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

Version 2.0

Adopted on 07 July 2021

Version history

Version 2.0	7 July 2021	Adoption of the Guidelines after public consultation
Version 1.0	2 September 2020	Adoption of the Guidelines for public consultation

EXECUTIVE SUMMARY

The concepts of controller, joint controller and processor play a crucial role in the application of the General Data Protection Regulation 2016/679 (GDPR), since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice. The precise meaning of these concepts and the criteria for their correct interpretation must be sufficiently clear and consistent throughout the European Economic Area (EEA).

The concepts of controller, joint controller and processor are *functional* concepts in that they aim to allocate responsibilities according to the actual roles of the parties and *autonomous* concepts in the sense that they should be interpreted mainly according to EU data protection law.

Controller

In principle, there is no limitation as to the type of entity that may assume the role of a controller but in practice it is usually the organisation as such, and not an individual within the organisation (such as the CEO, an employee or a member of the board), that acts as a controller.

A controller is a body that *decides* certain key elements of the processing. Controllership may be defined by law or may stem from an analysis of the factual elements or circumstances of the case. Certain processing activities can be seen as naturally attached to the role of an entity (an employer to employees, a publisher to subscribers or an association to its members). In many cases, the terms of a contract can help identify the controller, although they are not decisive in all circumstances.

A controller determines the purposes and means of the processing, i.e. the *why* and *how* of the processing. The controller must decide on both purposes and means. However, some more practical aspects of implementation ("non-essential means") can be left to the processor. It is not necessary that the controller actually has access to the data that is being processed to be qualified as a controller.

Joint controllers

The qualification as joint controllers may arise where more than one actor is involved in the processing. The GDPR introduces specific rules for joint controllers and sets a framework to govern their relationship. The overarching criterion for joint controllership to exist is the joint participation of two or more entities in the determination of the purposes and means of a processing operation. Joint participation can take the form of a *common decision* taken by two or more entities or result from *converging decisions* by two or more entities, where the decisions complement each other and are necessary for the processing to take place in such a manner that they have a tangible impact on the determination of the purposes and means of the processing. An important criterion is that the processing would not be possible without both parties' participation in the sense that the processing by each party is inseparable, i.e. inextricably linked. The joint participation needs to include the determination of purposes on the one hand and the determination of means on the other hand.

Processor

A processor is a natural or legal person, public authority, agency or another body, which processes personal data on behalf of the controller. Two basic conditions for qualifying as processor exist: that it is a separate entity in relation to the controller and that it processes personal data on the controller's behalf.

The processor must not process the data otherwise than according to the controller's instructions. The controller's instructions may still leave a certain degree of discretion about how to best serve the

controller's interests, allowing the processor to choose the most suitable technical and organisational means. A processor infringes the GDPR, however, if it goes beyond the controller's instructions and starts to determine its own purposes and means of the processing. The processor will then be considered a controller in respect of that processing and may be subject to sanctions for going beyond the controller's instructions.

Relationship between controller and processor

A controller must only use processors providing sufficient guarantees to implement appropriate technical and organisational measures so that the processing meets the requirements of the GDPR. Elements to be taken into account could be the processor's expert knowledge (e.g. technical expertise with regard to security measures and data breaches); the processor's reliability; the processor's resources and the processor's adherence to an approved code of conduct or certification mechanism.

Any processing of personal data by a processor must be governed by a contract or other legal act which shall be in writing, including in electronic form, and be binding. The controller and the processor may choose to negotiate their own contract including all the compulsory elements or to rely, in whole or in part, on standard contractual clauses.

The GDPR lists the elements that have to be set out in the processing agreement. The processing agreement should not, however, merely restate the provisions of the GDPR; rather, it should include more specific, concrete information as to how the requirements will be met and which level of security is required for the personal data processing that is the object of the processing agreement.

Relationship among joint controllers

Joint controllers shall in a transparent manner determine and agree on their respective responsibilities for compliance with the obligations under the GDPR. The determination of their respective responsibilities must in particular regard the exercise of data subjects' rights and the duties to provide information. In addition to this, the distribution of responsibilities should cover other controller obligations such as regarding the general data protection principles, legal basis, security measures, data breach notification obligation, data protection impact assessments, the use of processors, third country transfers and contacts with data subjects and supervisory authorities.

Each joint controller has the duty to ensure that they have a legal basis for the processing and that the data are not further processed in a manner that is incompatible with the purposes for which they were originally collected by the controller sharing the data.

The legal form of the arrangement among joint controllers is not specified by the GDPR. For the sake of legal certainty, and in order to provide for transparency and accountability, the EDPB recommends that such arrangement be made in the form of a binding document such as a contract or other legal binding act under EU or Member State law to which the controllers are subject.

The arrangement shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects and the essence of the arrangement shall be made available to the data subject.

Irrespective of the terms of the arrangement, data subjects may exercise their rights in respect of and against each of the joint controllers. Supervisory authorities are not bound by the terms of the arrangement whether on the issue of the qualification of the parties as joint controllers or the designated contact point.

TABLE OF CONTENTS

The European Data Protection Board

Having regard to Article 70 (1e) of the Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, (hereinafter "GDPR" or "the Regulation"),

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018[1],

Having regard to Article 12 and Article 22 of its Rules of Procedure,

Whereas the preparatory work of these guidelines involved the collection of inputs from stakeholders, both in writing and at a stakeholder event, in order to identify the most pressing challenges;

HAS ADOPTED THE FOLLOWING GUIDELINES

INTRODUCTION

1. This document seeks to provide guidance on the concepts of controller and processor based on the GDPR's rules on definitions in Article 4 and the provisions on obligations in chapter IV. The main aim is to clarify the meaning of the concepts and to clarify the different roles and the distribution of responsibilities between these actors.

2. The concept of controller and its interaction with the concept of processor play a crucial role in the application of the GDPR, since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice. The GDPR explicitly introduces the accountability principle, i.e. the controller shall be responsible for, and be able to demonstrate compliance with, the principles relating to processing of personal data in Article 5. Moreover, the GDPR also introduces more specific rules on the use of processor(s) and some of the provisions on personal data processing are addressed - not only to controllers - but also to processors.

3. It is therefore of paramount importance that the precise meaning of these concepts and the criteria for their correct use are sufficiently clear and shared throughout the European Union and the EEA.

4. The Article 29 Working Party issued guidance on the concepts of controller/processor in its opinion 1/2010 (WP169)[2] in order to provide clarifications and concrete examples with respect to these concepts. Since the entry into force of the GDPR, many questions have been raised regarding to what extent the GDPR brought changes to the concepts of controller and processor and their respective roles. Questions were raised in particular to the substance and implications of the concept of joint controllership (e.g. as laid down in Article 26 GDPR) and to the specific obligations for processors laid down in Chapter IV (e.g. as laid down in Article 28 GDPR). Therefore, and as the EDPB recognizes that the concrete application of the concepts needs further clarification, the EDPB now deems it necessary

[1] References to "Member States" made throughout this document should be understood as references to "EEA Member States".
[2] Article 29 Working Party Opinion 1/2010 on the concepts of "controller" and "processor" adopted on 16 February 2010, 264/10/EN, WP 169.

to give more developed and specific guidance in order to ensure a consistent and harmonised approach throughout the EU and the EEA. The present guidelines replace the previous opinion of Working Party 29 on these concepts (WP169).

5. In part I, these guidelines discuss the definitions of the different concepts of controller, joint controllers, processor and third party/recipient. In part II, further guidance is provided on the consequences that are attached to the different roles of controller, joint controllers and processor.

PART I – CONCEPTS

1 GENERAL OBSERVATIONS

6. The GDPR, in Article 5(2), explicitly introduces the accountability principle which means that:

   - the controller shall be *responsible for the compliance* with the principles set out in Article 5(1) GDPR; and that
   - the controller shall be able to *demonstrate compliance* with the principles set out in Article 5(1) GDPR.

   This principle has been described in an opinion by the Article 29 WP [3] and will not be discussed in detail here.

7. The aim of incorporating the accountability principle into the GDPR and making it a central principle was to emphasize that data controllers must implement appropriate and effective measures and be able to demonstrate compliance. [4]

8. The accountability principle has been further elaborated in Article 24, which states that the controller shall implement appropriate technical and organisational measures to ensure and to be able **to demonstrate** that processing is performed in accordance with the GDPR. Such measures shall be reviewed and updated if necessary. The accountability principle is also reflected in Article 28, which lays down the controller's obligations when engaging a processor.

9. The accountability principle is directly addressed to the controller. However, some of the more specific rules are addressed to both controllers and processors, such as the rules on supervisory authorities' powers in Article 58. Both controllers and processors can be fined in case of non-compliance with the obligations of the GDPR that are relevant to them and both are directly accountable towards supervisory authorities by virtue of the obligations to maintain and provide appropriate documentation upon request, co-operate in case of an investigation and abide by administrative orders. At the same time, it should be recalled that processors must always comply with, and act only on, instructions from the controller.

10. The accountability principle, together with the other, more specific rules on how to comply with the GDPR and the distribution of responsibility, therefore makes it necessary to define the different roles of several actors involved in a personal data processing activity.

---

[3] Article 29 Working Party Opinion 3/2010 on the principle of accountability adopted on 13 July 2010, 00062/10/EN WP 173.

[4] Recital 74 GDPR.

11. A general observation regarding the concepts of controller and processor in the GDPR is that they have not changed compared to the Directive 95/46/EC and that overall, the criteria for how to attribute the different roles remain the same.

12. The concepts of controller and processor are *functional* concepts: they aim to allocate responsibilities according to the actual roles of the parties.[5]This implies that the legal status of an actor as either a "controller" or a "processor" must in principle be determined by its actual activities in a specific situation, rather than upon the formal designation of an actor as being either a "controller" or "processor" (e.g. in a contract).[6] This means that the allocation of the roles usually should stem from an analysis of the factual elements or circumstances of the case and as such is not negotiable.

13. The concepts of controller and processor are also *autonomous* concepts in the sense that, although external legal sources can help identifying who is a controller, it should be interpreted mainly according to EU data protection law. The concept of controller should not be prejudiced by other - sometimes colliding or overlapping - concepts in other fields of law, such as the creator or the right holder in intellectual property rights or competition law.

14. As the underlying objective of attributing the role of controller is to ensure accountability and the effective and comprehensive protection of the personal data, the concept of 'controller' should be interpreted in a sufficiently broad way, favouring as much as possible effective and complete protection of data subjects[7] so as to ensure full effect of EU data protection law, to avoid lacunae and to prevent possible circumvention of the rules, while at the same time not diminishing the role of the processor.

2 DEFINITION OF CONTROLLER

2.1 Definition of controller

15. A controller is defined by Article 4(7) GDPR as

> *"**the natural or legal person, public authority, agency or other body** which, **alone or jointly with others**, **determines** the **purposes and means** of the **processing of personal data**; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be **provided for by Union or Member State law**".*

16. The definition of controller contains five main building blocks, which will be analysed separately for the purposes of these Guidelines. They are the following:

- "the natural or legal person, public authority, agency or other body"

[5] Article 29 Working Party Opinion 1/2010, WP 169, p. 9.

[6] See also the Opinion of Advocate General Mengozzi, in *Jehovah's witnesses*, C-25/17, ECLI:EU:C:2018:57, paragraph 68 ("*For the purposes of determining the 'controller' within the meaning of Directive 95/46, I am inclined to consider [….] that excessive formalism would make it easy to circumvent the provisions of Directive 95/46 and that, consequently, it is necessary to rely upon a more factual than formal analysis […].*")

[7] CJEU, Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, judgment of 13 May 2014, paragraph 34; CJEU, Case C-210/16, Wirtschaftsakademie Schleswig-Holstein, judgment of 5 June 2018, paragraph 28; CJEU, Case C-40/17, Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV, judgment of 29 July 2019, paragraph 66.

- "determines"
- "alone or jointly with others"
- "the purposes and means"
- "of the processing of personal data".

2.1.1 "Natural or legal person, public authority, agency or other body"

17. The first building block relates to the type of entity that can be a controller. Under the GDPR, a controller can be "*a natural or legal person, public authority, agency or other body*". This means that, in principle, there is no limitation as to the type of entity that may assume the role of a controller. It might be an organisation, but it might also be an individual or a group of individuals.[8] In practice, however, it is usually the organisation as such, and not an individual within the organisation (such as the CEO, an employee or a member of the board), that acts as a controller within the meaning of the GDPR. As far as data processing within a company group is concerned, special attention must be paid to the question of whether an establishment may be acting as a controller or processor, e.g. when processing data on behalf of the parent company.

18. Sometimes, companies and public bodies appoint a specific person responsible for the implementation of the processing activity. Even if a specific natural person is appointed to ensure compliance with data protection rules, this person will not be the controller but will act on behalf of the legal entity (company or public body) which will be ultimately responsible in case of infringement of the rules in its capacity as controller. In the same vein, even if a particular department or unit of an organisation has operational responsibility for ensuring compliance for certain processing activity, it does not mean that this department or unit (rather than the organisation as a whole) becomes the controller.

Example:

The marketing department of Company ABC launches an advertising campaign to promote ABC's products. The marketing department decides the nature of campaign, the means to be used (e-mail, social media ...), which customers to target and what data to use in order to make the campaign as successful as possible. Even if the marketing department acted with considerable independence, Company ABC will in principle be considered as the controller seeing as the advertising campaign is launched by the company and takes place within the realm of its business activities and for its purposes.

19. In principle, any processing of personal data by employees which takes place within the realm of activities of an organisation may be presumed to take place under that organisation's control.[9] In exceptional circumstances, however, it may occur that an employee decides to use personal data for his or her own purposes, thereby unlawfully exceeding the authority that he or she was given. (e.g. to set up his own company or similar). It is therefore the organisation's duty as controller to make sure

[8] For example, in its Judgment in *Jehovah's witnesses*, C-25/17, ECLI:EU:C:2018:551, paragraph 75, the CJEU considered that a religious community of Jehovah's witnesses acted as a controller, jointly with its individual members. Judgment in *Jehovah's witnesses*, C-25/17, ECLI:EU:C:2018:551, paragraph 75.

[9] Employees who have access to personal data within an organisation are generally not considered as "controllers" or "processors", but rather as "persons acting under the authority of the controller or of the processor" within the meaning of article 29 GDPR.

that there are adequate technical and organizational measures, including e.g. training and information to employees, to ensure compliance with the GDPR. [10]

2.1.2 "Determines"

20. The second building block of the controller concept refers to the controller's *influence* over the processing, by virtue of an *exercise of decision-making power*. A controller is a body that *decides* certain key elements about the processing. This controllership may be defined by law or may stem from an analysis of the factual elements or circumstances of the case. One should look at the specific processing operations in question and understand who determines them, by first considering the following questions: "*why is this processing taking place*?" and "*who decided that the processing should take place for a particular purpose?"*.

