

ICANN org Public Comment: EDPB Guidelines 07/2020 on the Concepts of Controller and Processor in the GDPR

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– **Submission by Electronic Form** –

Submission Deadline: 19 Oct 2020

The Internet Corporation for Assigned Names and Numbers (“**ICANN org**”) is grateful to the European Data Protection Board (“**Board**”) for providing this opportunity to comment on the Board’s further elaboration of the concepts of controller and processor in the General Data Protection Regulation (“**GDPR**”). In times of growing complexity in multi-faceted, multi-purpose, and multi-actor processing activities, which have evolved since the Article 29 Working Party Opinion 1/2010 on the concepts of “controller” and “processor” was adopted on 16 February 2010, these updated Guidelines are of considerable practical relevance. Although identifying these roles is one of the most fundamental aspects of the GDPR, this can be a challenge, especially when applying these concepts to the novel and innovative processing situations involved in the domain name ecosystem.

ICANN org is a not-for-profit public-benefit corporation that, on behalf of the Internet community, oversees the technical coordination of the top-most level of the Internet’s Domain Name System (DNS), and especially its security, stability, and resiliency. ICANN brings together governments, noncommercial and commercial stakeholder groups, civil society, and individuals. Each group represents a different interest on the Internet. Collectively, they make up the ICANN community, which develops policies for the DNS through a consensus-driven bottom-up process.

The requirements of the GDPR have had a significant impact on the personal data processing activities of the whole Internet community. This includes the processing and availability of registration data in relation to the administration of generic top-level domains (gTLDs).

Executive Summary

The draft European Data Protection Board Guidelines 07/2020 on the concepts of controller and processor in the GDPR (the “Guidelines”) observed that the concepts of controller, joint controller, and processor play a crucial role in the application of the GDPR, since they determine who is responsible for compliance with different data protection rules and how data subjects can exercise their rights in practice. As observed by the Board, “[t]he precise meaning of these concepts and the criteria for their correct interpretation must be sufficiently clear and consistent throughout the European Economic Area (EEA).”

ICANN org welcomes the publication of these draft Guidelines, which are an important step toward clarity and consistency in the interpretation of these concepts. We encourage the Board to consider the topics addressed below as it works to finalize these Guidelines, to ensure that all parties concerned by the GDPR, including controllers, processors, data subjects, courts, and supervisory authorities, have a clear and consistent understanding of how the concept of controllership applies and, equally, where its boundaries are to be set to prevent any undesired diffusion of responsibility to the detriment of data subjects.

While these Guidelines are a helpful step, ICANN org believes that additional clarity would be beneficial in the following areas:

1. Precise attribution of “**control**” to **particular stages in the processing** under a micro-level analytic framework.
2. When and how is “**control**” **inferred from a contract**, absent a party’s actual involvement in processing contemplated under any such agreement.
3. The newly introduced concept of “**converging decisions.**”

Issue 1: Limitation of ‘Control’ to Particular Stages in the Processing

ICANN org particularly appreciates the clarification provided in point 2.1.5 of the Guidelines¹ that “control” exercised by a particular entity may, of course, extend to the entirety of processing at issue, but may also, alternatively, be limited to a particular stage in the processing. This aligns with the European Court of Justice’s (“CJEU”) judgment in *FashionID*.²

Following the *Fashion ID* judgment, such a “micro-level analytic framework” is indispensable to the determination of an entity’s scope of control under the GDPR. Applying the rationale from the *Fashion ID* decision, the processing of personal data must be evaluated operation-by-operation to identify the controller(s) of every operation involved in that chain of processing, by analyzing who determines both the purposes and the means of each processing operation. In other words, when a processing scenario involves more than one discrete processing operation, each operation in the chain may or may not be controlled by the same party(ies). *Fashion ID* made clear that it is no longer correct to apply an overly broad and indefinite assumption of “control” from a “macro-level” perspective. Instead, we must rely on the definition provided by Article 4 No. 2 GDPR to assess the respective processing operations (e.g., personal data collection, storage, use, disclosure, erasure) along the data lifecycle in each specific case — especially in those with multi-actor chains of processing.

This is also supported by what the CJEU emphasized with its parenthesis, “*without prejudice to any civil liability provided for in national law in this respect*.”³ This statement demonstrates that while national law might provide for a broader liability, it would no longer be a justifiable extension of liability of controllers under EU data protection law to find an entity to be a controller of processing operations if the entity has no realistically enforceable form of “control” over the purposes and means of those operations.

As ¶¶ 60 and 70 of the Guidelines rightly point out, neither the use of a shared database or a common infrastructure for individual, non-coordinated purposes, nor the mere

¹ See 5th Building Block, “Of the processing of personal data.”

² See *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV*, C-40/17, ECLI:EU:C:2019:629, ¶ 74.

³ See *id.*

participation in a chain of operations with each actor having an independent purpose and independent means will lead to the assumption of joint controllership within the meaning of Article 26 GDPR. However, it should already be clarified at this point that the assumption of “*successive independent controllers*” as indicated in ¶ 70 is not a given, either, but needs to be separately assessed for the respective stages of processing according to the micro-level analytical framework. This implies that, in particular when evaluating whether or not several entities pursue a common purpose, one does not come to overly sweeping conclusions that embrace the entire chain, since—as the CJEU itself has made clear—a *multitude* of purposes can be pursued in a chain of processing, each relating solely to *individual* chain links and entities.

