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Subject : Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the General Data Protection Regulation)
- Effective judicial protection of data subjects' fundamental rights in the context of the envisaged "one-stop shop" mechanism

I. INTRODUCTION

1. In January 2012, the Commission submitted a 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[1] (the draft Regulation) which will replace the existing legal framework set up by Directive 95/46/EC[2].

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1 Doc. 5853/12. The draft text discussed in this Opinion is the latest one presented by the Presidency in doc. 16626/1/13 REV 1.

2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31.

2. The one-stop shop mechanism as laid down in Section II of Chapter VII of the draft Regulation is a mechanism whereby, in transnational cases, a single independent supervisory authority is competent to ensure that controllers or processors comply with the General Data Protection Regulation. This mechanism was first debated at the Justice and Home Affairs ("JHA") Council meeting of 7-8 October 2013 at which the Chair concluded, *inter alia,* that :

a) in important transnational cases the draft Regulation should establish a one-stop shop mechanism in order to arrive at a single supervisory decision, which would be fast, ensure consistent application, provide legal certainty and reduce administrative burden.

b) further expert work on this should continue along a model in which a single supervisory decision is taken by the 'main establishment' supervisory authority but the exclusive jurisdiction of that authority would be limited to the exercise of certain powers;

c) the Working Party should explore methods for enhancing the 'proximity' between individuals and the decision-making supervisory authority by involving the 'local' supervisory authorities in the decision-making process. This proximity is an important aspect of the protection of individual rights;

d) *the competent Working Party should explore which powers could be entrusted to the European Data Protection Board (EDPB).*"[3]

3. Therefore, the 7-8 October JHA Council left open the question as to which single supervisory authority in transnational cases will be competent to exercise exclusive powers (including corrective powers) and how proximity as an important aspect of the protection of individual rights, would be achieved.

4. In the course of the proceedings in the DAPIX Working Party in October and November and in Coreper of 27 November 2013, the Presidency presented papers outlining the essential elements of a one-stop shop model based on conferring certain powers to one of the national supervisory authorities and presented a draft compromise text on the key provisions of the draft Regulation relating to that model of one-stop shop.[4] In that context, amended provisions on administrative and judicial remedies contained in Chapter VIII (Articles 73 to 77 of the draft Regulation)[5] were also discussed.

[3] Doc. 16626/2/13 REV 2, page 2.
[4] Doc. 16626/1/13 REV 1.
[5] Doc. 16626/1/13 REV 1, pages 47 to 53.

5. In those Presidency papers, the one-stop shop was developed as a mechanism whereby a single supervisory authority in the Member State, i.e. that where the controller or processor has its main establishment, the so-called "lead authority", is exclusively competent to exercise *inter alia* corrective powers, while allowing the data subject to have his/her complaints dealt with by his/her local supervisory authority in the initial stage.

6. In the JHA Council meeting of 6 December 2013, a revised Presidency document on the essential elements of the one-stop shop mechanism[6] was presented. However, this revised Presidency document maintained the key element that the lead authority would have exclusive competence to exercise corrective powers.

7. Both at the Coreper and JHA Council meetings, respectively on 27 November 2013 and 6 December 2013, the legal question was discussed whether the overall mechanism of a one-stop shop, as presented in the above-mentioned Presidency papers, would guarantee the effective judicial protection of data subjects' fundamental rights. This contribution further develops the oral interventions made by the Legal Service at those meetings.

II. LEGAL FRAMEWORK

8. In accordance with Article 8 of the Charter of Fundamental Rights of the European Union (the Charter), the right to the protection of personal data is a fundamental right and compliance with data protection rules shall be subject to control by an independent authority.

9. Article 16 TFEU is the legal basis of the draft Regulation which empowers the Union legislature to lay down the rules relating to the protection of this fundamental right, and the rules relating to the free movement of personal data.

[6] Doc. 17025/13.

10. Article 47 of the Charter, which corresponds in substance to both Articles 13 and 6(1) of the European Convention on Human Rights (ECHR),[7] provides for the right to an effective remedy before a tribunal and a right to a fair trial. Article 52(3) of the Charter provides that "*in so far as this Charter contains rights which correspond to rights guaranteed by the* [ECHR]*, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*".

11. Article 6(1) of the ECHR provides in particular for a right to a fair trial by an independent and impartial tribunal established by law and Article 13 of the ECHR provides that everyone whose rights and freedoms as set forth in the ECHR (such as the right to respect for private life under Article 8) are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

III. LEGAL ANALYSIS

1. Consequences of conferring an exclusive competence to a lead supervisory authority for the imposition of corrective measures

12. The proposed one-stop shop mechanism consists in particular in conferring an exclusive competence to a lead authority, i.e. the supervisory of the main establishment of the controller or processor, to impose corrective measures,[8] in cases where the processing takes place in the context of the activities of an establishment of a controller or processor in the Union and the processing concerned was decided by the main establishment.[9]

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[7] See in the Explanations relating to the Charter, ad Article 47.