Circumstances giving rise to control

21. Having said that the concept of controller is a functional concept, it is therefore based on a **factual rather than a formal analysis**. In order to facilitate the analysis, certain rules of thumb and practical presumptions may be used to guide and simplify the process. In most situations, the "determining body" can be easily and clearly identified by reference to certain legal and/or factual circumstances from which "influence" normally can be inferred, unless other elements indicate the contrary. Two categories of situations can be distinguished: (1) control stemming from *legal provisions*; and (2) control stemming from *factual influence*.

1) Control stemming from legal provisions

22. There are cases where control can be inferred from explicit legal competence e.g., when the controller or the specific criteria for its nomination are designated by national or Union law. Indeed, Article 4(7) states that "*where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.*" While Article 4(7) only refers to "the controller" in the singular form, the EDPB considers that it may also be possible for Union or Member State law to designate more than one controller, possibly even as joint controllers.

23. Where the controller has been specifically identified by law this will be determinative for establishing who is acting as controller. This presupposes that the legislator has designated as controller the entity that has a genuine ability to exercise control. In some countries, the national law provides that public authorities are responsible for processing of personal data within the context of their duties.

24. However, more commonly, rather than directly appointing the controller or setting out the criteria for its appointment, the law will establish a task or impose a duty on someone to collect and process certain data. In those cases, the purpose of the processing is often determined by the law. The controller will normally be the one designated by law for the realization of this purpose, this public task. For example, this would be the case where an entity which is entrusted with certain public tasks (e.g., social security) which cannot be fulfilled without collecting at least some personal data, sets up a database or register in order to fulfil those public tasks. In that case, the law, albeit indirectly, sets out who is the controller. More generally, the law may also impose an obligation on either public or private entities to retain or provide certain data. These entities would then normally be considered as controllers with respect to the processing that is necessary to execute this obligation.

[10] Article 24(1) GDPR.

Example: Legal provisions

The national law in Country A lays down an obligation for municipal authorities to provide social welfare benefits such as monthly payments to citizens depending on their financial situation. In order to carry out these payments, the municipal authority must collect and process data about the applicants' financial circumstances. Even though the law does not explicitly state that the municipal authorities are controllers for this processing, this follows implicitly from the legal provisions.

2) Control stemming from factual influence

25. In the absence of control arising from legal provisions, the qualification of a party as controller must be established on the basis of an assessment of the factual circumstances surrounding the processing. All relevant factual circumstances must be taken into account in order to reach a conclusion as to whether a particular entity exercises a determinative influence with respect to the processing of personal data in question.

26. The need for factual assessment also means that the role of a controller does not stem from the nature of an entity that is processing data but from its concrete activities in a specific context. In other words, the same entity may act at the same time as controller for certain processing operations and as processor for others, and the qualification as controller or processor has to be assessed with regard to each specific data processing activity.

27. In practice, certain processing activities can be considered as naturally attached to the role or activities of an entity ultimately entailing responsibilities from a data protection point of view. This can be due to more general legal provisions or an established legal practice in different areas (civil law, commercial law, labor law etc.). In this case, existing traditional roles and professional expertise that normally imply a certain responsibility will help in identifying the controller, for example: an employer in relation to processing personal data about his employees, a publisher processing personal data about its subscribers, or an association processing personal data about its members or contributors. When an entity engages in processing of personal data as part of its interactions with its own employees, customers or members, it will generally be the one who determines the purpose and means around the processing and is therefore acting as a controller within the meaning of the GDPR.

Example: Law firms

The company ABC hires a law firm to represent it in a dispute. In order to carry out this task, the law firm needs to process personal data related to the case. The reasons for processing the personal data is the law firm's mandate to represent the client in court. This mandate however is not specifically targeted to personal data processing. The law firm acts with a significant degree of independence, for example in deciding what information to use and how to use it, and there are no instructions from the client company regarding the personal data processing. The processing that the law firm carries out in order to fulfil the task as legal representative for the company is therefore linked to the functional role of the law firm so that it is to be regarded as controller for this processing.

Example: Telecom operators[11]:

[11] The EDPB considers that this example, previously included in Recital (47) of Directive 95/46/EC, remains relevant also under the GDPR.

Providing an electronic communications service such as an electronic mail service involves processing of personal data. The provider of such services will normally be considered a controller in respect of the processing of personal data that is necessary for the operation of the service as such (e.g., traffic and billing data). If the sole purpose and role of the provider is to enable the transmission of email messages, the provider will not be considered as the controller in respect of the personal data contained in the message itself. The controller in respect of any personal data contained inside the message will normally be considered to be the person from whom the message originates, rather than the service provider offering the transmission service.

28. In many cases, an assessment of the contractual terms between the different parties involved can facilitate the determination of which party (or parties) is acting as controller. Even if a contract is silent as to who is the controller, it may contain sufficient elements to infer who exercises a decision-making role with respect to the purposes and means of the processing. It may also be that the contract contains an explicit statement as to the identity of the controller. If there is no reason to doubt that this accurately reflects the reality, there is nothing against following the terms of the contract. However, the terms of a contract are not decisive in all circumstances, as this would simply allow parties to allocate responsibility as they see fit. It is not possible either to become a controller or to escape controller obligations simply by shaping the contract in a certain way where the factual circumstances say something else.

29. If one party in fact decides why and how personal data are processed that party will be a controller even if a contract says that it is a processor. Similarly, it is not because a commercial contract uses the term "subcontractor" that an entity shall be considered a processor from the perspective of data protection law.[12]

30. In line with the factual approach, the word "determines" means that the entity that actually exerts a decisive influence on the purposes and means of the processing is the controller. Normally, a processor agreement establishes who the determining party (controller) and the instructed party (processor) are. Even if the processor offers a service that is preliminary defined in a specific way, the controller has to be presented with a detailed description of the service and must make the final decision to actively approve the way the processing is carried out and request changes if necessary. Furthermore, the processor cannot at a later stage change the essential elements of the processing without the approval of the controller.

Example: standardised cloud storage service

A large cloud storage provider offers its customers the ability to store large volumes of personal data. The service is completely standardised, with customers having little or no ability to customise the service. The terms of the contract are determined and drawn up unilaterally by the cloud service provider, provided to the customer on a "take it or leave it basis". Company X decides to make use of the cloud provider to store personal data concerning its customers. Company X will still be considered a controller, given its decision to make use of this particular cloud service provider in order to process personal data for its purposes. Insofar as the cloud service provider does not process the personal data for its own purposes and stores the data solely on behalf of its customers and in accordance with instructions, the service provider will be considered as a processor.

[12] See e.g., Article 29 Data Protection Working Party, Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), 22 November 2006, WP128, p. 11.

2.1.3 "Alone or jointly with others"

31. Article 4(7) recognizes that the "purposes and means" of the processing might be determined by more than one actor. It states that the controller is the actor who "alone or jointly with others" determines the purposes and means of the processing. This means that several different entities may act as controllers for the same processing, with each of them then being subject to the applicable data

31. protection provisions. Correspondingly, an organisation can still be a controller even if it does not make all the decisions as to purposes and means. The criteria for joint controllership and the extent to which two or more actors jointly exercise control may take different forms, as clarified later on.[13]

2.1.4 "Purposes and means"

32. The fourth building block of the controller definition refers to the object of the controller's influence, namely the "purposes and means" of the processing. It represents the substantive part of the controller concept: what a party should determine in order to qualify as controller.

33. Dictionaries define "purpose" as "an anticipated outcome that is intended or that guides your planned actions" and "means" as "how a result is obtained or an end is achieved".

34. The GDPR establishes that data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Determination of the "purposes" of the processing and the "means" to achieve them is therefore particularly important.

35. Determining the purposes and the means amounts to deciding respectively the "why" and the "how" of the processing:[14] given a particular processing operation, the controller is the actor who has determined *why* the processing is taking place (i.e., "to what end"; or "what for") and *how* this objective shall be reached (i.e. which means shall be employed to attain the objective). A natural or legal person who exerts such influence over the processing of personal data, thereby participates in the determination of the purposes and means of that processing in accordance with the definition in Article 4(7) GDPR.[15]

36. The controller must decide on both purpose and means of the processing as described below. As a result, the controller cannot settle with only determining the purpose. It must also make decisions about the means of the processing. Conversely, the party acting as processor can never determine the purpose of the processing.

37. In practice, if a controller engages a processor to carry out the processing on its behalf, it often means that the processor shall be able to make certain decisions of its own on how to carry out the processing. The EDPB recognizes that some margin of manoeuvre may exist for the processor also to be able to make some decisions in relation to the processing. In this perspective, there is a need to provide guidance about which **level of influence** on the "why" and the "how" should entail the qualification of an entity as a controller and to what extent a processor may make decisions of its own.

38. When one entity clearly determines purposes and means, entrusting another entity with processing activities that amount to the execution of its detailed instructions, the situation is straightforward, and there is no doubt that the second entity should be regarded as a processor, whereas the first entity is the controller.

---

[13] See Part I, Section 3 ("Definition of joint controllers").
[14] See also the Opinion of Advocate General Bot in *Wirtschaftsakademie*, C-210/16, ECLI:EU:C:2017:796, paragraph 46.
[15] Judgment in *Jehovah's witnesses*, C-25/17, ECLI:EU:C:2018:551, paragraph 68.

Essential vs. non-essential means

39. The question is where to draw the line between decisions that are reserved to the controller and decisions that can be left to the discretion of the processor. Decisions on the purpose of the processing are clearly always for the controller to make.

40. As regards the determination of means, a distinction can be made between essential and non-essential means. "Essential means" are traditionally and inherently reserved to the controller. While non-essential means can also be determined by the processor, essential means are to be determined by the controller. "Essential means" are means that are closely linked to the purpose and the scope of the processing, such as the type of personal data which are processed ("*which data shall be processed*?"), the duration of the processing ("*for how long shall they be processed?*"), the categories of recipients ("*who shall have access to them?*") and the categories of data subjects ("*whose personal data are being processed?*"). Together with the purpose of processing, the essential means are also closely linked to the question of whether the processing is lawful, necessary and proportionate. "Non-essential means" concern more practical aspects of implementation, such as the choice for a particular type of hard- or software or the detailed security measures which may be left to the processor to decide on.

Example: Payroll administration

Employer A hires another company to administer the payment of salaries to its employees. Employer A gives clear instructions on who to pay, what amounts, by what date, by which bank, how long the data shall be stored, what data should be disclosed to the tax authority etc. In this case, the processing of data is carried out for Company A's purpose to pay salaries to its employees and the payroll administrator may not use the data for any purpose of its own. The way in which the payroll administrator should carry out the processing is in essence clearly and tightly defined. Nevertheless, the payroll administrator may decide on certain detailed matters around the processing such as which software to use, how to distribute access within its own organisation etc. This does not alter its role as processor as long as the administrator does not go against or beyond the instructions given by Company A.

Example: Bank payments

As part of the instructions from Employer A, the payroll administration transmits information to Bank B so that they can carry out the actual payment to the employees of Employer A. This activity includes processing of personal data by Bank B which it carries out for the purpose of performing banking activity. Within this activity, the bank decides independently from Employer A on which data that have to be processed to provide the service, for how long the data must be stored etc. Employer A cannot have any influence on the purpose and means of Bank B's processing of data. Bank B is therefore to be seen as a controller for this processing and the transmission of personal data from the payroll administration is to be regarded as a disclosure of information between two controllers, from Employer A to Bank B.

Example: Accountants

Employer A also hires Accounting firm C to carry out audits of their bookkeeping and therefore transfers data about financial transactions (including personal data) to C. Accounting firm C processes these data without detailed instructions from A. Accounting firm C decides itself, in accordance with legal provisions regulating the tasks of the auditing activities carried out by C, that the data it collects

will only be processed for the purpose of auditing A and it determines what data it needs to have, which categories of persons that need to be registered, how long the data shall be kept and what technical means to use. Under these circumstances, Accounting firm C is to be regarded as a controller of its own when performing its auditing services for A. However, this assessment may be different depending on the level of instructions from A. In a situation where the law does not lay down specific obligations for the accounting firm and the client company provides very detailed instructions on the processing, the accounting firm would indeed be acting as a processor. A distinction could be made between a situation where the processing is - in accordance with the laws regulating this profession - done as part of the accounting firm's core activity and where the processing is a more limited, ancillary task that is carried out as part of the client company's activity.

Example: Hosting services

Employer A hires hosting service H to store encrypted data on H's servers. The hosting service H does not determine whether the data it hosts are personal data nor does it process data in any other way than storing it on its servers. As storage is one example of a personal data processing activity, the hosting service H is processing personal data on employer A's behalf and is therefore a processor. Employer A must provide the necessary instructions to H and a data processing agreement according to Article 28 must be concluded, requiring H to implement technical and organisational security measures. H must assist A in ensuring that the necessary security measures are taken and notify it in case of any personal data breach.

41. Even though decisions on non-essential means can be left to the processor, the controller must still stipulate certain elements in the processor agreement, such as – in relation to the security requirement, e.g. an instruction to take all measures required pursuant to Article 32 of the GDPR. The agreement must also state that the processor shall assist the controller in ensuring compliance with, for example, Article 32. In any event, the controller remains responsible for the implementation of appropriate technical and organisational measures to ensure and be able to demonstrate that the processing is performed in accordance with the Regulation (Article 24). In doing so, the controller must take into account the nature, scope, context and purposes of the processing as well as the risks for rights and freedoms of natural persons. For this reason, the controller must be fully informed about the means that are used so that it can take an informed decision in this regard. In order for the controller to be able to demonstrate the lawfulness of the processing, it is advisable to document at the minimum necessary technical and organisational measures in the contract or other legally binding instrument between the controller and the processor.

Example: Call centre

Company X decides to outsource a part of its customer service relations to a call centre. The call centre receives identifiable data about customer purchases, as well contact information. The call centre uses its own software and IT infrastructure to manage the personal data concerning Company X's customers. Company X signs a processor agreement with the provider of the call centre in accordance with Article 28 GDPR, after determining that the technical and organisational security measures proposed by the call centre are appropriate for the risks concerned and that the call centre will only process the personal data for the purposes of Company X and in accordance with its instructions. Company X does not provide any further instructions to the call centre as to specific software to be used nor any detailed instructions regarding the specific security measures to be implemented. In this example, Company X remains a controller, despite the fact that the call centre has determined certain non-essential means of the processing.

