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Polish Confederation Lewiatan position paper on procedural rules on enforcement of the General Data Protection Regulation

I. Preliminary Points

a. Competence of the European Commission (EC)

• We have concerns that the scope of the proposals in the initiative appear to go beyond those matters the EC has legal competence to regulate.
• Article 61(9) GDPR grants the EC the power to adopt implementing acts to specify the format and procedures for mutual assistance between Supervisory Authorities (SAs) and the arrangements for the exchange of information between SAs and between SAs and the European Data Protection Board (EDPB) under Article 67 GDPR.
• Under the GDPR, the EC has no further power to adopt implementing or delegated acts.
• We presume that any procedural rules adopted by the EC as a result of this Initiative will fall strictly within the prescribed legal framework.
• Any rules that go beyond this framework could only be established through the ordinary legislative procedure, Article 16 TFEU.

b. Equality of Rights

• The GDPR provides for a comprehensively harmonised and conclusive 'regulatory framework' for the public enforcement of data subject rights by independent SAs (Article 51(ff) GDPR) with fixed competences, tasks, and powers.
- The GDPR also created a comprehensive system of cooperation and consistency. This system is organised according to the 'one-stop-shop' (OSS) principle, under which the Lead Supervisory Authority (LSA) of the controller's main establishment is the only point of contact competent for this controller's cross-border processing operations (Article 56(1) GDPR).
- In this context, the LSA must cooperate sincerely and effectively with other SAs (Article 63(ff) GDPR). This harmonised regulatory framework, like the substantive provisions of the GDPR, serves to achieve two equal goals of the GDPR, i.e. the same high level of protection of natural persons and the removal of obstacles to personal data flows within the Union, and an adequate balance of the data subject's and controller's fundamental rights,

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and where applicable, those of third parties in the Union at the administrative and procedural level. • We trust that the EC's proposals will not jeopardise the balanced system established by the GDPR for the benefit of both data subjects and controllers concerned.

- **The one-stop-shop mechanism** allows companies carrying out cross-border personal data processing to deal with one lead supervisory authority, and not 27, making it simpler for companies to do business in the EU and ensuring business certainty. Therefore, this mechanism **should be maintained and the consulted initiative should only reinforce procedural issues, which will enable more effective cooperation between authorities on cross-border issues.**
- Firstly, it is important to strengthen that the **practice of the application of the GDPR by different national authorities varies**. Observed activity of the local European data protection offices allows the conclusion that there are visible differences in GDPR interpretation and application across different countries. **Resignation from the OSS formula** (so introduction of multiple-shops formula) **would be more conducive to deepening the differences between member states rather than supporting further harmonisation**. It would also significantly **reduce the predictability** of the processes since these local differences will have to be addressed by companies carrying out cross-border personal data processing. For instance, in Germany there exists a visible expectation that e-commerce platforms should always make it possible to make a purchase without registration. This opinion is not shared commonly and the Polish office does not share that opinion. In case of an OSS formula the e-commerce platform registered in Poland offering e-shopping options to German clients can rely on the Polish Data Protection Office requirements. In case of multiple-shops formula such a company shall also follow the German opinion. In the case of multi-country platforms it is not possible to limit the potential range of clients, and in such a case the only solution granting any real supervision is to have one authority (one-stop).
- Secondly, it is also worth noting that introduction of the multiple-stop mechanism would open the complex issue of foreign law application and obligation for companies operating cross-border to monitor **27 national laws** and follow **27 interpretations of GDPR**. This would result in the very **complex legal situation** of such businesses.
- Therefore, maintenance of the one stop shop formula is essential. The **OSS mechanism allows companies to operate with greater legal certainty, predictability and doesn't add extra operating costs**. Legal solutions which are implemented in cross-border issues are by definition more complex than domestic ones, but in terms of collision law there is still a possibility to establish a direct legal link to a given governing law (e.g. choice of law,

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performance of the contract etc.) and to have control over it. This allows to **estimate risks, create processes, offer simple solutions for customers** - in general terms the whole process is predictable. One-stop formula enhances the above mentioned predictability.

