SUOMEN PERIMISTOIMISTOJEN LIITTO

To the European Data Protection Board

Re: Comments on the Guidelines 07/2020 on the concepts of controller and processor in the GDPR

General notions

First, the registered Association of Finnish Collection Agencies finds the Guidelines very welcome and helpful, when it comes to adding understanding and awareness of data protection matters, as well as creating harmony and adding trust on the market.

Our main concerns relate to the requirements posed on the content of Data Processing Agreements ("DPA") in the Guidelines, namely, how heavy the content of a DPA needs to be.

- In general, if the criteria for satisfactory DPA content appears heavy for the market operators, as they understand it from the EDPB guidelines, it may lead to market practice where DPAs do meet such criteria per se but also go further, becoming *overly detailed or otherwise excessive*. For example, one should be careful when suggesting that the contractual parties should have formal processes in place for certain things, as it may lead to unnecessary formalities elsewhere too. The experience from the time when companies were preparing to the GDPR becoming applicable law suggests that overreactions do occur.
- Excessively heavy or detailed DPA content put small and medium-sized enterprises in a difficult position, not only when they lack capacity to meet such requirements, but also when the requirements posed by larger companies (e.g. several clients) conflict with each other, call for sub-processors' commitment to such requirements, or both. One must remember to consider the chain of operators, controllers and processors, as a whole, not forgetting their imbalance of contractual power.
- The risk that all market operators face is that the cost of DPA negotiations as well as later ongoing bureaucracy is not in balance with the value of the business relationship. One should bear in mind that the need for a DPA comes from the law. Therefore, elements of a formality cannot be fully avoided. Similarly, while contractual parties have to arrange their relationship and negotiate a variety of things, the need for negotiations stemming from a party's exaggerated contractual requirements is undesired.
- Another type of risk is that the DPAs will be signed more blindly, for the sake of "getting the deal", thus compromising a genuine commitment to data protection or understanding what has been committed to.
- While standard contractual clauses adopted by national supervisory authorities (Article 28(8) GDPR) are definitely useful, the number and extent of national variations should be kept minimal, and rather seek not only harmonization but standardization. This would allow companies to build their data protection practices with greater confidence and prevent superfluous negotiations. Of course, this is not to compromise that the controller and the processor may still choose to negotiate their own contract.

Specific notions

- Paragraph 24: It would be good to clarify, whether an entity can be both a controller and a processor for the same set of data, at the same time, at least by presumption. For example, if a debtor has debts towards several creditors and a collection agency is managing respective collection cases in its collection system, collection data entries overlap. At the same time, law may pose a preservation period on the collection agency regarding the collection records, while the collection agency might also use the collection records for their own statistical purposes. Thus, the question is whether one could claim that the collection agency is processing personal data as a processor in a situation like this. For the sake of clarity, the members of the registered Association of Finnish Collection Agencies consider themselves controllers of the collection records.

- Paragraph 42: According to the paragraph, "It is not necessary that the controller actually has access to the data that is being processed". It would be good to clarify, whether this is also the case with processors. In other words, if an entity receives an assignment to process personal data on a controller's behalf but outsources the processing entirely, can such entity still be considered a processor?

- Paragraph 93: For example here, the concerns expressed in the **General notions** above arise.

- Paragraphs 102-105: As stated in the **General notions** above, such SCCs are very welcome, provided that they are as standardized as possible. It is not desired that numerous member states of the EU as well as companies on the market introduce their own edition of clauses.

- Paragraph 107: It remains unclear, if the referral to imbalance of contractual power also suggests that larger companies should pay attention to their terms and practices being objectively appropriate. If yes, this should be communicated more firmly.

- Paragraph 109: It should be clarified, what the referred "chance to specify details regarding the processing" means in practice. At the same time, one should bear in mind the risk of overly heavy and detailed DPA provisions, as stated in **General notions** above.

- Paragraph 111: It remains somewhat unclear and calls for clarification, how *subject-matter* differs from *purpose*, or how much they overlap, perhaps case-by-case.

- Paragraph 112: It would be good to clarify, what the referred "other relevant information may need to be included" means in practice, are they so-called boilerplate terms or something more specific, or both.

In Helsinki, on the 19th of October 2020

the registered Association of Finnish Collection Agencies