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to:	Working Group on Information Exchange and Data Protection (DAPIX)
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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 (General Data Protection Regulation) - 'Main establishment' rule and consistency mechanism

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1. This Presidency paper is intended to provide the basis for a discussion of the 'main establishment' rule and the consistency mechanism.
2. A key objective of the proposed General Data Protection Regulation is to ensure a more consistent, coherent and streamlined application of data protection standards across the Union. The fragmented manner in which the 1995 Data Protection Directive has been transposed into national laws, and the requirement that controllers and processors engage with the supervisory authorities of all the Member States in which they operate, has been identified as a source of unnecessary burdens and an obstacle to increased cross-border business activity. Diverging rules are also a source of confusion and uncertainty for data subjects. The proposed Regulation contains several mechanisms which are intended to address and overcome these difficulties.

### **‘Main establishment’ rule**

3. A key component of the reform package is the proposed ‘main establishment’ rule, frequently, and perhaps misleadingly, referred to as the ‘one-stop shop’. The rule is intended to promote a more streamlined and consistent application of the Regulation in cases where a controller or processor is established in more than one Member State. According to Article 51.2, the supervisory authority of the ‘main establishment’ of the controller or processor shall, without prejudice to the co-operation and consistency provisions in Chapter VII, be competent for the supervision of the processing activities of the controller or processor in all Member States concerned. The rule will, therefore, benefit controllers and processors with establishments in several Member States by reducing multiple contact points under current arrangements to a single contact point in future.

4. It follows that the definition of ‘main establishment’ is crucially important for the operation of the proposed ‘main establishment’ rule. If it is not sufficiently clear, legal uncertainty will follow and the anticipated benefits will not be realised. Article 4(13), as amended, contains the following definition:

‘main establishment’ means—

- as regards the controller, the place of its establishment in the Union where the main decisions as to the purposes, conditions and means of the processing of personal data are taken; if no decisions as to the purposes, conditions and means of the processing of personal data are taken in the Union, (...) the place where the main processing activities in the context of the activities of an establishment of a controller in the Union take place;
- as regards the processor, the place of its central administration in the European Union, and, if it has no central administration in the European Union, the place where the main processing activities take place;

5. Article 51 means that a controller or processor will have contact with only one supervisory authority. On the other hand, Article 73 appears to mean that data subjects will have the right to lodge complaints with a supervisory authority of their choice in any Member State, i.e. including an authority other than the supervisory authority of their own Member State, the supervisory authority of the Member State in which the infringement occurred or the supervisory authority of the main establishment (Article 73.1). Indeed it appears possible that a data subject could lodge the same complaint with several supervisory authorities.

6. Moreover, a properly-established advocacy body (body, organisation or association) which aims to protect data subject rights and interests will have the right to lodge a complaint with a supervisory authority in any Member State on behalf of one or more data subjects if it considers that a data subject's rights have been infringed as a result of processing (Article 73.2). It remains to be clarified if data subject consent is required in such cases. In any event, such a body will have the right to do so independently of any specific complaints if it considers that a personal data breach has occurred (Article 73.3).

7. If a complaint is lodged under Article 73 with a supervisory authority other than the supervisory authority of the main establishment, contact and cooperation between the supervisory authorities concerned will be necessary.

8. The proposed Regulation contains provisions which are intended to ensure good cooperation and mutual assistance between supervisory authorities (Article 55) and joint action, where appropriate, in investigations and enforcement activities (Article 56). These are intended to ensure smooth operation of the 'main establishment' rule.

9. Issues which need to be clarified further include the following:

- a. the criteria governing identification of the main establishment, especially where there are 'semi-autonomous' subsidiaries in several Member States (this is common in the financial services and telecoms sectors);
- b. rules applicable where there is no main establishment in the Union;
- c. role and investigative powers of a supervisory authority which receives a complaint when it is not the 'main establishment' authority;
- d. competence of the 'main establishment' supervisory authority to impose administrative fines and other corrective measures, and the enforcement of these in other Member States;
- e. criteria for the involvement of other supervisory authorities in particular cases;
- f. manner in which national law sanctions interact with administrative sanctions imposed by supervisory authority
- g. dealing with multiple complaints in the same case.

## **Consistency mechanism**

10. The establishment of a strengthened European Data Protection Board, comprising the head of a supervisory authority from each Member State and the European Data Protection Supervisor, is intended, in particular, to ensure a more consistent application of data protection standards across the Union. The Commission will also have the right to participate actively in the meetings and activities of the Board.

11. In future, supervisory authorities will be required to co-operate with each other and with the Commission through the so-called ‘consistency’ mechanism (Article 57). It will mean, for example, that before taking a measure having legal effect which may affect data processing in other Member States, or impede the free movement of personal data within the internal market, a supervisory authority must communicate the draft measure to the Board and the Commission. The Board, having considered the matter, will issue a non-binding opinion both to the requesting supervisory authority and the supervisory authority of the ‘main establishment’ within one week. The supervisory authorities concerned are required to ‘take account of’ the Board’s opinion and the requesting supervisory authority must inform the Board and the Commission within two weeks whether it intends to proceed with the original measure or amend it in line with the opinion (Article 58).

12. While supervisory authorities remain independent, it can be expected that they will normally follow the Board’s opinions on communicated draft measures. However, in order to address exceptional cases, the proposed Regulation contains ‘safeguard’ mechanisms, including possible suspension by the Commission of a proposed measure in order to ensure correct and consistent application of the Regulation (Articles 59 and 60).

13. While there is general recognition of the need for consistent application of the Regulation, and structures to encourage and promote such consistency, there is less agreement on some of the detailed proposals, including the following:

- a. broad scope of the mechanism (any supervisory authority and the Commission may request that any matter be dealt with in the consistency mechanism);
- b. the extent of the Board's powers, including its internal procedures, and the nature of Board opinions;
- c. the proposed role of the Commission in order to ensure compliance with Treaty requirements.

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