

ICDP '15

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"ONE STOP SHOP" considerations

Introduction

The core principle of a single data protection authority having jurisdiction over organizations that operate across multiple European countries (the 'one stop shop' principle) for both compliance and enforcement matters is a sensible and crucially important element of the draft Regulation. We strongly welcome that the European Commission has introduced this principle in the draft Data Protection Regulation. It should be noted that today for some entities with a main establishment in one jurisdiction from which they conduct their activities across the EU this principle is already a reality – with a Regulation in place, it becomes even more important that this principle is maintained and reinforced and therefore, a clear and unambiguous legal foundation is essential.

A fully harmonized legal framework for data protection coupled with a one stop shop for compliance and enforcement will dramatically reduce administrative and compliance burdens for organizations while at the same time ensuring a high level of protection for data subjects. This is a fundamental requirement, if we want to achieve a true European Single Market and allow companies to operate in multiple Member States. In addition, the one stop shop principle will benefit data subjects across the EU intending to seek redress for infringements related to their personal data: Considering that in its role as the competent authority the supervisory authority of the main establishment will have invested significant resources and expertise to thoroughly understand the privacy policies and practices of the controllers or processors under its jurisdiction, it will be best equipped to effectively deal with the case and provide the best redress to the data subject.

For the Regulation to be successful in practice, it must afford organizations, data protection authorities ("DPAs") and data subjects greater legal certainty. As such, for the one stop shop principle to be effective the Regulation must provide for workable and clear provisions establishing effective and unambiguous criteria by which businesses can designate their place of establishment and ensuring clarity over the jurisdiction and competence of DPAs.

This paper aims to:

- (1) clarify what we believe are the prerequisites of a sound 'one stop shop' principle,
- (2) present suggestions for improvements that also address some of the recent criticisms, and
- (3) provide input to the European Council's work following the conclusions drawn during the Justice and Home Affairs Ministerial council on 6 October.

Prerequisites for a sound and effective one stop shop

1. Clear and unambiguous criteria to allow organizations to determine their "main establishment"

The concept of 'main establishment' as stipulated in the proposed Regulation is the decisive factor to determine which DPA will effectively function as a one stop shop. It is important to provide clear criteria so that an unambiguous decision can be taken as to where a company's main establishment is located. The criteria as proposed by the Commission are too narrow to work in different situations and provide too much room for diverging interpretation and views. In addition, the fact that different 'main establishment' tests apply to controllers and processors further complicates the situation, particularly where businesses are controller and processor at the same time for different processing operations. We are similarly concerned with respect to the 'main establishment' test as currently discussed within DAPIX¹. This provides even less clarity and certainty than the Commission proposal and risk nullifying any benefit of the one stop shop.

To take account of today's business reality and provide for clear-cut and common sense criteria allowing for flexibility and predictability for all stakeholders, the Regulation should establish a single uniform 'main establishment' test for both controller and processor and provide for the following set of objective criteria to determine the 'main establishment': (1) the location of an organization's designated European headquarters; (2) the location of the entity within an organization which is best placed in terms of management functions and administrative responsibilities to deal with and enforce the data protection rules; (3) the location of the entity within an organization where effective and real management activities are exercised determining the data processing for the organization.

A similar concept has been developed in relation to Binding Corporate Rules and could hence perfectly lend itself for the purpose of determining the place of 'main establishment' in the context of the draft Regulation. Such a transparent and consistent approach will provide for legal certainty required by business while preventing the risk of forum shopping and disputes over the place of main establishment.

2. Powers and competences of supervisory authorities

The Regulation provides for the possibility of the data subject to lodge a complaint with their local authority. This is sound practice and in itself makes sense due to potential traditional, cultural and language issues amongst citizens and indeed DPAs attempting to handle complaints in multiple languages. However, for the one stop shop to effectively work, further elements need to be clarified, particularly with regards to the actual powers of the DPAs. More specifically, the legal instrument being a Regulation, all DPAs will be executing EU law directly. Hence, for the purpose of executing the Regulation when responding to a consumer complaint, they can no longer be considered as mere administrative bodies of national law. This is an essential aspect for pan-European enforcement of decisions of the lead DPA.

¹ Text as proposed in Article 4(13) in the Presidency note 14742/13 dated 14 October.

This change of status of DPAs triggered by the fact they will be executing EU law (rather than pure national administrative law) triggers a number of important consequences, namely:

- As far as enforcement of the EU Regulation is concerned, all DPAs need to have the same powers and duties. However, it is a reality today that there are discrepancies in powers, duties and competences of DPAs at national levels. In order to eliminate these discrepancies, it is important to ensure that the catalogue of DPA powers as stipulated in the Regulation is final and exhaustive. It is counterproductive for the system to have open catalogue of powers, competences and duties for the purposes of compliance with the EU Regulation. We therefore recommend avoiding ambiguous phrases such as "in particular".
- Having the same powers, duties and competences as far as compliance with the EU Regulation is concerned does, however, not mean that all DPAs are always competent in every single case.

3. Clarifying DPAs' competences and when and how these should be exercised for the purposes of applying the EU Regulation

The ICDP welcomes the European Council conclusions for supporting a structure of the one-stop-shop principle along a model in which the exclusive competence for taking supervisory decisions vis-à-vis the controller/processor rests with the "main establishment" supervisory authority, even though such exclusive jurisdiction may be limited to certain powers. The element of exclusive competence is a fundamental requirement, if we want to achieve a true European Single Market and incentivize companies to operate in multiple Member States".

