

To: European Data Protection Board

Vienna, 19.10.2020

Subject: noyb's comments on 07/2020 on the concepts of controllers and processor in the GDPR

Dear EDPB Members,

noyb welcomes the opportunity to submit comments on the Guidelines 7/2020 published for consultation. We very much welcome the clarification that the Guidelines will bring and support the EDPB's general approach in these Guidelines.

While we fill it is not our core expertise to make submissions on matters of controller-processor relationships, we would nevertheless like to submit the following observations for the consideration of the EDPB:

- **Concept of controllers, legal persons and commercial activities**

When reading the Guidelines it seems striking to us that - while highlighting that a controller may be a "natural person" - all examples and Guidelines are dealing with business to business or government relationships. The Guidelines currently leave the reader with the impression that natural persons are solely playing a role as data subjects.

Nothing could be further from reality: Just like the example on page 27 of the Guidelines that deals with the use of cloud services by a municipality, private users equally use cloud providers for their purposes, run their own servers and webpages or use their email accounts. Especially many open source projects and attempts to have users keep their own data locally or in a secure cloud environment aim to regain the factual and legal power of users over their personal data.

Ever since the CJEU judgement in C-101/01 *Lindqvist* it is clear that private individuals may in many cases be a "controller" themselves – often even when processing their own data. The GDPR has explicitly not taken a different position on this issue, despite this point being (often rightfully) criticized.

In relation to fears that private users may be exposed to the duties of the GDPR, we want to highlight that the "*household exemption*" in Article 2(2)(c) GDPR, interpreted in light of Recital 18, would usually exempt the users from the duties of the GDPR, while still allowing them to instruct processors under Article 29 GDPR.

The EDPB has already found for controllers that do not fall under the territorial scope of the GDPR, that their EU processors nevertheless falls under the scope of the GDPR nevertheless.¹ Equally, Recital 18 highlights that processors of private users that act as controllers under the household exemption are still bound by the GDPR.

While a mere data subject is limited to the options e.g. in Articles 7 or 12 to 22 GDPR, a data subject that is also “controlling” his/her personal data (for example on a local or rented server) has the right to instruct the processor to perform processing operations in any way shape or form that he chooses. In the same way, users of locally installed software or users of cloud providers that offer services to (private and commercial) controllers must be treated equally by the law.

We therefore want to encourage the EDPB to ensure that the Guidelines reflect the much more dynamic reality of private users.

- **Power imbalance between Controller and Processor**

In relation to § 107 of the Guidelines we want to highlight that *noyb* has come across more and more “*standard contracts*” under Article 28(3) GDPR that undermined the natural roles of the controller and processor as foreseen by the GDPR in reality.

Some contracts even prohibit the controllers’ rights to instruct the processor to process data in certain ways or undermine the right of the controller to conduct an audit.² It seems necessary to us, that the EDPB guidelines highlight that any freedom of contract has its limits where the contractual arrangement is *de facto* undermining the GDPR.

Another problem that results from extreme power imbalance between processors and controllers are processors that simply refuse to sign a contract under Article 28(3) GDPR. We therefore welcome that the Guidelines highlight in § 101 that the processor has an equal obligation to enter into a contract.

¹ EDPB Guidelines 3/2018 on the territorial scope of the GDPR, pages 11 and 12.

² See e.g. the agreement by Amazon Web Services in Section 2 or 11: https://d1.awsstatic.com/legal/aws-gdpr/AWS_GDPR_DPA.pdf