

Ms Andrea Jelinek,
Chair of the European Data Protection Board

Brussels, 9 April 2021

Dear Chair Andrea Jelinek,

On 24 February 2021, POLITICO Europe published an investigative article on the data practices of Amazon, the multinational technology company based in Seattle.¹ The article documents testimonies from former employees pointing to several violations of obligations imposed on controllers under the General Data Protection Regulation (GDPR). These matters must be investigated urgently by the relevant data protection authorities.

Based on information provided in this article, however, it is unclear who these relevant authorities may be. It appears that Amazon has designated its entity in Luxembourg as its main establishment in the European Union. This means that the National Commission for Data Protection (CNPD) would be the lead supervisory authority for cross-border activities. Yet information advanced in the article regarding the management structure within Amazon and the fact that the US-based entity maintains control over decisions regarding the handling of data casts doubt as to whether Amazon Luxembourg can be considered as a “main establishment” for the company.

In 2018, the EDPB adopted revised guidelines to help identify the main establishment for controllers and the subsequent lead authority.² In your guidance, you indicate that to determine where a main establishment is, “it is firstly necessary to identify the central administration of the data controller in the EU”. You then note that the approach implied in the GDPR is that the central administration in the EU is the place where “decisions about the purposes and means of the processing of personal data are taken and this place has the power to have such decisions implemented.” Furthermore, you add that recital 36 of the GDPR provides important clarification on how to identify a main establishment in cases where it is not the place of central administration of a controller in the EU. It involves identifying “where the effective and real exercise of management activities, that determine the main decisions as to the purposes and means of processing through stable arrangements, takes place.” As a result, a main establishment does not necessarily have to be the place of central administration of a controller in the EU but it should always be the place where “real” and “effective” management decisions related to data processing are taking place.

¹ Vincent Manancourt, *Millions of people’s data is at risk’ — Amazon insiders sound alarm over security*, February 2021. POLITICO Europe. <https://www.politico.eu/article/data-at-risk-amazon-security-threat/>

² Working Party 29, *Guidelines on the Lead Supervisory Authority*, October 2017. Adopted by the EDPB during its first plenary meeting. https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611235

Additionally, in 2019 the EDPB adopted its opinion on the competence of a supervisory authority in case of a change in circumstances relating to the main or single establishment.³ You note that “the disappearance of the main or single establishment mid-procedure (either because the main establishment has been moved out of the EEA territory or because it has been disbanded) will divest the controller to benefit from the one-stop-shop.” Importantly, this opinion clarifies that if no main establishment in the EU can be identified for a controller, then all data protection authorities (DPAs) would be competent to investigate cases.

Access Now calls on the EDPB to confirm this guidance and the criteria used to identify a controller’s main establishment under the GDPR, to assess how these criteria apply in the case of Amazon, and to clarify when questions and objections can be raised regarding the identification of a main establishment:

- Does the EDPB confirm, in accordance with your guidelines on the Lead Supervisory Authority, that the main establishment of a controller in the European Union - whether or not it is the place of central administration - should be “where the effective and real exercise of management activities, that determine the main decisions as to the purposes and means of processing through stable arrangements, takes place”?
- In your guidelines, you provide for a set of questions to assess factors that “are useful for determining the location of a controller’s main establishment” in cases where it is not the location of its central administration in the EU. You note that “other factors may be relevant depending on the controller or processing activity in question and that additional questions may be asked to the controller to prove where its main establishment is located”. Does the EDPB have a list of agreed additional factors? If yes, could you please publish this information? If not, would you consider developing such guidance to ensure a harmonised application across the EU?
- The data controller itself can indicate where its main establishment is. However the data protection authorities may verify if the designated entity fulfills the criteria to qualify as a main establishment. In addition, opinion 8/2019 clarifies that in cases where there is no main establishment for a controller in the EU, the one-stop-shop would not apply and all DPAs would be able to investigate and resolve cases. On this basis, do you confirm that it is possible to challenge the designation of main establishment and to conclude that a data controller has no main establishment in the EU if the criteria set forth under the GDPR and your guidelines are not met?
- In case of disagreement between members of the EDPB regarding the designation of an entity as a main establishment, could you confirm that a DPA can express its views on the matter as soon as a case is lodged in the Internal Market Information system (IMI), in order

³ EDPB, *Opinion 8/2019 on the competence of a supervisory authority in case of a change in circumstances relating to the main or single establishment*, Adopted in 2019. https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_opinion_201908_changeofmainorsingleestablishment_en.pdf

to address this issue as early as possible in a case? In such cases, what would be the process for parties in a case to be heard on that matter?

Disagreement on the designation of a main establishment would not necessarily be related to the process whereby DPAs may express conflicting views in determining which authority may be competent once a main establishment has been designated as foreseen under Article 65 (1) (b) GDPR. It would instead question the existence of a main establishment *at all* in the EU.

- Based on the information available in the article from POLITICO Europe which suggests that Amazon's self-designated main establishment does not appear to be able to exercise “real” and “effective” management activities related to data processing activities, do you consider that the Amazon entity in Luxembourg can qualify as a main establishment?

To ensure the correct and consistent application of the GDPR, we invite the EDPB to clarify this matter urgently.

We look forward to hearing back from you and remain at your disposal for any questions you may have.

Best regards,

Estelle Massé.

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