



## ETNO comments on

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

October 2020

The European Telecommunications Network Operators' Association (ETNO) welcomes the opportunity to comment on the European Data Protection Board (EDPB) draft Guidelines 07/2020 on the concepts of controller and processor in the GDPR.

We support the EDPB's attempt to clarify the legal concepts of controller, joint controllers, and processor, as well as the relationships among these actors and their implications. Any guidance on the practical application of intricate legal concepts is always welcome, for the sake of establishing common understanding across the EU.

Depending on the specific circumstance, telecommunication providers can be either data controller or data processors; furthermore, telecom operators typically operate as part of multisided business environments that involve a chain of multiple suppliers and customers.

Therefore, **legal certainty as to the allocation of responsibilities** for the processing of personal data in these environments is highly important, and it will become increasingly critical as the deployment of 5G connectivity and its high-impact use cases (eHealth, connected vehicles, robotics...) paves the way for intricate processing activities, involving large amount of data and multiple parties.

While the draft Guidelines provide some clarifications on how to comply with the GDPR requirements, they fall short of addressing some **complexities that are difficult to apply in practice** (e.g., distinction between joint controllers and separate controllers; to whom the data subject should address their requests in case of joint controllership).

Our remarks on some key issues are outlined in further detail in our submissions below.

- **Definition of processor**

We welcome guidance about **the role of the processor**, which is sometimes complicated and difficult to apply in practice. We refer to section 80 of the Guidelines, which reads 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 EDPB explains that *"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. **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"*. The EDPB concludes that a case-by-case analysis remains necessary to determine the roles of service providers.

The draft Guidelines provide some to illustrate different situations; the two examples regarding "General IT support" and "IT consultant fixing a software bug" are particularly relevant. In the former, the service provider is considered a data processor. The main objective of the service is not to process personal data, but *"the IT service provider **systematically** has access to personal data when performing the service"*. In the latter example, the service provider is not considered a processor. The main objective of the service is not to process personal data and any access to personal data is *"**purely incidental and therefore very limited**"*.



Notwithstanding these clarifications, we take note that there may be cases where it could be hard to apply the EDPB's interpretation in practice and to draw a line between a situation when a party is a processor and when it is not.

- **Codes of Conduct**

Considering the changing nature of the roles of the same organisations as well as rapid developments in technology, use of data and business models based on use and re-used of data, **Codes of Conduct** can play an important role in complementing the legislation. Sectoral Codes of Conduct can help to clarify the relationships between the different actors with the specificities of a given sector, in full respect of GDPR provisions.

- **Different Roles and Attribution of Responsibilities**

The draft Guidelines go beyond the letter of the – already very detailed – GDPR provisions by **introducing new obligations for companies**. The EDPB appraises the relationships between controller and processor and between joint controllers based on a strict interpretation of the principle of accountability. Most notably:

- The EDPB recommends to **review all controller-processor Data Processing Agreements**, which should not merely restate the content of Article 28, but should also specify how the GDPR requirements will be met “to further clarify how Article 28 core elements are going to be implemented with detailed instructions”;
- The EDPB introduces compliance measures and related obligations that **exceed those listed in Article 26**, and which joint controllers should include in their “arrangement”.
- Even if there is no legal requirement in the GDPR for a contract, the EPDB recommends that an arrangement between joint controllers be made in the form of a **binding document** (“Article 26 agreement”).

**The role of any EDPB guidance should be to clarify GDPR provisions when necessary, not to introduce additional requirements**, in a kind of gold-plating exercise. Otherwise, the result could be more confusion for companies that would have to follow two, sometimes divergent, references: the GDPR detailed provisions on the one hand, and the EDPB interpretation on the other.

We hope that the EDPB will find our comments useful and we look forward to the final Guidelines, which we wish will further help companies and data subject to deal with complex situations that are not adequately addressed in this draft, while ensuring full adherence to the rights and obligations laid down in the GDPR.

#### **About ETNO**

ETNO has been the voice of Europe's telecommunication network operators since 1992 and has become the principal policy group for European electronic communications network operators. Its 39 members and observers from Europe and beyond are the backbone of Europe's digital progress. They are the main drivers of broadband and are committed to its continual growth in Europe.

ETNO members are pan-European operators that also hold new entrant positions outside their national markets. ETNO brings together the main investors in innovative and high-quality e-communications platforms and services, representing 70% of total sector investment.