

# Public consultation regarding the guidelines on the concept of controller and processor in the GDPR

Michael Montavon, PhD Student, University of Fribourg (Switzerland)

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As a researcher making a PhD in the field of cyberadministration and data protection law, I have a remark regarding § 50 of the guidelines.

These say : Not all processing operations involving several entities give rise to joint controllership. The overarching criterion for joint controllership to exist is the joint participation of two or more entities in the determination of the purposes and means of a processing operation. More specifically, joint participation needs to include the determination of purposes on the one hand and the determination of means on the other hand. If each of these elements are determined by all entities concerned, they should be considered as joint controllers of the processing at issue.

I noted that this interpretation is far more restrictive than what was before mentioned in par. III.1.d of the previous guidelines. According to these guidelines, it was necessary to take into consideration that “the reality shows that this is only one of the different kinds of ‘pluralistic control’ which may exist. In this perspective, “jointly” must be interpreted as meaning “together with” or “not alone” in different forms and combinations.” For this reason, it was said that “in assessing joint control a substantive and functional approach should be taken [...] focusing on whether the purposes and means are determined by more than one party.

If we take the example of the public administration. Normally, the purpose of the data treatment is determined by the authority in charge of the matter through the law but the means, including the security measures to be undertaken, are more likely to be determined by the it-department. Reason for that is that not every authority in charge of a specific matter (for example : tax, social, education etc.) has its own it-experts. According to the previous guidelines, I understand that both the authority in charge of the matter and the it-department in charge of the informatics would have been considered joint-controllers. And this sounds correct to me although the it-department has nothing to say about the purpose of the treatment.

According to the new guidelines, I fear that the it-department will not be considered anymore as a joint controller because it has nothing to say about the purpose of the treatment. Conclusion is that it can only be a processor. According to me, such a conclusion does not only circumvents basic understanding of data protection law shaped according to the previous guidelines but it also leads to a wrong result. Inside a same collectivity, or even inside a same company, the it-department shall not be considered a processor in my opinion but a joint controller. Application of the rules concerning the processor would only lead to much more bureaucracy without making the protection better.

Thank you for your attention to my modest contribution.

Michael Montavon