Comments on

Guidelines 07/2020 on the concepts of controller and processor in the GDPR

from the perspective of the Translation and Interpreting Sector

In response to the EDPB's invitation for public consultation FIT Europe and EUATC hereby submit their comments on Guidelines 07/2020 on the concepts of controller and processor in the GDPR.

They are two organisations representing the Translation and Interpreting Sector on a European level:

- FIT Europe, the Regional Centre in Europe of the International Federation of Translators, with 61 members (which are translation and interpreting associations around Europe), representing the interests of over freelance 40,000 translators and interpreters who are members of those associations: www.fit-europe-rc.org;
- EUATC, the European Union of Associations of Translation Companies, representing 24 national associations of translation companies and over 650 language service companies across Europe: euatc.org;

In this endeavour they also have the support of EULITA, the European Legal Interpreters and Translators Association, a non-profit association, established in 2009 under the Criminal Justice Programme of the EU Commission's Directorate-General of Freedom, Security and Justice (eulita.eu).

For the Translation and Interpreting (T&I) Sector a ***correct and consistent interpretation*** of the concepts of controller and processor on a European level is ***fundamental*** to comply with the GDPR. The distinction between the roles of controller and processor has given rise to many discussions, inconsistencies and uncertainty in our sector, as has the content of data processing agreements. Therefore, we wholeheartedly welcome the opportunity to submit our comments and questions concerning these concepts from the perspective of the T&I Sector.

So that you can more fully understand the problems raised, our comments are set against a broader background outlining the specific situation of the sector. This document also refers in an incidental manner to related issues that have proven problematic for the sector, but only insofar as they relate to the issues of controller and processor.

We hope that our comments will be a stepping stone to a comprehensive, in-depth discussion and consultation with the EDPB about data processing in the T&I Sector.

This document contains a summary of issues related to the concept of controller and processor, which need attention, and are specific to the T&I sector, as they may differ from the standard rules and situations of business and data processing presented in and envisaged by the Guidelines 07/2020.

As an introduction, we give some background information about the T&I Sector, to enable the reader full understanding of our comments and questions.

The comments are ordered following the structure of the Guidelines 07/2020.
Following issues will be commented and discussed:

Background information about the translation and interpreting sector in the light of the GDPR

The T&I Sector both globally and at European level generates considerable economic turnover. Research data from official statistics in 2017[1] collected by Nimdzi Insights, a language services research company, reported the revenues within the language services market in the European Union as USD 6.8 billion, the largest market for language services in the world.

In another survey from 2020[2], Nimdzi Insights reports that 44% of the 150 largest language service companies are located in Europe.

Data protection has become an important issue for the T&I profession following the introduction of the GDPR in May 2018. The GDPR has introduced rules intended to bring order to the data processing arena, but lack of uniform interpretation of these rules across Europe causes a lot of confusion for the sector. Many sets of instructions, guidelines and model documents have been published and a mass of information on the GDPR is freely available on the internet. However, most of the proposed solutions are general in nature and do not take into account the specific needs of translators, interpreters and Language Service Providers (LSPs).

To increase compliance and to ensure uniform implementation across Europe and internationally within this sector, there is therefore an urgent need for specific guidelines for the T&I profession. These guidelines should answer major questions about the procedures and formalities connected with data processing in the sector and propose best practices. They should encompass the whole T&I process and every link in the supply chain, from the end client to the translator and interpreter, as well as LSPs.

Translators, interpreters and LSPs routinely work in cross border contexts. However, as interpretations of the GDPR requirements and guidelines for data protection differ from country to country (see Annex 2), it is imperative that common guidance should be sought and guidelines be drafted on a European level. This will allow translators, interpreters and LSPs to apply uniform standards, fully protecting not only the rights and freedoms of the data subject, but also the interests of all actors in the T&I profession.

The need for specific guidelines for data processing in the T&I sector has been confirmed by surveys conducted recently concerning GDPR-awareness among professional associations of translators and interpreters, among freelance professionals, and among LSPs. Some general conclusions from these surveys are presented below.

