

Transnational Training Workshop on Data Protection  
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# One-stop-shop mechanism

FORTHCOMING CHALLENGES UNDER THE LIGHT OF ARTICLE 47 OF THE  
CHARTER

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## Foundations of the OSS mechanism

- ▶ Recital (9) of the GDPR
- ▶ *‘DPD had not prevented fragmentation in the implementation of data protection across the Union’*
- ▶ Need to ensure **consistency** became the **‘name of the game’** of the GDPR and the OSS mechanism **‘one of the central pillars’** of the new legal framework
- ▶ **Legal Framework** :Articles 55, 56, 58,60, 61 and 66 GDPR
- ▶ **General rule**: Supervision of **cross- border processing activity**, or involving citizens of, more than one MS, is led by only one SA, called the LSA

### *When ?*

- ▶ Cross border activity: Art. 4 (23) (a) (b) GDPR
- ▶ Key remark: Not applicable on public/or private authorities acting under Art 6 (1) (c) or (e) GDPR
- ▶ LSA: DPA of the main establishment or the single establishment of the Controller
- ▶ SACs: Establishment of the Controller or the Processor or data subject substantially affected or a complaint has been lodged

## OSS in a nutshell

### *How?*

- ▶ Close cooperation between LSA and SACs
- ▶ LSA: The exclusive competence to take binding enforcement decision
- ▶ *primus inter pares* ? AG opinion in Facebook Ireland and others C -645/19, para 111

### *EDPB and Courts*

- ▶ Establishment of a dispute resolving mechanism in front of the EDPB
- ▶ EDPB's decision challenged before the CJEU ( Article 263 TFEU + rec. 143 GDPR) ?

# CJEU, Facebook Ireland and others ( C-645/19),

AG Opinion  
( 13 January 2021)

## *Facts*

- ▶ Facebook is placing cookies on Internet users' devices without their consent and is collecting data in an allegedly excessive manner when they browse a web page in the Facebook.com domain or on third parties' websites, including via Facebook social plug-ins and pixels.

## *Key question*

- ▶ Whether the One-Stop-Shop regime, read in conjunction with Articles 7,8 and 47 of the Charter, prevents a national SA (other than the LSA) from initiating court proceedings in its MS against infringements of the GDPR with respect to cross-border data processing.

## Key Provisions

### *Articles: 56 (6) and 58 (5) GDPR*

- ▶ 56(6) : ‘The lead supervisory authority shall be the sole interlocutor of the controller or processor for the cross-border processing carried out by that controller or processor’.
- ▶ 58(5) : ‘Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and where appropriate, to initiate or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation’.
- ▶ Article 58(5) direct effect: Subject matter sufficiently clear, precise and unconditional.
- ▶ AG opinion in Facebook Ireland and others C -645/19, para 166



## *AG Opinion*

Three primary methods of interpretation:

- ▶ Literal
- ▶ Systematic
- ▶ Teleological

*‘the interpretation which best serves the purpose for which the provision was made’*

*Text ,context and purpose*

- A textual, teleological and historical approach to the interpretation of the GDPR confirms that DPAs are bound to follow the rules on competence and the cooperation and consistency mechanisms set out in the GDPR (para 89)

The Rule of Law

EEC is

*‘a community of law  
[Rechtsgemeinschaft] ...  
because it serves to  
realize the idea of law’*

## Rule of Law

- Consistent and Homogenous application of data protection rules (recital 9)
- Competent national SA to bring an action before the national courts (Facebook Ireland and Schrems C -311/18 para 120)
- Circumvention of the consistency mechanism
- DPA to bring judicial proceedings/ not an appropriate way for administrative authorities to deal with data protection infringements
- Regarding cross- boarder activity the competence of the LSA is the rule, and the competence of other SA is the exception ( para 47)
- General competence of a LSA with regard to cross -boarder data processing (para 88)

## Article 47 (Charter)

### A three – layered approach

- ▶ EU data protection: High level of protection of the fundamental right to respect for private life with regard to the processing of personal data (Schrems I, para 39 )
- ▶ Could SA itself as a ‘public authority’ claim the protection of the Charter ?
- ▶ Lack of clarity in general ( T-496/10 Bank Mellat I, C-176/13 P Bank Mellat II)
- ▶ AG: ‘in the context of the present case ..can be safely left unexplored’.

