

**Telefónica Comments on the EDPB
Guidelines on the on the concepts of controller and
processor in the GDPR**

Telefónica welcomes the opportunity to make comments to the Guidelines on the concepts of controller and processors in the GDPR (“the Guidelines”) and to EDPB’s intention *“to clarify the meaning of the concepts and to clarify the different roles and the distribution of responsibilities between these actors”*. We do believe that this is an important exercise as these concepts are key elements to provide the proper certainty about the assignation of responsibilities obligations regarding data protection as regulated in the GDPR.

From a data protection point of view, the most relevant initial question is the role played by an entity that processes personal data in relation to the role of data controller or processor of personal data. The question is by no means trivial because data protection regulations assign certain obligations and limitations to one or the other.

Being controller or processor, as stated in the Guidelines, is not a question of choice but is a regulated issue which, as stated in the Guidelines, deals with fundamentally factual questions. It is no less true, however, that the nature of the controller or processor is not clearly delimited, especially in cases where there is a provision of services from which a processing activity may derive.

Under Directive 95/46/EC, the data processor maintained a less relevant status in terms of legal obligations, since the Directive basically focused on the obligations of the data controller. The GDPR has substantially extended this focus by making data processor directly responsible for GDPR compliance and emphasising its obligations to cooperate with the controller. In addition, the development of the data economy makes the role of the data processor more relevant in the potential secondary use of information.

In addition, new technologies such AI, IoT, blockchain or connected vehicles will generate increasing amounts of data, processed in complex ecosystems, not limited to the traditional roles of controller/processor. Organisations will necessarily be confronted to cases where the line between controller, processor or joint controller will be difficult to be drawn, but EDPB draft guidelines do not address these complex difficulties to apply in practice.

With these comments, Telefónica expands on some elements of the draft EDPB Guidelines that need to be clarified in order to reach a balanced outcome, that provides real guidance for Data Protection Authorities, industry and citizens. Clear rules are so important as a uniform interpretation of such rules to ensure trust of individuals and data subjects across the EU.

1. Data controllers subject to regulated activities

When the entity provides regulated services subject to an authorization, notification license or in any case, activities executed in legally based exclusive terms, the entity providing a regulated service carries out, by definition, exclusive activities. Therefore, these activities cannot be understood as forming part of an activity delegated by a customer.

In this regard, providers of regulated activities, such as entities from the financial, insurance and telecommunications sectors must be considered as data controllers with respect to the provision of such regulated services and to the extent of such activities necessary to provide the services. As stated in the example of the Guidelines regarding bank payments (Paragraph 38), the payment service provider, the insurance entity and the telco operator are data controllers given that the entity “decides independently” from the customer “on which data has to be processed to provide the service, for how long the data must be stored, etc”. The customer cannot have any influence on the purpose for which such entities process data.

In the specific case of telecommunication sector, in our opinion telco operators are acting as data controllers in providing telecommunication services to B2B and B2C customers. That will be the case as well when providing roaming services in the visited network to roaming customers.

2. Joint controllership

We welcome EDPB’s efforts to clarify the requirements and situations that would lead to joint controllership situations. However, we consider there are still situations that should be further clarified, in an objective manner, on what are the boundaries that lead to joint controllership, like the ones outlined by Advocate General Bobek in the Fashion ID case. The recent Jurisprudence of the Court of Justice of the European Union (CJUE) on joint controllership is expansive, and a wrong interpretation of this position could lead to think that almost everything could be a joint controllership.

Without prejudice to the Jurisprudence of the CJEU, it should be avoided the quick assumption that complex ecosystems where there is a common purpose substrate automatically fall within the notion of joint controllership. Most cases, where there is no concurrence of wills (or purposes) around a common service or processing

activities, but different purposes from different entities sharing a single data set, can be instrumented through data controller to data controller mechanisms.

We consider that data subject expectations must be an important element of analysis when deciding, based on information, the roles associated with each processing, regarding this topic. Data subjects expect that the entity primarily responsible should be the one in which they place their trust in a service provision relationship. Sharing responsibility with different stakeholders, even proving enough transparency, might not be the best option from a data subject point of view.

3. Programmatic advertising

A clear case of complex ecosystem is programmatic advertising. We consider that these guidelines are a good opportunity to deal with this topic, not only because is urgent to tackle these activities but because it could pave the way for a clear understanding of this kind of cooperative ecosystems and the responsibility of each party from a data protection perspective.

In any case, we consider that there should be further clarification on the data protection role of advertisers when providing instructions to set up their campaigns through other actors in the programmatic ecosystem. This remains currently unsolved and subject to subjective interpretations of the different actors, partly because of the extensive interpretation of CJUE regarding joint controllership, and causes complex negotiations and legal uncertainty in the ecosystem that would require a clear and urgent guidance by EDPB.

So we ask EDPB for proposals that provide certainty based on the real facts of the processing, the responsibilities assumed in the processing and the reasonable expectations of the users.

4. Principle of Accountability

EDPB analysis on the relationships between the controller and the processor and between joint controllers builds on a strict interpretation of the principle of accountability.

For instance, EDPB recommends to review all controller-processor Data Processing Agreements, which should not only restate the content of Article 28, but should also specify how GDPR requirements will be met to further clarify how Article 28 core elements are going to be implemented with detailed instructions (Paragraph 109). EDPB interpretation goes beyond the spirit and the letter of GDPR and is in contradiction with the principle of accountability.

Accountability means that the controller, and in a certain way also the processor, shall be responsible for the fairness, the lawfulness and the transparency of the processing

and shall be able to demonstrate compliance with all principles relating to the processing of personal data as detailed in Article 5.1. of GDPR. However, EDPB comes back to a system of documentation and proposes to specify in written every detail as how the requirements will be met, and which level of security is required for the given data processing. This is not necessary at all as the obligations of the processor are clearly stated in Article 28 of GDPR. The processor will have to comply with this provision and the controller, based on a well understood Accountability principle, will have to ensure the processor honours these obligations.

5. Conclusion

EDPB Guidelines should have a very specific objective: “clarifying GDPR provisions only when necessary”. Telefónica believes that GDPR already strikes the right balance between the need for legal certainty as far as data subject’s rights and obligations of controllers, processors and joint controllers are concerned and the need to ensure certain flexibility for organisations, based on a well understood principle of accountability.

Telefónica considers it necessary for the EDPB to assess the necessity to provide clarification to the above-mentioned points for the benefit of organisations, Data Protection Authorities and, ultimately, data subjects. We hope that these comments will help EDPB as it finalises its Guidelines and we remain at your disposal for further clarification.

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