[1] Source accessible for subscribers only:
https://www.nimdzi.com/market-size-for-translation-and-interpreting-full-report/
[2] Source accessible for subscribers only: https://www.nimdzi.com/the-2020-nimdzi-100-full-report/

1. Summary of survey results

At the end 2019 and the beginning of 2020 FIT Europe carried out a survey amongst freelancer translators and interpreters and another one amongst the national associations representing them in order to assess the state of awareness of the GDPR in the profession and the level of implementation of data protection measures in the sector.

The survey for individual translators and interpreters generated some 1,300 responses, the survey of associations 55 responses.

A first conclusion to be drawn is that there is still a significant amount of confusion about whether the GDPR applies to T&I activities and if so, to what extent. A lack of basic awareness and consistent interpretation often causes professionals to avoid the subject of data protection. Although over half of freelancers have taken some general interest in the GDPR, only a little over one third of them stated that they are well informed about the GDPR or fully and consciously (try to) comply with the GDPR in their business. Around 10 percent of the respondents do not even know if the GDPR applies to them.

Although one can see there is interest in the GDPR, only about one third of the respondents have taken action to properly implement data protection measures in their businesses. As reasons for not doing so, about half of the respondents stated that they are waiting for clear guidelines.

Specific reasons cited for not complying with the GDPR included:

- *While I feel I have to comply with GDPR for my European clients, it is very difficult to navigate and implement and [it] puts undue burden on a solopreneur. Precise guidelines that apply to and are implementable by micro businesses, in particular translators and interpreters would be very helpful.*
- *It all seems much too complicated and time-consuming to me.*
- *With such a small business (sole trader) it does not seem like a priority. (...)*
- *I do not translate documents containing sensitive information and I am a freelancer and I do not keep any records nor process any personal data.*
- *I do not work with any direct clients, only agencies, so I do not come into contact with any kind of personal information. The materials I have translated since GDPR came in force do not contain any sensitive data either.*

In answer to the question as to which information is most needed to help freelancers fully comply with the GDPR, clear guidelines about obligations as a translator/interpreter was the most common answer, model documents (e.g. privacy policy, data processing agreement) took second place and technical guidelines on how to adapt one's business to the GDPR was chosen as third option.

Respondents added the following comments to this question:

- *Even if fully compliant, it would be great to have documents available that are actually tailored to translators/interpreters.*
- *Industry-specific guidelines, such as how to be compliant AND keep my translation memories, do I need to request my customers to sign some forms, etc.*

At the end of the freelancer survey there was a field for free comments and remarks, where many respondents vented their frustration on a lack of specific guidelines:

- *The training I attended and others that my colleagues attended were all very general, explaining the norm and its rationale but trainers weren't able to tell what part of the norm we as interpreters and translators need to comply with, and what parts are irrelevant or not applicable to us. It was (still is) very confusing.*
- *Many guidelines have agencies as a target group. There should be guidelines adapted to the reality of freelancers.*
- *Too much information and much of it not related to translation or interpreting. Too little information on the most important part of it all - assessing your data and your priorities in relation to this data, and working out how to regularly clean/delete your data. I'm amazed no tools have yet been developed to warn you when personal data is being kept too long!*
- *It is very complicated and time-consuming. Some subcontractors do not want to sign those documents. Often the documents are 5 times the length of the translation job, the red tape is not in proportion with the job. (...)*
- *(...) practical issues in tending my TMs and older translations, which form part of my business knowledge, so I do not want to just delete them.*
- *It worries me that agencies can require that I sign personal data processing agreements that give them authority to check my compliance. Since I work for many agencies, I feel that this is a threat to confidentiality, especially if an agency would come to inspect my premises and my computer.*

Even if freelance professionals are aware of their obligations under the GDPR and actively implement data protection measures, many doubts remain:

- *As of today, I think I am fully compliant with GDPR, but somehow doubts remain: Is this enough? Or do I have to add more things I do not know yet? Or not well enough yet?*
- *I am quite aware of the GDPR regulations and know that I am concerned. Yet it seems so much work for my tiny microenterprise. The main problem for me is lack of time. I do not know where to start!*

The outcome of the survey for associations showed that although most of them have sought expert advice and feel they have done enough to inform their members about the GDPR, there is still a need for clear and uniform guidelines for the sector and more training for members. However, we note a mismatch here, because although associations have, for the most part, provided training, and feel they have done enough for their members, freelancers do not report feeling confident when it comes to the GDPR, clearly indicating that associations need to be providing more training. The absence of clear guidance on critical points hampers their ability to do so.

