

Warszawa, 25.03.2013

INSTRUKCJA DLA PRZEDSTAWICIELA POLSKI
na posiedzenie grupy roboczej Rady UE ds. Wymiany Informacji i Ochrony Danych (DAPIX)
27 marca 2013 r.

Instytucja wiodąca: Ministerstwo Administracji i Cyfryzacji

Instytucje współpracujące: Generalny Inspektor Ochrony Danych Osobowych, Ministerstwo Gospodarki, Ministerstwo Sprawiedliwości, Ministerstwo Spraw Wewnętrznych, Ministerstwo Pracy i Polityki Społecznej, Ministerstwo Zdrowia, Główny Urząd Statystyczny, Urząd Komunikacji Elektronicznej, Urząd Ochrony Konkurencji i Konsumentów, Ministerstwo Finansów, Ministerstwo Kultury i Dziedzictwa Narodowego, Stałe Przedstawicielstwo RP przy UE, Ministerstwo Spraw Zagranicznych, Naczelna Dyrekcja Archiwów Państwowych.

Informacje na temat przedstawicieli Polski na posiedzenie:	
Imię i nazwisko/stanowisko:	Agnieszka Wawrzyk, Radca, Wydział Sprawiedliwość i Sprawy Wewnętrzne SP RP przy UE
Delegacja towarzysząca:	

PORZĄDEK OBRAD

1. **Approval of the agenda**
2. **General Data Protection Regulation**
'Main establishment' rule and consistency mechanism
7565/13 DATAPROTECT 32 JAI 211 MI 211 DRS 52 DAPIX 54 FREMP 30 COMIX 175
CODEC 608
DS 1004/13
3. **Any other business**

Stanowisko Polski do zaprezentowania podczas posiedzenia:

Delegowany Rzeczypospolitej Polskiej zajmie stanowisko do poszczególnych artykułów zgodnie z uwagi przedstawionymi poniżej.

Art. 4 (13) (obecnie pkt. 14) Rozporządzenia ('Main establishment')

- The current definition is overly complex and creates possibilities for companies that operate in several Member States to choose the Member State in which main establishment will be situated, i.e. *de facto* to choose supervisory authority (probably the weakest one or with little enforcement). Such a solution may result in „forum shopping”.
- Under the current definition, the main establishment doesn't have to be located in the Member State where processing takes place – this is another factor which may stimulate forum shopping.
- The 'main establishment' criteria allow only for determination of the supervisory authorities that will be involved. Please note that there is lack of criterion to address national applicable law (i.e. sectoral banking or health regulations). Poland suggests inserting an appropriate clause to remove uncertainty. Zob. opinia EDPS z dnia 7 marca 2013 r. : ***It is not always clear what room the Regulation leaves for national law. For instance, to what extent are the provisions of Chapters II and III exhaustive and to what extent are provisions for specific sectors allowed? The EDPS recommends that this issue be examined more carefully, in order to decide whether there is a need for a further provision specifying the extent to which specific national laws are allowed, 'without prejudice to the Regulation', as mentioned above. Dalej: The EDPS notes furthermore that Article 3 of the Proposal only provides for determination of the application of EU law. The Proposal does not foresee any criteria for national applicable law issues. In principle, a regulation would make a provision on national applicable law useless. However, as highlighted in part II.2.a.(i), Member States keep the possibility to adopt specific legislation on data protection, in the field of employment or health for instance. It is not clear if and on what basis a national and sectoral data protection law or another national law relevant in that context could be applicable beyond the borders of that Member State.***
- It is possible for an entity to act as both a data controller and a data processor. In such cases PL proposes to subject such entity to the same rules as the processor as regards the definition of 'main establishment'.
- In light of the above adopting a simpler and uniform definition for both the controller and processor may be a better solution (for example the country where a given entity is registered) W świetle powyższego, może zaproponować definicję siedziby w standardowym znaczeniu (np. po prostu “location of the European headquarters”?

Art. 51 Rozporządzenia ('Competence')

- There is lack of criterion to address national applicable law. In situation where controller or processor operates in more than one Member State, the supervisory authority may have to apply sectoral law of a Member State other than the law of the Member State the supervisory authority is located in. (zob. uwagi do art. 4 (13) powyżej).

Art. 55 Rozporządzenia ('Mutual assistance')

- Role of the lead authority should be seen as an exclusive competence. Moreover, a lead authority shall be supported by other supervisory authorities and shall have measures to effectively demand such support.

Art. 73 Rozporządzenia ('Right to lodge a complaint with a supervisory authority')

- Article 73(2) allows data subjects to have a judicial remedy in the country where they reside, independently of the competent supervisory authority. This solution might lead to situations involving a court from one Member State, and a supervisory authority of another Member State. This problem may be especially severe in areas covered by sectoral rules. Poland feels this mechanism need further clarification in order to avoid costly proceedings and disputes. It should be a rule that DPAs cooperate under Chapter VII Section I.
- Article 73(3) should be deleted as it grants the right to lodge a complaint to body, organisation or association which does not have to prove any legal interest in the complaint proceedings. This provision may be abused by vexatious organisations, set up specifically to pursue such actions, possibly for gainful purposes..

Art. 74 Rozporządzenia ('Right to a judicial remedy against a supervisory authority')

- Article 74(4) is incoherent and runs against the provisions of Chapter VII of the draft regulation. On the one hand the draft regulation places an obligation on supervisory authorities to cooperate and, on the other hand, allows one authority (in a Member State where the data subject has its habitual residence) to act against its counterpart in another Member State. Poland is concerned with possible ramifications of such conflicts between national DPAs.

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MINISTERSTWA ADMINISTRACJI I CYFRYZACJI

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