In terms of practically oriented amendments, ICANN org would like to refer to the Board’s observation in ¶ 26 that “*contractual terms between the different parties involved can facilitate the determination of which party (or parties) is acting as controller.*” This suggests that:

- Parties, especially in complex multi-actor processing chains, should be encouraged to build on this micro-level analytic framework in their various contracts from the start and to describe the extent of their respective “control” in a sufficiently precise manner to accurately reflect reality and facilitate the factual controllership assessment;
- Flowcharts, which clearly illustrate to data subjects and other stakeholders the controller(s) of the respective chain links along the chain of processing, could be included in data protection notices as an optional, trust-building accountability measure under Article 5(2) GDPR.

Issue 2: Factual Influence — Interplay Between Contractual Provisions and ‘Control’

Closely connected with the need for sufficiently micro-level assessments, the Board in ¶ 26 under point 2.1.2 in the Guidelines attaches importance to the contractual terms when speaking of “*factual influence*,” although such terms can of course not be the final criterion (see 2nd Building Block: “*Determines*”). The Board holds the view that “[e]ven if a contract is silent as to who is the controller, it may contain sufficient elements to infer

who exercises a decision-making role with respect to the purposes and means of the processing.”

ICANN org would like to specify that the mere fact of having a contract or specific clauses therein relating to data processing and/or data protection in place between two entities does not, in itself, constitute a significant criterion for elevating both parties to the rank of controllers, such as if one party has a contractual obligation, supported by adequate technical and organizational measures, not to access any personal data stored by the other party and if this corresponds to reality.

ICANN org suggests that the Board clarify which elements of a contract might imply who exercises a decision-making role with respect to the purposes and means of the processing.

In addition to appropriate micro-level assessments for certain stages of processing, which we have already considered under Issue 1 above, specific contractual elements should only indicate a sufficient degree of control in exceptional cases. Assertion of the arguably ambiguous concept of “data ownership” could, for example, point into the direction of a party being considered an independent controller.

In this context, adherence to international community-based policies by decentralized organizations (e.g., umbrella associations, standardization organizations, global think tanks) should not *per se* lead to a general controllership assumption of both the members and the organization itself. This is particularly important if the latter merely coordinates the policy-making process, as is the case with many governance models in the digital space.

Lastly on this issue, ICANN org would recommend a further clarification of whether a contract between the parties, alone, would lead to a joint controllership assumption if one party lacks any factual influence on the processing. The Board states that “[i]n line with the factual approach, the word “determines” means that the entity that actually exerts influence on the purposes and means of the processing is the controller.” Building on that, it should be emphasized that a contractual set of rules or a joint code of conduct, without further possibilities of exerting control over the actual processing activities, is not

sufficient to assume joint controllership and that independent controllership would need further examination on the basis of the other criteria described for control stemming from factual influence in the Guidelines.

Issue 3: ‘Converging Decisions’ Leading to (Joint) Controllership

ICANN org observes that for a joint participation in the determination of purposes, a common decision of the parties involved was deemed sufficient before the publication of the Guidelines. In the Guidelines, the Board has now introduced in ¶¶ 51-53 the concept of “*converging decisions*” by several entities that “*complement each other and are necessary for the processing to take place in such manner that they have a tangible impact on the determination of the purposes and means of the processing,*” requiring an “*inextricable link*” between the processing and the parties’ participation.

From the perspective of ICANN org, a cross-reference to the micro-level analytical framework (see Issue 1 above) would provide helpful clarity at this point. This “*inextricable link*” must be examined in a reasonably restricted way with due regard to the respective stage of processing, to avoid a situation of overall controllership of all those involved, paving the way for a diffusion of responsibility in multi-stakeholder processing activities.

As far as the Board points out in ¶ 14 that the concept of “controller” should be interpreted in a “*sufficiently broad way,*” it appears to ICANN org that the main motivation driving such interpretation is to “*avoid lacunae and to prevent possible circumvention of the rules.*” However, from ICANN org’s point of view, there exists the risk that, taking a very broad view, all entities could ultimately be regarded as controllers throughout the chain of processing as many operations may or may not be inextricably linked to each other. To avoid such legal uncertainty, the criteria under the newly developed concept of “converging decisions” should be adopted carefully and uniformly by the Board, rather than by the single European data processing supervisory authorities.

Finally, this concept should also take into account that the assumption of “control” needs to focus on whether the possibility for an entity to exert any kind of power is sufficiently strong and significant to justify the full and unlimited duty to comply with all

data protection requirements set out in the GDPR and the resulting full third-party liability.⁴ Failing such an approach, a large number of complex obligations and a joint and several liability of the joint controllers would not be sufficiently compensated by any further rights conferred, which might result in avoidance strategies in the market rather than effective solutions for the protection of the rights and freedoms of data subjects.

Conclusion

Concluding, we would appreciate if the above considerations were taken into account by the Board.

⁴ See Article 82(4) GDPR.