In the spring of 2020 another survey, The European Language Industry Survey was conducted by EUATC, ELIA, FIT Europe, GALA, LIND and the EMT Network. This is an annual survey that contains questions aimed at the various segments comprising the language industry. The section addressed to Language Service Providers (LSPs) in the 2020 edition contained several questions about GDPR. The key finding was that respondents did not consider GDPR a challenge, having taken steps to implement it, nor did they consider it to be a major trend anymore.

To quote from the survey report:

- *GDPR seems to be phasing out as a challenge, with only 19% of the respondents expressing concerns.*
- *Only a few participating companies were uncertain about their GDPR status. The vast majority consider themselves GDPR-compliant, which explains why GDPR is not considered a challenge anymore.*
- *All size segments have been involving GDPR experts. Only a minority seem to be using technology to ensure GDPR*.[3]

However, giving the rising uncertainty about Brexit and the adequacy of the UK's data protection regime after it, and the SCHREMS II judgment which invalidated the Privacy Shield decision, LSPs have begun to realise that many questions about the GDPR remain unanswered, and have become increasingly concerned about how data will flow freely outside the EU. This is a concern shared by many freelance translators. Although physically based in the EU, many translators and LSPs do business globally. Clients can be anywhere in the world.

The results of these surveys definitely show that awareness levels need to be raised further and – to do so – uniform interpretation and specific guidelines for the industry are very much needed. In order to develop custom guidelines for the T&I profession, basic questions have to be answered, some of which were repeatedly posed by the respondents to the survey.

2. The lack of consistent interpretation of the GDPR

Some answers to questions concerning data processing in the T&I Sector have already been offered by legal experts and local data protection authorities. Still, these interpretations and opinions are largely divergent. As mentioned above, one of the major conclusions of the surveys is that there is definitely a lack of consistent interpretation of the GDPR in the T&I Sector. This situation is also confirmed in many discussions the authors of this document had with experts and T&I professionals.

As the Guidelines clearly point out in the executive summary, *"the precise meaning of these concepts [of controller and processor] and the criteria for their correct interpretation must be sufficiently clear and consistent throughout the European Economic Area (EEA)".* The same applies for all other rules and requirements of the GDPR, especially in the T&I Sector, where actors often work cross border between member states.

A consistent interpretation of the GDPR is crucial to create a stable working environment for all market players. Unfortunately, there are many discrepancies between interpretations and guidance which cause different approaches in different member states. Legal experts have no common, consistent opinion on many issues that appear problematic for the T&I Sector. Very often, the nature of the professional activities performed by translators, interpreters and LSPs is not thoroughly understood by experts offering advice, which indeed leads to general guidelines that are not tailored to the situation of the sector.

Examples of these inconsistencies can be found all over the sector and in different member states (see Annex 2). Depending on legal advice, actors in the industry define their role as controllers, joint controllers or processors, very often without distinction as to the type of data processing activities. The next actors in the supply chain are forced to follow the interpretation of their client in order not

[3] https://ec.europa.eu/info/sites/info/files/2020_language_industry_survey_report.pdf

to lose clients and contracts. Very often, freelancers and small LSPs are in no position to question the contracts offered by bigger players in the market and have little choice but to sign contracts they feel uncomfortable with or do not fully understand (see Annex 2).

