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Input on the proposed implementing acts

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This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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Website: http://ec.europa.eu/justice/data-protection/index_en.htm

Input on the proposed implementing acts

On 5 October 2012, the Working Party adopted Opinion 8/2012 providing further input on the data protection reform discussions. One of the issues discussed was whether all provisions allowing the Commission to adopt delegated and implementing acts were actually justified and needed.

In the Annex to Opinion 8/2012, the Working Party presented an Article-by-Article analysis of all provisions on possible delegated acts. The provisions on implementing acts were left aside for the time being. The current additional input focuses on these implementing acts.

The Working Party first recalls and elaborates further, the differences between delegated and implementing acts as indicated in Opinion 8/2012. Subsequently, the relevant criteria for determining the justification and need of implementing acts are listed. Finally, an Article-by-Article assessment of all possible implementing acts is provided.

The difference between delegated and implementing acts

Since the entry into force of the Lisbon Treaty the Commission can be empowered to adopt delegated acts and implementing acts. Delegated acts are based on Article 290 TFEU and can be adopted to supplement or to amend non-essential parts of the legal act (in this case the proposed Regulation). Implementing acts are based on Article 291 TFEU and can be used where uniform conditions are needed for implementing legally binding acts of the Union, such as a Directive or a Regulation.

As to delegated acts, according to Article 86(3) of the proposed Regulation, the Parliament and the Council may revoke the delegation of power at any time. Furthermore, according to Article 86(5) of the proposed Regulation, a delegated act shall only enter into force if no objection has been expressed by the Parliament or the Council within two months of notification of the act.

Implementing acts are adopted through a committee procedure. According to Article 87 of the proposed Regulation, all implementing acts are adopted through the examination procedure (see Article 5 of Regulation (EU) No 182/2011) and in one specific cases, in case of urgency, by a procedure which leads to an immediately applicable implementing act (see Article 8 of Regulation (EU) No 182/2011 and Article 62(2) of the proposed Regulation).

In comparison with delegated acts, the role of the European Parliament and of the Council is more limited with regard to implementing acts. The European Parliament or the Council may indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council of its decision (Article 11 of Regulation (EU) No 182/2011).

Article 290 and 291 TFEU do not provide clear criteria for choosing between a delegated and an implementing act. From the proposed Regulation it becomes clear that the Commission considers implementing acts for ensuring the uniform, more technical conditions for the implementation of the Regulation, such as standard forms and standard procedures.

Assessment of proposed implementing acts

Laying down norms in binding EU instruments ensures legal certainty, as well as a level playing field within the EU. There are situations in which a binding EU instrument which specifies a provision of the Regulation will be the most appropriate way to create legal certainty, protect the data subject and avoid distorting discrepancies between the Member States.

However, in other situations a flexible approach and room for cultural differences might be more appropriate to ensure the practical application of the rules. In such cases it may be more suitable to provide guidance through guidelines of the EDPB, which acknowledges the need for flexibility and supports the introduction of the principle of accountability. Ultimately, the matter is left to the Court of Justice and national courts.

In opinion 8/2012, the following criteria were presented for determining which instrument would be most appropriate to deal with a specific issue (legislative act, delegated act, implementing act, in the recitals of the legislative act and guidelines of the DPAs or the EDPB):

- whether the issue concerns an essential part of the Regulation or not[1];
- whether the issue needs to be dealt with at European or national level (i.e. is there a the need for harmonisation);
- whether a legally binding or a more flexible instrument is needed;
- whether the instrument is compatible with the need for technological neutrality;
- whether there is a need to provide further guidance at all (i.e. whether or not it should be left to the controller to give substance to the rules under the specific circumstances of the case, subject always to supervision, enforcement and judicial review).

As to the implementing acts, the Working Party underlines that the power to adopt implementing acts should only be conferred on the Commission where uniform conditions for implementing the proposed Regulation <u>are needed</u>, as determined in Article 291 TFEU. In light of the criteria just listed, when assessing the need for a power to adopt implementing acts, the focus lies on whether the Regulation, with possible additional delegated legislation, would not achieve its purposes in the absence of implementing acts.

It should be borne in mind that the adoption of implementing acts increases the prescriptive nature of the EU data protection framework, which may not be fully consistent with the introduction of the principle of accountability which aims at entrusting data controllers with the practical aspects of complying with data protection obligations. With a clear provision in the Regulation, possibly supplemented by a delegated act, it often is not necessary for achieving the purposes of the Regulation (the protection of the individuals and the free movement of personal data), to have further implementing rules at EU level. In many of the provisions in which standard forms and procedures are currently foreseen through implementing acts, it would be sufficient to have guidance by DPAs and possibly the EDPB if practice shows the need for it.