2.1.5 "Of the processing of personal data"

42. The purposes and means determined by the controller must relate to the "processing of personal data". Article 4(2) GDPR defines the processing of personal data as "*any operation or set of operations which is performed on personal data or on sets of personal data*". As a result, the concept of a controller can be linked either to a single processing operation or to a set of operations. In practice, this may mean that the control exercised by a particular entity may extend to the entirety of processing at issue but may also be limited to a particular stage in the processing.[16]

43. In practice, the processing of personal data involving several actors may be divided into several smaller processing operations for which each actor could be considered to determine the purpose and means individually. On the other hand, a sequence or set of processing operations involving several actors may also take place for the same purpose(s), in which case it is possible that the processing involves one or more joint controllers. In other words, it is possible that at "micro-level" the different processing operations of the chain appear as disconnected, as each of them may have a different purpose. However, it is necessary to double check whether at "macro-level" these processing operations should not be considered as a "set of operations" pursuing a joint purpose using jointly defined means.

44. Anyone who decides to process data must consider whether this includes personal data and, if so, what the obligations are according to the GDPR. An actor will be considered a "controller" even if it does not deliberately target personal data as such or has wrongfully assessed that it does not process personal data.

45. It is not necessary that the controller actually has access to the data that is being processed.[17] Someone who outsources a processing activity and in doing so, has a determinative influence on the purpose and (essential) means of the processing (e.g. by adjusting parameters of a service in such a way that it influences whose personal data shall be processed), is to be regarded as controller even though he or she will never have actual access to the data.

Example: Market research 1

Company ABC wishes to understand which types of consumers are most likely to be interested in its products and contracts a service provider, XYZ, to obtain the relevant information.

Company ABC instructs XYZ on what type of information it is interested in and provides a list of questions to be asked to those participating in the market research.

Company ABC receives only statistical information (e.g., identifying consumer trends per region) from XYZ and does not have access to the personal data itself. Nevertheless, Company ABC decided that the processing should take place, the processing is carried out for its purpose and its activity and it has provided XYZ with detailed instructions on what information to collect. Company ABC is therefore still to be considered a controller with respect of the processing of personal data that takes place in order to deliver the information it has requested. XYZ may only process the data for the purpose given by Company ABC and according to its detailed instructions and is therefore to be regarded as processor.

[16] Judgment in *Fashion ID*, C-40/17, ECLI:EU:C:2019:629, paragraph 74: "*(A)s the Advocate General noted, [...-] it appears that a natural or legal person may be a controller, within the meaning of Article 2(d) of Directive 95/46, jointly with others only in respect of operations involving the processing of personal data for which it determines jointly the purposes and means. By contrast, [...] that natural or legal person cannot be considered to be a controller, within the meaning of that provision, in the context of operations that precede or are subsequent in the overall chain of processing for which that person does not determine either the purposes or the means".*

[17] Judgment in *Wirtschaftsakademie*, C-201/16, ECLI :EU :C :2018 :388, paragraph 38.

Example: Market research 2

Company ABC wishes to understand which types of consumers are most likely to be interested in its products. Service provider XYZ is a market research agency which has collected information about consumer interests through a variety of questionnaires which pertain to a wide variety of products and services. Service provider XYZ has collected and analysed this data independently, according to its own methodology without receiving any instructions from Company ABC. To answer Company ABC's request, service provider XYZ will generate statistical information, but does so without receiving any further instructions about which personal data should be processed or how to process it in order to generate these statistics. In this example, service provider XYZ acts as the sole controller, processing personal data for market research purposes, autonomously determining the means for doing so. Company ABC does not have any particular role or responsibility under data protection law in relation to these processing activities, as Company ABC receives anonymised statistics and is not involved in determining the purposes and means of the processing.

3 DEFINITION OF JOINT CONTROLLERS

3.1 Definition of joint controllers

46. The qualification as joint controllers may arise where more than one actor is involved in the processing.

47. While the concept is not new and already existed under Directive 95/46/EC, the GDPR, in its Article 26, introduces specific rules for joint controllers and sets a framework to govern their relationship. In

47. addition, the Court of Justice of the European Union (CJEU) in recent rulings has brought clarifications on this concept and its implications.[18]

48. As further elaborated in Part II, section 2, the qualification of joint controllers will mainly have consequences in terms of allocation of obligations for compliance with data protection rules and in particular with respect to the rights of individuals.

49. In this perspective, the following section aims to provide guidance on the concept of joint controllers in accordance with the GDPR and the CJEU case law to assist entities in determining where they may be acting as joint controllers and applying the concept in practice.

3.2 Existence of joint controllership

3.2.1 General considerations

50. The definition of a controller in Article 4 (7) GDPR forms the starting point for determining joint controllership. The considerations in this section are thus directly related to and supplement the

[18] See in particular, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie*, (C-210/16), *Tietosuojavaltuutettu v Jehovan todistajat — uskonnollinen yhdyskunta* (C-25/17), *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV (*C-40/17). To be noted that while these judgments were issued by the CJEU on the interpretation of the concept of joint controllers under Directive 95/46/CE, they remain valid in the context of the GDPR, given that the elements determining this concept under the GDPR remain the same as under the Directive.

considerations in the section on the concept of controller. As a consequence, the assessment of joint controllership should mirror the assessment of "single" control developed above.

51. Article 26 GDPR, which reflects the definition in Article 4 (7) GDPR, provides that *"[w]here two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers."* In broad terms, joint controllership exists with regard to a specific processing activity when different parties determine *jointly* the purpose and means of this processing activity. Therefore, assessing the existence of joint controllers requires examining whether the determination of purposes and means that characterize a controller are decided by more than one party. "Jointly" must be interpreted as meaning "together with" or "not alone", in different forms and combinations, as explained below.

52. The assessment of joint controllership should be carried out on a factual, rather than a formal, analysis of the actual influence on the purposes and means of the processing. All existing or envisaged arrangements should be checked against the factual circumstances regarding the relationship between the parties. A merely formal criterion would not be sufficient for at least two reasons: in some cases, the formal appointment of a joint controller - laid down for example by law or in a contract - would be absent; in other cases, it may be that the formal appointment does not reflect the reality of the arrangements, by formally entrusting the role of controller to an entity which actually is not in the position to "determine" the purposes and means of the processing.

53. Not all processing involving several entities give rise to joint controllership. The overarching criterion for joint controllership to exist is the **joint participation of two or more entities in the determination of the purposes and means** of a processing. More specifically, joint participation needs to include the determination of purposes on the one hand and the determination of means on the other hand. If each of these elements are determined by all entities concerned, they should be considered as joint controllers of the processing at issue.

3.2.2 Assessment of joint participation

54. Joint participation in the determination of purposes and means implies that more than one entity have a decisive influence over whether and how the processing takes place. In practice, joint participation can take several different forms. For example, joint participation can take the form of a **common decision** taken by two or more entities or result from **converging decisions** by two or more entities regarding the purposes and essential means.

55. Joint participation through a *common decision* means deciding together and involves a common intention in accordance with the most common understanding of the term "jointly" referred to in Article 26 of the GDPR.

The situation of joint participation through *converging decisions* results more particularly from the case law of the CJEU on the concept of joint controllers. Decisions can be considered as converging on purposes and means **if they complement each other and are necessary for the processing to take place in such manner that they have a tangible impact on the determination of the purposes and means of the processing**. It should be highlighted that the notion of converging decisions needs to be considered in relation to the purposes and means of the processing but not other aspects of the commercial relationship between the parties.[19] As such, an important criterion to identify converging decisions in this context **is whether the processing would not be possible without both parties' participation in the purposes and means in the sense that the processing by each party is**

[19] Indeed, all commercial arrangements involve converging decisions as part of the process by which an agreement is reached.

inseparable, i.e. inextricably linked. The situation of joint controllers acting on the basis of converging decisions should however be distinguished from the case of a processor, since the latter – while participating in the performance of a processing – does not process the data for its own purposes but carries out the processing on behalf of the controller.

56. The fact that one of the parties does not have access to personal data processed is not sufficient to exclude joint controllership.[20] For example, in *Jehovah's Witnesses*, the CJEU considered that a religious community must be considered a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching.[21] The CJEU considered that it was not necessary that the community had access to the data in question, or to establish that that community had given its members written guidelines or instructions in relation to the data processing.[22] The community participated in the determination of purposes and means by organising and coordinating the activities of its members, which helped to achieve the objective of the Jehovah's Witnesses community.[23] In addition, the community had knowledge on a general level of the fact that such processing was carried out in order to spread its faith.[24]

57. It is also important to underline, as clarified by the CJEU, that an entity will be considered as joint controller with the other(s) only in respect of those operations for which it determines, jointly with others, the means and the purposes of the same data processing in particular in case of converging decisions. If one of these entities decides alone the purposes and means of operations that precede or are subsequent in the chain of processing, this entity must be considered as the sole controller of this preceding or subsequent operation.[25]

58. The existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. On the contrary, the CJEU has clarified that those operators may be involved at different stages of that processing and to different degrees so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.

3.2.2.1 Jointly determined purpose(s)

59. Joint controllership exists when entities involved in the same processing carry out the processing for jointly defined purposes. This will be the case if the entities involved process the data for the same, or common, purposes.

60. In addition, when the entities do not have the same purpose for the processing, joint controllership may also, in light of the CJEU case law, be established when the entities involved pursue purposes which are closely linked or complementary. Such may be the case, for example, when there is a mutual benefit arising from the same processing operation, provided that each of the entities involved participates in the determination of the purposes and means of the relevant processing operation. However, the notion of mutual benefit is not decisive and can only be an indication.. In *Fashion ID*, for example, the CJEU clarified that a website operator participates in the determination of the purposes

[20] Judgment in *Wirtschaftsakademie*, C-210/16, ECLI:EU:C:2018:388, paragraph 38.
[21] Judgment in *Jehovah's witnesses*, C-25/17, ECLI:EU:C:2018:551, paragraph 75.
[22] Ibid.
[23] Ibid, paragraph 71.
[24] Ibid.
[25] Judgment in *Fashion ID*, C-40/17, ECLI:EU:2018:1039, paragraph 74 "*By contrast, and without prejudice to any civil liability provided for in national law in this respect, that natural or legal person cannot be considered to be a controller, within the meaning of that provision, in the context of operations that precede or are subsequent in the overall chain of processing for which that person does not determine either the purposes or the means*".

(and means) of the processing by embedding a social plug-in on a website in order to optimize the publicity of its goods by making them more visible on the social network. The CJEU considered that the processing operations at issue were performed in the economic interests of both the website operator and the provider of the social plug-in.[26]

61. Likewise, as noted by the CJEU in *Wirtschaftsakademie*, the processing of personal data through statistics of visitors to a fan page is intended to enable Facebook to improve its system of advertising transmitted via its network and to enable the administrator of the fan page to obtain statistics to manage the promotion of its activity.[27] Each entity in this case pursues its own interest but both parties participate in the determination of the purposes (and means) of the processing of personal data as regards the visitors to the fan page.[28]

62. In this respect, it is important to highlight that the mere existence of a mutual benefit (for ex. commercial) arising from a processing activity does not give rise to joint controllership. If the entity involved in the processing does not pursue any purpose(s) of its own in relation to the processing activity, but is merely being paid for services rendered, it is acting as a processor rather than as a joint controller.

3.2.2.2 Jointly determined means

63. Joint controllership also requires that two or more entities have exerted influence over the means of the processing. This does not mean that, for joint controllership to exist, each entity involved needs in all cases to determine all of the means. Indeed, as clarified by the CJEU, different entities may be involved at different stages of that processing and to different degrees. Different joint controllers may therefore define the means of the processing to a different extent, depending on who is effectively in a position to do so.

64. It may also be the case that one of the entities involved provides the means of the processing and makes it available for personal data processing activities by other entities. The entity who decides to make use of those means so that personal data can be processed for a particular purpose also participates in the determination of the means of the processing.

65. This scenario can notably arise in case of platforms, standardised tools, or other infrastructure allowing the parties to process the same personal data and which have been set up in a certain way by one of the parties to be used by others that can also decide how to set it up.[29] The use of an already existing technical system does not exclude joint controllership when users of the system can decide on the processing of personal data to be performed in this context.

66. As an example of this, the CJEU held in *Wirtschaftsakademie* that the administrator of a fan page hosted on Facebook, by defining parameters based on its target audience and the objectives of managing and promoting its activities, must be regarded as taking part in the determination of the means of the processing of personal data related to the visitors of its fan page.

67. Furthermore, the choice made by an entity to use for its own purposes a tool or other system developed by another entity, allowing the processing of personal data, will likely amount to a joint decision on the means of that processing by those entities. This follows from the Fashion ID case where

[26] Judgment in *Fashion ID,* C-40/17, ECLI:EU:2018:1039, paragraph 80.
[27] Judgment in *Wirtschaftsakademie*, C-210/16, ECLI:EU:C:2018:388, paragraph 34.
[28] Judgment in *Wirtschaftsakademie*, C-210/16, ECLI:EU:C:2018:388, paragraph 39.
[29] The provider of the system can be a joint controller if the criteria mentioned above are met, i.e. if the provider participates in the determination of purposes and means. Otherwise, the provider should be considered as a processor.

the CJEU concluded, that by embedding on its website the Facebook Like button made available by Facebook to website operators, Fashion ID has exerted a decisive influence in respect of the operations involving the collection and transmission of the personal data of the visitors of its website to Facebook and had thus jointly determined with Facebook the means of that processing.[30]

68. It is important to underline that **the use of a common data processing system or infrastructure will not in all cases lead to qualify the parties involved as joint controllers,** in particular where the processing they carry out is separable and could be performed by one party without intervention from the other or where the provider is a processor in the absence of any purpose of its own (the existence of a mere commercial benefit for the parties involved is not sufficient to qualify as a purpose of processing).

Example: Travel agency

A travel agency sends personal data of its customers to the airline and a chain of hotels, with a view to making reservations for a travel package. The airline and the hotel confirm the availability of the seats and rooms requested. The travel agency issues the travel documents and vouchers for its customers. Each of the actors processes the data for carrying out their own activities and using their own means. In this case, the travel agency, the airline and the hotel are three different data controllers processing the data for their own and separate purposes and there is no joint controllership.

