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European Data Protection Board
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Consultation on Guideline 07/2020

Dear members of the European Data Protection Board!

I would like to participate as an individual in your consultation on Guideline 07/2020. My feedback reflects my personal views based on my experience as END for the European Commission and more than 10 years working for an international active company.

1. **WP 169**

I welcome Guideline 07/2020 since it stipulates many facts and gives good advice, especially with regard to joint controllers. Its "predecessor", **WP 169**, is most likely one of the most important and best in the history of Working Party 29. WP 169 explains in an almost perfect way the history and development of the key terms of European data protection concept. This is the key to understanding the autonomous European concepts.¹ Having said this, I am convinced that it would be a pity to "simply" replace WP 169 as proposed² by the new Guideline. A declaration that still recognizes WP 169 as - partially - valid would be very useful.

2. **"determines"**

The aim of the concept of the controller is to allocate responsibility³ which means that there may not exist "non-responsible" processing of person data. "Determines" therefore tends to mean "**being responsible for**" data processing which, particular in case of joint controllers only, might be the case for **one or few processing activities**. This aspect could perhaps be emphasized more strongly than it is currently formulated in section 55.

3. **Processing within companies belonging to a group**

Some clarifications concerning various situations processing personal data in a **group of companies**, which I have specified below, would be more than welcome.

¹ Guideline 07/2020 section 13

² Guideline 07/2020 section 4

³ Guideline 07/2020 section 12

- (1) Group companies are individual controllers when they let process personal data of their employees by one group companies which is specialized e.g. on HR administration topics. In this case the latter is **processor for other group companies**.⁴
- (2) All **group companies are joint controllers** if they manage a pool of potential candidates who wish to work for the group and who agree that their CV and other relevant information can be seen and used by group companies in focus of the candidates. This changes when a potential candidate applies for a concrete job in a single group company which acts then as controller.
- (3) When stipulated in a Controller-Processor Agreement (CPA) processors can propose new or additional sub-processor which are regarded as accepted sub-processor when controller does not object (*general authorization approach*).⁵ Similar to this situation, one group company (a controller) could be authorized by other group companies (controllers) to act for them in a legally binding manner, e.g. to enter into CPAs or to give their processors instructions in a harmonized manner (**power of attorney approach**).

4. Joint controllers and connected vehicles

When "processing is not be possible without both parties participation in the sense that the processing by each party is inseparable, i.e. inextricably linked,"⁶ then vehicle manufacturers and freight forwarders are **joint controllers** if, during a tour, data are permanently generated, transmitted and stored in a cloud to which both parties have access. Since "Guidelines 1/2020 on processing personal data in the context of connected vehicles and mobility related applications" does not specify in detail that joint control often exists in connection with connected vehicles, it would be useful to explain this in Directive 07/2020 by means of an example.

It is no secret that there are many joint controllers who are reluctant to accept a joint controller constellation because of the joint liability. Whether this fear is justified or not will not be discussed here. However, at least among vehicle manufacturers, this fear could be allayed, considering that **Article 11 GDPR** might be applicable to them and that the scope of joint liability is limited to joint processing activities.

5. Controller-Processor Agreements

A CPA should be a "written" contract.⁷ This requirement had been understood - at least in Germany - to mean that the handwritten signature was a decisive element of the contract. It cannot therefore be stressed enough that "in writing" should be understood as "in documented form", similar to the wording of Article 17(4) of Directive 95/46/EC. The principle of liability of Article 5(2) GDPR requires nothing more and nothing less.

The existence of the "**national security clause**"⁸ in Article 28 (3) (a) GDPR was often not considered as a real requirement by data controllers and processors. This has changed with the "Schrems II" judgment of the ECJ. The standard contractual clauses provide for legal consequences if there is a risk that the application of essential principles of European data protection cannot be guaranteed. Such clear instructions cannot be expected. However, some enlightening recommendations would certainly be welcome for CPA constellations within the EU.

Kind regards



⁴ Guideline 07/2020 section 75

⁵ Guideline 07/2020 section 151

⁶ Guideline 07/2020 section 53

⁷ Guideline 07/2020 section 101

⁸ Guideline 07/2020 section 118

