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[...]
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Subject: Relationship with travel agency

Dear [...],

You have requested the EDPS' view on the relationship between the [European Institution] and its travel agency. Please find below a summary of the relevant facts and my office's legal analysis and conclusion.

The facts

The [European Institution] [uses a contractor] for providing travel agency services [under an inter-institutional framework contract]. The [European Institution] and other participating institutions have been in contact with [the contractor] concerning its status under data protection rules – whether it is a processor for the contracting authorities, a joint controller with them, or a separate controller.

In discussions with the contracting authorities, [the contractor] maintains that it is a separate controller. The contracting authorities take the view that [the contractor] should be considered a processor. [The contractor] also provides services to other EUIs outside of the inter-institutional framework contract at hand. Its contract with the [a different EUI] is structured as a controller-processor relationship. From the information provided, [the contractor] has not challenged this construction.

Your main question is how to qualify the relationship between the individual contracting authorities and [the contractor].

Legal analysis

The EDPS has provided Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725 (the Guidelines / the Regulation)¹. Earlier

¹ Guidelines on the [Concepts of controller, processor and joint controllership under Regulation \(EU\) 2018/1725](#).

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guidance was provided by the Article 29 Working Party Opinion 1/2010 on the concepts of ‘controller’ and ‘processor’ (WP169)². As successor of the Article 29 Working Party, the European Data Protection Board is currently revising WP169.

There are different possibilities how to organise the relationship with a contractor such as [contractor]. As this issue is of general relevance, I will simply refer to the parties involved as ‘the contracting authority’ and ‘the contractor’.

This issue can be assessed under two different angles:

- Given the tasks assigned to the contractor and the contractual framework, what *is* the contractor’s role?
- What are the consequences of the different possible legal constructions?

What *is* the role of the contractor?

For answering question a), the checklist on page 20 of the Guidelines is a useful tool. While it refers to assessing whether an EUI under the Regulation is a processor, the definition of ‘processor’ is virtually identical under the Regulation and the GDPR³. The checklist is written from the perspective of the organisation providing a service. Here is the checklist completed based on the information provided in your case:

Your organisation... [the contractor]	Yes...	No...
... Follows instructions from another party with regard to the processing of personal data.	... to fulfil the contract; the contracting parties have voiced their concern about possible further processing for the contractor’s <i>own</i> purposes.	
... Does not decide to collect personal data from individuals.	... the decision to provide personal data lies with the contracting authority, in line with what is necessary for the contractor to fulfil the tasks entrusted to it.	
... Does not decide on the legal basis for the collection and use of that data.	... the contractor itself states that it relies on the contracting authority to ensure a lawful ground for processing, such as consent (where relevant) ⁴ .	
... Does not decide the purpose or purposes for which the data will be used.	... the purpose is defined by the contracting authority as part of the procurement requirements (organising duty travel for staff), the contractor does not get to define additional/different purposes than	

² https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf

³ Article 4(8) of Regulation (EU) 2016/679, OJ L 119, 4.5.2016, p. 1.

⁴ In the case at hand, consent does not appear to be relevant: fulfilling the tasks assigned to EUIs in the public interest will sometimes require that their staff travel. See recital 22, second sentence, of the Regulation, which includes the internal management and organisation of EUIs in order to enable to do so in this ground for lawfulness.

	those set by the contracting authority.	
... Does not decide whether to disclose the data, or to whom.	... only disclosed where necessary for provision of the services contracted, i.e. to fulfil the contract.	
... Does not decide the data retention period.		... the contractor sets up its own retention periods. However, the contracting authority makes that choice its own via the contract. Making this choice presupposes having been fully informed by the contractor about the periods.
... Makes certain decisions on how data is processed, but implements such decisions under a contract or another legal act or binding arrangement with the controller.	... while the contractor designs its own internal procedures, the contracting authority accepts them being used on its behalf via the contract. Making this choice presupposes having been fully informed by the contractor about the procedures.	
... Is not interested in the end result of the processing.	... the contractor's interest is in fulfilling the contract.	

The contractor should have no further interest in the processing of the data provided by the contracting authority beyond fulfilling its contractual obligations vis-à-vis the contracting authority; that is the idea behind processing personal data ‘only on documented instructions from the controller’ on behalf of the controller: processors act as the ‘extended arm’ of the controller. These instructions are about for which purposes the data provided to the processor can be used.

In the case at hand, the contractor referred to example 7 in WP169 to argue it should be considered as a separate controller. In that example, a travel agency sends personal data of its customers to an airline and a chain of hotels for booking purposes. The travel agency, airline and hotel chain are separate controllers. The contractor argues that its situation is the same. However, there is one important difference between example 7 and the case at hand: the contracting authority chose to outsource one support function for its activities to a contractor. The data subjects do not enter in a direct relationship with the travel agency; it is mediated via their employer, who could have chosen to provide these services in-house. Example 7 on the other hand is about a direct-to-customer situation⁵.