- In addition, the multiple-shops formula is, in our view, unfavorable from the point of view of the e-commerce market, assuming the need to align the Administrator's conduct with the position of more than one supervisory authority. The preferred form is, of course, to be under the supervision of a single authority (one-stop). Especially, in terms of collision of laws, one-stop mechanism, would give a possibility to create a legal link between governing laws and establish simpler solutions for both - market and customers.
- Another advantage of the OSS formula is the possible cooperation with the local authorities that have the best knowledge on the interplay between GDPR and specific local provisions, including specific national context, legal traditions etc. This becomes even more important since GDPR provisions, including art. 6, often refer to national provisions which are often supervised by local offices or authorities.
- In the call for evidence the European Commission informed that the impact assessment will not be prepared for this initiative since "the initiative will not affect the rights of data subjects, the obligations of data controllers and processors, or the lawful grounds for processing personal data as set out by the GDPR". Therefore, **it is necessary to ensure that the planned initiative focuses on cooperation between national data protection authorities and does not contain provisions that will affect the data subjects, controllers or processors.**

c. Procedural clarification
As this Initiative responds inter alia to the list published by the EDPB on 10 October 2022 identifying procedural aspects of the cooperation between SAs in cross-border cases that could benefit from further harmonisation at EU level, we share below concerns based upon this list

d. We would like to point out that the sectoral approach to privacy or data protection rights included in the recently adopted legislation (e.g. the Digital Services Act) or still in the pipeline (e.g. the Directive on platform workers) imposes additional standards on certain groups of actors beyond those set out in the GDPR. This creates the risks of undermining the overall objectives of the GDPR and creating an uneven playing field between those entities targeted by the additional requirements and those not covered by them.

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II. Specifying Procedural Deadlines for Cooperation Between DPAs on Cross-Border Cases

- We understand that the EDPB is concerned that the absence of deadlines in the GDPR may cause undue delay and/or disparity in the finalisation of cases.
- The EDPB suggests that the introduction of deadlines for a number of procedural steps (both at national level and in the context of cross-border cooperation) would be useful to avoid undermining the credibility of enforcement and may help alleviate public concern from complainants that cases are being handled too slowly.
- The EDPB considers that deadlines should be specified, e.g. to start an investigations, to issue a draft decision, or to prepare a revised draft decision after relevant and reasoned objections are sent. The EDPB recognises that such deadlines should take into account the specificity and complexity of each case.
- The LSA would then have to provide justifications where it is not possible to meet these deadlines, and would face consequences for failing to comply with the newly established procedural deadlines.
- We submit that the length of time required to complete each procedural step depends on the complexity of the subject matter of the inquiry in question. We are concerned that providing for arbitrary and fixed deadlines for procedural steps which apply to all inquiries without discrimination, with no regard for the complexity of the subject matter, would likely operate to the detriment of the party under investigation and undermine the fair, properly reasoned, efficient, and consistent application of the GDPR.
- The commencement of an investigations, issuing of a draft decision, and preparation of a revised draft decision are complex procedural steps that must be made carefully, and should not be constrained by artificial deadlines.
- It is relevant to note in this regard that the exercise by the SA of their powers must be "subject to appropriate safeguards, including…due process set out in Union and Member State law in accordance with the Charter" (Article 58(4) GDPR), as is the exercise by the SAs of their power to impose administrative fines (Article 83(8) GDPR).
- It is unclear how such deadlines could be compatible with a case-by-case analysis taking into account the specificity and complexity of the investigation in question and the procedural safeguards provided for under the applicable national law, which must be respected in accordance with Articles 58(4) and 83(8).
- It is equally unclear how the fundamental rights of the party subject to investigation could be respected were such arbitrary deadlines to apply to all inquiries, regardless of the circumstances. We note in this regard that the

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EDPB has itself expressed concern and frustration in respect of the fixed deadlines imposed by the Article 65 process and queries why it would seek to impose such deadlines on the SAs.