However, as par. 26 of the guidelines mentions *"in many cases, an assessment of the contractual terms of a contract are not decisive in all circumstances, as this would simply allow parties to allocate responsibility as they see fit. It is not possible either to become a controller or to escape controller obligations simply by shaping the contract in a certain way where the factual circumstances say something else".*

As mentioned before, the inconsistency in interpretation starts with the basic concepts of data controller and data processor. These concepts *"of controller and its interaction with the concept of processor"*, as indicated in par. 2 of the Guidelines, *"play a crucial role in the application of the GDPR, since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice".*

For the T&I Sector, the distinction between controller and processor should be made clearly, depending on the factual situation, and especially the type of activities and the type of personal data involved. When the interpretation of the concepts of controller and processor is inconsistent, as is now the fact in the T&I Sector, it is impossible to demonstrate compliance and take up the responsibilities for lawful and secure data processing. A consistent interpretation of these concepts from the perspective of translating and interpreting activities is therefore paramount for the sector.

In order to come to a consistent interpretation and application of the concepts of controller and processor in the T&I Sector, a good understanding of the data processing activities of translators, interpreters and LSPs is required.

PART I – CONCEPTS OF CONTROLLER AND PROCESSOR

As par. 12 of the guidelines states: *"The concepts of controller and processor are functional concepts: they aim to allocate responsibilities according to the actual roles of the parties. This implies that the legal status of an actor as either a "controller" or a "processor" must in principle be determined by its actual activities in a specific situation, rather than upon the formal designation of an actor as being either a "controller" or "processor" (e.g. in a contract)".*

We fully understand the need to analyse every single situation controllers and processors find themselves in individually, but we seek to draw a model for the T&I Sector based on the actual roles translators, interpreters and LSPs play in data processing – in a way similar to the examples presented in the Guidelines. This model will enable all actors to make a substantiated decision regarding their role in the data processing process.

Therefore, we will present the standard situation in which translators, interpreters and LSP's usually find themselves when offering their services to clients. Depending on the nature of the client, further doubts and questions arise concerning the standard roles of the translator, interpreter and LSP. These aspects will be explained below in detail.

In order to assess the role of the translator, interpreter and LSP in data processing and to analyse the type of processing activities, we first of all need to distinguish between **two types of personal data** we process as translators, interpreters and LSPs and the data processing activities connected with these types of data:

- administrative **client data** (name, address, telephone number, e-mail, etc.): these data are processed in the context of standard business activities not specific to the T&I Sector in order to identify clients, communicate with them, send quotes, accept jobs, invoice finished services, inform about promotions, etc.

- **data** contained **in the translated content** (in written documents, recordings, etc.): these data are closely tied into translation/interpreting activities.

To define the role of translators, interpreters and LSPs in data processing, we should apply the main criteria that define these roles.

As par. 16 of Guidelines points out:

The definition of controller contains five main building blocks [⋯]. They are the following:
- *"the natural or legal person, public authority, agency or other body"*
- *"determines"*
- *"alone or jointly with others"*
- *"the purposes and means"*
- *"of the processing of personal data".*

1. "of the processing of personal data"

Working through this list of building blocks, one might pose the question whether translators, interpreters and LSPs actually process personal data.

Insofar client data is concerned, there is no doubt that translators, interpreters and LSPs are processing personal data and fall under the general guidelines concerning client data processing for regular business purposes.

Insofar as data in translated content is concerned, there appears to be a broad spectrum of how the relevant requirements are interpreted. At one end of the spectrum, we have encountered the opinion that, as the processing of data in the translation or interpreting activities is purely incidental, data processing is not the goal of translation services and there could as well not be personal data in the translated documents, the GDPR does not apply to translating activities (see Annex 2 - example E).

In our opinion this seems a rather far fetched interpretation. Even if personal data in the translated document have no meaning or use for the translator, the fact that the data are in their possession means that they should properly care for the security of that data and guarantee that there is no unauthorised access to the data.

Also, as par. 41. of the guidelines indicates: *"Anyone who decides to process data must consider whether this includes personal data and, if so, what the obligations are according to the GDPR. An actor will be considered a "controller" even if it does not deliberately target personal data as such or has wrongfully assessed that it does not process personal data".*

Although in our opinion there is no doubt about the fact that translators and LSPs process personal data contained in documents transferred by their client, strong doubts can arise when analysing the situation of interpreters, both of spoken language and sign language. Should interpreting oral communication containing personal data be defined as data processing? Par. 77 of the Guidelines says that *"in practice, this means that **all imaginable handling of personal data** constitutes processing"*.

