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from: Presidency
to: JHA Counsellors/COREPER

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Subject: General Data Protection Regulation - The one-stop-shop mechanism

1. The one-stop-shop principle, as laid down in Section II of Chapter VI, has been discussed by the Working Party on Information Exchange and Data Protection (DAPIX) at meetings of 8-9 January, 27 March, 3-4 July and 9-10 September 2013. Various delegations have produced documents on this and the compilation of comments on Chapters VI and VII is set out in 7105/4/13 REV 4 DATAPROTECT 28 JAI 182 MI 170 DRS 42 DAPIX 49 FREMP 24 COMIX 141 CODEC 476 + ADD 1.

Commission proposal

2. The one-stop-shop principle together with the consistency mechanism is one of the central planks of the Commission proposal for a General Data Protection Regulation. Where the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union takes place in more than one Member State, one single supervisory authority should be competent for monitoring the activities of the controller or processor throughout the Union and taking the related decisions, in order to increase the consistent application, provide legal certainty and reduce administrative burden for such controllers and processors. The competent authority, providing such one-stop shop, should be the supervisory authority of the Member State in which the controller or processor has its main establishment (Article 51(2) and recitals 97 and 98).

3. The one-stop-shop principle is linked with the mandatory co-operation between the supervisory authorities through the European Data Protection Board, which is aimed at ensuring the consistent application of this Regulation throughout the Union (Recital 105). The one-stop-shop principle is thus clearly aimed to be an advantage for business within the internal market, which in the international digital economy, should be given the advantage of having to deal only with one supervisory authority throughout the European Union. However, it does not affect the competence of the supervisory authority for the supervision of processing activities of the controller or processor which are limited to one single Member State.

4. The principle sets out the supervision of the processing activities of the controller or the processors in all Member States, but under Article 73(1) data subjects would have the right to lodge a complaint at a supervisory authority in any Member State (e.g.: where he or she has his or her residence or where the controller is established or to another supervisory authority). This would leave, as it is currently the case under the 1995 Data Protection Directive, supervisory authorities the competence to hear complaints by data subjects and data subjects to decide where they want to go. At the same time, only the main-establishment supervisory authority would have the competence to take measures intended to produce legal effects regarding processing by that controller.

Current situation

5. Under the 1995 Data Protection Directive, the territorial scope of application of the Directive is governed by Article 4(1), according to which a Member State, as a rule, is to apply the national provisions it adopts pursuant to the Directive to the processing of personal data where there is an establishment of the controller on its territory, or in cases where the controller is not established in the Union, if he makes use of equipment situated on the territory of the Member State for the purposes of processing personal data.
6. This implies that a Member State has jurisdiction to supervise processing of personal data (and, should the processing be in violation of EU law, to have penalties imposed on the controller or processor), only if there is an establishment on the territory of that Member State. The mere fact that one or several individuals (data subjects) in a Member State claim to have been the victim of wrongful data processing operations carried out in another Member State, does, in the current situation, not give jurisdiction to the Member State of the complainant if there is no establishment of the controller/processor in that Member State. Furthermore, Directive 95/46/EC provides no cooperation mechanism between the supervisory authorities of the Member States whose residents are concerned by the processing activities.

Member States concerns

7. The Commission proposal for a one stop-shop principle has been the subject of several discussions in the Working Party on Information Exchange and Data Protection (DAPIX). In the course of these discussions the vast majority of delegations have voiced various and detailed criticisms on this principle. The most important concerns are summarised in 13643/13 DATAPROTECT 127 JAI 781 MI 767 DRS 169 DAPIX 109 FREMP 126 COMIX 502 CODEC 2025.

8. At the COREPER meeting of 25 September 2013 it appeared that, most Member States were in favour of the philosophy underlying the one-stop-shop mechanism, however, only a few accepted that the main establishment authority could have the exclusive jurisdiction to supervise all the processing activities of the company (controller) concerned and decide exclusively upon all measures (including penalties). The most important remaining point of concerns regarding the one-stop-shop principle is that, while it is intended to bring benefits to businesses, it would risk to be detrimental to the protection of the data protection rights of individuals, because supervision functions and the concomitant power to decide on (certain) measures will be concentrated in the hands of one supervisory authority, which may be a different authority than the one where the processing takes place and/or the affected citizens reside. It therefore appears that any solution to improve the one stop-shop mechanism should aim at combining the advantage for business by having only one decision at supervisory level and one supervisory interlocutor to deal with and the advantage for citizens to be able to exercise their rights before their 'own' supervisory authorities.

Possible variations to the Commission proposal

9. It is clear that the one-stop-shop principle as proposed by the Commission will need to be modified. A number of variations have already been suggested. The Presidency has hereafter endeavoured to further elaborate two suggestions which received most support at the COREPER meeting of 25 September 2013. It should, however, be borne in mind that under both models, citizens who claim to have been the victim of data protection violations may seek remedies through (civil or criminal) courts of law in other Member States rather than relying on a decision by a supervisory authority.

