Op-Ed

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www.eulawlive.com

Suggested citation: Alberto Miglio, "*Facebook Ireland*: The Scope of the 'One-Stop Shop' under the GDPR and How to React to Enforcement Bottlenecks", *EU Law Live*, 17 June 2021

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Alberto Miglio

The judgment of the Court of Justice in *Facebook Ireland* (C-645/19), issued this week on 15 June, has provided important clarifications on the allocation of competence between national supervisory authorities (SAs) in the enforcement of the General Data Protection Regulation (GDPR, 2016/679). In a nutshell, the Court of Justice held that SAs may bring judicial proceedings against data controllers or processors in the same instances where they have competence to adopt administrative decisions. This may happen, in particular, in case of inertia of the lead supervisory authority (LSA), provided that the cooperation and consistency procedures foreseen in the GDPR are respected.

While judicial actions by data subjects and criminal liability represent alternative avenues to enforce the rights to privacy and data protection, the European model leans heavily towards administrative enforcement by SAs. Directive 95/46, the predecessor to the GDPR, lacked procedures to ensure coordination among national data protection authorities or the consistency of their decisions. *Weltimmo* (C-230/14) and *irtschaftsakademie Schleswig-Holstein* (C-210/16), two cases decided under the Directive, made the shortcomings of this approach obvious. In cases of cross-border processing, several national authorities could potentially claim competence, leading to a fragmentation of enforcement and possibly to conflicting decisions.

In order to enhance predictability and ease the flow of personal data within the EU, the legislature sought to address the problem by concentrating competence in a single SA in most instances of cross-border data processing. For that purpose, Article 56 GDPR designates the SA of the main or single establishment of the controller or processor as the LSA and 'the sole interlocutor' of the company. Under the 'one-stop shop' procedure, it is in principle for the LSA to issue a decision (Article 60(7) GDPR). However, the other SAs concerned must be informed of the handling of the case by the SLA (Article 60(3) GDPR) and may object to its draft decision (Article 60(4) GDPR).

One of the interpretative issues raised by the newly introduced procedure is whether the one-stop shop, in addition to concentrating the competence to issue administrative decisions, also limits the competence of SAs other than the LSA to initiate judicial proceedings for infringements of the GDPR, a power explicitly conferred on SAs by Article 58(5) GDPR. This issue lies at the core of the first question submitted for preliminary ruling by the Brussels Court of Appeal in *Facebook Ireland*, a case where the Belgian SA was targeting the processing by Facebook of personal data of non-Facebook users by means of cookies, social plugins, and other technologies.

In a detailed and well-reasoned Opinion, Advocate General Bobek had suggested that the one-stop shop in principle deprives SAs other than the LSA of the power to go to court, but that there are exceptions to this rule, in particular where either the one-stop shop procedure is not applicable or where the LSA has remained inactive, provided the procedures laid down in the GDPR are complied with.

While the Advocate General had devoted the central part of the Opinion to demonstrating that the one-stop shop procedure affects the SAs' power to launch judicial actions for alleged infringements of the GDPR, the Court of Justice dealt with the issue more briefly and placed greater emphasis on the need to ensure effective protection of fundamental rights and on the duty of sincere cooperation that binds the SAs. However, in essence it followed the same approach.

On the one hand, the Court of Justice acknowledged that the one-stop shop procedure does limit the competence of SAs to bring legal proceedings, contrary to what the Belgian authority and some Member States' governments had argued. This conclusion is indeed rather straightforward, because if SAs retained an unrestrained competence to commence legal proceedings in cases of cross-border processing, they could circumvent the one-stop shop procedure simply by choosing judicial over administrative enforcement.

On the other hand, the Court recalled that the GDPR administrative enforcement system rests on 'sincere and effective cooperation' between the LSA and the other SAs concerned (paragraph 53). Thus, while the LSA is, as a rule, the sole authority entrusted with the power to issue decisions in cases of cross-border data processing, it must exercise that power in 'close cooperation' with the other SAs concerned (paragraph 63), taking into account their views as well as their objections.

Where the one-stop shop applies, only if the LSA fails to comply with its obligations may a different SA bring judicial proceedings for the enforcement of the GDPR, and only after resorting to the cooperation and consistency procedures laid down in the Regulation. This may occur in two cases. First, if an SA requests mutual assistance from the LSA and the latter does not provide the requested information, the SA concerned may adopt a provisional measure on the territory of its own Member State (Article 61(8) GDPR) and may request an urgent opinion or an urgent binding decision from the European Data Protection Board (EDPB) (Article 66(2) GDPR). Second, any SA may also request an opinion from the EDPB on 'any matter of general application or producing effects in more than one Member State' (Article 64(2) GDPR). The adoption of an opinion or a decision by the EDPB in either procedure and the

EDPB approval are preconditions for SAs other than the LSA to be able to bring judicial proceedings for the enforcement of the GDPR (paragraph 71).

The Court of Justice also answered most of the other questions submitted by the referring court, all conditional upon the answer given to the first question. First, where an SA has competence to bring judicial proceedings in cases of cross-border data processing, it is irrelevant whether the data controller has the main establishment or another establishment in the Member State concerned. Second, the SA may initiate proceedings against any of the controller's establishments, provided that the data processing is carried out 'in the context of the activities' of that establishment and thus the GDPR applies. Third, proceedings initiated before 25 May 2018, when the GDPR became applicable, may continue. In this case, Directive 95/46 remains applicable to infringements allegedly committed before that date. The SAC may continue the proceedings in respect of infringements allegedly committed after 5 May 2018 only if it has competence under the GDPR. Lastly, the Court held that Article 58(5) GDPR, stipulating the power of SAs to bring judicial proceedings, has direct effect. Unfortunately, the last question, whereby the referring court asked whether the outcome of judicial proceedings initiated by an SA would preclude the LSA from adopting an inconsistent decision, was considered hypothetical and thus declared inadmissible.

The *Facebook Ireland* judgment is an important reminder of the duty of sincere cooperation incumbent upon national authorities and the respective Member States, which must ensure the SAs are not only effectively independent, but also adequately staffed, trained and equipped to perform their tasks. The Court's insistence on the need for close cooperation between SAs is further in line with the legislature's softening of the one-stop shop mechanism by the strengthening of coordination procedures compared to the original Commission's proposal. Yet the very existence of this case – which has been pending since 2015 – is evidence of serious bottlenecks in the GDPR enforcement system and of difficulties of coordination between the SAs of different Member States. The Court attempted to strike a careful balance between preserving the effectiveness of the one-stop shop mechanism, which entails greater predictability for data controllers, and enhancing the speed and effectiveness of enforcement procedures. That neither predictability nor speed and effectiveness can probably be achieved is not the judiciary's fault. It is rather the consequence of a legal design that leaves the enforcement of uniform rules to national authorities despite the cross-border dimension of data processing.

Alberto Miglio is Assistant Professor of European Union Law at the University of Turin. He has recently edited the book European Union Law Enforcement: The Evolution of Sanctioning Powers (Routledge, 2021, with S. Montaldo and F. Costamagna).

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ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

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