[8] Corrective powers are listed in Article 53(1b) of the draft Regulation (doc.16626/1/13 REV1). They include in particular the following powers:
- ordering the controller or processor to bring processing operations into compliance with the provisions of the Regulation or ordering the rectification, restriction or erasure of data, or
- imposing a temporary or definitive limitation on processing, or
- imposing an administrative fine.

The lead authority is also given a number of authorisation powers in Article 53(1c) (such as authorising binding corporate rules and contractual clauses) for which the interlocutor of the authority is the controller applying for the authorisations and such a controller may challenge such authorisation or refusal decisions in the court of the Member State where the lead authority is established (Article 75(3)). The data subjects are not involved at that stage.

[9] Article 51(1a) of the draft Regulation.

As stated in the Presidency text of 29 November 2013, the "one-stop shop principle purports to be an advantage for businesses: it aims at ensuring compliance with the Regulation, increasing consistent application and legal certainty for enterprises, data subjects and supervisory authorities (…)"[10] (emphasis added).

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[10] Doc. 16626/2/13 REV 2, paragraph 3.

15. The Treaty of Lisbon has added Article 16 in the TFEU, in a Title (Title II of Part One) entitled "*Provisions having general application*", both as a fundamental principle and right (paragraph 1) and as a new horizontal legal basis (paragraph 2) which empowers the EU legislature to adopt rules on the protection of this fundamental right both by EU institutions and bodies and by Member States when carrying out activities falling within the scope of EU law, in any area.[11]

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[11] The only exception is Article 39 of the Treaty on the European Union which constitutes a specific legal basis on personal data protection by Member States when carrying out activities which fall within the common foreign security policy (CFSP) Chapter. Personal data protection by EU institutions and bodies in the CFSP area is however covered by Article 16 TFEU.

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19. Under the draft Regulation, a data subject may lodge a complaint to the lead authority but also to another supervisory authority such as the one of his/her habitual residence[12] (the local authority). However, in accordance with Articles 51(1a) of the draft Regulation, the local authority is not competent to impose corrective measures where the processing takes place in the context of the activities of an establishment of a controller or processor in the Union and the processing concerned was decided by the main establishment. In that case, the local authority "(…) *shall ex officio transmit the complaint to the* [lead] *supervisory authority which is competent* (…)" (Article 73(4) of the draft Regulation, emphasis added).

20. This means that if a data subject lodges a complaint because he/she considers that his/her fundamental right has been infringed by a controller or processor whose main establishment is not in the Member State where he/she has his habitual residence, the competent supervisory authority imposing the corrective measures will be the lead authority located in a Member State other than the one of the data subject's habitual residence. The local supervisory authority who has received the complaint will therefore not settle the dispute in a final way but will only forward the complaint to the lead authority for a decision on corrective measures and will participate in the cooperation and consistency mechanisms,[13] for example by having the possibility to object to a draft measure submitted by the lead authority and refer the matter to the European Data Protection Board (EDPB)[14] for an opinion which will not be binding on the lead authority.[15]

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[12] Article 51(1) of the draft Regulation "*each supervisory authority shall, on the territory of its own Member State, be competent to exercise the powers conferred on it in accordance with this Regulation* (…)", Article 52(1) *"*(…) *each supervisory authority shall on its territory* (…)*. (b) deal with complaints lodged by a data subject* (…)" and Article 73(1): *"*(…) *every data subject shall have the right to lodge a complaint with a supervisory authority competent in accordance with Article 51* (…)*".*

[13] Articles 54a to 63 of the draft Regulation.

[14] Article 54a(3) of the draft Regulation

[15] Article 58(9) of the draft Regulation.

21. The key role of supervisory authorities which are referred to in Article 16(2) TFEU and 8(3) of the Charter has been underlined by the Court of Justice as "(…) *the guardians of* [the] *fundamental rights and freedoms* [on the right to the protection of personal data]*, and their existence in the Member States is considered, as is stated in the 62nd recital in the preamble to Directive 95/46* [to be replaced by the draft Regulation]*, as an essential component of the protection of individuals with regard to the processing of personal data*".[16]

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(i) Case law of the European Court of Human Rights on the right of access to a court

23. The European Court of Human Rights (the ECoHR) interpreted the right of access to a court as guaranteed in Article 6(1) of the ECHR in the sense that limitations to this right must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[17] The test used by the ECoHR to assess the effective access to judicial remedies is examined *in concreto* and not theoretically.[18]

[16] Case C-518/07, *Commission v. Germany*, Judgment of the Court of Justice of the EU (Grand Chamber) of 23.3.2010, point 23.

