

Odense, Denmark

ATT:

EDPB

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Subject: Public consultation reply to EDPB's guidelines 07/2020 on the concepts of controller and processor in the GDPR

I read EDPB's guidelines on the concept of data processor and data controller in the GDPR. In this, it is described that a body qualifies to be a data processor if that body determines the purpose and means for the processing. Here it is mentioned that purpose is an "anticipated outcome that is intended or that guides your planned actions" (cf. line 30 in the aforementioned EDPB guidelines).

I wonder how it is with transmission-based services such as the postal service, email provider, telecommunications providers/operators, internet providers, etc. All of them have one thing in common: their service could not be performed without a receiving party, and because of that, they need the receiving party's name, address, email-address, IP-address, or the like - something personally identifiable, i.e. personal data.

Here, they act independently in relation to means for how they can fulfill the purpose "sending and delivering to the recipient". But the purpose is not 100% self-determined. The postal service, for example, has no purpose in sending and delivering a letter from Company X to Company X's customer. This would mean that the postal service is either a joint controller for this personal data together with Company X, or that they are an independent data controller for this personal data.

The postal service is not a data processor in this context, are they? And companies, as far as I know, do not enter into data processing agreements incl. approved sub-processors (where change of sub-processors is notified 30 days before), and I also do not think that the postal service complies with the duty to provide information to every single recipient of letters (due to it being disproportionately much work, I would assume).

But what are transmission-based services then regarded as? Are internet service providers, postal services, telecommunication services like SMS gateways or telecommunication operators, email service providers or the like in the sole act of sending and delivering the item (mail, SMS, email, information) regarded as data controllers or data processors? If they are controllers, are they independent controllers or joint controllers?

As I see it, the postal service is an independent data controller for data, and exempted from the duty to provide information to the data subjects due to disproportionate amount of work, and has cf. §14 collected the personal information of the data subjects NOT from the data subjects themselves (but with Company X in this example). They become data controllers as soon as they collect the name and address of the letter from the Company X, and while the processing is necessary for the fulfillment of the contract (i.e. their terms) to their customer, i.e. company X who tries to send the registered a letter, it is conspicuous that this contract has not been entered into with the data subject (the data subject has not ordered the postal service to send him/her a letter from Company X, but Company X has asked the postal service to send a letter to the data subject). So maybe their processing is legal because of the postal service having a legitimate interests - I can not say if that is

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the case, but it is possible especially in transmission-based services, which have to do with traffic, which in the transmission industry can be translated into better prices (e.g. in the telecommunications industry or possibly with an internet service provider, which also gets favorable economic conditions by sending more traffic, NOT directly being the result of more “orders”, but being the result of higher volume).

The point is: If the means are decided alone, i.e. in regards to the infrastructure of the transmission, both in relation to the IT-components and providers used in the process, and the purpose in a way is determined independently too, i.e. in regards to gathering traffic for pursuing favorable economic conditions or to fulfill contractual obligations to the sending party, are transmission-based services then not to be regarded as independent data controllers?

The answer is unclear, as the “purpose” is not clearly enough defined in the EDPB guidelines in order to make a reasonable assessment of the hierarchy of possibly multiple purposes in a single processing, so as to determine the controller of the processing.

To make this point from the sending parties side: If a company sends an SMS to its customer via an SMS gateway or a letter via a postal service or an email via an email service provider, then the company decides which gateway/service/service provider it uses. The purpose of this sharing of information with the service provider is to communicate with the customer. Meanwhile, the company as a controller does not decide, which postal service the letter is given to in the country of destination, or which telecommunication company in the end delivers the SMS to the customer, or which IT-infrastructure is used for sending the email, or which email service provider is sending the email to the customer. Those means are decided by the service provider, assumingly for their own purposes. The “transmission” as a category of processing is performed “on behalf of” the service provider, in regards to choosing who to transmit to and why, while the receiving party is chosen by the sending party and the purpose of that is communication between the two parties. It is unclear if the transmission-on-behalf-of-the-service-provider-purpose is seen as independent to the transmission-on-behalf-of-the-sending-party-purpose, or if they are interconnected, or if this transmission in transmission-based services are even regarded as processing of personal data in accordance with the GDPR.

I hereby hope that the EDPB is able to offer clarification in this matter, so as to enable transmission-based services like ESP, ISP, postal services, SMS gateways, email gateways, etc. to comply with the GDPR without having to be economically hurt due to restrictions on determining the means of the transmission (as stated earlier, traffic plays an integral part in the economic favorability and, therefore, in the existence of businesses, as a business would not withstand e.g. waiting 30 days in order to deliver an item when there is unforeseen delivery problems and another deliverer has to be chosen in a hurry, and neither withstand e.g. offering up a full list of suppliers that are receiving the personal data, as it would be equal to handing over a business secret, due to agreements with other suppliers and prices according to traffic and the whole supplier network is a transmission-based companies *raison d'être*).

Kind regards,

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