

## Proposals for Guidelines 07/2020 on the concept of controller and processor in the GDPR

### 1. Proposal for clarification No.1

1.1. Part I “Concepts”, Section 2.1.1. “Definition of Controller” of proposed Guidelines 07/2020 on the concept of controller and processor in the GDPR (hereinafter referred to as Guidelines) describes control stemming from legal provisions and explains how to identify controller in the case when legislator has designated some entity as controller.

1.1.1. First proposal for clarification concerns the fact that the situation described in paragraph 21 of the Guidelines does not necessarily apply only to the state or self-government institutions because also private organizations may be designated by legislator as controller for certain duties and paragraph 21 in the Guidelines could underline this aspect more directly.

1.1.2. Second unclear moment concerns delegation of tasks to other institutions in the course of exercising of public duties. This issue described below is not discussed in Latvia as well, but now more frequently arises in practical situations in Latvia. It could be an issue in every country where administrative law provides possibility to designate the public tasks to other entity on the bases of law or special contract. Therefore, situations described below could pay special attention in the Guidelines.

According to State Administration Structure Law<sup>1</sup> of Republic of Latvia there is several options how state (for example – city municipality) or state institution has rights to delegate certain task or set of tasks to other state body or sometimes even to private institutions. In one case, legislator may provide rights of delegation for some tasks exactly by the terms of the law, that is, law states that public authority may delegate certain task. In other case, delegation can be made by form of public delegation contract if this act is not forbidden or it is not contrary to public law and if delegation will serve better to fulfillment of the tasks (for example, state cannot make delegation to private organization to draft state budget). According to Article 41 (1) of the State Administration Structure Law: *a public person may delegate administration tasks, the performance of which is in the competence of such public person or its institution. When delegating administration tasks, the relevant public person shall be responsible for the performance of the function as a whole.* Article 42 (2) of the above-mentioned law provides: *when delegating an administration task in accordance with a contract, the authorised person shall be subordinate to the institution that enters into the contract with respect to the performance of the specific task.*

Thus, law sets general principles of delegation. We will further provide with 2 examples of delegation of public tasks and will describe personal data processing problems that arise from these situations.

**First example of the delegation of tasks.** City administration according to the Law on Local Government has duty to organize public transportation services for citizens. By public delegation contract the fulfillment of this task has been delegated to the city municipality company that is registered as a private entity – company under commercial law, which belongs to the city municipality. Public transportation services are realized and decisions on data processing means are made exclusively by the city company. Thus, there could be several scenarios concerning GDPR roles in this case. According to the State Administrative

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<sup>1</sup> Available: <http://likumi.lv/ta/en/en/id/63545-state-administration-structure-law>.

Structure Law the responsible body for fulfillment of the whole function as such is city municipality. However, decisions on personal data processing means are made only by city municipality company. In this situation one could say that the purpose of the task, sometimes also data subject categories (which citizen categories will have lower costs for transport tickets) are defined by municipality, but the data processing means are defined only by city municipality company. In this example city municipality (council) practically does not decide the means of personal data processing at all.

**Therefore, the question arises whether in this case municipality and its company are both joint controllers (in some part of processing) or separate controller? Please take into account that this is not public procurement contract, but delegation contract.**

**The second example of the delegation of tasks.** State Traffic Law of Republic of Latvia<sup>2</sup> provides that an offence may be recorded with technical means (photo devices or video devices), without stopping a vehicle. According to Article 43.6. (5<sup>1</sup>) of the State Traffic Law the **State Police may enter into delegating agreement with the Road Traffic Safety Directorate** in which it may be provided that the Road Traffic Safety Directorate shall, within the scope of the competence thereof, **process the information in the State Register of Vehicles and Drivers that has been received from technical means regarding the relevant violation, prepare draft report-decision referred to in Paragraph three of this Section which it shall send to the State Police for evaluation and taking of a decision, as well as after the taking of the relevant decision shall send the referred to report-decision to the person** referred to in the first sentence of Paragraph five of this Section.

In this example huge amount of personal data is being processed. We would agree more that State Police is controller, but State Register of Vehicles and Drivers is only processor for the State Police for all operations.

**These two situations show that in delegation of the tasks, different situations may arise and it could be necessary to give a guidance of what are essential elements here to understand the exact roles of different state bodies, that works for the same aim.**

1.1.3. Third issue that could be more clearly identified in the Guidelines is situations, where one state institution is serving for the other state institution as a processor. Are there any additional criteria in state sector that could help to identify the roles more correctly for state bodies? Under our understanding simple exchange with personal data between different state institutions (for example, state tax authority receives data from land register) basically constitutes controller-controller relationship. However, one state entity could use the other state entity (for example, state ministry) resources concerning book-keeping, IT servers, document flow systems, etc. In the last example we believe it is more like the controllers (state entity) and the processors (ministry) relationship.

