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Rethinking the one-stop-shop mechanism: Legal certainty and legitimate expectation[1]

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ABSTRACT

This paper aims to contribute to the discussion concerning the one-stop-shop mechanism proposed in the General Data Protection Regulation (hereinafter "GDPR"). The choice of regulation as the instrument to legislate on data protection is already an unmistakable indication that unification and simplification (together with respect of data subjects' interests) shall be the guide for every legal discussion on the matter. The one-stop-shop mechanism (hereinafter "OSS") clearly reflects the unification and simplification which the reform aims for. We believe that OSS is logically connected with the idea of one Data Protection Authority (hereinafter "DPA") with an exclusive jurisdiction and that this can only mean that, given one controller, no other DPA can be a competent authority.[2] In other words, OSS implies a single and comprehensive competent authority of a given controller. In our analysis we argue that such architecture: a) works well with the "consistency mechanism"; b) provides guarantees to data subjects for a clear allocation of powers (legal certainty); and c) is not at odds with the complaint lodging procedure. Our position on fundamental questions is as follows. *What is the perimeter of competence of the DPA in charge?* We believe that it should have enforcement power on every issue of the controller, including issuing the fines. *How to reconcile such dominant role of one DPA with the principle of co-operation among DPAs?* We do not consider co-operation at odds with the rule that decisions are taken by just one single authority. Finally, we share some suggestions on how to make the jurisdiction allocation mechanism (the main establishment criterion) more straightforward.

[1] This paper has been written in the midst of the data protection reform. Amendments proposed by Rapporteurs have been introduced one after the other. On 21 October 2013, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament adopted a new version of the GDPR, which was later adopted in first reading by the plenary on the 12th of March 2014. The authors have decided to focus their analysis on the version of the GDPR published by the EU Commission on 25 January 2012. EPA is a pan-European think tank based in Brussels and brings together data protection/security experts and businesses to engage in developing new policies that enhance data protection and data security while assuring sustainability for the development of current and new business. EPA is consulted by Members of the European Parliament, Counsel and Commission on privacy and data protection. Moreover, through its network of experts it regularly publishes papers and presents at international conferences on these matters.

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[2] In this paper "competence" and "jurisdiction" are used as synonyms.

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1. Introduction: "in pessima republica plurimae leges"

As early as almost two thousand years ago, a Roman senator and historian, Publius Cornelius Tacitus, observed that many laws lead to bad governance: "*In pessima republica plurimae leges*".

Inconsistency and fragmentation in Member States' personal data protection laws have been one of the very purposes for the European Commission (hereinafter the "Commission") to propose on 25 January 2012 the General Data Protection Regulation (hereinafter "GDPR"),[3] which aimed at a better governance through ***unification*** and ***simplification***: "the 27 EU Member States have implemented the 1995 rules differently, resulting in divergences in enforcement". A single law will do away with the current fragmentation and costly administrative burdens, leading to savings for businesses of around €2.3 billion a year. The initiative will help reinforce consumer confidence in online services, providing a much needed boost to growth, jobs and innovation in Europe […] Key changes in the reform include:

- *A single set of rules on data protection, valid across the EU. […]*
- *Organisations will only have to deal with a single national data protection authority in the EU country where they have their main establishment. Likewise, people can refer to the data protection authority in their country, even when their data is processed by a company based outside the EU".*[4]

However, two years after the Commission proposed its draft aimed at reforming the data protection law in the EU, adoption of a new set of rules is still uncertain, despite the move made by the last European Parliament in march, which concluded the first reading of the data protection reform package and adopted a text expected to be negotiated with the Council by its successor, just elected at the end of May.[5] While the need for the GDPR is generally not challenged, much of the controversy is over incorporation of certain new rules into a legal text. This is clearly shown by the concerns which led the Council to slow down the legislative process, amongst which the practical functioning of the One-Stop-Shop mechanism (hereinafter "OSS") and the attempt to introduce a general exemption from ordinary data protection rules for the public sector.[6] As a result of the latter stance taken by the Member States the EU legislator missed the chance to pass the new piece of legislation before the expiration of the parliamentary term which has just ended in May. This notwithstanding, the package should be passed into law in 2015, according to the wishes of the Vice-President of the Commission, Viviane Reding.[7]

1.1. Topic and aims

This paper aims at (re-)focussing on the initial effort by the Commission towards **'simplification'** and **'unification'**. We believe that such concepts should never be lost in sight, because the concepts of 'simplification' and 'unification' are connected to some of the most valued legal principles: the **'rule of law'** principle and the **'legitimate expectations'** principle. On the other hand, "plurimae leges" can contribute to increase in uncertainty and costs, to business frustration and to confuse citizens, to leave gaps and

[3] 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)/* COM/2012/011 final - 2012/0011 (COD) */.

[4] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Safeguarding Privacy in a Connected World. A European Data Protection Framework for the 21st Century, COM (2012) 9 final, 25.1.2012. The Commission had already pointed out in 2010 that the free flow of data within the internal market is hampered by the divergences among several different national laws (European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A comprehensive approach on personal data protection in the European Union, COM (2010) 609 final, 4.11.2010, paragraph 2.2). Such situation was also underlined by Article 29 Working Party (hereinafter: "A29WP") Opinion 8/2010 on applicable law (adopted on 16 December 2010) where A29WP undertook to clarify what is, case by case, the applicable law in the framework of the Directive 95/46/EC, in order to wipe out most doubts concerning complex business models and make data controllers more aware of the data protection law regulating their data processing. Moreover, it has to be pointed out that regulatory inconsistencies which currently exist among Member States also have a detrimental effect over the level of protection guaranteed to data subjects throughout Europe. In the light of these shortcomings, the harmonization of the European regulatory framework of data protection cannot wait any longer. In this respect the choice of a 'Regulation' seems to bring personal data protection in line with the core principles of EU law: **legal certainty** and **legitimate expectation** (cfr. C-74/74, *Comptoir national technique agricole (CNTA) SA v Commission of the European Communities*, [1975] ECR 533, paragraph 44).

[5] The vote in the plenary sitting of the European Parliament took place on 12 March 2014 (see here for further procedural details http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0011(COD)). The European Parliament has adopted the Albrecht's report on the GDPR, in the version proposed by the Committee on Civil Liberties, Justice and Home Affairs on 21 October 2013 (here the Report's text http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0402&language=EN). "On the other hand, the ministers of Justice, meeting in the Council on the 6th of June 2014, held an orientation debate on the "one stop shop" mechanism on the basis of a document prepared by the Presidency. The Council concluded that the future Presidency will continue to work at technical level on this issue". For more details see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/143119.pdf.

[6] A reliable testimony of the issues halting the debate in the Council is the letter sent to the President of the Council of the European Union by the European Data Protection Supervisor on the 14th of February 2014, in an attempt to unlock the debate within the 'Upper House' of the EU. The letter's content is public and available here https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2014/14-02-14_letter_Council_reform_package_EN.pdf.

[7] "Data Protection Day 2014: Vice-President Reding calls for a new data protection compact for Europe", http://europa.eu/rapid/press-release_IP-14-70_en.htm.