

THE COALITION OF EUROPEAN ORGANISATIONS ON DATA PROTECTION

Date: 5th May 2015

To: H.E. Ms. Ilze JUHANSONE, Ambassador Extraordinary and Plenipotentiary, Permanent Representative

Cc: Ms. Baiba JUGANE-LINTERE, Counsellor; Ms. Jekaterina Macuka, Head of Division

Subject: Impact of the GDPR's joint liability provision on the European industry

Dear Ambassador,

We are writing to you concerning the General Data Protection Regulation (GDPR) and the important issue of joint liability of controllers and processors, currently a subject of debate amongst Member States.

First of all, please allow us to stress the central importance of the protection of privacy in the Digital Economy. We see tremendous opportunities ahead of us, particularly for the non-ICT sectors of the European economy. Developments such as Industry 4.0 and the Internet of Things are examples where European industries have the opportunity to gain a competitive advantage on a global scale. Our hope is that the GDPR will support trust in the Digital Single Market and encourage European companies to create and offer innovative and competitive products and services both within and outside Europe.

This brings us to our aforementioned concern regarding Article 77 on joint liability. We hope that you will carefully consider this issue and conclude, as we have, that the current regime under the 95/46 Directive that separates the responsibilities of controllers and processor is still the right choice for Europe, namely because:

- **Processors should continue to assume direct liability, as is the case under the 95/46 Directive, when operating outside the instructions of a controller.** This merits reiteration. There is a misconception that processors that oppose joint liability take this stance to avoid responsibility. This is simply not true. In situations where a processor operates outside the contract with a controller, the processor is automatically a controller and assumes direct responsibility, in addition to the penalties laid down in the processing contract.
- **The EU Data processing market is not broken and hence no controller is “forced” to choose a cost minimizing non-compliant processor.** The market provides ample choices for controllers to choose compliant data processors and hence the GDPR should continue to provide controllers with the right incentives, as today under the 95/46 Directive.
- **DPA's suggest more awareness is needed rather than change of roles and responsibilities:** Joint liability in this case tries to fix a nonexistent problem. The recent decisions by European Data Protection Authorities have clarified^[1] for both controllers and processors the requirements controllers need to put on processors under the present 95/46 Directive. This shows that the measure needed is increased awareness rather than a change of roles and responsibilities.
- **The 95/46 Directive is explicit that controllers are responsible towards the data subject.** As the controller is the one who collects the data in the first place, it is logical that this entity should bear the responsibility to define the appropriate legal basis, the purpose of the processing and ensuring that if such processing is outsourced to another party (the processor), appropriate contractual safeguards are put in place.

^[1] For example see: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140402_microsoft.pdf

- The user is not necessarily aware, and should not be required to try to have a full understanding of how exactly the processing of its data is handled. From his/her perspective, the entity he/she entrusted the data to should bear full responsibility to ensure that it is appropriately protected and handled according to the purpose and legal ground it was collected for.
 - Furthermore, the processor only disposes the information entrusted on it by the controller. Joint liability introduces excessive information costs and information asymmetry for the processor at a prohibitive cost.
 - The processor should be responsible if it does not respect its contractual obligation or its legal obligations. However, the user should not be put in a potentially impossible situation to having to understand the dynamics between the controller/processor, understand what went wrong, who is responsible, etc. As mentioned above, the controllers should ensure to choose a processor that is able to handle the data entrusted on the controller with care and in case of a problem bears its responsibility vis-a-vis the controller. There is enough choice on the market to be able to achieve this.
- **Offering processing solutions is different from offering defective products causing harm.** A database service or other processing service is intrinsically neutral and has no inherent safety risk. It all depends on the usage and as such the instructions given by the controller. It is important to bear in mind that the controller is the only party that has the full information on the intended purpose, use and what has been communicated to the data subject. The processing may be perfectly fit for one usage purpose but inappropriate for another.
 - **Joint liability clashes with the data minimisation principle. A processor would need to have the same information as the controller in order to be able to determine if it can offer the service and accept exposure of joint liability.** As per the above and also in line with the data minimisation principle the processor does not have full information on the processing activity, only residual information, i.e. what the controller chooses to communicate and share with it. This also means requesting more information than the controller may want to provide exposes the controller to information disclosure that it may treat as trade secrets, increasing the risk of cybersecurity threats for all European based data processing.

For the reasons above, we believe the joint liability provision will negatively impact the European Digital Economy. Roles and responsibilities under the current 95/46 Directive have overwhelmingly stood the test of time and so the existing principles regulating roles, responsibilities and liabilities in the data processing value chain should be maintained in GDPR.

Please find attached an Annex where the Coalition suggests amendments to Article 77, which we believe provide a viable solution to the current proposed text.

Many thanks



Rene Summer

Coalition Spokesperson

ABOUT THE COALITION

Our Coalition is made up of eighteen European companies, from SMEs to Global Multinationals and non-profit organisations operating in a variety of sectors on a national, regional and global scale. With an aggregate turnover (2013) of over € 121 billion and some 607,000 employees worldwide, our footprint allows us to bring growth, progress and jobs to the EU economy. Our membership includes...

... an online auction house...

... a productivity solutions provider of compressors, vacuum solutions, construction and mining equipment...

... a non-profit organisation dedicated to collecting money to prevent and combat child cancer diseases...

... a global leader in household appliances

... two providers of communications technology and services...

... a designer, engineer, manufacturer and distributor of outdoor power products...

... an investment company...

... an e-commerce company providing payment services for online storefronts...

... an engineering group in tooling, materials technology, mining and construction ...

... an enterprise software corporation...

... a global provider of heavy trucks and buses, engines and services...

... a provider of assured, secure cloud services to the UK public sector...

... a global provider of renewable solutions in packaging, biomaterials, wood and paper...

... a university specialising in programmes on the digital economy...

... a provider of business software and services to more than 340 000 business in the Nordics...

... a producer and distributor of trucks, buses and construction equipment...

... a multiplatform digital entertainment company.

Our businesses are profoundly different but deeply united by the need for clear roles and responsibilities, open cross-border data flows, balanced codified sanction guide lines, effective one stop shop and absence of overly prescriptive rules as fundamental conditions for long-term growth, competitiveness and prosperity, for both us and the economies in which we operate.

For further information please visit us at <http://europeandatacoalition.eu/> or contact us:

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ANNEX: COALITION AMENDMENTS TO ART. 77

Commission	European Data Coalition Amendments to Commission Proposal
<p align="center"><i>Article 77</i></p> <p align="center"><i>Right to compensation and liability</i></p> <p>1. Any person who has suffered damage as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.</p> <p>2. Where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage.</p> <p>3. The controller or the processor may be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.</p>	<p align="center"><i>Article 77</i></p> <p align="center"><i>Right to compensation and liability</i></p> <p>1. Any person <u>data subject</u> who has suffered damage as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.</p> <p>2. Where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable <u>with the other</u> for the entire amount of the damage <u>to the extent that the joint controllers' respective liability has not been determined in the written arrangement referred to in Article 24.</u></p> <p>3. The controller or the processor may <u>shall</u> be exempted from this liability, in whole or in part, if the controller or the processor proves <u>that the controller and the processors used by the controller</u> are not responsible for the event giving rise to the damage.</p>