- We further submit that the imposition of arbitrary procedural deadlines will result in rushed decisions and, as such, is likely to result in more decisions being challenged by the parties under investigation and subsequently overturned by the courts.
- If there are concerns about the ability of the SA to progress investigations in a timely manner, while also affording the subject of the inquiry due process, this should be addressed by ensuring that the SAs have the necessary human and financial resources to perform their tasks in a timely manner, and not by curtailing the procedural safeguards to which controllers are entitled. This is particularly so in light of the magnitude of the administrative fines which may be imposed under the GDPR.
- We would like to point out that the EDPB's proposed binding procedural deadlines could jeopardize the parties' right to receive a fair and equitable decision. The complexity of the cases and the number of possible variables at both the evidence-gathering and subsumption stages preclude the use of a rigid deadline with adequate safeguards for the parties. Estimated and controlled risks, stability and predictability of processes, are mostly desired effects of OSS solution.
  It is possible to introduce deadlines that function similarly to those used in administrative proceedings, i.e. providing for the possibility of extension, while the change will not reduce the time for processing cases, but only impose additional procedural obligations.

III. Providing Tools to DPAs to Promote Cooperation Early in the Investigation Process

- The EDPB suggests that there is a need to clarify that the amicable settlement achieved in the OSS context on a specific case also requires cooperation on the legal questions behind the individual case (either by demonstrating it as an isolated case or by explaining what followup actions are intended to be taken regarding the breach of GDPR provisions by the controller).
- While we are generally supportive of clarifying the framework for amicable settlements, especially in Member States which currently do not have a legal framework for this, any such initiative should ensure that settlements are not burdened by too far-reaching coordination obligations.
- Otherwise, this could unreasonably deprive the LSA of its prerogatives and could have the effect of turning settlements, which are intended to be quick and simple solutions in the interests of both data subjects and controllers into long and more complex processes. It could also deter the amicable

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settlement of disputes, an outcome which would clearly be contrary to the objectives of the GDPR.

- We stress the importance of not distorting the enforcement system in cross-border cases established by the GDPR through procedural rules. While ensuring efficient and harmonious enforcement between SAs in such cases is an important objective, it is essential to preserve the LSAs independence and prerogatives established by the GDPR.
- The LSA has sole competence to determine the scope of an investigation and to investigate and find the facts. Neither the EDPB nor the CSAs are competent to engage in fact-finding. This is because, under the GDPR, the LSA is responsible for conducting an investigation with utmost respect for the rights of the defence of the party under investigation, while the EDPBs role in the dispute resolution process is limited to determining whether the CSAs objections are relevant and reasoned and, if so, to resolve any dispute between the CSAs in respect of the matters the subject of those objections.

IV. Clarifying the Position of Complainants in the Procedural Steps

- According to the EDPB, clarifying the position of complainants in the procedural steps, including the possibility to make their views known, requires that the EC adopt procedural rules to clarify (i) exactly what constitutes the minimum scope of a SAs file, and (ii) the scope of access that should be granted to the parties.
- We do not object to complainants being appropriately involved in the procedure. We agree, in principle, that it would be useful to have harmonised rules on what constitutes the minimum scope of the file, i.e. the required type of documents to be included.
- However, regarding the scope of potential access, in light of several situations where confidential information of on-going investigations was leaked to the media by high-profile complainants, we firmly consider that no procedural rule should be adopted in this respect without being accompanied by strict rules on confidentiality and appropriate sanctions for any breach of those confidentiality obligations.
- It is essential to avoid leaks that could undermine the integrity of the decision-making process based on the external pressures those leaks can give rise to. We note that the EDPB also considers it would be beneficial to specify rules on confidentiality.
- Respondents in the proceedings should always be able to identify the documents (and elements they contain), which should be treated as confidential and how this should limit the sharing of such documents or elements with other parties in the proceedings.

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- Given the sensitivity of cross-border investigations, it is crucial that recipients of such information received as part of the access to the file be prohibited from disclosing such information to anyone who is not a party to the proceedings or using the information, they obtain for any purpose other than the conduct of the inquiry. Failure to comply with this prohibition should be accompanied by deterrent sanctions.

V. Streamlining the way Parties Under Investigation are Heard During the Procedure

• We also agree that it is important to emphasize the issue of hearing the parties before the EDPB, both in terms of factual and legal claims. Failure to do so undermines the point, as well as the EDPB's ability to issue a proper decision. In conclusion, we fully share the position of the paper.

- We note that the scope of the right to be heard in the context of an SAs investigation varies depending on national rules. In some Member States, the parties under investigation can only make submissions on factual points.

