

Guideline (page number and description)	My comments
<p>Page 3</p> <p>“It is not necessary that the controller actually has access to the data that is being processed to be qualified as a controller.”</p>	<p>Please clarify that it is <i>not</i> necessary that the processor actually has access to the data that is being processed to be qualified as a processor as long as a sub-processor actually has access to the data.</p>
<p>Page 10 paragraph 17</p> <p>“As far as data processing within a company group is concerned, special attention must be paid to the question of whether an establishment acts as a controller or processor, e.g. when processing data on behalf of the parent company.”</p>	<p>My experienced view is that, you should focus on who, in a company group, pays the expenses for a certain data processing. This approach simplifies the identification of controller/processor/joint-controller.</p> <p>Consider a case that a parent company has subsidiaries, and the company group conducts a questionnaire to employees of these subsidiaries (e.g. a question like whether or not they are harassed in their workplace). These employees are instructed by the subsidiaries to access to a website to answer the questionnaire, and the website is operated by a processor retained by the company group. One approach is as follows:</p> <p>If the parent company solely pays the expenses to the website operator, the parent company is the sole processor and the rest of the subsidiaries and the website operator are processor.</p> <p>If the parent company as well as the subsidiaries pay the expenses to the website operator, the parent company and the rest of the subsidiaries are all joint-controllers, and the website operator is a processor.</p> <p>Focusing on who pays the expenses is helpful especially when certain processing activities are beneficial not only for a parent company as well as for subsidiaries.</p> <p>To be more specific, such processing helps the parent company to ensure that its governance system of the company group functions well. At the same time, such processing is useful for the</p>

	<p>subsidiaries because they can better understand how much attractive their workplaces are for their employees. This situation complicates the identification process of the controller/processor/joint-controller.</p> <p>On the other hand, if you focus on the expenses payer, you can easily identify who is, in a real sense, have gotten the benefit and incentive to conduct the processing in question.</p> <p>Lastly, this expenses approach is akin to a GDPR approach taken in Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) - Version 2.1. In order to identify whether or not a processing is conducted “in the context of “ an establishment, the Guidelines set a criterion “Revenue raising in the Union”. As you see, companies spend expenses where revenue incurs, and such revenue is the incentive to conduct the relevant processing activities. The reason why I focus on the expenses, not revenue, is because expenses are better tool for identification than revenue. The above-mentioned employment questionnaire case shows that, a company group does data processing and spends <i>expenses</i>, but <i>no revenue</i> incurs thanks to the processing activities. The Guidelines assume marketing activities when they propose the revenue criterion, but the criterion does not function in a case of employment management (e.g. the questionnaire case above).</p>
<p>P 16 Example</p>	<p>If XYZ produces an aggregated data (i.e. non-personal data) using the personal data it processes for ABC, is XYZ a controller?</p> <p>This question is based on the assumption that the service contract between XYZ and ABC does not prohibit XYZ from producing the aggregated data as above.</p> <p>In addition, if XYZ has gotten knowhow to efficiently conduct consumer survey and uses the knowhow for other clients, is XYZ a controller? Without a doubt, the knowhow is not personal</p>

	data, and this sort of situations usually occur when you retain consultants, law firms, or any external advisors.
P 25 Example	<p>In this case, MarketinZ's action constitutes a breach of the contract with GoodProductZ, and it is clear that MarketinZ's action makes it a controller, not a processor. I, honestly speaking, have a view that this example does not necessarily make GDPR clearer.</p> <p>Could you please raise examples in which a service provider processes personal data, and without a breach of the contract, the service provider becomes a controller?</p>
P28 Example	<p>If Companies X and Y have already held certain employees data for their own purposes and they transfer the data under the Company ZZ's instruction, is Company ZZ a controller?</p> <p>If the Company ZZ has purchased the Companies X and Y through mergers and acquisitions and Company ZZ takes an approach that its subsidiaries have significant discretions over employment and marketing, such situations occur. My personal view is that, when Japanese companies purchase overseas companies, such "independent/self-managed" subsidiaries emerge partly due to their English language capability. These "independent/self-managed" subsidiaries decide what to do in their territories specified by the Japanese parent company, and the parent company receives what their subsidiaries report to it based on the internal policies the parent company enacts.</p>
P29 Example	What are the merits to discuss whether or not certain entities are "recipients" in this case?
Page 29 Relationship between Controller and Processor	Please clarify whether or not a controller and a processor have to have the same type of legal basis for the processing for which the processor is retained by the controller. For example, the controller relies on a consent and the processor relies on legitimate interest. This situation might occur if the processor does not think the consent satisfies with the strict requirement under GDPR

	and the processor takes an approach that the processing is conducted based on the legitimated interest.
P30 paragraph 98 “other legal act”	If a non-contracting party receives a third party right under a contract with other parties, is the third party right recognized as “legal act”?
P31 paragraph 102 “standard contractual clauses”	Consider a case where a Korean company has a representative office in Paris, and the representative office does not have a corporate status. If the Korean company in Korea and the representative in Paris execute a contract including standard contract clauses for the purpose of transferring personal data from Paris to Korea, is the transfer legal under GDPR? It is invalid under contract law because no one can execute a contract with themselves. How about the validity under GDPR?
P31 paragraph 105 “(e.g. applicable law and jurisdiction)”	If the importer or exporter are <i>not</i> located in EU Member States, is it legal to set non-EU Member States’ laws as applicable law (governing law) of standard contractual clause? Consider a situation, a European subsidiary transfers personal data from Paris to a company in Singapore, and then the Singapore company transfers the same personal data to its Korean Headquarters in Korea. These two transfers are legalized under standard contractual clauses and the governing law is Korean law or Singapore law.
P37 paragraph 135 “upon request”	Is it legal to require data subjects to submit the request in a format specified by the joint-controllers and to require data subjects to pay certain fees for the joint-controllers to respond to the request?
Page 42 2.2.1 Form of the arrangement	Please release draft arrangement agreements for the convenience of businesses. That draft, I believe, significantly helps businesses execute a <i>written</i> arrangement with the terms and conditions recommended in the Guidelines.
P47	For the convenience of a company group containing companies in EU Member States as well as

Chart	<p>those in non-EU Member States, please make another chart considering the territorial scope discussion.</p> <p>The identification of controller/processor/joint-controller, and the territorial scope issue are intertwined, among other things, in a case where non-EU processors process personal data for the purpose of non-EU controllers to which Article 3.2 of GDPR is applied.</p>
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