

Feedback and comments on the Guidelines 07/2020 on the concepts of controller and processor in the GDPR

General

As a general remark on the EDPB and its predecessor WP29's approach to issuing opinions on the interpretation of GDPR, I wish to present my criticism on the fact that EDPB (and WP29) has a habit of drawing interpretations that are not backed up by the articles or recitals of the GDPR. And when interpretations of the regulation are presented, which do not have a clear backing in the text of the regulation, the board's arguments often seem to be reduced to logical and rational arguments. Instead, the board should attempt to provide legal merits for its arguments, meaning it should draw support from the case law of the EUCJ or the ECHR. And if not available, the EDPB should venture further into the foundations of jurisprudence, and the principles available on the basis of EU law, information law and fundamental rights. Just because an argument is logically sound doesn't make it legally credible. And the EDPB's opinions would be of far greater value if they

Also, EDPB appears not to be clear in drawing a line on the limit of its own mandate when it comes to suggesting interpretations of the GDPR which ultimately fall on fields of laws other than data protection. The draft guideline 07/2020 is particularly sensitive in this respect, because it deals a lot with contracts. And making interpretations on how contracts should be drafted, negotiated and complied with almost always falls under the field of contract law, and not GDPR.

Specific comments on the Guideline 07/2020

How and whether data processing agreement changes can or can not be notified is a matter of contract law, and not GDPR

According to the draft guideline, paragraph 107, the EDPB appears to be of the opinion that *"any proposed modification, by a processor, of data processing agreements included in standard terms and conditions should be directly notified to and approved by the controller. The mere publication of these modifications on the processor's website is not compliant with Article 28."*

I wish to draw the EDPB's attention to the fact that GDPR does not contain anything that backs up an interpretation such as this one. In other words, there's nothing in the regulation that supports the EDPB claim on how contracts could or could not be modified by notification to one or multiple parties.

The question on whether and how contracts can be amended, especially those based on standard terms and conditions, is a matter of contract law and not GDPR. And since contract law is something which has not been harmonized on the EU level, it would especially problematic to make a claim such as the one cited above.

Making interpretations of contract law is something which does not fall under the EDPB's mandate according to art 70 of GDPR. Therefore, the above quoted citation should be deleted altogether.

It is not clear what “clear and plain language” means in a legal document such as a contract, and there’s no such requirement stipulated under recital 79

EDPB makes a claim, under paragraph 172, that joint controller tasks should be stated in a “clear and plain language”. The EDPB goes on to refer to recital 79 to back up its argument. I wish to note here that nothing in recital 79 contains any statement as to how contractual language should be drafted. It can be generally assumed that clear and understandable language is preferable. However, contracts as legal documents will always contain language that may be perceived as complex or difficult to understand for a layman, or even a lawyer not experienced in contract law. And this often happens because sometimes certain expressions have certain meanings under different jurisdictions’ contract laws. And while that may result in a conflict with the aim of achieving “clear and plain language” there is nevertheless a legally valid reason for drafting such awkward language, from a layman’s point of view. Here again we observe the challenge of the EDPB attempting to venture into the domain of contract law.

Respectfully,

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