Still, in some specific situations, binding rules on standard forms and procedures might be needed if it actually fosters the protection of personal data and prevents market distortion, for instance if the risk of forum shopping appears. This is mainly the case with provisions which would require more technical conditions which cannot be provided for in the Regulation due to the technological neutrality of the general rules and in if the absence of such conditions:

- may have a negative impact on the protection of the data subject, or
- would have an impact on the harmonised level of protection in the internal market (because the absence of harmonisation could possibly influence the behaviour of controllers and processors).

[1] In that respect, the ruling of the Court of Justice of the European Union of 5 September 2012 in Case C-355/10 is relevant.

Article-by-Article assessment

Article 8(4) - standard forms for specific methods to obtain verifiable consent referred to in paragraph 1. Article 8 deals with processing of personal data of a child. Paragraph 1 provides that for the purposes of the Regulation, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent or custodian. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.

This provision also contains a power for the Commission to adopt delegated acts for the purpose of further specifying the criteria and requirements for the methods to obtain verifiable consent (Article 8(3)). In Opinion 8/2012, the Working Party explained that it did not seem necessary to provide such further guidance in a delegated act.

Applying the same logic would lead to the same conclusion with regard to the power to adopt implementing acts.

To the extent that the practical application of verifiable consent might require some further explanation, this should be done by means of guidance from the EDPB.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and preferably at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 12(6) - standard forms and specifying standard procedures for the communication referred to in paragraph 2, including the electronic format. In doing so, the Commission shall take the appropriate measures for MSMEs.

Article 12 deals with the procedures and mechanisms to be established by the controller for enabling the exercising of rights of the data subject in terms of the right to information (Article 14), right to access (Article 15), right to rectification (Article 16), right to be forgotten and to erasure (Article 17), right to data portability (Article 18) and right to object (Article 19).

Paragraph 2 provides for the duty of the controller to inform the data subject whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and to provide the requested information in writing within the set deadlines. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.

Article 12 is clear about the obligations on the controller. The Working Party does not see why an implementing act with standard forms and specified standards would be needed for the implementation of this provision. The absence of such conditions will not have a negative impact on the protection of the data subject or on the harmonised level of protection in the internal market.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and preferably at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 14(8) - standard forms for providing the information referred to in paragraphs 1 to 3, taking into account the specific characteristics and needs of various sectors and data processing situations where necessary.

Article 14 deals with the right of information of the data subject. Paragraphs 1-3 list the minimum information requirements, paragraph 4 the moment for the information to be given and paragraph 5 the allowed derogations from the rules in paragraphs 1-4.

Paragraph 1 provides a list (a-g) of minimum information to be provided to the data subject by the controller, as well as a more open clause (h) requiring the disclosure of any further information necessary to guarantee fair processing in respect of the data subject, having regard to the specific circumstances in which the personal data are collected.

Paragraph 2 provides that where the personal data are collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, whether the provision of personal data is obligatory or voluntary, as well as the possible consequences of failure to provide such data.

Paragraph 3 specifies that where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source the personal data originate.

Article 14(1)-(3) is clear about the obligations on the controller. The Working Party does not see why an implementing act with standard forms would be needed for the implementation of this provision. The absence of such conditions will not have a negative impact on the protection of the data subject or on the harmonised level of protection in the internal market.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and preferably at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 15(4) - specify standard forms and procedures for requesting and granting access to the information referred to in paragraph 1, including for verification of the identity of the data subject and communicating the personal data to the data subject, taking into account the specific features and necessities of various sectors and data processing situations.

Article 15 deals with the right of access for the data subject and paragraph 1 lists the information to be provided to the data subject on request, including confirmation as to whether or not personal data relating to the data subject are being processed.

Article 15 is clear about the obligations on the controller. The Working Party does not see why an implementing act with standard forms and procedures would be needed for the implementation of this provision. The absence of such conditions will not have a negative impact on the protection of the data subject or on the harmonised level of protection in the internal market.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and preferably at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 18(3) - specify the electronic format referred to in paragraph 1 and the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2.

Article 18 deals with the right to data portability.

Paragraph 1 provides for a right for the data subject to obtain from the controller a copy of data undergoing processing in an electronic and structured format which is commonly used and allows for further use by the data subject.

