To be or not to be a Data Controller or Data Processor? That is the question

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Controller or Processor?

1. Definition controller
2. Definition processor
3. Some examples
4. Art 29 Working Party and other regulatory guidance
5. Changes under Regulation
Data Controllers and Data Processors

- **Why significant?**
  - DC's place of establishment currently determines applicable law
  - DC's responsibilities currently significantly greater than DP’s
  - Notification/registration
  - DC is in charge of Subject Access Requests

- **Control doesn't = ownership**
  - Perfectly possible for a relationship to comprise 'controllership in common' or 'joint control' but for 1 party to own data and licence it to the other

**Data controller** - Entity which "either alone or jointly or in common with other persons determines the purposes ...and manner" of processing

**Data processor** – Entity which process data on behalf of the data controller
Types of third parties – Controller or Processor?

- Payroll provider
- Corporate Credit card
- Corporate travel agency
- Benefit provider (e.g. occupational health)
- Mailing house
- Website
- A provider of cloud services
- Database hosting
- Database maintenance
Assuming our supplier is a processor

Under English law you must:

• Perform an ongoing *due diligence* on the supplier (Schedule 1, Part II, s11)

• Have a *written contract* in place, which must state: (Schedule 1, Part II, s12)
  – That the supplier will only act on controller's instructions
  – That the supplier will have in place technical and organisational measures to protect the information

(in Germany, Spain, France and Italy these requirements are even more prescriptive)
Assuming our supplier is a Processor

Germany

- Service description and duration
- Security
- Data
- Rectification and erasure
- Right to subcontract
- Notification of security incidents
- Procedure on termination

Spain (Article 12)

- In writing / only use specified purposes / termination
- Processor treated as controller if use for other purposes
- Must comply with prescribed security requirements
If the supplier is a Controller

Requirements in the UK are not as prescriptive when sharing information with a controller. However you would still want a contract in place covering:

- Purposes limitation
- Breach notification – in case it involves your customers – employees and you want to be involved in informing them
- Onward sharing
- Security
- Cross-border transfers
Regulatory Guidance

- **Article 29 Working Party Opinion 1/2-010** – February 2010
- **ICO Guidelines** – Identifying 'data controllers' and 'data processors' Data Protection Act 1998 (published 14 March 2012)
- **France** – Cloud computing consultation (October - December 2011) / joint controllers and responsibilities e.g. Customer notifies CNIL and individuals
- **Germany** – DPAs guidance documents on data processing
Joint Controllers

- Cloud customers and service providers can be joint controllers
- Key considerations proposed by CNIL:
  - The level of instruction to the service provider;
  - Control exercised by the customer;
  - The added value supplied by the service provider;
  - The degree of transparency in the use of a service provider.
- CNIL suggest responsibility shared as follows:

<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Notifications to CNIL</th>
<th>Information to data subjects</th>
<th>Obligation of confidentiality and security</th>
<th>Exercise of data subjects’ rights of access, correction, alteration, updating or deletion</th>
</tr>
</thead>
<tbody>
<tr>
<td>The service provider is joint data controller for the processing</td>
<td>Customer</td>
<td>Customer</td>
<td>Customer and service provider</td>
<td>Customer (with the service provider’s support)</td>
</tr>
</tbody>
</table>
Changes in the Regulation

- **Joint Controllers** – define clearly responsibilities
- **Territorial scope** – covers processors
- **Responsibility** – Increased processor responsibility
- **Contract terms** – Contractual requirements specified
- **Breach notification** – extended to processors
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