The travel agency, the hotel chain and the airline then decide to participate jointly in setting up an internet-based common platform for the common purpose of providing package travel deals. They agree on the essential means to be used, such as which data will be stored, how reservations will be allocated and confirmed, and who can have access to the information stored. Furthermore, they decide to share the data of their customers in order to carry out joint marketing actions. In this case, the travel agency, the airline and the hotel chain, jointly determine why and how personal data of their respective customers are processed and will therefore be joint controllers with regard to the processing operations relating to the common internet-based booking platform and the joint marketing actions. However, each of them would still retain sole control with regard to other processing activities outside the internet-based common platform.

Example: Research project by institutes

Several research institutes decide to participate in a specific joint research project and to use to that end the existing platform of one of the institutes involved in the project. Each institute feeds personal data it already holds into the platform for the purpose of the joint research and uses the data provided by others through the platform for carrying out the research. In this case, all institutes qualify as joint controllers for the personal data processing that is done by storing and disclosing information from this platform since they have decided together the purpose of the processing and the means to be used (the existing platform). Each of the institutes however is a separate controller for any other processing that may be carried out outside the platform for their respective purposes.

Example: Marketing operation

Companies A and B have launched a co-branded product C and wish to organise an event to promote this product. To that end, they decide to share data from their respective clients and prospects

[30] Judgment in Fashion ID, C-40/17, ECLI:EU:2018:1039, paragraphs 77-79.

database and decide on the list of invitees to the event on this basis. They also agree on the modalities for sending the invitations to the event, how to collect feedback during the event and follow-up marketing actions. Companies A and B can be considered as joint controllers for the processing of personal data related to the organisation of the promotional event as they decide together on the jointly defined purpose and essential means of the data processing in this context.

Example: Clinical Trials[31]

A health care provider (the investigator) and a university (the sponsor) decide to launch together a clinical trial with the same purpose. They collaborate together to the drafting of the study protocol (i.e. purpose, methodology/design of the study, data to be collected, subject exclusion/inclusion criteria, database reuse (where relevant) etc.). They may be considered as joint controllers, for this clinical trial as they jointly determine and agree on the same purpose and the essential means of the processing. The collection of personal data from the medical record of the patient for the purpose of research is to be distinguished from the storage and use of the same data for the purpose of patient care, for which the health care provider remains the controller.

In the event that the investigator does not participate to the drafting of the protocol (he just accepts the protocol already elaborated by the sponsor), and the protocol is only designed by the sponsor, the investigator should be considered as a processor and the sponsor as the controller for this clinical trial.

[31] The EDPB plans to provide further guidance in relation to clinical trials in the context of its forthcoming Guidelines on processing of personal data for medical and scientific research purposes.

Example: Analysis of health data

Company ABC, the developer of a blood pressure monitoring app and Company XYZ, a provider of apps for medical professionals, both wish to examine how blood pressure changes can help predict certain diseases. The companies decide to set up a joint project and reach out to Hospital DEF to become involved as well.

The personal data that will be processed in this project consists of personal data which Company ABC, Hospital DEF and Company XYZ are separately processing as individual controllers. The decision to

Example: Headhunters

Company X helps Company Y in recruiting new staff- with its famous value-added service "global matchz". Company X looks for suitable candidates both among the CVs received directly by Company Y and those it already has in its own database. Such database is created and managed by Company X on its own. This ensures that Company X enhances the matching between job offers and job seekers, thus increasing its revenues. Even though they have not formally taken a decision together, Companies X and Y jointly participate to the processing with the purpose of finding suitable candidates based on converging decisions: the decision to create and manage the service “global matchz” for Company X and the decision of Company Y to enrich the database with the CVs it directly receives. Such decisions complement each other, are inseparable and necessary for the processing of finding suitable candidates to take place. Therefore, in this particular case they should be considered as joint controllers of such processing. However, Company X is the sole controller of the processing necessary to manage its database and Company Y is the sole controller of the subsequent hiring processing for its own purpose (organisation of interviews, conclusion of the contract and management of HR data).

process this data to assess blood pressure changes is taken jointly by the three actors. Company ABC, Hospital DEF and Company XYZ have jointly determined the purposes of processing. Company XYZ takes the initiative to propose the essential means of processing. Both Company ABC and the Hospital DEF accept these essential means after they as well were involved in developing some of the features of the app so that the results can be sufficiently used by them. The three organizations thus agree on having a common purpose for the processing which is the assessment of how blood pressure changes can help predict certain diseases. Once the research is completed, Company ABC, Hospital DEF and Company XYZ may benefit from the assessment by using its results in their own activities. For all these reasons, they qualify as joint controllers for this specific joint processing.

If Company XYZ had been simply asked by the others to perform this assessment without having any purpose of their own and merely been processing data on behalf of the others, Company XYZ would qualify as a processor even if it was entrusted with the determination of the non-essential means.

3.2.3 Situations where there is no joint controllership

69. The fact that several actors are involved in the same processing does not mean that they are necessarily acting as joint controllers of such processing. Not all kind of partnerships, cooperation or collaboration imply qualification of joint controllers as such qualification requires a case-by-case analysis of each processing at stake and the precise role of each entity with respect to each processing. The cases below provide non-exhaustive examples of situations where there is no joint controllership.

70. For example, the exchange of the same data or set of data between two entities without jointly determined purposes or jointly determined means of processing should be considered as a transmission of data between separate controllers.

Example: Transmission of employee data to tax authorities

A company collects and processes personal data of its employees with the purpose of managing salaries, health insurances, etc. A law imposes an obligation on the company to send all data concerning salaries to the tax authorities, with a view to reinforce fiscal control.

In this case, even though both the company and the tax authorities process the same data concerning salaries, the lack of jointly determined purposes and means with regard to this data processing will result in qualifying the two entities as two separate data controllers.

71. Joint controllership may also be excluded in a situation where several entities use a shared database or a common infrastructure, if each entity independently determines its own purposes.

Example: Marketing operations in a group of companies using a shared database:

A group of companies uses the same database for the management of clients and prospects. Such database is hosted on the servers of the mother company who is therefore a processor of the companies with respect to the storage of the data. Each entity of the group enters the data of its own clients and prospects and processes such data for its own purposes only. Also, each entity decides independently on the access, the retention periods, the correction or deletion of their clients and prospects' data. They cannot access or use each other's data. The mere fact that these companies use a shared group database does not as such entail joint controllership. Under these circumstances, each company is thus a separate controller.

Example: Independent controllers when using a shared infrastructure

Company XYZ hosts a database and makes it available to other companies to process and host personal data about their employees. Company XYZ is a processor in relation to the processing and storage of other companies' employees as these operations are performed on behalf and according to the instructions of these other companies. In addition, the other companies process the data without any involvement from Company XYZ and for purposes which are not in any way shared by Company XYZ.

72. Also, there can be situations where various actors successively process the same personal data in a chain of operations, each of these actors having an independent purpose and independent means in their part of the chain. In the absence of joint participation in the determination of the purposes and means of the same processing operation or set of operations, joint controllership has to be excluded and the various actors must be regarded as successive independent controllers.

Example: Statistical analysis for a task of public interest

A public authority (Authority A) has the legal task of making relevant analysis and statistics on how the country's employment rate develops. To do that, many other public entities are legally bound to disclose specific data to Authority A. Authority A decides to use a specific system to process the data, including collection. This also means that the other units are obligated to use the system for their disclosure of data. In this case, without prejudice to any attribution of roles by law, Authority A will be the only controller of the processing for the purpose of analysis and statistics of the employment rate processed in the system, because Authority A determines the purpose for the processing, and has decided how the processing will be organised. Of course, the other public entities, as controllers for their own processing activities, are responsible for ensuring the accuracy of the data they previously processed, which they then disclose to Authority A.

4 DEFINITION OF PROCESSOR

73. A processor is defined in Article 4 (8) as a natural or legal person, public authority, agency or another body, which processes personal data on behalf of the controller. Similar to the definition of controller, the definition of processor envisages a broad range of actors - it can be "*a natural or legal person, public authority, agency or other body*". This means that there is in principle no limitation as to which type of actor might assume the role of a processor. It might be an organisation, but it might also be an individual.

74. The GDPR lays down obligations directly applicable specifically to processors as further specified in Part II section 1 of these guidelines. A processor can be held liable or fined in case of failure to comply with such obligations or in case it acts outside or contrary to the lawful instructions of the controller.

75. Processing of personal data can involve multiple processors. For example, a controller may itself choose to directly engage multiple processors, by involving different processors at separate stages of the processing (multiple processors). A controller might also decide to engage one processor, who in turn - with the authorisation of the controller - engages one or more other processors ("sub processor(s)"). The processing activity entrusted to the processor may be limited to a very specific task or context or may be more general and extended.

76. Two basic conditions for qualifying as processor are:

a) being *a separate entity* in relation to the controller and

b) processing personal data *on the controller's behalf*.

77. *A separate entity* means that the controller decides to delegate all or part of the processing activities to an external organisation. Within a group of companies, one company can be a processor to another company acting as controller, as both companies are separate entities. On the other hand, a department within a company cannot be a processor to another department within the same entity.

78. If the controller decides to process data itself, using its own resources within its organisation, for example through its own staff, this is not a processor situation. Employees and other persons that are acting under the direct authority of the controller, such as temporarily employed staff, are not to be seen as processors since they will process personal data as a part of the controller's entity. In accordance with Article 29, they are also bound by the controller's instructions.

79. *Processing personal data on the controller's behalf* firstly requires that the separate entity processes personal data for the benefit of the controller. In Article 4(2), processing is defined as a concept including a wide array of operations ranging from collection, storage and consultation to use, dissemination or otherwise making available and destruction.. The concept of "processing" is further described above under 2.1.5.

80. Secondly, the processing must be done on behalf of a controller but otherwise than under its direct authority or control. Acting "on behalf of" means serving someone else's interest and recalls the legal concept of "delegation". In the case of data protection law, a processor is called to implement the instructions given by the controller at least with regard to the purpose of the processing and the essential elements of the means. The lawfulness of the processing according to Article 6, and if relevant Article 9, of the Regulation will be derived from the controller's activity and the processor must not process the data otherwise than according to the controller's instructions. Even so, as described above, the controller's instructions may still leave a certain degree of discretion about how to best serve the controller's interests, allowing the processor to choose the most suitable technical and organisational means.[32]

81. Acting "on behalf of" also means that the processor may not carry out processing for its own purpose(s). As provided in Article 28(10), a processor infringes the GDPR by going beyond the controller's instructions and starting to determine its own purposes and means of processing. The processor will be considered a controller in respect of that processing and may be subject to sanctions for going beyond the controller's instructions.

Example: Service provider referred to as data processor but acting as controller

Service provider MarketinZ provides promotional advertisement and direct marketing services to various companies. Company GoodProductZ concludes a contract with MarketinZ, according to which the latter company provides commercial advertising for GoodProductZ customers and is referred to as data processor. However, MarketinZ decides to use GoodProducts customer database also for other purposes than advertising for GoodProducts, such as developing their own business activity. The decision to add an additional purpose to the one for which the personal data were transferred converts MarketinZ into a data controller for this set of processing operations and their processing for this purpose would constitute an infringement of the GDPR.

82. The EDPB recalls that not every service provider that processes personal data in the course of delivering a service is a "processor" within the meaning of the GDPR. The role of a processor does not stem from the nature of an entity that is processing data but from its concrete activities in a specific context. In other words, the same entity may act at the same time as a controller for certain processing

[32] See Part I, sub-section 2.1.4 describing the distinction between essential and non-essential means.

operations and as a processor for others, and the qualification as controller or processor has to be assessed with regard to specific sets of data or operations. The nature of the service will determine whether the processing activity amounts to processing of personal data on behalf of the controller within the meaning of the GDPR. In practice, where the provided service is not specifically targeted at processing personal data or where such processing does not constitute a key element of the service, the service provider may be in a position to independently determine the purposes and means of that processing which is required in order to provide the service. In that situation, the service provider is to be seen as a separate controller and not as a processor.[33] A case-by-case analysis remains necessary, however, in order to ascertain the degree of influence each entity effectively has in determining the purposes and means of the processing.

Example: Taxi service

A taxi service offers an online platform which allows companies to book a taxi to transport employees or guests to and from the airport. When booking a taxi, Company ABC specifies the name of the employee that should be picked up from the airport so the driver can confirm the employee's identity at the moment of pick-up. In this case, the taxi service processes personal data of the employee as part of its service to Company ABC, but the processing as such is not the target of the service. The taxi service has designed the online booking platform as part of developing its own business activity to provide transportation services, without any instructions from Company ABC. The taxi service also independently determines the categories of data it collects and how long it retains. The taxi service therefore acts as a controller in its own right, notwithstanding the fact that the processing takes place following a request for service from Company ABC.

83. The EDPB notes that a service provider may still be acting as a processor even if the processing of personal data is not the main or primary object of the service, provided that the customer of the service still determines the purposes and means of the processing in practice. When considering whether or not to entrust the processing of personal data to a particular service provider, controllers should carefully assess whether the service provider in question allows them to exercise a sufficient degree of control, taking into account the nature, scope, context and purposes of processing as well as the potential risks for data subjects.

Example: Call center

Company X outsources its client support to Company Y who provides a call center in order to help Company X's clients with their questions. The client support service means that Company Y has to have access to Company X client data bases. Company Y can only access data in order to provide the support that Company X has procured and they cannot process data for any other purposes than the ones stated by Company X. Company Y is to be seen as a personal data processor and a processor agreement must be concluded between Company X and Y.

Example: General IT support

Company Z hires an IT service provider to perform general support on its IT systems which include a vast amount of personal data. The access to personal data is not the main object of the support service but it is inevitable that the IT service provider systematically has access to personal data when

[33] See also Recital 81 of the GDPR, which refers to "entrusting a processor processing activities", indicating that the processing activity as such is an important part of the decision of the controller to ask a processor to process personal data on its behalf.

performing the service. Company Z therefore concludes that the IT service provider - being a separate company and inevitably being required to process personal data even though this is not the main objective of the service – is to be regarded as a processor. A processor agreement is therefore concluded with the IT service provider.

Example: IT-consultant fixing a software bug

Company ABC hires an IT-specialist from another company to fix a bug in a software that is being used by the company. The IT-consultant is not hired to process personal data, and Company ABC determines that any access to personal data will be purely incidental and therefore very limited in practice. ABC therefore concludes that the IT-specialist is not a processor (nor a controller in its own right) and that Company ABC will take appropriate measures according to Article 32 of the GDPR in order to prevent the IT-consultant from processing personal data in an unauthorised manner.

84. As stated above, nothing prevents the processor from offering a preliminarily defined service but the controller must make the final decision to actively approve the way the processing is carried out, at least insofar as concerns the essential means of the processing. As stated above, a processor has a margin of manoeuvre as regards non-essential means, see above under sub-section 2.1.4.