Paragraph 2 provides for a right of the data subject to transmit the personal data provided by the data subject himself/herself, the processing of which is based on consent or on a contract and, any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn.

Article 18 introduces a right which requires technical implementation. The provision is not self-evident. A difference in how the right to data portability is applied in practice might lead to differences in level of protection of individuals and obligations on the controller which might hamper the internal market. Therefore, the Working Party does see the need for further rules, which are not necessarily technologically neutral.

Article 18(3) empowers the Commission to adopt implementing acts for specifying the electronic format referred to in 18(1) and the technical standards, modalities and procedures for the transmission of personal data pursuant to Article 18(2). It seems that such specifications are better placed in a delegated act, which is currently not foreseen in Article 18. Such a delegated act would allow to work with minimum requirements instead of complete technical instructions.

Article 23(4) - technical standards for the requirements laid down in paragraph 1 and 2. Article 23 concerns the principles of data protection by design and by default.

Article 23 introduces two principles which require technical implementation. The provision is not self-evident. A difference in how these principles are applied in practice might lead to differences in level of protection of individuals and obligations on the controller which might hamper the internal market.

However, these principles are more flexible in nature that the actual rights and obligations contained in the proposed Regulation. Therefore, as explained in Opinion 8/2012, the Working Party does see the usefulness of further guidance, but not through delegated or implementing acts, but through guidance provided by the DPAs and the EDPB.

Article 28(6) - standard forms for the documentation referred to in paragraph 1. Article 28(1) concerns the obligation on controllers to maintain documents of all processing operations under its responsibility.

Article 28 is clear about the obligations on the controller. This provision also contains a power for the Commission to adopt delegated acts (Article 28(5)). In Opinion 8/2012, the Working Party concluded that further guidance in a delegated act did not seem necessary. The same applies to the power to adopt implementing acts.

The Working Party does not see why an implementing act with standard forms would be needed for the implementation of this provision. The adoption of delegated and implementing acts under this provision would increase the prescriptive nature of the EU data protection framework, which is contrary to the introduction of the principle of accountability in Article 22 to which this provision is linked.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and possibly at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 30(4) - specifying the requirements laid down in paragraphs 1 and 2 to various situations, in particular to:
(a) prevent any unauthorised access to personal data;
(b) prevent any unauthorised disclosure, reading, copying, modification, erasure or removal of personal data;
(c) ensure the verification of the lawfulness of processing operations.

Article 30 deals with the security of processing.

This provision also contains a power for the Commission to adopt delegated acts (Article 30(3)). The Working Party takes the view that the division of substantive guidance over Article 30(3) (delegated acts) and 30(4) (implementing acts) is based on unclear criteria. In Article 30(4), the power of the Commission clearly goes beyond the adoption of standard forms and standard procedures.

In Opinion 8/2012, the Working Party explained why further specification as indicated in that provision by adopting a delegated act does not seem appropriate. In principle, the same reasoning would apply to the power to adopt implementing acts.

Still, the Working Party notes that Article 30 introduces obligations on the controller which are not self-explanatory. Therefore, further guidance might be needed and some additional rules on main lines, as a difference in technical standards might lead to differences in level of protection of individuals and obligations on the controller which might hamper the internal market. Such further rules should normally be provided in a delegated act.

Article 31(6) - standard format of a notification of a personal data breach to the supervisory authority, the procedures applicable to the notification requirement and the form and the modalities for the documentation referred to in paragraph 4, including the time limits for erasure of the information contained therein.

Article 31 concerns the obligation on the controller to notify a personal data breach to the supervisory authority.

Paragraph 4 provides for the obligation of the controller to document any personal data breaches, comprising the facts surrounding the breach, its effects and the remedial action taken. This documentation must enable the supervisory authority to verify compliance with this Article and shall only include the information necessary for that purpose.

This provision also contains a power for the Commission to adopt delegated acts (Article 31(5)). In Opinion 8/2012, the Working Party explained why, with regard to the security breach notification, it is important to provide further clarity in the proposed Regulation itself and not in a delegated act as proposed. Furthermore, it was indicated that it would be desirable to provide for certain details in a delegated act, provided it is adopted and in force at the same time as the proposed Regulation enters into force.

