

Editorial

Bridget Treacy opens Volume 10, Issue 4, of Privacy & Data Protection, commenting on the Article 29 Working Party's 'reaffirmation of the controller/processor' dichotomy'

The Article 29 Working Party's characterisation of SWIFT, a service provider that facilitates the settlement of international financial transactions, as a 'co-controller' for the purpose of Directive 95/46/EC (the Data Protection Directive) in late 2006 raised many eyebrows. There was much analysis and discussion of the Working Party's opinion, and a considerable degree of sympathy for SWIFT. Many service providers were concerned that the SWIFT analysis might well result in them being characterised as data controllers in some circumstances.

Following the decision, there has been detailed discussion of the essential characteristics of a 'data controller' versus a mere 'processor'. The definition itself appears straightforward: "a person...which alone or jointly with others determines the purposes and means of the processing of personal data."

Yet in practice, it is frequently not at all clear what degree of influence would characterise an organisation as a controller, rather than a mere processor. In some circumstances, the line between the two seems blurred or thin, and yet the consequences of the distinction are immense. Just how much influence will amount to 'determining the purpose' and whether a controller ever really determines the 'means' of the processing are questions that have, until recently, remained unanswered.

In recent years, technology has revolutionised the way in which data are collected and processed, raising new challenges for the controller-processor dichotomy. (Behavioural targeting, for example, due to the possibility of building detailed consumer profiles from non identifiable data). Further blurring the distinction between controller and processor is the relationship between service providers and advertisers, which has become increasingly collaborative. Indeed, many began to speculate whether it might be easier to abandon the controller-processor distinction and simply impose a set of core obligations on the parties that actually process the data.

The Working Party has put an end to all such speculation in its recently published Opinion on the concept of 'controller' and 'processor' [need to get ref].

In the Opinion, the original definition of 'controller' is explored and reaffirmed on the basis that the controller-processor distinction is still relevant. It includes a number of examples to demonstrate that the definition of controller may be applied to complex, new technologies. The Opinion also acknowledges tacitly that current collaborative arrangements between parties and the ever greater use of chains of data processing activity, are likely to result in more entities being characterised as

'co-controllers'. It is not clear how this concept will operate in those jurisdictions in which local laws do not recognise a concept of co-controllership.

At its heart, the Working Party Opinion acknowledges that the law may impose legal obligations on an entity to collect and process personal data, or there may be established circumstances in which the capacity of the parties is clear (e.g. employer and employee). Outside of these examples, the assessment must be based on the facts. It is precisely in this third area that commercial enterprises increasingly struggle to determine the relevant capacities of the parties.

In a passing nod to the outsourcing industry, the Opinion acknowledges that the task of determining the 'means' of the processing may be delegated by the controller, but that the determination of the purposes of the processing is the core activity that remains the domain of the controller.

The Working Party listed five factors that will be key to determining the capacity of the parties: the level of prior instruction given by the controller; the level of monitoring of service delivery by the controller; 'visibility' towards data subjects; levels of expertise of the parties; and the respective degree of autonomous decision-making power.

In a passing reference to cloud computing, the Opinion includes an example of distributed processing, and notes that where data are used in an unauthorised manner, the service provider may well be considered a controller. Further, service providers who provide added value services will almost certainly be controllers in relation to those activities.

It is clear that the controller versus processor dilemma is here to stay. Parties will need to analyse very carefully their respective data processing obligations in the knowledge that, they may be a controller in respect of certain processing, and a mere processor for other processing.

The Opinion emphasises that the analysis is essentially a factual one. Parties to commercial arrangements will need to focus more closely on the mechanics of their relationship, analysing which entity directs and controls the particular processing, and maintain that focus as the data processing activities change over time.

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Bridget Treacy is writing an article on the Working Party's Opinion for the upcoming edition of *Privacy & Data Protection*, Volume 10, Issue 4