Example: Cloud service provider

A municipality has decided to use a cloud service provider for handling information in its school and education services. The cloud service provides messaging services, videoconferences, storage of documents, calendar management, word processing etc. and will entail processing of personal data about school children and teachers. The cloud service provider has offered a standardized service that is offered worldwide. The municipality however must make sure that the agreement in place complies with Article 28(3) of the GDPR, that the personal data of which it is controller are processed for the municipality's purposes only. It must also make sure that their specific instructions on storage periods, deletion of data etc. are respected by the cloud service provider regardless of what is generally offered in the standardized service.

5 DEFINITION OF THIRD PARTY/RECIPIENT

85. The Regulation not only defines the concepts of controller and processor but also the concepts of recipient and third party. As opposed to the concepts of controller and processor, the Regulation does not lay down specific obligations or responsibilities for recipients and third parties. These can be said to be relative concepts in the sense that they describe a relation to a controller or processor from a specific perspective, e.g. a controller or processor discloses data to a recipient. A recipient of personal data and a third party may well simultaneously be regarded as a controller or processor from other perspectives. For example, entities that are to be seen as recipients or third parties from one perspective, are controllers for the processing for which they determine the purpose and means.

Third party

86. Article 4(10) defines a "*third party*" as a natural or legal person, public authority, agency or body other than

- the data subject,
- the controller,
- the processor and

- persons who, under the direct authority of the controller or processor, are authorised to process personal data.

87. The definition generally corresponds to the previous definition of "*third party*" in Directive 95/46/EC.

88. Whereas the terms "*personal data*", "*data subject*", "*controller*" and "*processor*" are defined in the Regulation, the concept of "*persons who, under the direct authority of the controller or processor, are authorised to process personal data*" is not. It is, however, generally understood as referring to persons that belong to the legal entity of the controller or processor (an employee or a role highly comparable to that of employees, e.g. interim staff provided via a temporary employment agency) but only insofar as they are authorized to process personal data. An employee etc. who obtains access to data that he or she is not authorised to access and for other purposes than that of the employer does not fall within this category. Instead, this employee should be considered as a third party vis-à-vis the processing undertaken by the employer. Insofar as the employee processes personal data for his or her own purposes, distinct from those of his or her employer, he or she will then be considered a controller and take on all the resulting consequences and liabilities in terms of personal data processing.[34]

89. A third party thus refers to someone who, in the specific situation at hand, is not a data subject, a controller, a processor or an employee. For example, the controller may hire a processor and instruct it to transfer personal data to a third party. This third party will then be considered a controller in its own right for the processing that it carries out for its own purposes. It should be noted that, within a group of companies, a company other than the controller or the processor is a third party, even though it belongs to the same group as the company who acts as controller or processor.

Example: Cleaning services

Company A concludes a contract with a cleaning service company to clean its offices. The cleaners are not supposed to access or otherwise process personal data. Even though they may occasionally come across such data when moving around in the office, they can carry out their task without accessing data and they are contractually prohibited to access or otherwise process personal data that Company A keeps as controller. The cleaners are not employed by Company A nor are they seen as being under the direct authority of that company. There is no intention to engage the cleaning service company or its employees to process personal data on Company A's behalf. The cleaning service company and its employees are therefore to be seen as a third party and the controller must make sure that there are adequate security measures to prevent that they have access to data and lay down a confidentiality duty in case they should accidentally come across personal data.

Example: Company groups – parent company and subsidiaries

Companies X and Y form part of the Group Z. Companies X and Y both process data about their respective employees for employee administration purposes. At one point, the parent company ZZ decides to request employee data from all subsidiaries in order to produce group wide statistics. When transferring data from companies X and Y to ZZ, the latter is to be regarded as a third party regardless of the fact that all companies are part of the same group. Company ZZ will be regarded as controller for its processing of the data for statistical purposes.

[34] The employer (as original controller) could nevertheless retain some responsibility in case the new processing occurred because of a lack of adequate security measures.

Recipient

90. Article 4(9) defines a "*recipient*" as a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. Public authorities are however not to be seen as recipients when they receive personal data in the framework of a particular inquiry in accordance with Union or Member State law (e.g. tax and customs authorities, financial investigation units etc.)[35]

91. The definition generally corresponds to the previous definition of "*recipient*" in Directive 95/46/EC.

92. The definition covers anyone who receives personal data, whether they are a third party or not. For example, when a controller sends personal data to another entity, either a processor or a third party, this entity is a recipient. A third party recipient shall be considered a controller for any processing that it carries out for its own purpose(s) after it receives the data.

Example: Disclosure of data between companies

The travel agency ExploreMore arranges travels on request from its individual customers. Within this service, they send the customers' personal data to airlines, hotels and organisations of excursions in order for them to carry out their respective services. ExploreMore, the hotels, airlines and excursion providers are each to be seen as controllers for the processing that they carry out within their respective services. There is no controller-processor relation. However, the airlines, hotels and excursion providers are to be seen as recipients when receiving the personal data from ExploreMore.

PART II – CONSEQUENCES OF ATTRIBUTING DIFFERENT ROLES

1 RELATIONSHIP BETWEEN CONTROLLER AND PROCESSOR

93. A distinct new feature in the GDPR are the provisions that impose obligations directly upon processors. For example, a processor must ensure that persons authorised to process the personal data have committed themselves to confidentiality (Article 28(3)); a processor must maintain a record of all categories of processing activities (Article 30(2)) and must implement appropriate technical and organisational measures (Article 32). A processor must also designate a data protection officer under certain conditions (Article 37) and has a duty to notify the controller without undue delay after becoming aware of a personal data breach (Article 33(2)). Furthermore, the rules on transfers of data to third countries (Chapter V) apply to processors as well as controllers. In this regard, the EDPB considers that Article 28(3) GDPR, while mandating a specific content for the necessary contract between controller and processor, imposes direct obligations upon processors, including the duty to assist the controller in ensuring compliance.[36]

1.1 Choice of the processor

94. The controller has the **duty to use "only processors providing sufficient guarantees** to implement appropriate technical and organisational measures", so that processing meets the requirements of the

[35] See also Recital 31 of the GDPR

[36] For instance, the processor should assist the controller, where necessary and upon request, in ensuring compliance with obligations relating to data protection impact assessments (Recital 95 GDPR). This needs to be reflected in the contract between the controller and the processor pursuant to Article 28(3)(f) GDPR.

GDPR - including for the security of processing - and ensures the protection of data subject rights.[37] The controller is therefore responsible for assessing the sufficiency of the guarantees provided by the processor and should be able to prove that it has taken all of the elements provided in the GDPR into serious consideration.

95. The guarantees "provided" by the processor are those that the processor is able to **demonstrate to the satisfaction of the controller**, as those are the only ones that can effectively be taken into account by the controller when assessing compliance with its obligations. Often this will require an exchange of relevant documentation (e.g. privacy policy, terms of service, record of processing activities, records management policy, information security policy, reports of external data protection audits, recognised international certifications, like ISO 27000 series).

96. The controller's assessment of whether the guarantees are sufficient is a form of risk assessment, which will greatly depend on the type of processing entrusted to the processor and needs to be made on a case-by-case basis, taking into account the nature, scope, context and purposes of processing as well as the risks for the rights and freedoms of natural persons. As a consequence, the EDPB cannot provide an exhaustive list of the documents or actions that the processor needs to show or demonstrate in any given scenario, as this largely depends on the specific circumstances of the processing.

97. The following elements[38] should be taken into account by the controller in order to assess the sufficiency of the guarantees: the processor's **expert knowledge** (e.g. technical expertise with regard to security measures and data breaches); the processor's **reliability**; the processor's **resources**. The reputation of the processor on the market may also be a relevant factor for controllers to consider.

98. Furthermore, the adherence to an approved code of conduct or certification mechanism can be used as an element by which sufficient guarantees can be demonstrated.[39] The processors are therefore advised to inform the controller as to this circumstance, as well as to any change in such adherence.

99. The obligation to use only processors "providing sufficient guarantees" contained in Article 28(1) GDPR is a continuous obligation. It does not end at the moment where the controller and processor conclude a contract or other legal act. Rather the controller should, at appropriate intervals, verify the processor's guarantees, including through audits and inspections where appropriate.[40]

1.2 Form of the contract or other legal act

100. Any processing of personal data by a processor must be governed by a contract or other legal act under EU or Member State law between the controller and the processor, as required by Article 28(3) GDPR.

101. Such legal act must be **in writing, including in electronic form**.[41] Therefore, non-written agreements (regardless of how thorough or effective they are) cannot be considered sufficient to meet the requirements laid down by Article 28 GDPR. To avoid any difficulties in demonstrating that the contract or other legal act is actually in force, the EDPB recommends ensuring that the necessary signatures are included in the legal act, in line with applicable law (e.g. contract law).

[37] Article 28(1) and Recital 81 GDPR.
[38] Recital 81 GDPR.
[39] Article 28(5) and Recital 81 GDPR.
[40] See also Article 28(3)h GDPR.
[41] Article 28(9) GDPR.

102. Furthermore, the contract or the other legal act under Union or Member State law must be **binding on the processor** with regard to the controller, i.e. it must establish obligations on the processor that are binding as a matter of EU or Member State law. Also it must set out the obligations of the controller. In most cases, there will be a contract, but the Regulation also refers to "other legal act", such as a national law (primary or secondary) or other legal instrument. If the legal act does not include all the minimum required content, it must be supplemented with a contract or another legal act that includes the missing elements.

103. Since the Regulation establishes a clear obligation to enter into a written contract, where no other relevant legal act is in force, the absence thereof is an infringement of the GDPR.[42] Both the controller and processor are responsible for ensuring that there is a contract or other legal act to govern the processing.[43] Subject to the provisions of Article 83 of the GDPR, the competent supervisory authority will be able to direct an administrative fine against both the controller and the processor, taking into account the circumstances of each individual case. Contracts that have been entered into before the date of application of the GDPR should have been updated in light of Article 28(3). The absence of such update, in order to bring a previously existing contract in line with the requirements of the GDPR, constitutes an infringement of Article 28(3).

A written contract pursuant to Article 28(3) GDPR may be embedded in a broader contract, such as a service level agreement. In order to facilitate the demonstration of compliance with the GDPR, the EDPB recommends that the elements of the contract that seek to give effect to Article 28 GDPR be clearly identified as such in one place (for example in an annex).

104. In order to comply with the duty to enter into a contract, **the controller and the processor may choose to negotiate their own contract** including all the compulsory elements **or to rely, in whole or in part, on standard contractual clauses in relation to obligations under Article 28**.[44]

[42] The presence (or absence) of a written arrangement, however, is not decisive for the existence of a controller-processor relationship. Where there is reason to believe that the contract does not correspond with reality in terms of actual control, on the basis of a factual analysis of the circumstances surrounding the relationship between the parties and the processing of personal data being carried out, the agreement may be set aside. Conversely, a controller-processor relationship might still be held to exist in absence of a written processing agreement. This would, however, imply a violation of Article 28(3) GDPR. Moreover, in certain circumstances, the absence of a clear definition of the relationship between the controller and the processor may raise the problem of the lack of legal basis on which every processing should be based, e.g. in respect of the communication of data between the controller and the alleged processor.

[43] Article 28(3) is not only applicable to controllers. In the situation where only the processor is subject to the territorial scope of the GDPR, the obligation shall only be directly applicable to the processor, see also EDPB Guidelines 3/2018 on the territorial scope of the GDPR, p. 12.

[44] Article 28(6) GDPR. The EDPB recalls that standard contractual clauses for the purposes of compliance with Article 28 GDPR are not the same as standard contractual clauses referred to in Article 46(2). While the former further stipulate and clarify how the provisions of Article 28(3) and (4) will be fulfilled, the latter provide appropriate safeguards in case of transfer of personal data to a third country or an international organisation in the absence of an adequacy decision pursuant to Article 45(3).

105. A set of standard contractual clauses (SCCs) may be, alternatively, adopted by the Commission[45] or adopted by a supervisory authority, in accordance with the consistency mechanism.[46] These clauses could be part of a certification granted to the controller or processor pursuant to Articles 42 or 43.[47]

106. The EDPB would like to clarify that there is no obligation for controllers and processors to enter into a contract based on SCCs, nor is it to be necessarily preferred over negotiating an individual contract. Both options are viable for the purposes of compliance with data protection law, depending on the specific circumstances, as long as they meet the Article 28(3) requirements.

107. If the parties wish to take advantage of standard contractual clauses, the data protection clauses of their agreement must be the same as those of the SCCs. The SCCs will often leave some blank spaces to be filled in or options to be selected by the parties. Also, as also mentioned above, the SCCs will generally be embedded in a larger agreement describing the object of the contract, its financial conditions, and other agreed clauses: it will be possible for the parties to add additional clauses (e.g. applicable law and jurisdiction) as long as they do not contradict, directly or indirectly, the SCCs[48] and they do not undermine the protection afforded by the GDPR and EU or Member State data protection laws.

108. Contracts between controllers and processors may sometimes be drafted unilaterally by one of the parties. Which party or parties that draft the contract may depend on several factors, including: the parties' position in the market and contractual power, their technical expertise, as well as access to legal services. For instance, some service providers tend to set up standard terms and conditions, which include data processing agreements.

109. An agreement between the controller and processor must comply with the requirements of Article 28 GDPR in order to ensure that the processor processes personal data in compliance with the GDPR. Any such agreement should take into account the specific responsibilities of controllers and processors. Although Article 28 provides a list of points which must be addressed in any contract governing the relationship between controllers and processors it leaves room for negotiations between the parties to such contracts. In some situations a controller or a processor may be in a weaker negotiation power to customize the data protection agreement. Reliance on the standard contractual clauses adopted pursuant to Article 28 (subparagraphs 7 and 8) may contribute to rebalancing the negotiating positions and to ensure that the contracts respect the GDPR.

---

[45] Article 28(7) GDPR. Article 28(7) GDPR. Article 28(7) GDPR. Article 28(7) GDPR. See the EDPB-EDPS Joint Opinion 1/2021 on standard contractual clauses between controllers and processors: https://edpb.europa.eu/our-work-tools/our-documents/edpbedps-joint-opinion/edpb-edps-joint-opinion-12021-standard_en.

[46] Article 28(8) GDPR. The Register for Decisions taken by supervisory authorities and courts on issues handled in the consistency mechanism, including standard contractual clauses for the purposes of compliance with Art. 28 GDPR, can be accessed here: https://edpb.europa.eu/our-work-tools/consistency-findings/register-for-decisions_en.