It seems that the issues to be dealt with in an implementing act should better be dealt with in the delegated act the Working Party referred to in Opinion 8/2012. In the presence of an improved provision in the proposed Regulation itself and further details in the delegated act, there seems to be no further need to empower the Commission to adopt implementing acts.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and possibly at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 32(6) - the format of the communication to the data subject referred to in paragraph 1 and the procedures applicable to that communication.

Article 32 concerns the obligation on the controller to communicate the personal data breach to the data subject.

Paragraph 1 requires the personal data breach to be communicated to the data subject without undue delay after the notification to the supervisory authority, when the personal data breach is likely to adversely affect the protection of the personal data or privacy of the data subject.

This provision also contains a power for the Commission to adopt delegated acts (Article 32(5)). In Opinion 8/2012, the Working Party explained why, with regard to the security breach notification, it is important to provide further clarity in the proposed Regulation itself and not in a delegated act as proposed. Furthermore, it was indicated that it would be desirable to provide for certain details in a delegated act, provided it is adopted and in force at the same time as the proposed Regulation enters into force.

It seems that the issues to be dealt with in an implementing act should better be dealt with in the delegated act the Working Party referred to in Opinion 8/2012. In the presence of an improved provision in the proposed Regulation itself and further details in the delegated act, there seems to be no further need to empower the Commission to adopt implementing acts.

For the sake of clarity the need might be felt in the future to align certain approaches which are developed in practice, however, this can be done at national level, with involvement of the DPAs and possibly at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 33(7) - may specify standards and procedures for carrying out and verifying and auditing the assessment referred to in paragraph 3.

Article 33 concerns the obligation to carry out data protection impact assessments.

Paragraph 3 provides that the assessment shall contain at least a general description of the envisaged processing operations, an assessment of the risks to the rights and freedoms of data subjects, the measures envisaged to address the risks, safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation, taking into account the rights and legitimate interests of data subjects and other persons concerned.

This provision also contains a power for the Commission to adopt delegated acts (Article 33(6)). In Opinion 8/2012, the Working Party explained that general requirements on how to assess whether or not a processing operation presents specific risks may be laid down in a delegated act. Alternatively or additionally, further guidance by the EDPB could be foreseen, provided that any possible list of processing operations that would be identifies as presenting specific risks shall not be exhaustive.

In such a constellation, the Working Party does not see why an implementing act which specifies standards and procedures for carrying out and verifying and auditing assessments would be needed for the implementation of this provision.

Article 34(9) - standard forms and procedures for prior authorisations and consultations referred to in paragraphs 1 and 2, and standard forms and procedures for informing the supervisory authorities pursuant to paragraph 6.

Article 34 concerns the obligation on controllers or processors to seek authorisation or consultation from the supervisory authority prior to the processing of personal data.

Paragraph 1 specifies the obligation in order to ensure the compliance of the intended processing with the Regulation and in particular to mitigate the risks involved for the data subjects where a controller or processor adopts contractual clauses as provided for in point (d) of Article 42(2) or does not provide for the appropriate safeguards in a legally binding instrument as referred to in Article 42(5) for the transfer of personal data to a third country or an international organisation.

Paragraph 2 specifies the obligation where:

(a) a data protection impact assessment as provided for in Article 33 indicates that processing operations are by virtue of their nature, their scope or their purposes, likely to present a high degree of specific risks; or
(b) the supervisory authority deems it necessary to carry out a prior consultation on processing operations that are likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope and/or their purposes, and specified according to paragraph 4.

Paragraph 6 obliges the controller or processor to provide the supervisory authority with the data protection impact assessment provided for in Article 33 and, on request, with any other information to allow the supervisory authority to make an assessment of the compliance of the processing and in particular of the risks for the protection of personal data of the data subject and of the related safeguards.

This provision also contains a power for the Commission to adopt delegated acts (Article 34(8)). In Opinion 8/2012, the Working Party explained that instead of a delegated act, guidelines from the EDPB would be most appropriate to further specify the criteria and requirements for determining the high degree of specific risks (likely to be) presented by processing operations, following a data protection impact assessment.

The Working Party does not see why an implementing act which specifies standards and procedures for prior authorisations and standard forms and procedures for informing the supervisory authorities would be needed for the implementation of this provision. The absence of such conditions will not have a negative impact on the protection of the data subject or on the harmonised level of protection in the internal market. It seems to be a subject per se for the EDPB to issue guidelines on if the need is felt.

Article 38(4) - for deciding that the codes of conduct and amendments or extensions to existing codes of conduct submitted to it pursuant to paragraph 3 have general validity within the Union.

