

Calls for EU-wide data regulator grow louder

Robert Hart



More regulators have joined calls for a Europe-wide data watchdog to replace the one-stop-shop mechanism, while one lawyer has argued there would be “no downsides” to the creation of such an authority.

German newspaper Handelsblatt reported last week that the country’s federal data protection commissioner Ulrich Kelber labelled the Irish watchdog’s regulation of big tech “unbearable”, lamenting the lack of major enforcement actions since the GDPR came into force nearly two years ago.

The one-stop-shop mechanism of the GDPR means Ireland’s watchdog is responsible for overseeing many of the tech industry’s biggest players, including Google and Facebook.

Kelber said he is wondering “whether the one-stop-shop can remain as it is, whether it only requires minor corrections or whether you have to take a major radical step.” He said he would like to see a European data

protection agency that could manage large, cross-border cases and be beholden to European, rather than national, procedural laws. He said such an authority could oversee complex, cross-border tasks sent to it following a three-quarter majority vote by the members of the European Data Protection Board.

Marit Hansen, who heads up the data regulator in Schleswig-Holstein, told GDR she “shares the criticism” of her colleague Kelber. She said that when it comes to dominant internet companies, the enforcement of the GDPR “does not function smoothly”.

Hansen said that in complex cases, the one-stop-shop “may easily mean a denial-of-service attack on single data protection authorities” as each complaint must be handled appropriately. Hansen stressed that these are “structural problems” rather than being specific to any one data protection authority.

Hansen said a European authority would have the advantage of being “beyond any suspicion of benefiting a specific location” and reduce the incentives for political interference or influence on a regulator’s activities. Hansen said it would be important for such an authority to be “independent”, equipped with sufficient resources and to participate in the EDPB. She said it would enable the level playing field promised by the GDPR to be reached more quickly.

The newspaper reported that Kelber’s colleague, Johannes Caspar, who heads Hamburg’s data watchdog, holds similar views. Caspar criticised the “significant deficits” in GDPR enforcement and called for new regulations to bring authorities closer together in a European enforcement system.

Reactions

Tobias Neufeld at neufeld in Düsseldorf told GDR “you can only have advantages” if an EU-wide data watchdog like that proposed by Kelber was set up. “I can’t see any downsides,” he said. “I think it would be very powerful.”

Neufeld said the “success stories” of similar initiatives like Interpol and European competition regulation demonstrate the concept works in principle.

Philip Kempermann, a partner at Heuking Kühn Lüer Wojtek in Düsseldorf, told GDR that while a similar system does indeed function for European competition law cases can still take years. He said that while he feels a similar system could work for data protection, “the difficulty is to define the competences” and who may collect the fines levied.

Carlo Piltz, a partner at Reuschlaw Legal Consultants in Berlin, told GDR that he did not understand why – should the authority deem action urgent – the federal German commissioner had not initiated an urgency procedure

permitted by the GDPR. In August last year, Hamburg's regulator **triggered** the previously unused urgency provision with respect to Google's voice assistant activities.

David Dumont, a partner at Hunton Andrews Kurth in Brussels, argued that the one-stop-shop is working – pointing to a number of cases that have been closed – but that it “is a lengthy process”. An EU-wide regulator could solve some of the issues the one-stop-shop is facing, Dumont said, but would “require a major overhaul” of the GDPR. He said he felt it “too early” to be taking “such drastic measures... I think the one-stop-shop mechanism may become more effective over time.”

David Smith, a former deputy commissioner for the UK's Information Commissioner's Office and now an adviser at Allen & Overy in London, told GDR that while he found the prospect of a European data regulator to be an “interesting idea,” it's “too early” to dismiss the one-stop-shop. He said investigations take any commissioner a lot of time as they must be thorough and of a “legally defensive standard”.

Smith said he was a “bit taken aback” by Kelber's comments. “It's unusual ... undermining the united front which the data protection commissioners like to portray,” he said. “It's surprising.”

Smith said that while he can see the arguments in favour of a EU-wide regulator, many would be worried about the loss of authority of independent data protection authorities.

Lokke Moerel at Morrison & Foerster in Berlin told GDR that many agree with Kelber's criticism of the one-stop-shop owing to a “bottleneck in enforcement” in particular jurisdictions. She said that while Kelber's statement was “somewhat harsh”, she is pleased that the regulator addressed the issue “head on” so “we can have a proper debate on how to solve these bottlenecks.”

Moerel said she does not feel an EU-wide data protection authority would solve the enforcement issues of the GDPR. “There's just too much to enforce,” she said, adding that it would take years to get a new authority “functioning at capacity”. Moerel said a better solution would be to “mobilise the available capacity [of data protection authorities] in an optimal manner” using the current cooperation mechanism.

A spokesperson for the EDPB told GDR that it feels the one-stop-shop mechanism “works well in practice”. The spokesperson said that there have been 82 final decisions for cases in which the one-stop-shop mechanism was applied.

However, the spokesperson said it has “become clear over the past 20 months” that resolving cross-border cases is “time and resource intensive”. “We believe in the value of the one-stop-shop and aim for it to work better and more efficiently over time, and to use the possibilities it offers to their fullest extent.”

On the subject of an EU-wide data protection authority, the spokesperson said it was important to remember that the GDPR “is the result of extensive negotiations ... the legislators at the time opted for a solution whereby national supervisory authorities, which are independent and close to the citizens, have the powers and means to apply the law, including enforcement actions and cooperate closely with one another via the one-stop-shop mechanism.”

Ireland’s Data Protection Commission did not respond to a request for comment.