## **2. Proposal for clarification No.2 concerning sub-processors (Part II – Consequences of Attributing Different Roles of the Guidelines).**

2.1. Guidelines uses the term “sub-processor”. There are no problems with this term, however, until now it was officially used only in the pre-GDPR period documents, namely standard contractual clauses for data transfer outside EU (decision 2010/87/EC). In the text of GDPR “sub-processor” is only used as “another processor” (Article 28 (2), 28 (4)) or “other processor” (Article 28(4)), but the first processor is

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<sup>2</sup> Available: <http://likumi.lv/ta/en/en/id/45467-road-traffic-law>.

named “initial processor” (Article 28 (4)). We think that there is no problem to use the notion “sub-processor” instead of “other processor” in the Guidelines, if this will help better to explain problems described below.

2.2. What concerns “sub-processor” different questions arises.

First of all, “sub-processor” is usually not involved according to initiative of the controller as far as controller as such could “survive” only with the first processor. However, the initial processor may ask at any time the controller for its consent to involve “sub-processor” in personal data processing. The question is to what extent the processor is responsible for the reliability of the “sub-processor”? Under GDPR controller is the one who decides to accept or not to accept the proposed “sub-processor” according to one of the two mechanisms. According to GDPR and draft Guidelines it is stressed that controller has to assess the sufficiency of the guarantees (paragraph 95 of the Guidelines). From the other side, the processor may know the proposed “sub-processor” better than controller, who has to approve or deny the processor’s choice, taking into account some information. Does this situation (where controller according to the principle of accountability makes assessment on the first processor (initial processor)), somehow differs, if initial processor is the first entity that offers to the controller to contract with any of its “sub-processors”. Because only after processor’s evaluation, the controller has to approve or deny involvement of the “sub-processor”. How the principle of accountability works for controller in this situation where controller is not the first, who will assess the sub-processor? What to do, if the chain of sub-processors consists of more than two processors? Is there any burden under GDPR for the processor to take part in the assessment of sufficient guarantees of “sub-processor”?

2.3. There is no explanation in the Guidelines on what kind of the liability is provided by Article 28 (4) by the phrase *“where that other processor fails to fulfill its data protection obligations, the initial processor shall remain fully liable to the controller for the performance of that other processor’s obligations”*. Does it mean that the liability of which the personal data processing takes place as provided by the contract (that is, controller receives necessary service from processor), or is it some kind of other liability?

2.4. Other questions: if the “sub-processor” is involved, does the “sub-processor” need to know the name of the controller to be written in text of the contract concluded between the processor and “sub-processor”? Who is the first to have an obligation to inform the controller on data breach if the breach occurs in systems of “sub-processor”: “initial processor” or “sub-processor”? If we take terms of GDPR (where “sub-processor” is named only as “another processor”), it could be taken that the “sub-processor” under the GDPR has direct obligation to inform controller on the breach as far as “sub-processor” according to GDPR is just another processor without special hierarchy between many processors.

### **3. Proposal for clarification No.3**

3.1. Guidelines do not reflect explanation of all terms used in GDPR in relation to notion “recipient” (Paragraph 88 of the Guidelines). For example, more attention from the Guidelines could get the term “controller representative” and “processor’s representative” used in Article 30 of the GDPR. Perhaps this “representative” is a controller or a processor who is not established in EU and thus needs to designate the representative in one of the EU countries. However additional explanation would be needed to understand if this representative could be a personal data recipient or the representative belongs to the controller and is the part of the controller.

#### **4. Proposal for clarification No 4.**

4.1. Practical examples exist when DPO functions are outsourced to specific company that employs several DPO. In this situation any application of data subject and controller`s decision to that application could theoretically be delivered to DPO company to look for advice. Guidelines has one example on law firm (example after paragraph 25), when the law firm decides on purpose and means of personal data processing and thus is controller. However, the example with law firm could be supplemented also with examples of outsourced DPO companies, that in line with our thoughts has only consulting functions (DPO function is consultations and not decision making on behalf of controllers) and therefore maybe could be treated as processors.

#### **5. Proposal for clarification No.5**

5.1. Guidelines could reflect one more practical example, where one controller (Controller No.1) collects personal data directly from data subject for its own purposes, but this Controller No.1 has agreement with another company (Controller No.2) which also has interest on the same personal data for different purposes. Both companies do not belong to one group. The Controller No.1 offers to the data subject to provide also his or her consent for personal data processing (for one or more purposes) to another company (Controller No.2). Data subject identity and other personal data are processed by Controller No.1 to register consent for processing and if data subject provides this consent, Controller No.1 delivers personal data to the Controller No.2. The issue arises, if the Controller No.1 providing data subject consent management process thus serves as a processor for the Controller No.2? This also will be not the joint controller case.

**We believe that our proposals will help to draft the final version of the Guidelines!**

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