Article 38 concerns voluntary codes of conduct intended to contribute to the proper application of the Regulation.

Paragraph 3 provides the possibility for associations and other bodies representing categories of controllers in several Member States to submit draft codes of conduct and amendments or extensions to existing codes of conduct to the Commission.

The Working Party sees the need for binding decisions at EU level which provide codes of conduct with general validity within the Union.

The Working Party wishes to note that it would have been most logical if such power was granted to the EDPB. However, due to the fact that the EDPB, as it is currently proposed, cannot take binding decisions, the power to confirm codes of conduct is laid on the Commission. The Working Party underlines that it should in any event be ensured that the EDPB plays an important role in the decision making process.

Article 39(3) - technical standards for certification mechanisms and data protection seals and marks and mechanisms to promote and recognize certification mechanisms and data protection seals and marks.

Article 39 provides that the Member States and the Commission shall encourage, in particular at European level, the establishment of data protection certification mechanisms and of data protection seals and marks, allowing data subjects to quickly assess the level of data protection provided by controllers and processors. The data protection certifications mechanisms shall contribute to the proper application of this Regulation, taking account of the specific features of the various sectors and different processing operations.

This provision also contains a power for the Commission to adopt delegated acts (Article 39(2)). In Opinion 8/2012, the Working Party explained that in order to ensure legal certainty towards the data subjects who rely on the certification mechanisms, seals and marks, a delegated act would seem the most appropriate instrument.

However, the Working Party does not see why an additional power to adopt implementing acts to lay down technical standards for certification mechanisms and data protection seals and marks and mechanisms to promote and recognize certification mechanisms and data protection seals and marks would be needed for the implementation of this provision. This can be done at national level, with involvement of the DPAs and possibly at EU level through guidance by the EDPB. It does not require a binding EU instrument.

Article 41(3) - that a third country, or a territory or a processing sector within that third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2.

Article 41(4) - the implementing act shall specify its geographical and sectoral application, and, where applicable, identify the supervisory authority mentioned in point (b) of paragraph 2.

Article 41(5) - that a third country, or a territory or a processing sector within that third country, or an international organisation does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, in particular in cases where the relevant legislation, both general and sectoral, in force in the third country or international organisation, does not guarantee effective and enforceable rights including effective administrative and judicial redress for data subjects, in particular for those data subjects residing in the Union whose personal data are being transferred; those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2), or, in cases of extreme urgency for individuals with respect to their right to personal data protection, in accordance with the procedure referred to in Article 87(3).

Article 41 concerns international transfers of personal data with an adequacy decision.

Paragraph 2 lists the elements that the Commission has to give consideration to when assessing the adequacy of the level of protection.

On the basis of past and current experience, the Working Party acknowledges the need for binding decisions at EU level on the adequacy of the level of data protection in third countries.

However, as to the procedure to be followed, the Working Party repeats it strong suggestion as expressed in Opinion 1/2012 of 23 March 2012 to include an obligation for the Commission to consult the EDPB during the decision making process.

Article 42(2)(b) - standard data protection clauses adopted by the Commission. Article 42 concerns international transfers of personal data by way of appropriate safeguards.

The Working Party sees the need for binding decisions at EU level on standard data protection clauses.

However, as to the procedure to be followed, the Working Party would suggest to include an obligation for the Commission to consult the EDPB during the decision making process.

Article 43(4) - specify the format and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article.

Article 43 concerns international transfers by way of binding corporate rules. According to paragraph 1, a supervisory authority shall in accordance with the consistency mechanism set out in Article 58 approve binding corporate rules, provided that the set conditions in Article 43(1) and (2) are met.

This provision also contains a power for the Commission to adopt delegated acts (Article 43(3)). In Opinion 8/2012, the Working Party explained that
- there seems to be no need to further specify the criteria and requirements for binding corporate rules in general and in particular regarding approval;
- a delegated act would be an appropriate instrument to further specify the application of Article 43(2)(b, d, e & f) to binding BCRs adhered to by processors (with additional guidance on the application of these provisions);
- a delegated act on further necessary requirements to ensure the protection of personal data would seriously risk encroaching upon the independence of the supervisory authorities.

The Working Party does not see why an additional power to adopt implementing acts to specify the format and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules would be needed for the implementation of this provision.

This is something which can be achieved through the EDPB. It does not require a binding EU instrument.

Article 55(10) - specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 6.

Article 55 concerns mutual assistance between the supervisory authorities in order to implement and apply the Regulation in a consistent manner.