[47] Article 28(6) GDPR.

[48] The EDPB recalls that the same degree of flexibility is allowed when the parties choose to use SCCs as appropriate safeguard for transfers to third countries pursuant to Article 46(2)(c) or Article 46(2)(d) GDPR. Recital 109 GDPR clarifies that "*The possibility for the controller or processor to use standard data-protection clauses adopted by the Commission or by a supervisory authority should prevent controllers or processors neither from including the standard data-protection clauses in a wider contract, such as a contract between the processor and another processor, nor from adding other clauses or additional safeguards provided that they do not contradict, directly or indirectly, the standard contractual clauses [...] or prejudice the fundamental rights or freedoms of the data subjects. Controllers and processors should be encouraged to provide additional safeguards via contractual commitments that supplement standard protection clauses*".

110. The fact that the contract and its detailed terms of business are prepared by the service provider rather than by the controller is not in itself problematic and is not in itself a sufficient basis to conclude that the service provider should be considered as a controller. Also, the imbalance in the contractual power of a small data controller with respect to big service providers should not be considered as a justification for the controller to accept clauses and terms of contracts which are not in compliance with data protection law, nor can it discharge the controller from its data protection obligations. The controller must evaluate the terms and in so far as it freely accepts them and makes use of the service, it has also accepted full responsibility for compliance with the GDPR. 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, bearing in mind the degree of leeway that the processor enjoys with respect to non-essential elements of the means (see paragraphs 40-41 above). The mere publication of these modifications on the processor's website is not compliant with Article 28.

1.3 Content of the contract or other legal act

111. Before focusing on each of the detailed requirements set out by the GDPR as to the content of the contract or other legal act, some general remarks are necessary.

112. While the elements laid down by Article 28 of the Regulation constitute its core content, the contract should be a way for the controller and the processor to further clarify how such core elements are going to be implemented with detailed instructions. Therefore, **the processing agreement should not merely restate the provisions of the GDPR**: rather, it should include more specific, concrete information as to how the requirements will be met and which level of security is required for the personal data processing that is the object of the processing agreement. Far from being a pro-forma exercise, the negotiation and stipulation of the contract are a chance to specify details regarding the processing.[49] Indeed, the "protection of the rights and freedoms of data subjects as well as the responsibility and liability of controllers and processors [...] requires a clear allocation of the responsibilities" under the GDPR.[50]

113. At the same time, the contract should **take into account "*the specific tasks and responsibilities of the processor in the context of the processing to be carried out and the risk to the rights and freedoms of the data subject*"**.[51] Generally speaking, the contract between the parties should be drafted in light of the specific data processing activity. For instance, there is no need to impose particularly stringent protections and procedures on a processor entrusted with a processing activity from which only minor risks arise: while each processor must comply with the requirements set out by the Regulation, the measures and procedures should be tailored to the specific situation. In any event, all elements of Article 28(3) must be covered by the contract. At the same time, the contract should include some elements that may help the processor in understanding the risks to the rights and freedoms of data subjects arising from the processing: because the activity is performed on behalf of the controller, often the controller has a deeper understanding of the risks that the processing entails since the controller is aware of the circumstances in which the processing is embedded.

114. Moving on to the **required content** of the contract or other legal act, EDPB interprets Article 28(3) in a way that it needs to set out:

[49] See also EDPB Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), p. 5.
[50] Recital 79 GDPR.
[51] Recital 81 GDPR.

- the **subject-matter** of the processing (for instance, video surveillance recordings of people entering and leaving a high-security facility). While the subject matter of the processing is a broad concept, it needs to be formulated with enough specifications so that it is clear what the main object of the processing is;
- the **duration**[52] of the processing: the exact period of time, or the criteria used to determine it, should be specified; for instance, reference could be made to the duration of the processing agreement;
- the **nature** of the processing: the type of operations performed as part of the processing (for instance: "filming", "recording", "archiving of images", ...) **and purpose** of the processing (for instance: detecting unlawful entry). This description should be as comprehensive as possible, depending on the specific processing activity, so as to allow external parties (e.g. supervisory authorities) to understand the content and the risks of the processing entrusted to the processor.
- the **type of personal data**: this should be specified in the most detailed manner as possible (for instance: video images of individuals as they enter and leave the facility). It would not be adequate merely to specify that it is "personal data pursuant to Article 4(1) GDPR" or "special categories of personal data pursuant to Article 9". In case of special categories of data, the contract or legal act should at least specify which types of data are concerned, for example, "information regarding health records", or "information as to whether the data subject is a member of a trade union";
- the **categories of data subjects**: this, too, should be indicated in a quite specific way (for instance: "visitors", "employees", delivery services etc.);
- the **obligations and rights of the controller**: the rights of the controller are further dealt with in the following sections (e.g. with respect to the right of the controller to perform inspections and audits). As regards the obligations of the controller, examples include the controller's obligation to provide the processor with the data mentioned in the contract, to provide and document any instruction bearing on the processing of data by the processor, to ensure, before and throughout the processing, compliance with the obligations set out in the GDPR on the processor's part, to supervise the processing, including by conducting audits and inspections with the processor.

115. While the GDPR lists elements that always need to be included in the agreement, other relevant information may need to be included, depending on the context and the risks of the processing as well as any additional applicable requirement.

1.3.1 The processor must only process data on documented instructions from the controller (Art. 28(3)(a) GDPR)

116. The need to specify this obligation stems from the fact that the processor processes data on behalf of the controller. Controllers must provide its processors with instructions related to each processing activity. Such instructions can include permissible and unacceptable handling of personal data, more detailed procedures, ways of securing data, etc. The processor shall not go beyond what is instructed by the controller. It is however possible for the processor to suggest elements that, if accepted by the controller, become part of the instructions given.

[52] The duration of the processing is not necessarily equivalent to the duration of the agreement (there may be legal obligations to keep the data longer or shorter).

117. When a processor processes data outside or beyond the controller's instructions, and this amounts to a decision determining the purposes and means of processing, the processor will be in breach of its obligations and will even be considered a controller in respect of that processing in accordance with Article 28(10) (see sub-section 1.5 below[53]).

118. The instructions issued by the controller must be **documented**. For these purposes, it is recommended to include a procedure and a template for giving further instructions in an annex to the contract or other legal act. Alternatively, the instructions can be provided in any written form (e.g. e-mail), as well as in any other documented form as long as it is possible to keep records of such instructions. In any event, to avoid any difficulties in demonstrating that the controller's instructions have been duly documented, the EDPB recommends keeping such instructions together with the contract or other legal act.

119. The duty for the processor to refrain from any processing activity not based on the controller's instructions also applies to **transfers** of personal data to a third country or international organisation. The contract should specify the requirements for transfers to third countries or international organisations, taking into account the provisions of Chapter V of the GDPR.

120. The EDPB recommends that controller pay due attention to this specific point especially when the processor is going to delegate some processing activities to other processors, and when the processor has divisions or units located in third countries. If the instructions by the controller do not allow for transfers or disclosures to third countries, the processor will not be allowed to assign the processing to a sub-processor in a third country, nor will he be allowed to have the data processed in one of his non-EU divisions.

121. A processor may process data other than on documented instructions of the controller **when the processor is required to process and/or transfer personal data on the basis of EU law or Member State law to which the processor is subject**. This provision further reveals the importance of carefully negotiating and drafting data processing agreements, as, for example, legal advice may need to be sought by either party as to the existence of any such legal requirement. This needs to be done in a timely fashion, as the processor has an obligation to inform the controller of such requirement before starting the processing. Only when that same (EU or Member State) law forbids the processor to inform the controller on "important grounds of public interest", there is no such information obligation. In any case, any transfer or disclosure may only take place if authorised by Union law, including in accordance with Article 48 of the GDPR.

1.3.2 The processor must ensure that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality (Art. 28(3)(b) GDPR)

122. The contract needs to state that the processor must ensure that anyone it allows to process the personal data is committed to confidentiality. This may occur either via a specific contractual agreement, or due to statutory obligations already in place.

123. The broad concept of "persons authorised to process the personal data" includes employees and temporary workers. Generally speaking, the processor should make the personal data available only to the employees who actually need them to perform tasks for which the processor was hired by the controller.

[53] See Part II, sub-section 1.5 ("Processor determining purposes and means of processing").

124. The commitment or obligation of confidentiality must be "appropriate", i.e. it must effectively forbid the authorised person from disclosing any confidential information without authorisation, and it must be sufficiently broad so as to encompass all the personal data processed on behalf of the controller as well as the conditions under which the personal data are processed.

1.3.3 The processor must take all the measures required pursuant to Article 32 (Art. 28(3)(c) GDPR)

125. Article 32 requires the controller and the processor to implement appropriate technical and organisational security measures. While this obligation is already directly imposed on the processor whose processing operations fall within the scope of the GDPR, the duty to take all measures required pursuant to Article 32 still needs to be reflected in the contract concerning the processing activities entrusted by the controller.

126. As indicated earlier, the processing contract should not merely restate the provisions of the GDPR. The contract needs to include or reference information as to the security measures to be adopted**, an obligation on the processor to obtain the controller's approval before making changes**, and a regular review of the security measures so as to ensure their appropriateness with regard to risks, which may evolve over time. The degree of detail of the information as to the security measures to be included in the contract must be such as to enable the controller to assess the appropriateness of the measures pursuant to Article 32(1) GDPR. Moreover, the description is also necessary in order to enable the controller to comply with its accountability duty pursuant to Article 5(2) and Article 24 GDPR as regards the security measures imposed on the processor. A corresponding obligation of the processor to assist the controller and to make available all information necessary to demonstrate compliance can be inferred from Art. 28.3 (f) and (h) GDPR.

127. The level of instructions provided by the controller to the processor as to the measures to be implemented will depend on the specific circumstances. In some cases, the controller may provide a clear and detailed description of the security measures to be implemented. In other cases, the controller may describe the minimum security objectives to be achieved, while requesting the processor to propose implementation of specific security measures. In any event, the controller must provide the processor with a description of the processing activities and security objectives (based on the controller's risk assessment), as well as approve the measures proposed by the processor. This could be included in an annex to the contract. The controller exercises its decision-making power over the main features of the security measures, be it by explicitly listing the measures or by approving those proposed by the processor.

1.3.4 The processor must respect the conditions referred to in Article 28(2) and 28(4) for engaging another processor (Art. 28(3)(d) GDPR).

128. The agreement must specify that the processor may not engage another processor without the controller's prior written authorisation and whether this authorisation will be specific or general. In case of general authorisation, the processor has to inform the controller of any change of sub-processors under a written authorisation, and give the controller the opportunity to object. It is recommended that the contract set out the process for this. It should be noted that the processor's duty to inform the controller of any change of sub-processors implies that the processor actively

indicates or flags such changes toward the controller.[54] Also, where specific authorisation is required, the contract should set out the process for obtaining such authorisation.

129. When the processor engages another processor, a contract must be put in place between them, imposing the same data protection obligations as those imposed on the original processor or these obligations must be imposed by another legal act under Union or Member State law (see also below paragraph 160). This includes the obligation under Article 28(3)(h) to allow for and contribute to audits by the controller or another auditor mandated by the controller.[55] The processor is liable to the controller for the other processors' compliance with data protection obligations (for further details on the recommended content of the agreement see sub-section 1.6 below[56]).

1.3.5 The processor must assist the controller for the fulfilment of its obligation to respond to requests for exercising the data subject's rights (Article 28(3) (e) GDPR).

130. While ensuring that data subjects requests are dealt with is up to the controller, the contract must stipulate that the processor has an obligation to provide assistance "by appropriate technical and organisational measures, insofar as this is possible". The nature of this assistance may vary greatly "taking into account the nature of the processing" and depending on the type of activity entrusted to the processor. The details concerning the assistance to be provided by the processor should be included in the contract or in an annex thereto.

131. While the assistance may simply consist in promptly forwarding any request received and/or enabling the controller to directly extract and manage the relevant personal data, in some circumstances the processor will be given more specific, technical duties, especially when it is in the position of extracting and managing the personal data.

132. It is crucial to bear in mind that, although the practical management of individual requests can be outsourced to the processor, the controller bears the responsibility for complying with such requests. Therefore, the assessment as to whether requests by data subjects are admissible and/or the requirements set by the GDPR are met should be performed by the controller, either on a case-by-case basis or through clear instructions provided to the processor in the contract before the start of the processing. Also, the deadlines set out by Chapter III cannot be extended by the controller based on the fact that the necessary information must be provided by the processor.

1.3.6 The processor must assist the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 (Art. 28(3)(f) GDPR).

133. It is necessary for the contract to avoid merely restating these duties of assistance: **the agreement should contain details as to how the processor is asked to help the controller meet the listed obligations**. For example, procedures and template forms may be added in the annexes to the agreement, allowing the processor to provide the controller with all the necessary information.

134. The type and degree of assistance to be provided by the processor may vary widely "*taking into account the nature of processing and the information available to the processor".* The controller must

[54] In this regard it is, by contrast, e.g. not sufficient for the processor to merely provide the controller with a generalized access to a list of the sub-processors which might be updated from time to time, without pointing to each new sub-processor envisaged. In other words, the processor must actively inform the controller of any change to the list (i.e. in particular of each new envisaged sub-processor).

[55] See also EDPB Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), 9 July 2019, at paragraph 44.

[56] See Part II, sub-section 1.6 ("Sub-processors").

adequately inform the processor as to the risk involved in the processing and as to any other circumstance that may help the processor meet its duty.

135. Moving on to the specific obligations, the processor has, first, a duty to assist the controller in meeting the obligation to adopt adequate technical and organisational measures to ensure security of processing.[57] While this may overlap, to some extent, with the requirement that the processor itself adopts adequate security measures, where the processing operations of the processor fall within the scope of the GDPR, they remain two distinct obligations, since one refers to the processor's own measures and the other refers to the controller's.

136. Secondly, the processor must assist the controller in meeting the obligation to notify personal data breaches to the supervisory authority and to data subjects. The processor must notify the controller whenever it discovers a personal data breach affecting the processor's or a sub-processor's facilities / IT systems and help the controller in obtaining the information that need to be stated in the report to the supervisory authority.[58] The GDPR requires that the controller notify a breach without undue delay in order to minimize the harm for individuals and to maximize the possibility to address the breach in an adequate manner. Thus, the processor's notification to the data controller should also take place without undue delay.[59] Depending on the specific features of the processing entrusted to the processor, it may be appropriate for the parties to include in the contract a specific timeframe (e.g. number of hours) by which the processor should notify the controller, as well as the point of contact for such notifications, the modality and the minimum content expected by the controller.[60] The contractual arrangement between the controller and the processor may also include an authorisation and a requirement for the processor to directly notify a data breach in accordance with Articles 33 and 34, but the legal responsibility for the notification remains with the controller.[61] If the processor does notify a data breach directly to the supervisory authority, and inform data subjects in accordance with Article 33 and 34, the processor must also inform the controller and provide the controller with copies of the notification and information to data subjects.

