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NOTE

from: Presidency
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)
- One-stop-shop mechanism

I. Background

1. The one-stop-shop mechanism has been discussed during the October and December 2013 JHA Council meetings. In October the Council expressed its general support for the principle that, in important transnational cases, the regulation should establish a one-stop-shop mechanism in order to arrive at a single supervisory decision, which should be fast, ensure consistent application, provide legal certainty and reduce the administrative burden.

2. At the October Council meeting the Chair also noted that further expert work should continue along a model in which a single supervisory decision is taken by the “main establishment” supervisory authority, while the exclusive jurisdiction of that authority might be limited to the exercise of certain powers. The Chair also indicated that the experts 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. It was also concluded that it should be investigated to what extent elements of the co-decision model could be incorporated and that further work at technical level should include investigating the possibility of providing the European Data Protection Board in some cases with the power to adopt binding decisions regarding corrective measures.
3. During the December Council, the Chair concluded that there are different opinions as to whether the supervisory authority of the main establishment should be given limited exclusive powers to adopt corrective measures and that work should continue at technical level. It was also noted that it is important that the supervisory authorities cooperate in the enforcement of data protection rules.
4. At the December Council meeting, the Council Legal Service indicated that the model as it resulted from the technical work would be incompatible with the right to an effective remedy. This problem could be solved by conferring certain powers on the European Data Protection Board with an appeal to the ECJ in certain transnational cases. This opinion is elaborated in the written contribution of the CLS¹.
5. The Presidency addresses in this paper key elements of the one-stop-shop mechanism and possible way forward.

¹ 18031/13 JUR 658 JAI 1167 DAPIX 160 DATAPROTECT 205 CODEC 3040.

II. Key elements of the one-stop-shop mechanism

Scope of application

6. The one-stop-shop mechanism ("lead DPA" and strong cooperation between DPAs) should apply to:
 - A) processing by a controller/processor established on the territory of more than one Member State;
 - B) processing by a controller/processor established in one Member State when data subjects in several Member States are or are likely to be [substantially] affected.

The one-stop-shop mechanism should not apply to public authorities.

7. Some delegations have called for the exclusion of minor cases from the scope of the one-stop-shop. The discussions in DAPIX have shown the difficulty to circumscribe what would be covered under this concept. At the same time it could be envisaged to allow for amicable settlement for cases with local impact, where there is no establishment of the controller or processor or no individual is affected in another Member State.

Possible way forward

8. *The compromise text could:*
 - ✓ *further clarify the application of the one-stop-shop rules to the situation referred to in point 5 (B)*
 - ✓ *provide for rules on amicable settlement ahead of the triggering of the consultation mechanism.*

Role and powers of the lead supervisory authority

9. The last compromise provides for a categorisation of powers that is monitoring, investigatory, corrective and authorisation. The "lead DPA" should take corrective and authorisation measures.

10. The discussions have shown that the concept of "exclusive" competence of the lead DPA with respect to certain measures has triggered reservations from some Member States. This could stem from the misunderstanding that such competence would be exercised extra-territorially and would be imposed in another Member State without any involvement of the respective local DPAs.
11. While there is support for a meaningful one-stop-shop, different views have been expressed as regards the remits of the lead DPA ranging from a mere contact point, to the granting of authorisation powers only to the exercise of the whole range of powers.
12. It is important to strike a fair balance between the competencies of the "lead DPA" and "local DPAs" giving weight to the "local" DPAs.

Possible way forward:

13. *The powers of DPAs could be regrouped in only the following categories:*
 - ✓ *investigatory powers;*
 - ✓ *corrective powers;*
 - ✓ *authorisation powers.*
14. *Two options on the range of powers of the lead DPA (acting in close cooperation with local DPAs (see below)):*
 - ✓ *the lead DPA could take decisions applying all categories of powers (option A);*
 - ✓ *the lead DPA could take decisions limited to corrective and authorisation powers (option B).*
15. *Any action on the territory of a Member State can only be carried out by the "local DPA", including in limited cases in the context of mutual assistance following a request from the "lead DPA. (Example: The lead DPA may request local DPAs to carry out an audit on the processing of a controller or processor on their territory to assess whether corrective measures imposed by the lead DPA on the controller or processor in the main establishment are followed in all establishments of the controller or processor).*

16. *Clarify that each DPA remains competent to hear complaints from individuals including those of its residents or to provide information on the exercise of the rights or the carrying out of investigations (on the basis of a complaint or a request of the LA or also on its own initiative in the context of its investigation/monitoring powers)*
17. *Include a new provision concerning procedural requirements for the DPA exercising the powers, specifying requirements for the impartial, fair and timely exercise of powers and for the content of a legally binding measure, such as giving reasons for the measure.:*
18. *Decisions of the lead DPA imply the involvement of concerned DPAs aiming to find consensus among them .*

