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# Data protection authority perspectives on the impact of data protection reform on cooperation in the EU

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This article presents the findings of interviews with representatives from the majority of EU data protection authorities in the context of the ongoing data protection reform process. It not only identifies commonalities between the authorities to the extent it is possible to speak about an EU DPA perspective, but also identifies areas of tension and disagreement as well as future intentions. The focus of the article is upon the impact of the data protection reform process on the way that these independent bodies, located in EU Member States will increasingly have to cooperate at an EU-level. Capturing these perspectives at this moment in the reform process provides not only insight into the process from a group of concerned stakeholders, but also insight into how these stakeholders are (re-)positioning themselves, planning, and anticipating the impacts of the reform.

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## 1. Introduction

European Union Data Protection Authorities (DPAs) are independent authorities (with their own powers and responsibilities, and organisationally separate from Member State ministries<sup>1</sup>) with a supervisory role in relation to data protection. Within the EU, they primarily draw their authority from the national implementations of Directive 95/46/EC – the Data Protection

Directive. Globally, DPAs (also known as privacy commissioners, data privacy agencies and privacy enforcement authorities<sup>2</sup>) play multiple roles, such as ombudsmen, auditors, consultants, educators, policy advisors and negotiators as well as conducting enforcement actions.<sup>3</sup>

The data protection legal regime in the EU is currently undergoing a reform process: The General Data Protection Regulation (GDPR) and the associated Police and Criminal Justice Data Protection Directive are intended to reform and update

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<sup>1</sup> Thatcher, Mark, “Regulation after delegation: independent regulatory agencies in Europe”, *Journal of European Public Policy*, Vol. 9, No.6, 2002, p. 956.

<sup>2</sup> OECD, Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy, Paris, 2007, <http://www.oecd.org/internet/interneteconomy/38770483.pdf>, accessed 26 February 2016.

<sup>3</sup> Bennett, Colin and Charles Raab, *The Governance of Privacy: Policy Instruments in Global Perspective*, MIT Press, Cambridge MA & London, 2003, pp.109–114.

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the 1995 EU Data Protection Directive and replace the 2008 Framework decision.<sup>4</sup> At the time of writing, the Commission, the European Parliament and the Council have adopted positions on the Regulation and have completed the trialogue negotiation process producing a compromise text<sup>5</sup> that will be formalised over the coming months. The resulting legislation is likely to have significant impacts for EU DPAs. These impacts are likely to be particularly significant on the way in which EU DPAs cooperate with each other in a number of registers.

Networking and group formation amongst DPAs have been ongoing for some time<sup>6</sup> and Europe is seen as a particular concentration of such activity, given the role of the Article 29 Data Protection Working Party as a point of discussion and coordination, and the coming together of EU DPAs in events such as the Spring Conference, and the Berlin Group. Collaboration outside of enforcement provides opportunities for DPAs to increase their regulatory capacity and effectiveness in relation to globalised threats to privacy.<sup>7</sup> However, the GDPR will place increased requirements for collaboration upon EU DPAs.

Given their ambiguous position as organisations that are likely to be deeply affected by the GDPR; responsible for enacting elements of it; and likely to have at least some of their manner of working restructured by it, but at the same time having limited official input into its final form, the perspective of EU DPAs on the reform process is particularly relevant. Capturing these perspectives at this moment in the reform process provides not only insight into the process from a group of concerned stakeholders, but also insight into how these stakeholders are (re-)positioning themselves, planning, and anticipating the impacts of the reform.

<sup>4</sup> De Hert, Paul, Vagelis Papakonstantinou, David Wright and Serge Gutwirth, "The proposed Regulation and the construction of a principles-driven system for individual data protection", *Innovation: The European Journal of Social Science Research*, Vol.26, No.1-2, 2013, pp.133-144; Kuner, Christopher, "The European Commission's Proposed Data Protection Regulation: a Copernican revolution in European Data Protection Law, *Privacy and Security Law Report*, The Bureau of National Affairs, 02/06/2012; Costa, Luiz and Yves Poulet, *Privacy and the Regulation of 2012*, *Computer Law and Security Review*, 28, 2012, pp.254-262.

<sup>5</sup> Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the protection on individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – analysis of the final compromise text with a view to agreement, Brussels, 15 December 2015.