First model: limited powers for the main-establishment supervisory authorities, enhanced consultations and an appeal to the European data Protection Board (EDPB)

10. A variation on the one-stop-shop principle as proposed by the Commission is to maintain the exclusive jurisdiction of the main establishment supervisory authority, but to limit it to the exercise of certain powers in relation to the controllers such as authorisation and consultation powers. In order to be able to act as single interlocutor for authorisation regarding all the processing activities in the European Union, the 'main-establishment' supervisory authority would obviously also need to have certain monitoring powers regarding processing operations in other Member States. Contrary to the authorisation powers, these monitoring powers need not be vested exclusively in the main establishment supervisory authority, but could also be exercised by the 'local' supervisory authority, that is the authority of the Member State where the processing takes place. Each supervisory authority would thus remain competent in relation to monitoring compliance with and investigating possible breaches of data protection rules that took place on the territory of its Member State. The 'local' authority would also remain competent for imposing fines.
11. The exact description of the powers that should be vested exclusively in the main establishment authority under this model will need to be the subject of further discussion at expert level.
12. Two additional guarantees could be provided: First, the 'main-establishment' supervisory authority could only exercise its authorisation powers after having consulted the other supervisory authorities concerned 'with a view to reaching consensus'. Second, with a view to enhancing uniformity of decisions taken by supervisory authorities, it could also be envisaged to allow the 'local' authority that has received a complaint to submit a draft measure to the 'main-establishment' authority with possibly prior consultations with the EDPB in case of disagreement between the two supervisory authorities.
13. As each supervisory authority under this model would remain competent to investigate, either *ex proprio motu* or further to a complaint it receives, possible data protection violations and impose fines, there is a risk of conflicting decisions from different supervisory authorities.

14. This risk could potentially be offset by adding another element to this model, namely an possibility to submit a final decision made by a supervisory authority to the EDPB, as a type of appeal mechanism. This possibility of submitting a case to the EDPB could be open to the supervisory authority that has jurisdiction with regard to the controller and to the supervisory authority at which a data subject has lodged a complaint. It could also be envisaged to allow a company (controller) which has establishments in several Member States to submit to the EDPB a decision of a supervisory authority with regard to him.

15. It has been established that from an EU law point of view, the EDPB as proposed by the Commission cannot be vested with the power to take legally binding decisions, but the EDPB opinion could become binding firstly by giving legal personality to the EDPB and secondly by conferring upon it clearly defined executive powers which should exclude too broad and discretionary powers involving policy choices (so-called 'Meroni' case law¹). In such case, the EDPB would not only be empowered but would also be obliged to adopt measures where clearly defined criteria laid down in the Regulation are fulfilled. Further discussion at expert level is required in order to decide upon: (1) the cases in which a matter could be submitted to the EDPB; and (2) the clearly defined criteria upon which the EDPB should decide.

16. Should delegations agree, this model with the additional guarantees is para. 12 and the appeal to the EDPB could obviously also be used to allow, as originally proposed by the Commission, the 'main-establishment' authority to exercise all powers with regard to all the processing activities of a company throughout the European Union.

¹ Case 9/56 Meroni v High Authority.

Model 2: co-decision by supervisory authorities concerned

17. In lieu of concentrating certain decision-making powers in the hands of the single supervisory authority of the Member State of the main establishment, the French delegation has proposed that the supervisory authorities of all Member States concerned could decide on the measures to be taken regarding a controller who has processing operations in those Member States. The main-establishment authority would still act as a the single interlocutor for a company with various establishments in different Member States, but would not be vested with an exclusive jurisdiction to take certain decisions, as these would be taken by all supervisory authorities involved under a co-decision model. The French proposal is set out in detail in 13808/13 DATAPROTECT 129 JAI 794 MI 776 DRS 171 DAPIX 110 FREMP 128 COMIX 509 CODEC 2058.
18. The French proposal contains a number of procedural steps and rules, including deadlines and voting rules by which supervisory authorities should reach a common decision. It would require further detailed discussion at expert level to investigate if and how a national independent supervisory authority could be 'obliged' to adopt and implement a decision through a co-decision procedure. An apparent advantage of this model is that it avoids the need to have decisions of a supervisory authority of one Member State enforced in another Member State. These decisions would be decisions under national law, contrary to a decision by the EDPB, which under the first model, could take certain 'appeal' decisions, which as Union decisions would be directly applicable and enforceable in all Member States.
19. An important consequence of this difference is that a data subject who disagrees with a final decision under the co-decision model, will have to lodge a remedy with a national court, whereas an action for the annulment of a decision by the EDPB would have to be lodged at the General Court of the European Union.

Question

20. When discussing the above variations to the Commission proposal for a one-stop-shop mechanism, delegations may take account of the following four factors:
- a) Which model offers the best guarantees for a sufficient involvement of the supervisory authority which has received a complaint;
 - b) Which model involves in the best manner all supervisory authorities in cases where there is a pan-European issue at stake;
 - c) Which model offers the best guarantees for avoiding blocking situations; and
 - d) Which model offers the best guarantees for judicial remedies against measures taken by the ('main-establishment' or other) supervisory authority?
21. *In view of the above, the Presidency invites delegations to indicate which of the above models (or elements thereof) they prefer for modifying the Commission proposal for a one-stop-shop mechanism.*
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