

Comments on the Guidelines 7/2020 on the concepts of controller and processor in the GDPR

From: Digital Legal, s.r.o, Privacy & Technology Law Firm, Bratislava
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Dear All,

We would like to take this opportunity to comment on the Board's Guidelines 7/2020 on the concepts of controller and processor in the GDPR (the "**Guidelines**"). We very much welcome the Guidelines and would like to comment only on joint controllers' part, also in relation to other guidelines 8/2020 on social media targeting.

According to the Guidelines:

*"In addition, when the entities do not have the same purpose for the processing, joint controllership may also, in light of the CJEU case law, be established when the entities involved pursue **purposes which are closely linked or complementary.**"*

We would like to clarify what CJEU's case-law says that joint controllers can have slightly different joint purposes, because *Wirtschaftsakademie* and *Fashion ID* clearly say exactly the opposite.

In paragraph 74 in *Fashion ID*, the CJEU says:

*"Accordingly, as the Advocate General noted, in essence, in point 101 of his Opinion, it appears that a natural or legal person may be a controller, within the meaning of Article 2(d) of Directive 95/46, jointly with others **only in respect of operations involving the processing of personal data for which it determines jointly the purposes and means. By contrast, and without prejudice to any civil liability provided for in national law in this respect, that natural or legal person cannot be considered to be a controller, within the meaning of that provision, in the context of operations that precede or are subsequent in the overall chain of processing for which that person does not determine either the purposes or the means.**"*

In paragraph 76 in *Fashion ID*, the CJEU says:

*"By contrast, in the light of that information, it seems, at the outset, **impossible that Fashion ID determines the purposes and means of subsequent operations involving the processing of personal data carried out by Facebook Ireland after their transmission to the latter, meaning that Fashion ID cannot be considered to be a controller in respect of those operations within the meaning of Article 2(d).**"*

Therefore, anything other than the envisioned function of the plugin is outside the jointly determined purposes and means as is confirmed in section 4.5 of the guidelines 08/2020. The joint processing operation here was the same. It is true that in *Fashion ID* the CJEU mentions that joint controllers can have their own economic interests:

*"those processing operations are performed in **the economic interests of both Fashion ID and Facebook Ireland, for whom the fact that it can use those data for its own commercial purposes is the consideration for the benefit to Fashion ID.**"*

It is also true that these economic interests can be different. But this does not automatically mean there are slightly different purposes of processing. The CJEU confirms this in paragraph 38 of *Wirtschaftsakademie* judgement where it mentions same processing to describe joint controllers:

“In any event, Directive 95/46 does not, where several operators are jointly responsible for the same processing, require each of them to have access to the personal data concerned.”

Also, the Guidelines mention:

*“Likewise, as noted by the CJEU in *Wirtschaftsakademie*, the processing of personal data through statistics of visitors to a fan page is intended to enable Facebook to improve its system of advertising transmitted via its network and to enable the administrator of the fan page to obtain statistics to manage the promotion of its activity.²² Each entity in this case pursues its own interest but both parties participate in the determination of the purposes (and means) of the processing of personal data as regards the visitors to the fan page.²³”*

This is not what the CJEU said in *Wirtschaftsakademie*. CJEU was explaining here that one cookie is used for both advertising and statistics. Statistics were the joint processing operation carried out by Facebook and Facebook fan page operator. In this respect, the Guidelines misinterpret the existing CJEU’s case-law. The relevant paragraph reads:

“That processing of personal data is intended in particular to enable Facebook to improve its system of advertising transmitted via its network, and to enable the fan page administrator to obtain statistics produced by Facebook from the visits to the page, for the purposes of managing the promotion of its activity, making it aware, for example, of the profile of the visitors who like its fan page or use its applications, so that it can offer them more relevant content and develop functionalities likely to be of more interest to them.”

It is a very dangerous concept that joint controllers could be jointly responsible for slightly different purposes because most of the basic data protection principles in Article 5 GDPR are linked to the purpose, and therefore different measures need to be put in place by each joint controller to ensure compliance with them, leaving nothing joint if the purpose can be different. Joint controllers determine joint purposes as the word ‘joint’ suggest which means the same purposes and that is confirmed by the CJEU’s case-law. The Board should not develop new concepts to describe old problems.

We hope our comments will be useful for the Board when adopting the Guidelines. I/we hereby consent to the publication of personal data contained in this document.

Kind regards,

On behalf of **Digital Legal, s.r.o.**

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