Yet, we should consider following aspects:

- the definition in Article 4 of the GDPR states that 'processing' means *"any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction"*. Can interpreting, for example, be defined as "adaptation or alteration", "dissemination" or "making available" of personal data?
- the material scope of the GDPR, defined in article 2 states that the "*Regulation applies to the processing of personal data [...] which form part of a **filing system** or are intended to form part of a filing system"*. Based on the above criteria, one could argue that interpreting can be considered as data processing only if the oral communication is recorded and leaves a permanent trace in a filing system. We should also take into account that interpreters sometimes receive documents containing personal data as reference materials to prepare for the actual interpreting job. During the actual interpreting job they also make notes. This, however, is not a situation restricted to interpreters. Translators also receive these kinds of documents and can make notes during their work. Whether this constitutes data processing should be considered when discussing how the GDPR impacts the sector.

2. "determines the purposes and means"

The next building blocks are the **purpose** and **means** and therefore we should analyse what the purpose and means of processing personal data is in the T&I profession.

Par. 20 of the Guidelines refers to *"certain rules of thumb and practical presumptions"* in this regard. We should ask that the guidelines provide a clear list of what those rules of thumb are and what practical presumptions can be made. At present they are not clearly stated, which adds to the confusion.

Par. 24 of the Guidelines goes on to suggest that, *"the need for factual assessment also means that the role of a controller does not stem from the nature of an entity that is processing data but from its **concrete activities in a specific context**. In other words, the same entity may act at the same time as controller for certain processing operations and as processor for others, and the qualification as controller or processor has to be assessed with regard to **each specific data processing activity**"*.

Therefore, as mentioned above, we can distinguish two types of data processed in the T&I Sector:

- administrative **client data**
- **data** contained **in the translated content**

and take a look at the specific processing operations performed on these types of data. We should assess what the "purpose" and "means" for the processing of these two types of data are and who determines this purpose and means.

The definitions of par. 31 are helpful here: *"Dictionaries define "purpose" as "an anticipated outcome that is intended or that guides your planned actions" and "means" as "how a result is obtained or an end is achieved".*
Par. 33 specifies that *"determining the purposes and the means amounts to deciding respectively the "why" and the "how" of the processing: given a particular processing operation, the controller is the actor who has determined why the processing is taking place (i.e., "to what end"; or "what for") and how this objective shall be reached (i.e. which means shall be employed to attain the objective)".*

Based on these definitions and guidelines we can put forward the following point of view as for the **purpose**:

Translators are data controllers insofar as **client data** are concerned.

- They determine **what client data** they collect to perform their services and require the client to deliver these data;
- They decide exactly **to what end** they need the data, e.g. to contact the client, to invoice the services, to submit financial documents for accountancy, etc.;

Translators are data processors insofar as **data in the translated content** are concerned:

- The client decides **the scope and character of the personal data** in the translated document. The translator, interpreter or LSP has no influence on the scope or character of the personal data in the documents. These data could as well not be there and for the translator it usually is of absolutely no importance whether the subject in the document is called Smith or Parker.
- It is the client who decides about **the purpose** and has *"influence over the processing, by virtue of an exercise of decision-making power. A controller is a body that decides certain key elements about the processing. [···] One should look at the specific processing operations in question and understand who determines them, by first considering the following questions: "why is this processing taking place?" and "who decided that the processing should take place for a particular purpose?" (par. 19).*
  The personal data will be processed – however incidental they are in the document – for the purpose of translating the document of the client's choice into the language of their choice. Furthermore, the client decides for what purpose the translated document will eventually be used, which is the basic decision for engaging in translation and thus engaging in data processing. It is the client that has to confirm that their purpose is legitimate and that they are authorised to be in possession of the personal data to be processed for this purpose. The translator cannot be held responsible for the lack of lawfulness on the client's side.

