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NOTE

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to:	COREPER/Council
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No. Cion prop.:	5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7 COMIX 61 CODEC 219
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) - Orientation debate on one-stop-shop mechanism

Background

1. In 2013, the one-stop-shop principle 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, 9-10 September, 17-18 October, 7-8 and 20 November 2013. During the Greek Presidency, it was discussed at the meetings of DAPIX of 6 and 19 February, 12-13 March, 8 and 16 May 2014.

2. In addition to the written contributions made previously[1], both the German[2] and Austrian[3] delegations have made detailed alternative proposals.

3. At the Council meeting of 7-8 October 2013, the Chair noted that

i) 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;

ii) 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;

iii) 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 a co-decision model could be incorporated ; and

iv) 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.

4. At the Council meeting of 5-6 December 2013, there was no majority behind the proposal for giving some exclusive powers of corrective measures to the data protection authority of the main establishment. The Chair therefore concluded that there were diverging opinions between Member States and work needed to be continued at technical level, including by looking at cooperation between supervisory authorities and at the possibility of entrusting the European Data Board with legally binding powers.

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1 The compilation of comments on Chapters VI and VII is set out in 7105/6/13 REV 6 DATAPROTECT 28 JAI 182 MI 170 DRS 42 DAPIX 49 FREMP 24 COMIX 141 CODEC 476. A number of specific comments on the one-stop-shop mechanism is set out in 7464/2/14 REV 2 DATAPROTECT 43 JAI 149 MI 256 DRS 36 DAPIX 41 FREMP 40 COMIX 146 CODEC 720.

2 6637/14 DATAPROTECT 29 JAI 98 MI 177 DRS 25 DAPIX 22 FREMP 27 COMIX 106 CODEC 451

3 8275/14 DATAPROTECT 53 JAI 199 MI 319 DRS 47 DAPIX 52 FREMP 52 COMIX 197 CODEC 936.

5. At the December 2013 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. According to the Council Legal Service, this problem could be mitigated 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 CLS[4].

6. The Presidency has redrafted the provisions on the one-stop-shop mechanism to accommodate the various concerns expressed by Member States with the objective to ensure an effective, smooth and well-framed cooperation between supervisory authorities.

7. The current compromise text provides for a possibility for a data protection authority to act as lead authority in cases of processing by a controller or processor established only in one Member State, but which affects data subjects in other Member States. It also covers the situation of processing in the context of the activities of an establishment of the same controller or processor established on the territory of different Member States. In both cases, the data protection authority of the Member State of the main or sole establishment acts as lead authority in close cooperation with the authorities of other concerned Member States.

8. This note focuses on two main issues. The first one centres on the need to ensure proximity of the decision-making process to the data subject and on the role of the local supervisory authorities. Several elements support this and are listed below (points 9 to 17).The second one concerns the powers of the lead supervisory authority (point 18).

Proximity to the data subject and role of the local supervisory authority

Local supervisory authority treats "local cases"

9. The one-stop-shop mechanism shall not apply if the subject matter of the specific processing concerns only processing carried out in a single Member State and involving only data subjects in that single Member State ("local case"), for example, where the subject matter concerns the processing of employees data in the specific employment context of a Member State.

[4] 18031/13 JUR 658 JAI 1167 DAPIX 160 DATAPROTECT 205 CODEC 3040.

Local supervisory authorities are involved in the decision-making process by the lead authority

10. The Presidency has endeavoured to ensure the proximity by involving all concerned supervisory authorities in deciding on the draft measure. The “local” concerned supervisory authority can trigger the cooperation mechanism by referring the matter to the lead authority. When the 'local' authority which investigates a case, finds that the faulty processing needs to be addressed through corrective, authorisation or advisory measures, it will transmit the case to the lead authority.

11. The lead authority cannot adopt a “go-it-alone” attitude but needs to cooperate with the data protection authorities of other Member States concerned by the processing in question in an endeavour to reach consensus. After having investigated the subject matter and having communicated the relevant information on the matter to the data protection authorities concerned, the lead supervisory authority must, where appropriate, draw up a draft decision on the (corrective, authorisation or advisory) measure to be taken and submit it to all authorities concerned for their opinion and take due account of their views.

12. The co-operation mechanism thus allows the supervisory authorities concerned to have input in the decision-making process regarding the decision adopted by the lead authority.

Possibility for local supervisory authorities to enter into amicable settlements on complaints

13. Individuals have always the possibility to lodge a complaint with their own “local” supervisory authority (i.e. an authority other than the lead authority). Where such complaint concerns only processing activities of an establishment of the controller or processor in one single Member State and the matter does not affect other data subject, that data protection authority may promote an amicable settlement between the data subject and the controller or processor. Where such amicable settlement cannot be reached or would not be appropriate, the “local” authority will refer the matter and the result of its related investigations to the lead supervisory authority.

Possibility for local supervisory authorities to submit a draft decision to the lead authority

14. The local supervisory authority to which a complaint has been lodged should have the possibility to submit, when referring the matter, to the lead authority a draft decision.

Possibility for local supervisory authorities to object to a draft decision

15. The data protection authorities may express their views through a so-called "silence procedure". Where, within a period of four weeks after having been consulted, any of the data protection authorities concerned expresses a reasoned objection to the draft decision of the lead authority, the latter shall submit the matter to European Data Protection Board under the consistency mechanism. The Board will then issue an opinion on the matter.

Possibility for the local supervisory authorities to dismiss or reject inadmissible or unfounded complaints

16. The local supervisory authority to which a complaint has been lodged, should be competent to dismiss or reject, in agreement with the lead authority, an inadmissible or unfounded complaint and serve this decision to the complainant. In such case, where the lead authority did not take action against the controller or processor, complainants would have a legal remedy against the decision of the local supervisory authority before the courts of their own Member State.

17. The controller or processor could seek judicial review vis-à-vis the lead authority in the Member State where its main establishment is located, and the complainant in the Member State of the local supervisory authority to which the complaint has been lodged.

Powers of the lead authority

18. At least one Member State has raised constitutional problems as regards the legal effects in other Member States, if measures adopted by the lead authority could imply the enforcement of such measure by the lead authority on the territory of other Member States. The Presidency has attempted to allay these concerns by clarifying that the lead authority shall be competent to apply its supervisory powers, decide on the case and direct this decision, on its own territory, to the main establishment of the controller or processor. It should then be for the controller or processor to implement this decision as regards all its establishments in the Union. This approach should respond to the concern regarding the enforcement in another Member State of corrective measures adopted by the lead authority, as these corrective measures would be served on the main (or single) establishment present within its territory.

Question

19. *In light of the above, delegations are invited to indicate whether they are of the opinion that the improvements made to the one-stop-shop mechanism ("local cases", amicable settlement, clarification of the scope of the decision of the lead data protection authority), are a way forward to build a consistent and efficient one-stop-shop mechanism while ensuring proximity.*