LU, MT and NL) appear to be in favour of different scales of sanctions. COM referred to the Market Abuse Regulation with three levels of fines. DK, HU, IE, SE and UK were opposed to maintaining different sanctions scales. FR and PL did not favour it, but could accept it. SI said that it was impossible to have amounts in the Article. In contrast NL wanted to set out amounts.

⁶⁵ FI suggested to insert *if higher* to clarify that the higher amount is the maximum amount for sanctions, also valid for paragraphs 2 and 3.

⁶⁶ EE did not consider it appropriate to set out sanctions in percentage because the sanction was not predictable. PT considered that there should be minimum penalties for a natural person and that for SMEs and micro enterprises the volume of the business should not be looked at when applying the fines (this factor should only be applicable for multinationals). PL thought that administrative fines should be implemented in the same way in all MS. PL said that the fines should be flexible and high enough to represent a deterrent, also for overseas companies. ES saw practical problems with worldwide fines. UK noted that the levels of fines in the EP report were far too high.

⁶⁷ UK commented that *turnover* was used in competition law and asked whether the harm was the same here. EE asked how the annual turnover was connected to the sanction. SI thought that compared to competition law where the damage concerned the society as a whole, data protection concerned private infringements. COM said that both competition law and data protection concern economic values, whereas data protection protects values of the data subject. COM further said that the fines must be dissuasive and that it was necessary to refer to something, *e.g.* percentage but that it was also necessary with a sufficiently broad scope to take into account the specificities of the case. UK thought that *name and shame* would be a more efficient practice than fines. UK further said that high fines would entail two problems: they would be challenged in court more often and controllers might get less help to verify a potential breach. DE, supported by FR, thought that the fines set out in Article 79a were only the maximum level and that question of fines could be submitted to the Ministers in June JHA Council. COM agreed that the Article only set out maximum fines and that the companies themselves would provide the amounts of the turnover.

- (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 the first sentence of paragraph 4 of Article 12.
2. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [500 000] EUR, or in case of an undertaking [1]% of its total worldwide annual (...) turnover of the preceding financial year, on a controller or processor who, intentionally or negligently:
- (a) does not provide the information, or (...) provides incomplete information, or does not provide the information [timely or] in a [sufficiently] transparent manner, to the data subject pursuant to Articles 12(3), 14 and 14a;
 - (b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 (...);
 - (c) **does not erase personal data in violation of the right to erasure and 'to be forgotten' pursuant to Article 17(1)(a), 17(1)(b), 17(1)(d) or 17(1)(e);**
 - (d) (...)
 - (e) **processes personal data in violation of the right to restriction of processing pursuant to Article 17a or does not inform the data subject before the restriction of processing is lifted pursuant to Article 17a(4);**
 - (f) **does not communicate any rectification, erasure or restriction of processing to each recipient to whom the controller has disclosed personal data, in violation of Article 17b;**
 - (g) **does not provide the data subject's personal data concerning him or her [or any other relevant information] in violation of Article 18;**
 - (h) **processes personal data after the objection of the data subject pursuant to Article 19(1) and does not demonstrate compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims;**

- (i) **does not provide the data subject with information concerning the right to object processing for direct marketing purposes pursuant to Article 19(2) or continues to process data for direct marketing purposes after the objection of the data subject in violation of Article 19(2a)**
- (j) (e) does not [or not sufficiently] determine the respective responsibilities with joint controllers pursuant to Article 24;
- (k) (f) does not [or not sufficiently]⁶⁸ maintain the documentation pursuant to Article 28 and Article 31(4).
- (l) (g)(...)

3. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [1 000 000] EUR or, in case of an undertaking, [2] % of its total worldwide annual turnover of the preceding financial year, on a controller or processor who, intentionally or negligently:

- (a) processes personal data without a (...) 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;

⁶⁸ IE, supported by SI, pointed it that a number of the terms used here (such as "sufficiently", "timely" and "incomplete") were so vague that they were not compatible with the *lex certa* principle. DE agreed with IE and added that it was a problem of objective of the provisions: on the one side the need for the controller to know what the rules are and on the other side the flexibility for the DPA.

- (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);
- (j) (...);
- (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) (...)⁶⁹
- (o) (...).

3a. [If a controller or processor intentionally or negligently violates several provisions of this Regulation listed in paragraphs 1, 2 or 3, the total amount of the fine may not exceed the amount specified for the gravest violation.]⁷⁰

⁶⁹ IT wanted to reinstate failure to cooperate with the DPO. IE thought that this was a subjective infringement.

⁷⁰ PL and FR wanted to keep paragraph 3a.

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 2 of Article 79.]⁷¹

Article 79b

Penalties⁷²

1. *For infringements (...) of this Regulation in particular for infringements which are not subject to administrative fines pursuant to (...) Article 79a Member States shall*⁷³ *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.*

⁷¹ CZ, DE, HU, NL and RO reservation. NL that thought that guidelines from the EDPB could solve the problems on the amounts. CZ wanted to delete the paragraph and thought that the DPA could set out the amounts.

⁷² AT, DE, DK, ES, FR, PL and PT and SK scrutiny reservation. COM explained that infringements not listed in Article 79a were those under national law, referred to in Chapter IX, for example infringements in employment law and relating to freedom of expression. In that way Article 79b is complementary to the list in Article 79 and does not exclude other penalties. IT thought it was better to delete the Article but lay down the possibility to legislate at national level. FR reservation on the imposition of criminal penalties. DE in favour of referring *expressis verbis* to criminal penalties. IE concerned that the provision would apply to infringements of the freedom of expression laws. In the same vein EE raised concerns because EE doesn't have laws on the freedom of expression.

⁷³ HU reservation.