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NOTE

From: Irish delegation
To: Working Group on Information Exchange and Data Protection (DAPIX)
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)
- The one-stop-shop mechanism

1. From the outset, Ireland has supported the Commission's proposals for an effective One-Stop-Shop mechanism based on consultation, mutual assistance and effective cooperation between the 'lead' DPA and 'concerned' DPAs in important cross-border cases. For these reasons, Ireland has fully supported the consultation and cooperation model developed during the Greek Presidency (set out in document 11028/14).
2. In order to resolve important cross-border cases, the EU needs a model which is efficient, ensures legal certainty and minimises the burdens involved. The system must be practical and workable. For these reasons, Ireland remains opposed to the proposals which have been tabled to grant legal personality and binding powers to the European Data Protection Board (EDPB). While it remains doubtful whether the implementation of these proposals can deliver 'proximity' for data subjects, it is highly likely that they will lead to excessive recourse to the Board, with resulting complexity, costs and delays.

Thresholds for referral of cases to the Board

3. Ireland welcomes the Presidency's paper which explores possible thresholds of filters for submitting cases to the EDPB (document 5331/15), thereby reducing the risk of excessive recourse to the Board.
 - a. Quantitative filter for objecting DPAs: Ireland fully supports the establishment of a minimum threshold. The Italian Presidency paper of 16 December (16974/14) already suggested a threshold of at least one-third of the concerned DPAs (Article 54aa.4a (option 1)). Ireland considers that referral to the Board should only arise in cases where, at the very least, a majority of concerned DPAs are in agreement to such referral.
 - b. Qualitative filter for objecting DPAs: The Presidency's analysis of the components of the lead DPAs draft decision is very helpful (paragraph 8). Ireland considers that any role of the EDPB should be confined to determining whether the facts of the case amount to an infringement of the Regulation or other data protection rules. The determination of any corrective action to be taken in the case should be a matter for decision by the lead DPA based on the guidelines of the Board under Article 66.1(ba) and the procedural law requirements of the Member State concerned.
 - c. The role of the EDPB should not extend to the determination of any corrective measures to be taken. In the case of administrative fines, there would inevitably be differing views on the part of Board members as to the appropriate levels of such fines. More importantly, the lead DPA must be in a position to defend any such measures if they are challenged before its national courts. It would be counter-productive to impose decisions on lead DPAs which it could not effectively defend. Moreover, in the event of a legal challenge, the process of discovery would soon reveal the earlier concerns of the lead DPA and improve the prospects of a successful challenge.
 - d. As the Presidency paper also mentions (paragraph 10), rules on freedom of expression, access to official documents and archives etc vary between Member States and it would not be appropriate for the Board to impose corrective measures which run counter to the constitutional norms and case law of Member States.

- e. Reasoned objection as ground for referral: Ireland supports a requirement that any concerned DPAs seeking referral to the Board must advance reasoned grounds for doing so. The Italian paper of 16 December already suggests that referral may only take place where a concerned DPA raises a ‘serious objection’ (Article 54aa.4a (option 1)). Article 54c clarifies that such an objection “shall be accompanied by an analysis of the significance of the risks posed by the draft decision (i.e. of the lead DPA) as regards the free flow of personal data or the fundamental rights and freedoms of data subjects.” Such reasoned grounds must have regard to the question of whether there is, or has been, an infringement of the Regulation and the procedural requirements of the national law of the Member State of the lead DPA.

Definition of ‘concerned’ DPA

4. Ireland remains concerned that the definition of ‘concerned DPA’ remains excessively wide. The Italian Presidency paper of 16 December suggested that a DPA would be ‘concerned’ for the purposes of the One-Stop-Shop where the processing “substantially affects or is likely to affect substantially” data subjects in that Member State. It goes on to state that “processing is deemed to substantially affect data subjects ... where the controller or processor is offering, as its core activity and on a regular basis, goods and services to ... data subjects ...”. This definition could, in practice, encompass every business with a web site, including SMEs and micro enterprises. It would also increase uncertainty for DPAs because they would not necessarily be aware of the existence of affected data subjects within their jurisdictions.
5. Ireland considers that the ‘risk based’ approach, which already informs the content of Chapter IV of the Regulation, can provide useful guidance when it comes to the definition of ‘concerned’ DPAs. Ireland considers that a DPA should become a ‘concerned’ DPA only in cases where the processing is likely to present a high degree of specific risk for the rights and freedoms of data subjects in that Member State. This approach would help to focus attention on areas of high risk processing and reduce uncertainty for DPAs.

Proximity issues

6. It remains unclear as to whether the granting of legal personality and binding powers to the Board will in practice deliver proximity for data subjects. In particular, it remains unclear whether the avenue of appeal against Board decisions adopted by a lead or concerned DPA, and those based on Board input, is to national courts or to the Court of Justice of the European Union. This is a matter of the utmost importance which must be clarified prior to the conclusion of discussions on the One-Stop-Shop mechanism.
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