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From: German delegation
To: JHA Counsellors (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.

In the light of the discussions in the last DAPIX meeting, DE would like to update the changes it proposed on 21 April to Article 77 (cf. 8150/15).

DE proposes the following wording of Article 77, changes compared to 8150/15 are highlighted in grey:

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 **or the processor** for the damage suffered.
2. **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.
3. The controller or the processor **shall** be exempted from ~~this~~ liability, (...) 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. Where more than one controller or processor or a controller and a processor are ~~involved in the processing which gives rise to the damage~~ **liable for the same damage pursuant to the conditions laid down in paragraphs 1 to 3**, 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.
5. 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 can exempt himself from liability only if he proves that the damage has not been caused by his fault. In this case there is no joint-and-several liability. However if the damage has only partially been caused by the controller's fault, paragraph 4 applies and the controller may sue the processor for possible recourse claims.
- (2) A processor shall be liable for violations of this Regulation only where he has not complied with obligations of this Regulation specifically directed to him or acted outside or contrary to lawful instructions of the controller. The processor can exempt himself from liability if he proves that the damage has not been caused by his fault. In this case there is no joint-and-several liability. If the damage has only partially been caused by the processor's fault, paragraph 4 applies and the processor may sue the controller for possible recourse claims.
- (3) Only in a case where the conditions in (1) and (2) are met, the controller and the processor shall be jointly and severally liable for the damage. In the proceedings against the controller and/or processor the extent to which each of them has caused the damage by his fault is not relevant, as in the case of joint liability the data subject can claim the whole amount from each party. Only in proceedings concerning a recourse claim between the controller and the processor the degree of liability of each party needs to be determined by the judge. 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 the proposed rules on liability are fair and proportionate: As far as controllers are concerned, they should not have the possibility to escape liability by outsourcing their duties 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 exempt the controller from his liability.

As far as processors are concerned, they should not be liable for data protection violations only by the controller. Therefore they are only jointly and severally liable where the conditions of Article 77 para (2) are met.

In addition, a modification of the current situation is sensible for two reasons: (1) In order to take into account the existing case law concerning the 1995 Directive according to which 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 therefore aims at a compromise by restricting joint and several liability of the controller and the processor to a limited scope of cases.
