

Working Party confirms ‘controller’ and ‘processor’ distinction

Bridget Treacy, Partner at Hunton & Williams, discusses the Article 29 Working Party’s clarification of the concepts of data controller and data processor

The distinction between data ‘controller’ and data ‘processor’ lies at the heart of the EU Data Protection Directive 95/46/EC (the ‘Directive’), not least because the characterisation as either controller or processor determines the extent of a party’s legal obligations under the Directive. Experience has demonstrated that establishing whether a party is a controller or a processor in practical terms is fraught with difficulty. The increase in collaborative business models, the dynamic nature of the relationships between customer and vendor, the advent of cloud computing and the growing use of web 2.0 models, frequently result in a blurring of the line between controller and processor.

Against this background and the somewhat controversial Opinion on SWIFT in 2006, the Article 29 Working Party has examined the concepts of ‘controller’ and ‘processor’ in some detail in its recently issued Opinion 1/2010 (available from the Justice and Home Affairs section of www.europa.eu).

Background to Opinion 1/2010

When the Article 29 Working Party analysed the data processing activities of SWIFT in 2006, it determined that SWIFT, together with its financial institution clients, was a co-controller in relation to the personal data it processes.

The characterisation of SWIFT as a co-controller, with all of the attendant controller obligations under the Directive, was surprising given SWIFT’s role as a service provider facilitating the settlement of international financial transactions. At the time, commentators expressed considerable sympathy for SWIFT and regarded the Opinion as extreme.

Some drew a parallel with Royal Mail, making the point that a mere messenger should not have the legal responsibilities of a co-controller. In addition, outsource vendors and other service providers were concerned by the obvious implications for them. Applying the SWIFT analysis to many outsourced arrange-

ments could just as readily lead to other service providers being characterised as data controllers in circumstances that they had not anticipated. This would have significant consequences for contract governance and risk management, as well as implications for the pricing model.

Shortly after the SWIFT decision, the Article 29 Working Party signalled that it would provide further guidance on these key definitions, seeking to distinguish the two roles. There was a degree of speculation at this time that it might be easier to abandon the controller/processor distinction altogether and to replace it with the more pragmatic concepts of ‘responsible person’ and ‘processing service provider’.

However, in its recent Opinion the Working Party concluded that the distinction between controller and processor remains relevant and workable, and therefore the controller/processor framework will remain. In light of the confirmation, organisations must continue to analyse closely the nature of their data processing activities.

Exploring the meaning of ‘controller’

The characterisation of a party as a controller is important as it determines which (or whose) local law will govern the data processing activities. The relevant entity will need to ensure that there is a legitimate basis for processing data and comply with local registration requirements. The entity will also be responsible for providing individuals with access to their data and dealing with their data protection rights more generally.

The Directive defines a controller as “the person or entity that determines, alone or jointly with others, the purposes and the means of the processing of personal data.” The definition points to three characteristics: separate legal personality, the ability to act alone or with others, and a degree of control over the data processing activity.

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The aspect of the definition that causes the greatest difficulty in practice is the final element: the ability to determine the ‘purposes and means’ of the data processing activity. The Working Party confirms that this is a factual issue, yet the facts are often difficult to analyse.

Frequently in contract negotiations, there is lengthy debate as to the extent of control over the purposes and means of the processing. The reality is that the parties tend to focus on purpose, rather than means, as the determining factor, taking the view that the means by which the processing occurs is usually a technical issue for the processor to determine once the controller has specified the purposes of the processing. In its Opinion, the Working Party refers to both the technical and organisational aspects of ‘means’, and acknowledges that both elements may be delegated to the processor.

The Opinion provides some helpful examples of the controller/processor analysis. A selection of these are summarised in the table.

Unsurprisingly, in describing the degree of discretion that a controller must exercise to determine the purposes of

the processing activity, the Working Party resorts to general phrases such as “level of influence” and “margin of

manoeuvre.”

More helpfully, the Working Party points to three issues for consideration:

- 1) the level of instruction that the controller provides to the processor — this will likely determine the processor’s margin of manoeuvre in relation to the data processing;
- 2) whether the controller monitors service performance and delivery — if the controller closely supervises the processor’s compliance with the contract, this may be an indicator that the controller is in full control of the processing activities. Conversely, a “hands off” approach by the controller may increase the likelihood that the processor assumes co-controller responsibilities; and
- 3) data subjects’ expectations — if the controller is highly visible to data subjects, then it is less likely that the processor will have a co-controller role.

Example	Controller or processor	Reasons
Telecom operator	Both	Controller for traffic and billing data. Otherwise processor.
Business process outsourcing vendor (e.g. mail marketing and payroll)	Processor	Provided scope of vendor’s services are clearly defined and vendor is not permitted to use the data for other “added value” purposes.
Headhunters	Ambiguous but likely co-controller	Controller in relation to candidates. Co-controller or processor in relation to client. Added value services of matching against and existing database of candidates points towards co-controller.
Social network service providers	Controller	Users also likely to be controller, unless household exemption applies.
Behavioural advertising	Controller	Publisher is a controller. Ad network provider is a controller. If collaborate, publisher and ad network provider may be joint controllers.
Accountants	Both	Controller where providing general professional services. Where retained for specific tasks under the supervision of in-house team, e.g. internal audit, processor. Where negligence or fraud is detected, controller in discharging professional obligations to report.
Clinical drug trials	Fact dependent	Whether the sponsoring drug company and the trial centre are joint controllers depends on how the particular trial is set up and whether the sponsor determines the purposes and means of the processing. In some trials, the researcher may have greater discretion.

Exploring the meaning of ‘processor’

The Directive defines a processor as “the person or entity that processes personal data on behalf of the controller.”

As the processor acts on behalf of the controller, the processor must necessarily be a separate entity. But aside from this surety, the lines of demarcation between controller and processor are often blurred.

There are many situations in which a processor exceeds the original mandate and plays a role in determining the purposes for which data are processed. An example of this is where an outsource vendor, over time, is asked to take on a greater role within the outsource relationship, or to provide “added value” services that require the vendor to process customers’ data for additional purposes.

In a passing reference to cloud computing, the Opinion includes an example of distributed processing, and notes that where data are used in an unauthorised manner, the service provider may well be considered a controller. In these cases, the legality of the processing activity must be examined, but the vendor will probably be a co-controller with the customer.

Co-controllers and multiple processors

The Working Party acknowledges the reality that many relationships involve multiple parties with the ability to determine the purposes and means of the processing activities, and circumstances in which a controller may delegate data processing activities to multiple processors. Here, the Working Party advises a clear allocation of data protection responsibilities among the parties. However, in practice data processing arrangements involving multiple parties are common and often evolve during the life of a contract.

The Working Party encourages parties to ensure clear contractual arrangements. But arguably of greater importance is the monitoring of contractual relationships, particularly the change control process (the mechanism by which parties amend a contract), to ensure that data processing responsibilities are understood, accurately reflected in the contract and in the contract governance procedures. This is a key challenge for all parties.

Conclusion

The controller versus processor dilemma is here to stay. Parties will need to analyse very carefully their respective data processing obligations in the knowledge that, in relation to a particular data set, they may be a controller for certain processing, and a mere processor for other processing.

As mentioned above, the Opinion emphasises the analysis is essentially a factual one, but facts change over time and the relationships between the parties will inevitably evolve. Parties to commercial arrangements need to focus closely on the mechanics of their relationship, analysing which entity directs and controls the particular processing, and maintain that focus as the data processing activities mature over time. Such an analysis, though difficult to achieve in practice, is essential.

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