#### *However*

- ▶ As to ensure a ‘high level of protection of natural persons’, a ‘strong and more coherent data protection framework’ is needed ( recitals 7,9 and 10 GDPR).
- ▶ The framework established by the GDPR is intended to ensure consistency at all levels: for natural persons, for economic operators, for controllers and processors, and for supervisory authorities alike.
- ▶ GDPR seeks to promote ‘closer cooperation’ among them ( recital 116 GDPR) .
- ▶ Conclusion: OSS by promoting consistency ensures high level of protection of the rights and freedoms of data subjects (para 96).

## Article 47 (Charter)

### A three -layered approach

Concept of Proximity Article 79 and rec. 145 of GDPR

Data subjects v controllers and processors, bring proceedings directly against controllers or processors before the courts of the MS in which they reside

Or

Where the controller or processor has an establishment.

Rule favourable to data subjects

## Data subjects v DPA

- ▶ Lodge a complaint before the DPA of their MS, even if the LSA is located in another Member State ( Article 78 GDPR)
- ▶ Action and inaction of SA ( Facebook Ireland and Schrems, C-311/18, para. 110 )

### *However*

- ▶ Unlike in the case of actions against controllers and processors, be brought before the courts of the MS where SA is established
- ▶ Scope :Avoid data subjects having to ‘tour’ the courtrooms of EU
- ▶ Problem: Potentially adopting two -tier decisions
- ▶ The LSA v the controller or processor
- ▶ The National DPA v the complainant

## *Exact content of each of those decisions? Identical or different ?*

- ▶ Decision of the SA authority with which the data subject lodged a complaint largely be an ‘empty shell’?
- ▶ Challenging Article 47 of the Charter : Extent of the judicial review of the Courts ( recital 143 full jurisdiction )
- ▶ Data subject, in order to have access to an indeed ‘effective judicial remedy’ within the meaning of Article 78 of the GDPR and Article 47 of the Charter, have to bring judicial proceedings before the courts of the MS where the LSA is established in any case?
- ▶ Undermining the concept of proximity ?
- ▶ In case of triggering the case in front of the EDPB
- ▶ Challenging a legal binding provision of the Board before the CJEU (recital 143)
- ▶ Challenging Article 81 of the GDPR ‘Suspension of Proceedings’ as an example of cooperation between judicial authorities / data protection domain

Thorny issues?

## The striking point of enforceability of GDPR

- ▶ DPA argument :the enforcement of the GDPR in cross-border situations cannot be left almost solely to the LSA and to the data subjects that may be affected by the processing.
- ▶ GDPR contains mechanisms aimed at avoiding such scenarios.
- ▶ Chapter VII GDPR ‘Cooperation and Consistency’

*AG* : ‘EU legislature made a clear institutional and structural choice and there is, to my mind, no doubt about what it intended to achieve’ (para 128)

*GDPR balancing test:*

‘Delicate equilibrium between the need to ensure a high level of protection of natural persons and the need to remove the obstacles to flows of personal data within the Union. Those two objectives are, as evidenced in particular by recital 10 and Article 1(1) of the GDPR, inextricably linked’

- ▶ National supervisory authorities must ensure a fair balance between them (Commission v Germany, C 518/17 para 24, Schrems I para 42).
- ▶ Key point: OSS is challenging a proper balance between public and private enforcement of the data protection rules and the GDPR ?

GDPR does not include a general bar for other DPAs, including SACs, to start proceedings against potential infringement of data protection rules

### *When ?*

- ▶ Acting outside the material scope of the GDPR;
- ▶ Investigating cross-border data processing carried out by public authorities, in the public interest or in the exercise of official authority ;
- ▶ By controllers not established in the EU;
- ▶ Adopting urgent measures in situations envisioned by Article 66 of the GDPR; or
- ▶ Intervening following a decision of the lead DPA not to handle a case.

## Conclusion

*The OSS mechanism reflects the needs to :*

- ▶ Ensure a high level of protection of natural person
- ▶ A strong and more coherent data protection framework
- ▶ Two goals inextricably linked
- ▶ The enacted provisions
- ▶ Ensure consistency at all levels: for data subjects, for economic endeavors, for controllers and processors and for supervisory authorities as well.
- ▶ Enhance closer cooperation between Administrative and Judicial Authorities.

*How?*

- ▶ Under the strict conditions set forth by the GDPR and the Charter and simultaneously contributes to the creation of a Digital Single Market in EU.



Thank You