

THE COALITION OF EUROPEAN ORGANISATIONS ON DATA PROTECTION

Date: 21 April 2015

To: First Vice-President Frans Timmermans

Cc: Vice-President Andrus Ansip; Commissioner Věra Jourová; Commissioner Günther Oettinger

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

Dear Mr. Timmermans,

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 in Council. Before addressing this issue, please allow us to stress the central importance of protection of privacy in the Digital Economy. We see tremendous opportunities ahead of us, particularly for non-ICT sectors. Developments such as Industry 4.0, the Internet of Things and alike are great examples where European industries start from a pole position. Our hope is that GDPR will support trust in the Digital Single Market and encourage European industries to create and offer innovative and competitive products and services at home in Europe and outside the EU.

This brings us to our aforementioned concern regarding Article 77 on joint liability. We hope you will consider very carefully 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:

- **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 choice for controllers to choose compliant data processors and hence GDPR should continue to provide controllers with the right incentives, as under the 95/46 Directive. 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 Directive. This shows that the measure needed is increased awareness rather than a change of roles and responsibilities.
- **Today, the 95/46 Directive is explicit that controllers are responsible towards the data subject.** In any situation where there is uncertainty about the responsible controller, the question is whether the controller has secured an appropriate legal basis for processing and sound contractual clauses with the processor in a transparent way. Introducing joint liability in such a situation does not address the root cause of the problem. Furthermore, joint liability introduces excessive information costs and information asymmetry for the processor at a prohibitive cost. In this case, joint liability is not targeted enough and imposes unnecessary and excessive transaction costs for the EU processing market with a negative impact on growth and jobs.
- **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 as 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.

For the reasons above, we believe the joint liability provision will negatively impact the European Digital Economy. Many Coalition members have waited years for a compelling and robust cost-benefit analysis

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

supporting the case of joint-liability. Unfortunately this has not happened and solid arguments in opposition continue to be disregarded. We hope to see the principles of better regulation in action and therefore welcome a thorough cost benefit analysis to ensure that serious reflection precedes the introduction of a massive intervention that will fundamentally change the direction and conditions for European data processing.

In conclusion, it is indisputable that the modernization of the 95/46 Directive requires us to review the roles and responsibilities of processors, and that the outcome of this review must protect the citizens' rights. It shall furthermore ensure sound conditions for the creation of new services to the benefit of industry and consumers. 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.

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...

- ... the leading Central and Eastern European e-commerce company...*
- ... 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...*
- ... the leading university in technology and digital arts programmes...*
- ... 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...*
- ... the leading company in advanced mobile services.*

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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