Cooperation between lead DPA and other (concerned DPAs)

19. The last compromise provides as regards corrective measures a cooperation mechanism initiated by the "local" DPA involving the lead DPA and other concerned/local DPAs. The local DPA may propose a draft corrective measure to the lead DPA. On this basis, the lead DPA endeavours to reach consensus with the other concerned DPAs and
- shares all relevant information with the concerned DPAs
 - submits to them a draft measure and takes utmost account of their views.
20. By objecting (veto and escalation), the concerned DPAs have the power to reach the suspension of that draft measure. In such cases, the draft measure is submitted to the Board for an opinion.
21. If there is an urgent need to act to protect the rights of data subjects, any concerned DPA may adopt an interim/provisional measure on the territory of its Member State with a maximum validity of one month.

Possible way forward:

22. *Defining “concerned DPA” in the meaning of local DPAs which are concerned by the subject matter, either based on the criterion of local establishment of controller or processor or residence of data subjects affected.*
23. *The compromise text could be further clarified by providing that the cooperation can be triggered both by the lead DPA and any concerned DPA and in particular by the one to which a complaint has been lodged.*
24. *A further element of proximity could be to empower a DPA receiving a complaint to impose a specific deadline to act on the draft measure to the lead. In case of failure to act by the lead DPA, the local DPA could be empowered to take action itself.*
25. *Clarify that the local DPA may not only act as a mailbox but can filter complaints. When it receives a complaint it should have the duty and the powers to assess if it is founded and if the LA has to be involved/ addressed, or whether an amicable solution in the sense referred to in point 7 would solve the problem .*
26. *In case that the local DPA assesses the complaint/case as unfounded, perhaps it should have to notify the lead authority about this and the lead DPA should have the power to proceed against the assessment of the local DPA.*

Notification and enforcement of the adopted measure

27. The last compromise provides that the lead DPA notifies the measures it has adopted under cooperation or consistency mechanism to the controller or processor concerned. The DPA of the complainant informs the data subject of the measure adopted by the lead DPA.
28. A DPA may refuse to enforce a measure of another DPA where compliance with the request would be incompatible with the provisions of the Regulation or with the Union or Member State law to which the DPA is subject to.

Possible way forward:

29. Clarify that the lead DPA adopts and notifies (directly) a legally binding measure towards the controller or processor. The lead DPA informs the concerned DPA(s) about the decision and its notification. Introduce a rule that in case of an unfounded complaint the DPA to which the complaint has been lodged, shall reject the complaint after having consulted the lead DPA and other DPAs concerned.

Remedies for the individual

30. Data subject should have the right to lodge a complaint with their DPA . Individuals (including third country nationals) should not be faced with complex analysis of which is the competent DPA.
31. As regards judicial redress, proximity implies that individuals can always go before to courts in their own jurisdiction against a controller or processor.
32. On judicial review, the last compromise provides that a decision of a DPA must be challenged before the courts of the Member State where the DPA is established. The fact that a judicial remedy against a DPA must be sought in some cases in a Member State other than the one in which the data subject is resident has been perceived as affecting the right to an effective judicial protection. This argument has been further developed by the CLS. The Decision of the lead DPA can be challenged before the Courts of the territory of lead DPA.
33. Actions against a DPA based in another Member State have a priori to be brought before the authorities and courts of that Member State. Other examples of the *acquis* follow a similar policy option (eg: Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Regulation 450/2008 laying down the Community Customs Code).

Possible way forward:

34. *Maintain the right of the data subject under the 1995 Directive to complain to the DPA of its choice. Clarify that the DPA of the data subject keeps the discretion to start an investigation on a case which is submitted to it. The lead DPA mechanism would intervene when the local DPA considers that a legal binding measure would be sought.*
35. *Clarify that where the DPA has rejected an unfounded complaint, the data subject may bring proceedings to the courts in the same Member State.*
36. *Reinstate the option for the data subject of requesting the local DPA to bring proceedings on his or her behalf against the other DPA, while maintaining the discretion of the requested DPA to follow or reject such request.*
37. *Consider to remove the rule of the jurisdiction of DPA in Article 74 (left to Member States).*

The role of the European Data Protection Board

38. *Where no decision can be reached between concerned DPAs, the matter should be submitted to the EDPB. Opinions of the board should be published.*
39. *Under a non-binding format the Board has an added-value by the expectation it may exert on the lead DPA. The latter will face the publicity given to the opinion of the board and will have to take utmost account of such an opinion and must explain the reasons in case it does not follow it.*
40. *Some delegations would favour a Board entrusted in some cases with the power to adopt binding decisions regarding corrective measures.*
