

European Data Protection Board
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OUR REFERENCE

YOUR REFERENCE

LEUVEN

October 19, 2020

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

Dear European Data Protection Board,

We welcome your Guidelines 07/2020 on the concepts of controller and processor in the GDPR (the "Guidelines") and the call for comments on the current version.

We would like to submit the comments below:

- 1) **Existence of joint controllership (p. 17):** For joint controllership to exist, is it required that both controllers are subject to the GDPR? For example, a controller established outside the EEA to whom the GDPR does not apply based on its territorial scope jointly determines the purposes and the means of a data processing activity with a controller established in the EEA who is subject to the GDPR. In this case, is there joint controllership within the meaning of Article 26 GDPR with all the associated consequences? It would be useful if the Guidelines pay specific attention to the situation of joint controllership with parties outside of the EEA, but also to the relationship between separate controllers or a controller and a processor, in case (one of the) controller(s) is established outside the EEA. In addition, it would be beneficial if the Guidelines could take into account the recent ruling of the ECJ with regard to the SCCs (C-311/18) and give some guidance on how these should be dealt with in the future.
- 2) **Para. 55:** The concept of being a joint controller for certain processing operations and a sole controller for other processing operations in the same chain of processing is theoretically plausible in some way, but applying this in practice seems extremely complex to us. We are concerned that this will give rise to endless discussions between the parties involved. We would welcome more clarification on how this should work in practice.
- 3) **Para. 68:** We very much appreciate that the EDPB explicitly recognizes the existence of the concept of separate controllership. However, it is still unclear to us what is required for a transmission of data between separate controllers. Could you please address whether there are any specific requirements and if so, which ones?
- 4) **Para. 79:** The guidelines state that "*the processor may not carry out processing for its own purpose(s)*". However, could you please confirm that this paragraph should be read in conjunction with paragraph 24? This would give us greater comfort that it is effectively possible to act at the same time as a controller for one processing activity and as a processor for another processing activity.



- 5) **Para. 102-103:** The EDPB confirms that it is possible to rely on SCCs in relation to obligations under Article 28 GDPR which may be adopted by the European Commission or by a supervisory authority. Could you please clarify whether it is possible to rely on SCCs that have been approved by a supervisory authority not established in the Member State where the controller who wishes to rely on these SCCs is established? In particular, we refer to the SCCs adopted by the competent supervisory authority of Denmark.¹ In addition, we would also find it extremely useful if SCCs in relation to obligations under Article 28 GDPR were adopted by the European Commission.
- 6) **Para. 112:** The Guidelines state that *“other relevant information may need to be included in the [data processing] agreement”*. Could you please give some examples of what that additional information might be and could you also give an example of a situation where the EDPB expects such additional information to be included in the agreement?
- 7) **Para. 124:** It is mentioned that *“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 order to better understand how to apply this in practice, it would be helpful to get some specific examples of what exactly are the required measures in some concrete situations.
- 8) **Para. 139:** In our opinion, it would be useful if some examples were provided of a legal EU or Member State obligation requiring further storage of data.
- 9) **Para. 165:** The Guidelines state that *“the allocation [of obligations among joint controllers] 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”*. To make this more concrete, we believe that an example that can be given is that one of the joint controllers is not able to identify the data subjects without maintaining, acquiring or processing additional information as it only processes pseudonymised data or has no access to data at all. Also, we would very much appreciate the EDPB addressing the situation where both joint controllers only process pseudonymised data and its implications for the content of the joint controllership arrangement.

We would like to thank the EDPB in advance for taking the time to go through these comments and, where deemed appropriate, amend the Guidelines accordingly.

Yours sincerely

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¹ https://edpb.europa.eu/sites/edpb/files/files/file2/dk_sa_standard_contractual_clauses_january_2020_en.pdf.