<sup>6</sup> Barnard-Wills, David and David Wright, *Co-ordination and cooperation between Data Protection Authorities*, PHAEDRA Project Workstream 1 report, April 2014 revised June 2014. <http://www.phaedra-project.eu/wp-content/uploads/PHAEDRA-D1-30-Dec-2014.pdf>, accessed 26 February 2016; Wright, David and Kush Wadhwa, "Cooperation and Coordination viewed by supervisory authorities themselves: Result of the PHAEDRA surveys" in Paul De Hert, Dariusz Kloza and Pawel Makowski (eds.) *Enforcing Privacy: Lessons from current implementations and perspectives for the future*, Warsaw, Wydawnictwo Sejmowe, 2015. [http://www.phaedra-project.eu/wp-content/uploads/phaedra1\\_enforcing\\_privacy\\_final.pdf](http://www.phaedra-project.eu/wp-content/uploads/phaedra1_enforcing_privacy_final.pdf), accessed 26 February 2016.

<sup>7</sup> Raab, Charles, "Information Privacy: Networks of Regulation at the Subglobal level", *Global Policy*, Vol.1, No. 3, October 2010, pp.291-302.

This article is therefore intended to contribute to the literature on the international relations of data protection authorities. Cooperation between DPAs has become the subject of a relatively small number of previous articles,<sup>8</sup> many of which engage with the extent to which there is an emerging field of interaction between these actors engaged in cross-border collaboration, and the extent to which the development of multi-level governance can be identified<sup>9</sup>. This article expands this picture with the perspective of EU DPAs themselves. Their perceptions, anticipated challenges, problems and how they construct past experiences will impact upon the development in practice of EU governmentality (regimes of shared practice operating in spaces beyond, around and between states<sup>10</sup>) around privacy and data protection post-GDPR.

The paper first provides an account of the interview methods deployed in this study, before examining DPA perspectives on the GDPR and its impacts upon cooperation, in particular, the consistency mechanism, the "one-stop-shop" principles, the European Data Protection Board, the trialogue process, and information sharing. It then examines DPA perspectives on cooperation frameworks more broadly, including the possibilities of structured systems for information exchange, sharing best practice, requests for assistance, the role of the European Commission, complaint handling, alerting tools and budgets for cross border investigations.

The paper finds that DPAs anticipate a significant impact from the GDPR, particularly for their inter-EU cooperation. The GDPR is seen as likely to increase the need for cooperation and to structure the form that this cooperation will take. As the reform process is still ongoing there is ambiguity about the final results, but even beyond that DPAs anticipate they will need to conduct further work on the practical details of cooperation. DPAs are concerned to build upon positive existing cooperation and communication methods. Key challenges for DPAs include maintaining legitimacy, freedom of action and ability to determine their own strategies and methods, and ability to take what they see as appropriate measures, whilst maintaining coordination and consistency with their peers. Open debates include the extent to which the GDPR will effectively harmonise data protection across Europe, and which elements of strategic independence and national context will remain for DPAs. Further, the extent to which structured processes and common approaches are possible or desirable is still an open question, with different DPAs holding different positions. Language differences remain a key topic of discussion in these interviews, potentially

<sup>8</sup> *Ibid*; Bygrave, Lee A., *Data Protection Law. Approaching Its Rationale, Logic and Limit*, Kluwer Law International, The Hague/London/New York, 2002; Raab, Charles and Paul de Hert, "Privacy actors, performances, and the future of privacy protection in Serge Gutwirth, Yves Poulet, Paul de Hert, C. de Terwange and S. Nouwt (Eds), *Re-inventing data protection?*, Dordrecht, Springer, 2009; Newman, A., *Protectors of Privacy: Regulating Personal Data in the Global Economy*, Ithaca, NY, Cornell University Press, 2008.

<sup>9</sup> Hijmans, Hielke, *The European Union as a Constitutional Guardian of Internet Privacy and Data Protection: The story of Article 16 TFEU*, University of Amsterdam Dissertation, 5 February 2016.

<sup>10</sup> Dean, Mitchell, *Governmentality: Power and Rule in Modern Society*, 2nd Edition, London, Sage, 2010, p. 229.

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