• We insist that, to give full effect to the right to be heard enshrined in Article 41 of the Charter of Fundamental Rights of the EU (CFREU), it is necessary that this right covers both the factual and legal elements raised in the investigation and provides parties with the opportunity to make written and/or oral submissions, as appropriate.

• We further note that the EDPB's recommendation regarding the parties' right to be heard in the context of cross-border investigations is limited to hearings before the SAs. We are concerned that the insistence that the right to be heard be afforded only by national SAs undermines the importance of the right to be heard before the EDPB.

• In circumstances where the EDPB is conferred with the power in cross-border investigations to resolve disputes between the CSAs in respect of those matters that are the subject of relevant and reasoned objections, it is inconceivable that the party under investigations cannot be heard directly by the EDPB.

• It has been the experience of some members that in certain inquiries that the absence of a right to be heard before the EDPB can lead to the EDPB making binding decisions based on an inaccurate or incomplete understanding of the facts, which could have been remedied by the parties.

• For example, parties under investigation can make submissions to the LSA in respect of CSA objections before the LSA finalises its draft decision. However, this is no opportunity to comment on the LSAs final draft decision before it goes to the EDPB and no opportunity to comment on the EDPBs analysis and assessment of those objections. It is frequently the case that the EDPB adopts an entirely new position on the applicable legal principles, which has never been put to the parties and in respect of which the parties have not been afforded any

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right to be heard. • The EDPB should grant the party under investigation a right to be heard in writing and orally and an opportunity to respond to the positions the EDPB intends to adopt in the procedure leading to its binding decision. This requires that the EDPB proactively discloses the material in its files (facts, legal characterisations of those facts, and evidence on which the EDPB relies), together with its preliminary position, to the party under investigation.

• While the EDPB is required to make its decision on the basis of facts as found by the LSA, the right to be heard by the EDPB must apply to both the legal characterisation of those facts by the EDPB and the legal positions the EDPB intends to adopt.

• The obligation to grant the party under investigation a right to be heard applies with particular force where the EDPB adopts positions on the facts or law that have not been canvassed in the procedure at national level. For example, some EDPB binding decisions relied on a study that it never shared with the party under investigation.

• In addition, an oral hearing is necessary because EDPB decisions can lead to significant administrative fines and/or significant detrimental effects on the position or activities of the party under investigation. An oral hearing would allow the party under investigation to eliminate possible uncertainties and inaccuracies with respect to the facts and to address any concerns raised by the EDPB in respect of the legal position adopted by the party under investigation.

• The party under investigation's right to be heard directly by the EDPB in the Article 65 GDPR proceedings should take place before the EDPB adopts its decision. In practice this means that the party under investigation should have the right to be provided with the provisional views of the EDPB and be afforded an opportunity to respond to these views before the EDPB adopts its decision.

• We believe that the harmonisation of rules on the right to be heard before SAs would be ineffective if it were not complemented by a systematic right to be heard before the EDPB.

• The example of merger control procedures under Regulation (EC) 139/2004 shows that it is possible to reconcile the need for authorities to act speedily and diligently with the need to provide concerned parties (in this instance controllers), with effective rights to a fair hearing within short but sufficient time limits. VI. Clarifying how Information is to be Shared Between the Investigating DPA and the Concerned Supervisory Authorities - Including in the Steps Leading to a Binding Opinion of the EDPB

• We understand that the EDPB recommends that the EC provide uniform and consistent rules for identifying cases where further investigation is not warranted. The EDPB also highlights practical difficulties with identifying the scope of the investigation.

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• We believe that such rules are likely to impinge on the LSAs independence and margin of discretion to assess the elements of each case. The EC should refrain from adopting such rules, or at the very least give due consideration to the LSAs margin of discretion and powers.
• The EDPB also recommends that the EC adopt procedural rules to ensure the harmonisation of LSAs obligation to cooperate and share information with CSAs in the early stages of the investigation. It suggests that the EC should prescribe the timing, contents and modalities of information sharing to a strict degree.
• We are concerned that such rules will only contribute to increasing the already significant pressure on LSAs. Such rules, combined with the numerous deadlines sought to be imposed by the EDPB, will have a constraining and counterproductive effect on the workload of the LSA.
• We further submit that any such rules would also have to address the necessity to preserve the confidentiality of inquiry documents, so as to preserve the integrity of the decision-making process.

Yours Sincerely

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