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From:	German delegation
To:	Working Group on Information Exchange and Data Protection (DAPIX)
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Chapter VIII

I.   Introduction

The definition and concepts of joint and several liability in the Data Protection Regulation will be of great importance in the practice of data processing. For this reason and in order to achieve legal certainty for data subjects, controllers and processors, clear and understandable rules are essential.

DE would like to thank the PRES for the changes made to Art. 77 in the new document 7722/15. DE generally supports the new wording of Art. 77, which in parts is based on the DE proposal made in the DAPIX of March 31st. However DE does not support the alternative wording of Art. 77 para.1.

Based on the proposal of LVA-PRES, DE proposes the following wording of Art. 77:

Art 77

Right to compensation and liability

1.   Any person who has suffered *material or immaterial* damage as a result of a processing operation which is not in compliance with this Regulation shall have the right to receive compensation from the controller *(…)* for the damage suffered. *A processor shall be liable for violations of this Regulation only where he has not complied with obligations of this Regulation specifically directed to processors or acted outside or contrary to lawful instructions of the controller.*

2.   Where more than one controller or processor or a controller and processor are ~~involved in the processing which gives rise to the damage~~ *liable to the same damage pursuant to the conditions laid down in paragraph 1*, each controller or processor shall, be jointly and severally liable for the entire amount of the damage. This is without prejudice to recourse claims between controllers and/or processors.

3.   The controller or the processor **shall** be exempted from ~~this~~ liability, in whole or in part, if the controller or the processor proves ~~they are not responsible for the event giving rise to the damage~~ *that the damage has not been caused by his fault*.

4.   Court proceedings for exercising the right to receive compensation shall be brought before the courts ~~with jurisdiction for compensation claims~~ *competent* under national law of the Member State referred to in paragraph 2 of Article 75.

II.   **Core Elements of the Proposal**

This text has the following three core elements:

(1) The controller is primarily liable for damages suffered as a consequence of data protection violations. The controller has the opportunity to exempt itself from liability.

(2) A processor shall be liable for violations of this Regulation only where it has not complied with obligations of this Regulation specifically directed to it or acted outside or contrary to lawful instructions of the controller. The processor has the opportunity to exempt itself from this liability.

(3) Only in a case where the conditions in (1) and (2) are fulfilled, the controller and the processor shall be jointly and severally liable for the damage. In this case it is important to emphasise that liability follows fault, meaning that a party is only liable if he/she has intentionally or negligently acted contrary to his duties laid down in this Regulation.

In our view this result is fair and proportionate: As far as controllers are concerned, they should not have the possibility to escape their responsibilities by outsourcing them to a processor. In other words: If the controller decides to use a third party (processor) to perform a contract with a data subject, this does not free the controller from liability.

As far as processors are concerned, they should not be liable for faults of the controller that they are not to blame for. Therefore they are only jointly and severally liable where the conditions of Art. 77 par. 1 (2) are fulfilled.

In addition, a modification of the current situation is sensible for two reasons: (1) Under the existing 1995 Directive courts assume that the processor is liable when operating outside the instructions of the controller; (2) in contrast to the Directive, the new Regulation entails documentation, security and notification obligations (Art.28, Art.30, Art.31) which apply specifically and directly to the processor.

The DE proposal tries therefore to find a compromise away from pure joint and several liability by restricting joint and several liability to certain cases.

In addition, in order to avoid misunderstandings, DE would wish to delete the addition "the data subject may sue" based on HU suggestion in Art.77 para.2.

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