[17] Case of *de Geouffre de la Pradelle v. France*, application No 12964/87, judgment of the ECoHR of 16.12.1992, point 28.

[18] Case of *Weissman and others v. Romania*, application No 63945/00, judgment of the ECoHR of 4.5.2006, point 37.

The ECoHR considers that a complainant is entitled to expect a "*coherent system*" that would achieve a fair balance between the authorities' interests and his/her own; in particular, he/she should have a "*clear, practical and effective opportunity to challenge an act*" that was a direct interference with his/her fundamental right.[19] The ECoHR has already taken into account the "*extreme complexity*"[20] of the law to effectively access a court to conclude that through an overall assessment, the system of judicial redress was not "*sufficiently coherent and clear*".[21]

24. The ECoHR also assesses the effective right of access to the courts in the context of parallel proceedings (e.g. one through an administrative procedure and the other one before ordinary courts) to conclude that "*all in all, the system was not sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them*"[22] (emphasis added). Finally, the ECoHR assesses on the basis of the proportionality principle whether litigation costs such as a financial requirement, are "*excessive*". In this regard, the ECoHR considers that a restriction on access to a court is only compatible with Article 6(1) of the ECHR if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued. It has already held that if the amount is very high for any ordinary litigant and was not justified either by the particular circumstances of the case or by the applicants' financial position, it is disproportionate and thus impairs the very essence of the right of access to a court.[23]

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In accordance with Article 74(3) of the draft Regulation, the judicial review of the decision of the lead authority which rejects the data subject's claim will have to be brought by the data subject (or by organisations he/she has mandated)[24] before the courts of the Member State where the supervisory authority is established.

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[19] Case of *de Geouffre de la Pradelle v. France,* point 34. See also *Bellet v. France*, application No 23805/94, judgment of 4 December 1995, point 36 and *Beneficio Cappella Paolini v. San Marino*, Application No 40786/98, judgment of 13.7.2004, point 28.
[20] Case of *de Geouffre de la Pradelle v. France*, point 33.
[21] Case of *de Geouffre de la Pradelle v. France*, point 35.
[22] Case of *Bellet v. France*, application No 23805/94, judgment of 4 December 1995, point 37.
[23] Case of *Weissman and others v. Romania*, points 36, 37, 39 and 42.
[24] Article 76 of the draft Regulation

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26. While it is undisputed that *"(...) it is for national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law*",[25] it is a different issue whether a rule of exclusive jurisdiction in favour of one national court renders the exercise of the data subject's rights "*impossible in practice or excessively difficult*"[26] (principle of effectiveness of judicial remedies stemming from Article 47 of the Charter).

27. Compliance with the principle of effectiveness of judicial remedies is assessed by the Court of Justice on a case by case basis depending on the circumstances of the case. **DELETED**

[25] See e.g. Case C-432/05, *Unibet*, paragraph 38 and Opinion of the Court 1/2009 of 8 March 2011, paragraph 68.

[26] See e.g. Case C-93/12, judgment of the Court of Justice of 27.6.2013, points 50 to 61 regarding the application *in concreto* of the effectiveness principle to a rule of territorial jurisdiction.

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28. In parallel to the system of judicial review provided for in Article 74(3) of the draft Regulation, Article 75(2) allows the data subject to bring other types of judicial proceedings before the courts of the Member State where the controller or processor has an establishment or before the courts of the Member State where the data subject has his/her habitual residence, unless the controller is a public authority acting in the exercise of its public powers.

Therefore, on the basis of Articles 74(3) and 75(2) of the draft Regulation, in the event that the rights under the Regulation have been infringed as a result of the processing of personal data in non-compliance with the Regulation, several courts may be competent to assess the non-compliance with the Regulation and to give redress to the data subject which may consist for example in corrective measures. **DELETED**

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36. The EDPB, which, under the draft Regulation, would be the successor of the current "Article 29 Working Party", is composed of the 28 national independent supervisory authorities and the European Data Protection Supervisor (EDPS) (see Articles 64 to 72 of the draft Regulation). The draft Regulation foresees that it is independent (Article 65) and that its secretariat will be provided by the EDPS (Article 71).

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Under the so-called "*Meroni*" case law,[27] executive powers can be given to such an EU body or agency, provided they are clearly defined and they do not encompass too broad and discretionary powers involving policy choices. **DELETED**

[27] Case 9/56 *Meroni v High Authority*. It should be noted that the Court of Justice (in Case C-270/12) is expected to hand down a judgment on 21 January 2014 on the application of this *Meroni* case law in a concrete case after the entry into force of the Lisbon Treaty.

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42. As regards the judicial remedies against the binding decisions that would be taken by the EDPB in this context, it results from the first paragraph of Article 263 TFEU that the Court of Justice ("ECJ") will be competent to review the legality of such decisions. Effective judicial remedies would thus be ensured uniformly at Union level.

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