With respect to the Council's idea to limit the exclusive powers of the DPA of the main establishment, it is important to ensure that the powers and duties of DPAs are clarified and defined with care in the Regulation. It should be differentiated between (1) cases where a local DPA has jurisdiction under the one-stop-shop principle, (2) cases where the DPA of the main establishment has exclusive competence and (3) cases where there should be shared competence between the DPA of the main establishment and the local DPA.

A suggestion for such clarification is as follows:

- The DPA of the main establishment should be the sole competent authority for issuing binding decisions and sanctions (as the case may be) on the companies with main establishment in their territory.
- Furthermore, the DPA of the main establishment should be exclusively competent to authorize investigations, undertake privacy audits and render compliance decisions vis-à-vis companies who have their main establishment within their jurisdiction. As a result, take the view that option 3 as proposed in the Presidency document dated 14 October is a good starting point. However, we believe that option 3 does not go far enough. For instance, the powers as outlined in Article 53.1 (d) and Article 53.1b (b) should be considered as being part of the catalogue of the main establishment DPA's exclusive competences.

- The local DPA of a complainant is the competent authority for receiving complaints from data subjects, supporting them in the exercise of their rights, processing these complaints, consulting and coordinating with the main establishment DPA with respect to monitoring compliance with and investigating possible breaches of data protection rules that took place on their territory. To allow for "proximity" to the data subject, we also agree that the local DPAs should be competent for decisions as stipulated in Article 53.1 (b) and have investigative powers as outlined in Article 53.1a on the territory of their Member State. However, it should be clarified that any action and decision relating to a company under the jurisdiction of the main establishment DPA always needs to be coordinated with the latter.
- It should also be clarified which of the powers as outlined in Article 53 are designed as shared competences between the main establishment DPA and the local DPA.

Discrepancies amongst DPAs about a measure or proposed measure by the competent DPA need to be justified on the basis of failure to comply with the Regulation. Mere disagreement about such a measure is not sufficient to block the decision of the lead DPA. In other words, there needs to be a reasoned opinion.

In reference to the Presidency note 14742/13 dated 14 October ICDP would like to point out that Options 1 and 2 as outlined in the document would go against the essence of a one stop shop and therefore Option 3 is the only viable possibility to enable a one stop shop in practice. That said, whereas Option 3 is a good starting point, further clarification is needed on the exact competencies prescribed to the local DPA, the lead DPA and the shared competences. For instance, Article 53.1 (d) and Article 53.1b (b) should be included in option 3 as exclusive competences for the lead DPA, while Article 53.1b (a) and (d) could be deemed as areas for shared competence between the local and the lead DPAs.

4. Establishing proximity between the data subject and the DPA of the main establishment

In order to realize a true one stop shop, with one decision and one fine, it is crucial that the lead DPA is the only authority that takes the decision in cases where there are formal complaints from the data subject (individual cases triggered by formal complaints). **However, local DPAs concerned have a substantive role to play:**

- a) Before the decision making process by the lead DPA, through reinforced mutual assistance and enhanced cooperation between DPAs. In particular the supervisory authority of the data subject would have the authority to:
 - Act as the point of contact for the data subject,
 - Advise the data subject on their rights,
 - Communicate the complaint to the DPA of the main establishment,
 - Assist the DPA of the main establishment in fact gathering in the context of investigations,
 - Communicate with the DPA of the main establishment in order to inform the data subject about its findings and the final measure.

b) During the decision making process

- The regulation should introduce an obligation for the DPA of the main establishment to communicate with and consult other DPAs concerned during the process and to take due account of their opinions. In order to avoid potential delays clear time frames for the gathering of reasoned opinions should be set.
- The DPA of the main establishment would consult with the local DPA of the data subject as described above and have the exclusive jurisdiction to issue binding decisions and impose fines in cases of a complaint received by a data subject residing in another Member State.

5. Ensuring consistency of decisions

We fully support the role of the European Commission as a guardian of the treaties. However, further clarification is needed as to the role of and interactions between the competent DPA, the local DPAs, the European Data Protection Board and the European Commission in the context of the consistency mechanism.

The consistency mechanism or any other appeal mechanism is important in ensuring a harmonized application of the regulation in the Union.

An appeal mechanism could be constructed by adding the possibility to submit a final decision prepared by a supervisory authority to the EDPB. This possibility of submitting a case to the EDPB could be open to the supervisory authority of the main establishment and to a supervisory authority at which a data subject has lodged a complaint. (i.e. the supervisory authority concerned). Rules would have to be put in place in order to limit the number of cases that could be submitted to the EDPB so as to avoid delays and inefficiencies. It could also be envisaged to allow a controller that has establishments in several Member States to submit to the EDPB for an appeal a decision of a supervisory authority with regard to him. Finally, the role of the European Commission who acts as the guardian of the treaties, must be clarified.

6. Affording the benefit of the one stop shop to non-EU businesses

Any organization which is subject to the provisions of the Regulation needs to be awarded the benefit of the one stop shop, whether such organization is established in the EU or not. The purpose of the one stop shop principle is to ensure the correct functioning of the Internal Market. It should not be misused as an industrial policy measure to distort the 'level playing field' between market operators by incentivizing establishments in the EU. There is no reason to deprive non-EU established organizations that provide goods and/or services to the EU and are therefore entirely covered by all the provisions of the Regulation, the benefit of the one stop shop, as long as they designate a representative with establishment in the EU [following the criteria of 4 (13)]. Affording non-EU based organization the benefit of the one stop shop will not only allow realization of a true "level playing field" but will also incentivize non-EU based companies to name a representative in the EU, particularly where this not a mandatory requirement, thereby facilitating supervision and enforcement of EU data protection law

compliance. Finally, any differential treatment is likely to be considered against the EU principle of non-discrimination.