Paragraph 6 requires the supervisory authorities to supply the information requested by other supervisory authorities by electronic means and within the shortest possible period of time, using a standardised format.

The Working Party does not see why the power on the Commission to adopt implementing acts to specify the format and procedures for mutual assistance referred to in this provision and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the EDPB is needed. Such a power would risk encroaching upon the independence of the supervisory authorities.

The proposed Regulation contains a clear obligation on DPAs to provide each other relevant information and mutual assistance. The means through which this is achieved can be decided upon by the DPAs collectively in the context of the EDPB.

Article 62(1)(a) - deciding on the correct application of the Regulation in accordance with its objectives and requirements in relation to matters communicated by supervisory authorities pursuant to Article 58 or 61, concerning a matter in relation to which a reasoned decision has been adopted pursuant to Article 60(1), or concerning a matter in relation to which a supervisory authority does not submit a draft measure and that supervisory authority has indicated that it does not intend to follow the opinion of the Commission adopted pursuant to Article 59.

Article 62(2) - on duly justified imperative grounds of urgency relating to the interests of data subjects in the cases referred to in point (a) of paragraph 1, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 87(3).

Article 58 concerns opinions by the EDPB.

Article 61 concerns the urgency procedure where a supervisory authority considers that there is an urgent need to act.

Article 60(1) concerns the suspension of a draft measure taken by the EDPB when the Commission has serious doubts as to whether the draft measure would ensure the correct application of the Regulation or would otherwise result in its inconsistent application.

Article 59 concerns the opinion by the Commission in relation to matters raised pursuant to Articles 58 or 6 meant to ensure correct and consistent application of the Regulation.

The Working Party, as well as the EDPS, have expressed fundamental concerns about the possibility as currently foreseen in the proposed Regulation for the Commission to adopt such implementing acts as it would prejudice the independence of the data protection authorities (see Opinion 1/2012, p. 20 and EDPS Opinion of 7 March 2012, paras. 248-255).

Therefore, the Working Party strongly recommends removing the power of the Commission to adopt such implementing acts.

Article 62(1)(b) - deciding, within the period referred to in Article 59(1), whether it declares draft standard data protection clauses referred to in point (d) of Article 58(2), as having general validity.

Article 59(1) sets a deadline of 10 weeks after a matter has been raised under Article 58 and 6 weeks in the case of Article 61.

Article 58(2)(d) concerns measures by a supervisory authority intended to produce legal effects which aim to determine standard data protection clauses referred to in point (c) of Article 42(2).

As already stated in the comments under Article 42(2), the Working Party sees the need for binding decisions at EU level on standard data protection clauses.

The procedure as foreseen implies that the Commission declares the standard data protection clauses generally valid, after the clauses have been approved in the EDPB. The Working Party would recommend a clarification in the provision that the Commission, when declaring the clauses generally valid, cannot alter the content of the standard data protection clauses.

In that respect, it should be noted that a role for the Commission is already foreseen in the consistency procedure itself. See for comments on the consistency procedure also Opinion 1/2012, p.20 (see also the Opinion of the EDPS of 7 March 2012, pts. 245-255).

Article 62(1)(c) - specifying the format and procedures for the application of the consistency mechanism referred to in the current section (Chapter 7, Section 2).

The Working Party does not see why the power on the Commission to adopt implementing acts to specify the format and procedures for the consistency mechanism is needed.

The proposed Regulation already contains detailed rules on the procedure. Further specifications can be provided by the DPAs collectively in the context of the EDPB.

Article 62(1)(d) - specifying the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in Article 58(5), (6) and (8).

Article 58(5) concerns the communication between the supervisory authorities and the Commission of any relevant information, including as the case may be a summary of the facts, the draft measure, and the grounds which make the enactment of such measure necessary.

Article 58(6) concerns the chair of the EDPB informing the members of the EDPB and the Commission of any relevant information which has been communicated to it.

Article 58(8) concerns the supervisory authority referred to in paragraph 1 and the supervisory authority competent under Article 51 communicating to the chair or the EDPB and to the Commission whether it maintains or amends its draft measure and, if any, the amended draft measure.

The Working Party does not see why the power on the Commission to specify the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the EDPB is needed. The means through which the exchange of information is achieved can be decided upon by the DPAs collectively in the context of the EDPB.

Done at Brussels, on 22 January 2013

For the Working Party
The Chairman

Jacob KOHNSTAMM