137. Furthermore, the processor must also assist the controller in carrying out data protection impact assessments when required, and in consulting the supervisory authority when the outcome reveals that there is a high risk that cannot be mitigated.

138. The duty of assistance does not consist in a shift of responsibility, as those obligations are imposed on the controller. For instance, although the data protection impact assessment can in practice be carried out by a processor, the controller remains accountable for the duty to carry out the assessment[62] and the processor is only required to assist the controller "where necessary and upon request."[63] As a result, the controller is the one that must take the initiative to perform the data protection impact assessment, not the processor.

---

[57] Article 32 GDPR.

[58] Article 33(3) GDPR.

[59] For more information, see the Guidelines on Personal data breach notification under Regulation 2016/679, WP250rev.01, 6 February 2018, p. 13-14.

[60] See also EDPB Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), 9 July 2019, at paragraph 40.

[61] Guidelines on Personal data breach notification under Regulation 2016/679, WP250rev.01, 6 February 2018, p. 14.

[62] Article 29 Data Protection Working Party, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, WP 248 rev.01, p. 14

[63] Recital 95 GDPR.

1.3.7 On termination of the processing activities, the processor must, at the choice of the controller, delete or return all the personal data to the controller and delete existing copies (Art. 28(3)(g) GDPR).

139. The contractual terms are meant to ensure that the personal data are subject to appropriate protection after the end of the "provision of services related to the processing": it is therefore up to the controller to decide what the processor should do with regard to the personal data.

140. The controller can decide at the beginning whether personal data shall be deleted or returned by specifying it in the contract, through a written communication to be timely sent to the processor. The contract or other legal act should reflect the possibility for the data controller to change the choice made before the end of the provision of services related to the processing. The contract should specify the process for providing such instructions.

141. If the controller chooses that the personal data be deleted, the processor should ensure that the deletion is performed in a secure manner, also in order to comply with Article 32 GDPR. The processor should confirm to the controller that the deletion has been completed within an agreed timescale and in an agreed manner.

142. The processor must delete all existing copies of the data, unless EU or Member State law requires further storage. If the processor or controller is aware of any such legal requirement, it should inform the other party as soon as possible.

1.3.8 The processor must make available to the controller all information necessary to demonstrate compliance with the obligations laid down in Article 28 and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller (Art. 28(3)(h) GDPR).

143. The contract shall include details on how often and how the flow of information between the processor and the controller should take place so that the controller is fully informed as to the details of the processing that are relevant to demonstrate compliance with the obligations laid down in Article 28 GDPR. For instance, the relevant portions of the processor's records of processing activities may be shared with the controller. The processor should provide all information on how the processing activity will be carried out on behalf of the controller. Such information should include information on the functioning of the systems used, security measures, how the data retention requirements are met, data location, transfers of data, who has access to data and who are the recipients of data, sub-processors used, etc.

144. Further details shall also be set out in the contract regarding the ability to carry out and the duty to contribute to inspections and audits by the controller or another auditor mandated by the controller.

The GDPR specifies the inspections and audits are carried out by the controller or by a third party mandated by the controller. The goal of such audit is ensuring that the controller has all information concerning the processing activity performed on its behalf and the guarantees provided by the processor. The processor may suggest the choice of a specific auditor, but the final decision has to be left to the controller according to Article 28(3)(h) of the GDPR.[64] Additionally, even where the

[64] See EDPB-EDPS Joint Opinion 1/2021 on standard contractual clauses between controllers and processors, paragraph 43.

inspection is performed by an auditor proposed by the processor, the controller retains the right to contest the scope, methodology and results of the inspection.[65]

The parties should cooperate in good faith and assess whether and when there is a need to perform audits on the processor's premises,, as well as which type of audit or inspection (remote / on-site / other way to gather the necessary information) would be needed and appropriate in the specific case also taking into account security concerns; the final choice on this is to be taken by the controller. Following the results of the inspection, the controller should be able to request the processor to take subsequent measures, e.g. to remedy shortcomings and gaps identified.[66] Likewise, specific procedures should be established regarding the processor's and the controller's inspection of sub-processors (see sub-section 1.6 below[67]).

145. The issue of the allocation of costs between a controller and a processor concerning audits is not covered by the GDPR and is subject to commercial considerations. However, Article 28 (3)(h) requires that the contract include an obligation for the processor to make available all information necessary to the controller and an obligation to allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller. This means in practice that parties should not insert in the contract clauses envisaging the payment of costs or fees that would be clearly disproportionate or excessive, thus having a dissuasive effect on one of the parties. Such clauses would indeed imply that the rights and obligations set out in Article 28(3)(h) would never be exercised in practice and would become purely theoretical whereas they form an integral part of the data protection safeguards envisaged under Article 28 GDPR.

1.4 Instructions infringing data protection law

146. According to Article 28(3), the processor must immediately inform the controller if, in its opinion, an instruction infringes the GDPR or other Union or Member State data protection provisions.

147. Indeed, the processor has a duty to comply with the controller's instructions, but it also has a general obligation to comply with the law. An instruction that infringes data protection law seems to cause a conflict between the aforementioned two obligations.

148. Once informed that one of its instructions may be in breach of data protection law, the controller will have to assess the situation and determine whether the instruction actually violates data protection law.

149. The EDPB recommends the parties to negotiate and agree in the contract the consequences of the notification of an infringing instruction sent by the processor and in case of inaction from the controller in this context. One example would be to insert a clause on the termination of the contract if the controller persists with an unlawful instruction. Another example would be a clause on the possibility for the processor to suspend the implementation of the affected instruction until the controller confirms, amends or withdraws its instruction[68].

[65] See Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), paragraph 43.
[66] See Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), paragraph 43.
[67] See Part II, sub-section 1.6 ("Sub-processors").
[68] See EDPB-EDPS Joint Opinion 1/2021 on standard contractual clauses between controllers and processors, paragraph 39.

1.5 Processor determining purposes and means of processing

150. If the processor infringes the Regulation by determining the purposes and means of processing, it shall be considered as a controller in respect of that processing (Article 28(10) GDPR).

1.6 Sub-processors

151. Data processing activities are often carried out by a great number of actors, and the chains of subcontracting are becoming increasingly complex. The GDPR introduces specific obligations that are triggered when a (sub-)processor intends to engage another player, thereby adding another link to the chain, by entrusting to it activities requiring the processing of personal data. The analysis of whether the service provider acts as a sub-processor should be carried out in line with what described above on the concept of processor (see above paragraph 83).

152. Although the chain may be quite long, the controller retains its pivotal role in determining the purpose and means of processing. Article 28(2) GDPR stipulates that the processor shall not engage another processor without prior specific or general written authorisation of the controller (including in electronic form). In the case of general written authorisation, the processor must inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes. In both cases, the processor must obtain the controller's authorisation in writing before any personal data processing is entrusted to the sub-processor. In order to make the assessment and the decision whether to authorise subcontracting, a list of intended sub-processors (including per each: their locations, what they will be doing and proof of what safeguards have been implemented) will have to be provided to the data controller by the processor.[69]

153. The prior written authorisation may be specific, i.e. referring to a specific sub-processor for a specific processing activity and at a specific time, or general. This should be specified in the contract or other legal act that governs the processing.

154. In cases where the controller decides to accept certain sub-processors at the time of the signature of the contract, a list of approved sub-processors should be included in the contract or an annex thereto. The list should then be kept up to date, in accordance with the general or specific authorisation given by the controller.

155. If the controller chooses to give its **specific authorisation**, it should specify in writing which sub-processor and what processing activity it refers to. Any subsequent change will need to be further authorised by the controller before it is put in place. If the processor's request for a specific authorisation is not answered to within the set timeframe, it should be held as denied. The controller should make its decision to grant or withhold authorisation taking into account its obligation to only use processors providing "sufficient guarantees" (see sub-section 1.1 above[70]).

156. Alternatively, the controller may provide its **general authorisation** to the use of sub-processors (in the contract, including a list with such sub-processors in an annex thereto), which should be supplemented with criteria to guide the processor's choice (e.g., guarantees in terms of technical and organisational

[69] This information is needed, so that the controller can comply with the accountability principle in Article 24 and with provisions of Articles 28(1), 32 and Chapter V of the GDPR.
[70] See Part II - sub-section 1.1 ("Choice of the processor").

measures, expert knowledge, reliability and resources).[71] In this scenario, the processor needs to inform the controller in due time of any intended addition or replacement of sub-processor(s) so as to provide the controller with the opportunity to object.

157. Therefore, the main difference between the specific authorisation and the general authorisation scenarios lies in the meaning given to the controller's silence: in the general authorisation situation, the controller's failure to object within the set timeframe can be interpreted as authorisation.

158. In both scenarios, the contract should include details as to the timeframe for the controller's approval or objection and as to how the parties intend to communicate regarding this topic (e.g. templates). Such timeframe needs to be reasonable in light of the type of processing, the complexity of the activities entrusted to the processor (and the sub-processors) and the relationship between the parties. In addition, the contract should include details as to the practical steps following the controller's objection (e.g. by specifying time frame within which the controller and processor should decide whether the processing shall be terminated).

159. Regardless of the criteria suggested by the controller to choose providers, the processor remains fully liable to the controller for the performance of the sub-processors' obligations (Article 28(4) GDPR). Therefore, the processor should ensure it proposes sub-processors providing sufficient guarantees.

160. Furthermore, when a processor intends to employ an (authorised) sub-processor, it must enter into a contract with it that imposes the same obligations as those imposed on the first processor by the controller or the obligations must be imposed by another legal act under EU or Member State law. The whole chain of processing activities needs to be regulated by written agreements. Imposing the "same" obligations should be construed in a functional rather than in a formal way: it is not necessary for the contract to include exactly the same words as those used in the contract between the controller and the processor, but it should ensure that the obligations in substance are the same. This also means that if the processor entrusts the sub-processor with a specific part of the processing, to which some of the obligations cannot apply, such obligations should not be included "by default" in the contract with the sub-processor, as this would only generate uncertainty. As an example, as to assistance with data breach related obligations, notification of a data breach by a sub-processor directly to the controller could be done if all three agree. However, in the case of such direct notification the processor should be informed and get a copy of the notification.

2 CONSEQUENCES OF JOINT CONTROLLERSHIP

2.1 Determining in a transparent manner the respective responsibilities of joint controllers for compliance with the obligations under the GDPR

161. Article 26(1) of the GDPR provides that joint controllers shall in a transparent manner determine and agree on their respective responsibilities for compliance with the obligations under the Regulation.

162. Joint controllers thus need to set "who does what" by deciding between themselves who will have to carry out which tasks in order to make sure that the processing complies with the applicable obligations under the GDPR in relation to the joint processing at stake. In other words, a distribution of responsibilities for compliance is to be made as resulting from the use of the term "*respective*" in

[71] This duty of the controller stems from the accountability principle in Article 24 and from the obligation to comply with provisions of Articles 28(1), 32 and Chapter V of the GDPR.

Article 26(1). This does not preclude the fact that EU or Member State law may already set out certain responsibilities of each joint controller. Where this is the case, the joint controller arrangement should also address any additional responsibilities necessary to ensure compliance with the GDPR that are not addressed by the legal provisions.[72]

163. The objective of these rules is to ensure that where multiple actors are involved, especially in complex data processing environments, responsibility for compliance with data protection rules is clearly allocated in order to avoid that the protection of personal data is reduced, or that a negative conflict of competence lead to loopholes whereby some obligations are not complied with by any of the parties involved in the processing. It should be made clear here that all responsibilities have to be allocated according to the factual circumstances in order to achieve an operative agreement. The EDPB observes that there are situations occurring in which the influence of one joint controller and its factual influence complicate the achievement of an agreement. However, those circumstances do not negate the joint controllership and cannot serve to exempt either party from its obligations under the GDPR.

164. More specifically, Article 26(1) specifies that the determination of their respective responsibilities (i.e. tasks) for compliance with the obligations under the GDPR is to be carried out by joint controllers "*in particular"* as regards the exercising of the rights of the data subject and the duties to provide information referred in Articles 13 and 14, unless and in so far as the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject.

165. It is clear from this provision that joint controllers need to define who respectively will be in charge of answering to requests when data subjects exercise their rights granted by the GDPR and of providing information to them as required by Articles 13 and 14 of the GDPR. This only refers to defining in their internal relationship which of the parties is obligated to respond to which data subjects' requests. . Regardless of any such arrangement, the data subject may contact either of the joint controllers in accordance with Article 26 (3) GPDR. However, the use of the terms "*in particular*" indicates that the obligations subject to the allocation of responsibilities for compliance by each party involved as referred in this provision are non-exhaustive. It follows that the distribution of the responsibilities for compliance among joint controllers is not limited to the topics referred in Article 26(1) but extends to other controller's obligations under the GDPR. Indeed, joint controllers need to ensure that the whole joint processing fully complies with the GDPR.

166. In this perspective, the compliance measures and related obligations joint controllers should consider when determining their respective responsibilities, in addition to those specifically referred in Article 26(1), include amongst others without limitation:

- Implementation of general data protection principles (Article 5)
- Legal basis of the processing[73] (Article 6)
- Security measures (Article 32)

[72] "In any event, the joint controller arrangement should comprehensively address all of the responsibilities of the joint controllers, including those which may have already been set out in the relevant EU or Member State law and without prejudice to the obligation of joint controllers to make available the essence of the joint controller arrangement in accordance with Article 26(2) GDPR."

[73] Although the GDPR does not preclude joint controllers to use different legal basis for different processing operations they carry out, it is recommended to use, whenever possible, the same legal basis for a particular purpose.