The contractor also argues that ‘providing travel services’ is its core purpose for processing personal data, while it would not be for the contracting authority. Thus, it should be considered as a separate controller. By this reasoning, outsourcing processing activities that are only

⁵ The relationship between the travel agency and the hotel chain / airline, in turn, is indeed that of a transfer to a separate controller. Similarly, the contractor is indeed a separate controller for its own internal management (management of its own staff etc.). That is not in dispute here.

ancillary to the contracting authority's core tasks could never be a controller-processor relationship. Providing services that are ancillary to the contracting authority's activities is the core of most outsourcing business models, so this would be a surprising conclusion. It would also go directly against examples 2, 5 and 20 in the same WP169.

On page 13, WP169 asks the **key question** (emphasis added):

'Would the outsourced company have processed data if it were not asked by the controller, and at what conditions? A processor could operate further to general guidance provided mainly on purposes and not going very deep in details with regard to means.'

The answer to that question is 'no'. In the context of its business with corporate clients, the contractor processes data based on the contract with its clients, which chose from the portfolio of available services, setting the conditions.

The nature of the service will determine whether the processing activity amounts to processing of personal data on behalf of the controller within the meaning of the GDPR and the Regulation. In practice, services in which the processing of personal data is purely **auxiliary**, i.e. does not constitute a sufficiently important element of the service, very often do not give rise to a controller-processor relationship. In the case at hand, it appears that the processing of personal data on behalf of the contracting authority is a sufficiently important element of the contractor's activities to qualify the relationship as one between controller and processor.

When considering whether or not to entrust the processing of personal data to a particular service provider, controllers should carefully assess whether the service provider in question allows them to exercise a sufficient degree of control, taking into account the nature, scope, context and purposes of processing as well as the potential risks for data subjects.

What are the consequences of the different possible legal constructions?

The question under point b) above especially comes into play when the contracting authority is a public sector entity subject to specific rules.

The EUIs are subject to the Regulation and enjoy certain privileges and immunities under Protocol No. 7 to the Treaties. The contractor is subject to GDPR and does not enjoy the same protections. The EUIs are thus under an equivalent, but separate, framework for data protection compared to the contractor and enjoy certain additional protections.

The main difference between controller-controller transfers, joint controllership and a controller-processor relation is the amount of control the contracting authority has over the processing of data.

In a **controller-processor** relationship, the contracting authority can (and has to) exclude further processing beyond what is necessary for fulfilling the contract between the contractor and the contracting authority in its instructions to the processor. It can also impose an obligation for the processor (as far as legally permissible for the processor) to resist e.g. law-enforcement authorities where their activities could prejudice the privileges and immunities of the contracting authority⁶. This scenario offers the most control for the controller and thus most safeguards for protection of the rights of the data subjects.

Joint controllership with other entities implies that that other entity has some influence over how the EUI fulfils its task. That may be appropriate in some constructions with national public authorities for achieving a shared aim in the public interest, e.g. when an EUI and relevant national authorities both participate in the governance of a shared database. However, it would not be appropriate for a private party to have such influence on EUIs when fulfilling their tasks

⁶ EDPS [Guidelines on the use of cloud computing services by the European institutions and bodies](#), pp. 18-19, 25.

assigned in the public interest. It is also for this reason that the EDPS advises EUIs against entering into such situations with private companies⁷.

In a situation of **transfers between separate controllers**, the further processing is completely under the responsibility of the contractor as the subsequent controller⁸ and supervision will be carried out by the competent national data protection authority. While the contracting authority may still put confidentiality obligations and limitations on further processing in the contract in this situation, enforcing them will be more difficult than in a controller-processor relationship. Notably, restrictions on further processing would have to be freely negotiated between the parties here, while in a controller-processor situation, the law already mandates several such restrictions.

Therefore, a controller-processor arrangement is the preferred option, as it allows the contracting authority maximum control over how personal data will be handled on its behalf and thus more safeguards for the data subjects.

Conclusion

Summing up the analysis made above, the EDPS considers that in situations such as this, a controller-processor relationship is the most appropriate construction, for the reasons explained.

It is then for the contracting authorities to implement this relationship via the contracts with their contractors.

In light of the above, we urge contracting authorities not to consider engaging any processor that is not willing to provide sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of Regulation (EU) 2018/1725 and ensure the protection of the rights of data subjects.

I hope this was helpful.

Yours sincerely,

[signed]
Wojciech Rafał WIEWIÓROWSKI

⁷ [Guidelines](#), p. 23.

⁸ This would also imply that the subsequent controller needs to show that it has a ground for lawfulness of its processing. Consent would not work here, as the data subjects are not in a position to make a free choice here. Also, the contractor states that it relies on the contracting authority to ensure that there is a lawful ground for the processing. That is something a controller cannot do under either the Regulation or GDPR.