

European Data Protection Board

FEEDBACK

Rue Wiertz 60

B-1047 Brussels

[edpb@edpb.europa.eu](mailto:edpb@edpb.europa.eu)

15/09/2020

Dear Sir(s),

### **Guidelines 07/2020 on the concepts of controller and processor in the GDPR**

As a privacy practitioner (and a data subject) I'd like to draw your attention to GDPR Article 4 (13) and (19), the concepts of *the place of central administration* as well as *controlling* and *controlled undertakings within groups of undertakings* that seem to go totally unnoticed in the current draft Guidelines.

While I agree with the basic notions about applicable law (items 12 and 13 of the draft Guidelines) and distinctions between controllers and processors, it's worth noting that

- a) When drafted GDPR was specifically clarified<sup>1</sup> to reflect the concerns brought up by European Data Protection Supervisor (EDPS) in connection of groups of undertakings and is currently providing a number of Recitals and Articles<sup>2</sup> supporting the possibility of group level controllership.
- b) All legal entities are subject to a number of statutory duties starting from company, book keeping and labour laws, which may involve and even necessitate certain amount of processing of personal data. Should such duties automatically constitute a "control stemming from legal provisions" as implied by the current draft Guidelines, this would invariably place the controllership at a legal entity level and therefore effectively undermine not just GDPR's status as *lex specialis*<sup>3</sup> and amendments effected as per EDPS's comments, but also reducing the administrative burden, increasing legal certainty and enhancing data controllers' responsibility as some of the

---

<sup>1</sup> See the Opinion of the European Data Protection Supervisor of 7 March 2012, items 79, 106, 107, 208 and 273; Position of the European Parliament adopted at first reading on 12 March 2014 (P7\_TC1-COD(2012)0011), Article 4 (13); Position (EU) No 6/2016 of the Council at the first reading, Recital 150, Article 4 (13) and 83 (4) – (6).

<sup>2</sup> See e.g. GDPR Recitals 22, 37 and 150 providing the definition of a group, distinguishing between controlling and controlled undertakings and implying that subsidiaries could be establishments of a controller instead being self-governing controllers or processors themselves, as well as Articles 4 (13), 4 (19), 37 (2) and 83 (4) – (6) defining the place of central administration (of a group) as main establishment, enabling appointment of a data protection officer, as one of the key accountability related obligation of a controller, on a "consolidated" basis as well as making a group liable for breaches committed by a subsidiary.

<sup>3</sup> The controller role is assigned by general or sector specific laws and not according to the functional and autonomous concepts defined by GDPR.

key objectives of GDPR<sup>4</sup> by complicating and possibly even multiplying the governance arrangements needed to demonstrate compliance within large group of undertakings, re-exposing them to variations in the various member state laws and allowing them to “box” e.g. some of their higher risk processing activities in smaller undertakings in order to limit their liabilities towards data subjects and authorities.

- c) In some cases – as exemplified by Article 109 of Directive 2013/36/EU – parent undertakings are obliged to ensure that their policies and procedures designed to meet those statutory duties are applied across the group in uniform manner. The subsidiaries may be maintained also for some specific purpose, or product<sup>5</sup>, that the parent company is either legally unable or unwilling to cater, and/or the subsidiaries do not *de facto* have a possibility *not to utilise* the facilities provided by the parent company. Neither way are the subsidiaries governed fully on “sub-consolidated” basis, and the central administration at the parent company assumes the overall decision making power, which should be the *functional* hallmark of controllership.

I remain at your disposal should you need any further information or clarifications.

---

<sup>4</sup> See COM(2010) 609 final, Chapter 2.2.

<sup>5</sup> See e.g. the collective investment schemes operated under Directive 2009/65/EC.