- Notification of a personal data breach to the supervisory authority and to the data subject[74] (Articles 33 and 34)
- Data Protection Impact Assessments (Articles 35 and 36)[75]
- The use of a processor (Article 28)
- Transfers of data to third countries (Chapter V)
- Organisation of contact with data subjects and supervisory authorities

167. Other topics that could be considered depending on the processing at stake and the intention of the parties are for instance the limitations on the use of personal data for another purpose by one of the joint controllers. In this respect, both controllers always have a duty to ensure that they both have a legal basis for the processing. Sometimes, in the context of joint controllership, personal data are shared by one controller to another. As a matter of accountability, each controller has the duty to ensure that the data are not further processed in a manner that is incompatible with the purposes for which they were originally collected by the controller sharing the data.[76]

168. Joint controllers can have a certain degree of flexibility in distributing and allocating obligations among them as long as they ensure full compliance with the GDPR with respect of the given processing. The allocation should take into account factors such as, who is competent and in a position to effectively ensure data subject's rights as well as to comply with the relevant obligations under the GDPR. The EDPB recommends documenting the relevant factors and the internal analysis carried out in order to allocate the different obligations. This analysis is part of the documentation under the accountability principle.

169. The obligations do not need to be equally distributed among the joint controllers. In this respect, the CJEU has recently stated that "*the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data*".[77] However, there may be cases where not all of the obligations can be distributed and all joint controllers may need to comply with the same requirements arising from the GDPR, taking into account the nature and context of the joint processing. For instance, joint controllers using shared data processing tools or systems both need to ensure compliance with notably the purpose limitation principle and implement appropriate measures to ensure the security of personal data processed under the shared tools.

[74] Please also see EDPB guidelines on Personal data breach notification under Regulation 2016/679, WP250.rev.01 which provide that joint controllership will include "*determining which party will have responsibility for complying with the obligations under Articles 33 and 34. WP29 recommends that the contractual arrangements between joint controllers include provisions that determine which controller will take the lead on, or be responsible for, compliance with the GDPR's breach notification obligations*"(p.13).

[75] Please also see EDPB guidelines on DPIAs, WP248.rev01 which provide the following: "*When the processing operation involves joint controllers, they need to define their respective obligations precisely. Their DPIA should set out which party is responsible for the various measures designed to treat risks and to protect the rights and freedoms of the data subjects. Each data controller should express his needs and share useful information without either compromising secrets (e.g.: protection of trade secrets, intellectual property, confidential business information) or disclosing vulnerabilities*" (p.7).

[76] Each disclosure by a controller requires a lawful basis and assessment of compatibility, regardless of whether the recipient is a separate controller or a joint controller. In other words, the existence of a joint controller relationship does not automatically mean that the joint controller receiving the data can also lawfully process the data for additional purposes which are beyond the scope of joint control.

[77] Judgment in *Wirtschaftsakademie*, C-210/16, ECLI:EU:C:2018:388, paragraph 43.

170. Another example is the requirement for each joint controller to maintain a record of processing activities or to designate a Data Protection Officer (DPO) if the conditions of Article 37(1) are met. Such requirements are not related to the joint processing but are applicable to them as controllers.

2.2 Allocation of responsibilities needs to be done by way of an arrangement

2.2.1 Form of the arrangement

171. Article 26(1) of the GDPR provides as a new obligation for joint controllers that they should determine their respective responsibilities "*by means of an arrangement between them*". The legal form of such arrangement is not specified by the GDPR. Therefore, joint controllers are free to agree on the form of the arrangement.

172. In addition, the arrangement on the allocation of responsibilities is binding upon each of the joint controllers. They each agree and commit *vis-à-vis* each other on being responsible for complying with the respective obligations stated in their arrangement as their responsibility.

173. Therefore, for the sake of legal certainty, even if there is no legal requirement in the GDPR for a contract or other legal act, the EDPB recommends that such arrangement be made in the form of a binding document such as a contract or other legal binding act under EU or Member State law to which the controllers are subject. This would provide certainty and could be used to evidence transparency and accountability. Indeed, in case of non-compliance with the agreed allocation provided in the arrangement, its binding nature allows one controller to seek the liability of the other for what was stated in the agreement as falling under its responsibility. Also, in line with the accountability principle, the use of a contract or other legal act will allow joint controllers to demonstrate that they comply with the obligations imposed upon them by the GDPR.

174. The way responsibilities, i.e. the tasks, are allocated between each joint controller has to be stated in a clear and plain language in the arrangement.[78] This requirement is important as it ensures legal certainty and avoid possible conflicts not only in the relation between the joint controllers but also vis-à-vis the data subjects and the data protection authorities.

175. To better frame the allocation of responsibilities between the parties, the EDPB recommends that the arrangement also provide general information on the joint processing by notably specifying the subject matter and purpose of the processing, the type of personal data, and the categories of data subjects.

2.2.2 Obligations towards data subjects

176. The GDPR provides several obligations of joint controllers towards data subjects:

The arrangement shall duly reflect the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects

177. As a complement to what is explained above in section 2.1 of the present guidelines, it is important that the joint controllers clarify in the arrangement their respective role, "*in particular*" as regards the exercise of the rights of the data subject and their duties to provide the information referred to in Articles 13 and 14. Article 26 of the GDPR stresses the importance of these specific obligations. The joint controllers must therefore organise and agree on how and by whom the information will be

[78] As stated in Recital 79 of the GDPR *"(...) the responsibility and liability of controllers and processors, also in relation to the monitoring by and measures of supervisory authorities, requires a clear allocation of the responsibilities under this Regulation, including where a controller determines the purposes and means of the processing jointly with other controllers*".

provided and how and by whom the answers to the data subject's requests will be provided. Irrespective of the content of the arrangement on this specific point, the data subject may contact either of the joint controllers to exercise his or her rights in accordance with Article 26(3) as further explained below.

178. The way these obligations are organised in the arrangement should "*duly*", i.e. accurately, reflect the reality of the underlying joint processing. For example, if only one of the joint controllers communicates with the data subjects for the purpose of the joint processing, such controller could be in a better position to inform the data subjects and possibly to answer their requests.

The essence of the arrangement shall be made available to the data subject

179. This provision is aimed to ensure that the data subject is aware of the "*essence of the arrangement*". For example, it must be completely clear to a data subject which data controller serves as a point of contact for the exercise of data subject rights (notwithstanding the fact that he or she can exercise his or her rights in respect of and against each joint controller). The obligation to make the essence of the arrangement available to data subjects is important in case of joint controllership in order for the data subject to know which of the controllers is responsible for what.

180. What should be covered by the notion of "*essence of the arrangement*" is not specified by the GDPR. The EDPB recommends that the essence cover at least all the elements of the information referred to in Articles 13 and 14 that should already be accessible to the data subject, and for each of these elements, the arrangement should specify which joint controller is responsible for ensuring compliance with these elements. The essence of the arrangement must also indicate the contact point, if designated.

181. The way such information shall be made available to the data subject is not specified. Contrary to other provisions of the GDPR (such as Article 30(4) for the record of processing or Article 40(11) for the register of approved codes of conduct), Article 26 does not indicate that the availability should be "*upon request*" nor "*publicly available by way of appropriate means*". Therefore, it is up to the joint controllers to decide the most effective way to make the essence of the arrangement available to the data subjects (e.g. together with the information in Article 13 or 14, in the privacy policy or upon request to the data protection officer, if any, or to the contact point that may have been designated). Joint controllers should respectively ensure that the information is provided in a consistent manner.

The arrangement may designate a contact point for data subjects

182. Article 26(1) provides the possibility for joint controllers to designate in the arrangement a contact point for data subjects. Such designation is not mandatory.

183. Being informed of a single way to contact possible multiple joint controllers enables data subjects to know who they can contact with regard to all issues related to the processing of their personal data. In addition, it allows multiple joint controllers to coordinate in a more efficient manner their relations and communications *vis-à-vis* data subjects.

184. For these reasons, in order to facilitate the exercise of data subjects' rights under the GDPR, the EDPB recommends joint controllers to designate such contact point.

185. The contact point can be the DPO, if any, the representative in the Union (for joint controllers not established in the Union) or any other contact point where information can be obtained.

Irrespective of the terms of the arrangement, data subjects may exercise their rights in respect of and against each of the joint controllers.

186. Under Article 26(3), a data subject is not bound by the terms of the arrangement and may exercise his or her rights under the GDPR in respect of and against each of the joint data controllers.

187. For example, in case of joint controllers established in different Member States, or if only one of the joint controllers is established in the Union, the data subject may contact, at his or her choice, either the controller established in the Member State of his or her habitual residence or place of work, or the controller established elsewhere in the EU or in the EEA.

188. Even if the arrangement and the available essence of it indicate a contact point to receive and handle all data subjects' requests, the data subjects themselves may still choose otherwise.

189. Therefore, it is important that joint controllers organise in advance in their arrangement how they will manage answers to requests they could receive from data subjects. In this respect, it is recommended that joint controllers communicate to the other controllers in charge or to the designated contact point, the requests received in order to be effectively handled. Requiring data subjects to contact the designated contact point or the controller in charge would impose an excessive burden on the data subject that would be contrary to the objective of facilitating the exercise of their rights under the GDPR.

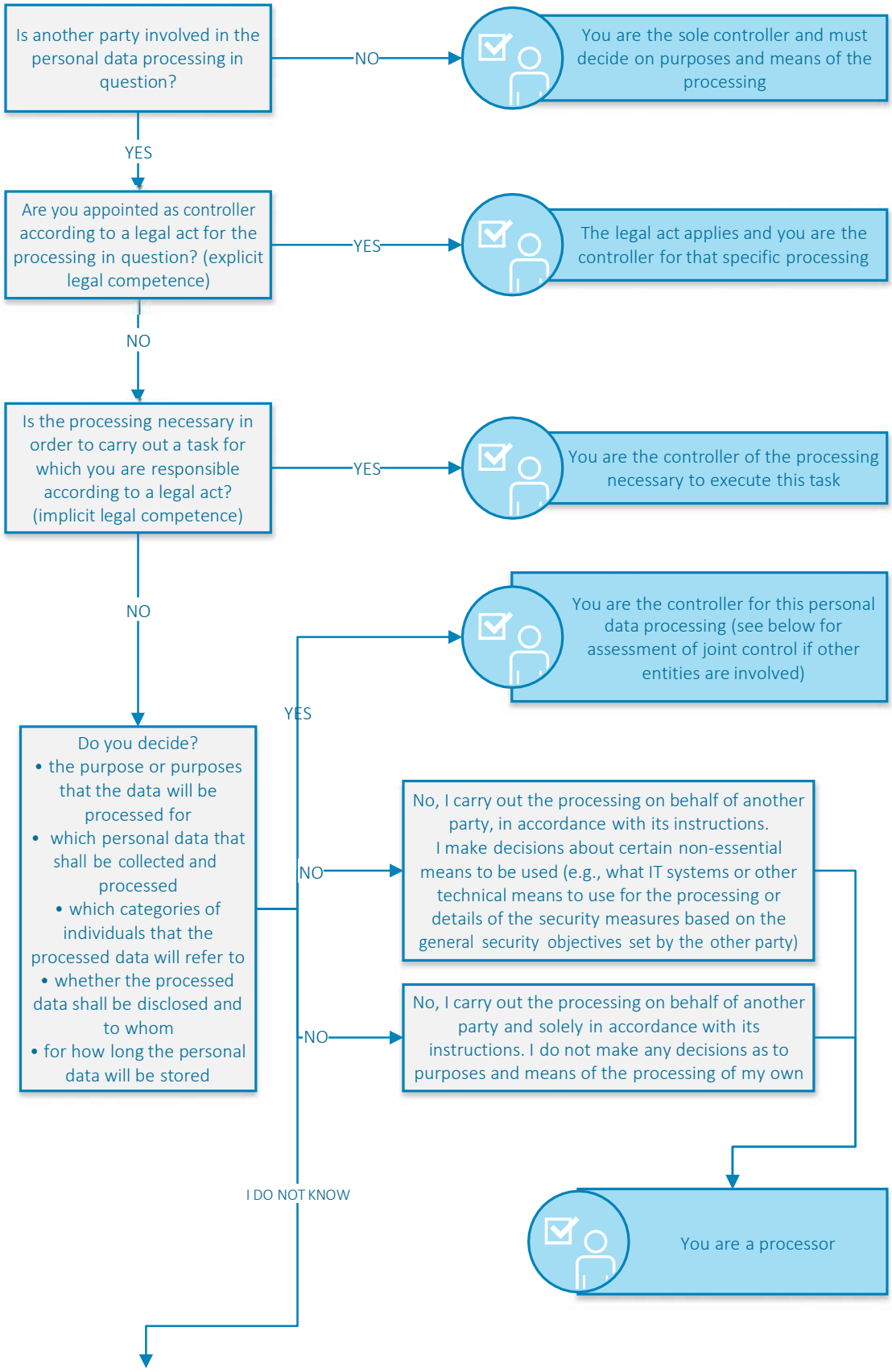
2.3 Obligations towards data protection authorities

190. Joint controllers should organise in the arrangement the way they will communicate with the competent supervisory data protection authorities. Such communication could cover possible consultation under Article 36 of the GDPR, notification of a personal data breach, designation of a data protection officer.

191. It should be recalled that data protection authorities are not bound by the terms of the arrangement whether on the issue of the qualification of the parties as joint controllers or the designated contact point. Therefore, the authorities can contact any of the joint controllers to exercise their powers under Article 58 with respect to the joint processing.

Annex I – Flowchart for applying the concepts of controller, processor and joint controllers in practice

Note: in order to properly assess the role of each entity involved, one must first identify the specific personal data processing at stake and its exact purpose. If multiple entities are involved, it is necessary to assess whether the purposes and means are determined jointly, leading to joint controllership.



I DO NOT KNOW

I don't know who decides on the purposes or means of the processing. :

The following factors may help to determine the appropriate qualification of the roles:

Factors that indicate that you are the controller

- You obtain a benefit from, or have an interest in, the processing (other than the mere payment for services received from another controller)
- You make decisions about the individuals concerned as part of or as a result of the processing (e.g. the data subjects are your employees)
- The processing activities can be considered as naturally attached to the role or activities of your entity (e.g. due to traditional roles or professional expertise) which entails responsibilities from a data protection point of view
- The processing refers to your relation with the data subjects as employees, customers, members etc.
- You have complete autonomy in deciding how the personal data is processed
- You have entrusted the processing of personal data to an external organisation to process the personal data on your behalf

Factors that indicate that you are the processor

- You process the personal data for another party's purposes and in accordance with its documented instructions - you do not have a purpose of your own for the processing.
- Another party monitors your processing activities in order to ensure that you comply with instructions and terms of contract.
- You do not pursue your own purpose in the processing other than your own business interest to provide services.
- You have been engaged for carrying out specific processing activities by someone who in turn has been engaged to process data on another party's behalf and on this party's documented instructions (you are a sub-processor)

Joint controllership - If you are the controller and other parties are involved in the personal data processing: