

Data Controller or Data Processor?

How to Interpret Two Core Definitions of Data Protection Legislation

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Companies and individuals may face difficulties in determining which one of the definitions they fall under and whether they or the ones they are working with have data protection responsibility. Interaction between these two concepts is of paramount importance, as it imposes obligations in terms of liability. This piece aims to inform companies involved in the processing of personal data to be able to determine whether they are or the third parties they work with are acting as a data controller and/or as a data processor under Turkish data protection legislation.

Along with information systems, business models become more complex. A number of organizations may be working together in an initiative that involves processing personal data. Even if the “data controller” and the “data processor” are defined under the data protection legislation, companies and individuals may face difficulties in determining which definition they fall under and whether they or the company they are working with have data protection responsibility within the scope of the Law No. 6698 on Protection of Personal Data.

Processing of personal data means any operation performed on personal data, wholly or partly, whether through automatic means, or if the data is part of a data filing system, through non-automatic means, such as collection, recording, storage, preservation, alteration, retrieval, disclosure, transfer, acquisition, making available, categorizing or blocking. Considering this wide definition, entities and individuals who are involved in the aforementioned activities may fall under the scope of data controller or data processor, and might be held liable for their actions.

According to Article 3/1(i) of the DP Law; data controller is;

“the real person or legal entity which sets the objectives and means of processing personal data and who is in charge of establishment and management of data filing system”.

Data processor on the other hand is defined as;

“the real person or legal entity, which processes personal data based on the authority given by and on behalf of the data controller” under Article 3 (1-ğ) of the DP law.

One of the main reasons there is a distinction between the two terms are to prevent loss of a right when the data is being processed. There is a significant line in between the data controller and processor because the data controller will be the one to determine the reason for process, and the processor will be the one to act within the scope of framework determined by the controller. As indicated under Article 12(3) of the DP Law the data controller is obligated to carry out or have carried out necessary inspections within his institution and organization in order to ensure implementation of the provisions of the DP Law.

Within the scope of EU Data Protection Directive 95/46/EC (“Directive”) data controller means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed. A data controller must be a “person” recognized in law, that is to say: individuals; organizations; and other corporate and unincorporated bodies of persons. For example; a government department sets up a database of information about every child in the country. It does this in partnership with local councils. Each council provides personal data about children in its area, and is responsible for the accuracy of the data it provides. It may also access personal data provided by other councils (and should comply with the data protection principles when using that data). The government department and the councils should be deemed data controllers in relation to the personal data on the database.

As a general principle under DP Law and EU legislation, data controller determines the purposes for which and the manner in which personal data will be processed. Therefore, the data controller is the actor who decides “how” and “why” personal data is processed.

Data processor, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller. For example a utilities company engages another company which operates call centers to provide its customer

services functions on its behalf. The call center staff has access to the utilities company's customer records for the purpose of providing those services but may only use the information they contain for specific purposes and in accordance with strict contractual arrangements. The utilities company remains the data controller. The company that operates the call center would be considered as a data processor.¹

In some cases, there are difficulties in determining data controller and processor responsibilities. For example, in the franchise business model, the parent company decides which personal data will be collected and how personal data will be processed, and the company with the branch must comply with these rules. However, the branch that collects personal data is directly related to the data subjects and is the first point of contact where personal data is collected. If the branch makes the decision on setting the objectives and means of processing personal data and who is in charge of establishment and management of data filing system, the parent company should not be considered "data controller" but the branch should.

With regards to determining whether an organization is a data controller or a data processor the following list can be useful;²

Data Controller:

- to collect the personal data in the first place and the legal basis for doing so;
 - which items of personal data to collect, i.e. the content of the data;
 - the purpose or purposes the data are to be used for;
 - which individuals to collect data about;
 - whether to disclose the data, and if so, who to;
 - whether subject access and other individuals' rights apply ie the application of exemptions;
- and
- how long to retain the data or whether to make non-routine amendments to the data.

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/>

² http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf

According to Article 29 Data Protection Working Party, an independent EU advisory body, there are three ways a controller can be appointed³; (a) Control stemming from explicit legal competence: establishes a task or imposes a duty on someone to collect and process certain data. For example, this would be the case of an entity which is entrusted with certain public tasks (e.g., social security) which cannot be fulfilled without collecting at least some personal data, and sets up a register with a view to fulfil them. (b) Control stemming from implicit competence: stems from common legal provisions or established legal practice pertaining to different areas for example the employer in relation to data on his employees, the publisher in relation to data on subscribers, the association in relation to data on its members or contributors. (c) Control stemming from factual influence. This is the contractual relations between the different parties involved.

According to Information Commissioner's Office data processor may decide:

- what IT systems or other methods to use to collect personal data;
- how to store the personal data;
- the detail of the security surrounding the personal data;
- the means used to transfer the personal data from one organization to another;
- the means used to retrieve personal data about certain individuals;
- the method for ensuring a retention schedule is adhered to; and
- the means used to delete or dispose of the data⁴.

In order for data subjects to securely disclose their personal data, the data controllers and data processors are obligated to process the personal data within the scope of the purpose of processing. The data controller has the right to decide on which items to collect, to determine the purpose of processing and whether to disclose the data or not which gives the controller a freedom to carry out its activities in a manner and technical style, and as per Article 17 of the Directive, must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction. Whereas, the processor mainly is given the option to rely on decisions taken by controller and will be obliged to follow the

³ http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf

⁴ <http://www.thesolicitorsgroup.com/News/Article.aspx?ArticleID=3569921a-a91a-4eaf-a712-f71147164715>

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rules and take necessary steps determined by the controller. As per Article 16 of the Directive, the data processor acting under the authority of the controller who is allowed to process the data and has access to it, is required to act based on the controller's instructions or based on law.

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