But as par. 34 of the guidelines points out *"the **controller must decide on both the purpose and means** of the processing as described below. As a result, the controller cannot settle with only determining the purpose. It must also make decisions about the means of the processing. Conversely, the party acting as processor can never determine the purpose of the processing".*

Whereas it is very clear to us that translators, interpreters or LSPs who carry out job requests from their client do not determine the purpose for which the data contained in the translated documents are to be processed, one might object that the LSP or translator does decide about the means of processing. Still, it is the client that takes the main decision about **how to achieve their purpose** (obtaining a document in another language): human translation by a translator/interpreter instead

of machine translation by Google Translate or DeepL, a professional translator and qualified specialist rather than his niece studying French in high school, and so on.

The choice of means that is made by the translator or LSP concerning e.g. software, dictionaries, internal procedures for job handling, quality assurance, etc. can be seen as strictly technical means, which is a concept referred to in par. 35 of the Guidelines: *"In practice, if a controller engages a processor to carry out the processing on its behalf, it often means that the processor shall be able to make certain decisions of its own on how to carry out the processing. The EDPB recognizes that some margin of manoeuvre may exist for the processor also to be able to make some decisions in relation to the processing. In this perspective, there is a need to provide guidance about which* ***level of influence*** *on the "why" and the "how" should entail the qualification of an entity as a controller and to what extent a processor may make decisions of its own".*

This definition of the level of influence concerning the question of ***"how"*** translation or interpreting is done is paramount for the T&I Sector. As we see it, the translator, interpreter or LSP only decides about the means based on their professional experience.

This is a comparable situation to example on page 14 of the guidelines about payroll services. Rephrasing it for the T&I Sector:

"Client A hires a translator to perform translation services. Client A gives clear instructions on what documents to translate into what language, by what deadline, how long the translation containing data shall be stored, etc. In this case, the processing of data is carried out for Client A's purpose to use the document in a lawsuit and the translator may not use the translated documents nor the data for any purpose of its own. The way in which the translator should handle the documents containing personal data is in essence clearly and tightly defined: only for performing the translation. Nevertheless, the translator may decide on certain detailed matters around the processing such as what software and what dictionaries to use, whether to ask a colleague to do revision of the translation, etc. This does not alter their role as processor as long as the translator does not go against or beyond the instructions given by Client A and does not use the documents and personal data for other purposes".

In fact, using documents and data transferred by the client for purposes other than the ones defined by the client is quite inconceivable for translators, interpreters and LSPs and goes strongly against professional ethics in the T&I Sector. Translators, interpreters and LSPs are strictly bound by non-disclosure agreements, legally defined professional secrecy requirements and/or professional codes of conduct.

So as the executive summary says the translator *"as a processor must not process the data otherwise than according to the controller's instructions. The controller's instructions may still leave a certain degree of discretion about how to best serve the controller's interests, allowing the processor to choose the most suitable technical and organisational means".*

3. "alone or jointly with others"

Another of the building blocks mentioned is "alone or jointly".

If we build on the model outlined above, the question concerning individual or joint controllership should not pose major problems in the T&I Sector. When translators, interpreters and LSPs are processors, this question is irrelevant. In cases where they are controllers, the general rules apply.

However, we have met the opinion that the LSP and translator/interpreter are joint controllers for all processed data, with the LSP accepting the role of controller, not processor of the data received from its client (see Annex 2 - Example A). This approach is inconsistent with the approach we have sketched above and with the factual circumstances which typically apply in the T&I Sector. It imposes on the LSP, translator and interpreter broader obligations and a responsibility for elements of data processing over which they have no influence whatsoever. This is a situation that should be avoided and clear guidance from the EDPB on this point would be most welcome.

4. "the natural or legal person, public authority, agency or other body"

The last building block of the definition of controller, mentioned in the guidelines, is *"the natural or legal person, public authority, agency or other body"*.
This is of importance for the situation in the T&I Sector, because translators, interpreters and LSPs cooperate with all these entities. The character of each of these entities gives rise to questions concerning the role of controller-processor.

Therefore, to define the situation of translators, interpreters and LSPs we distinguish three **types of client**:

- Legal persons;
- Natural persons;
- Judicial authorities.

a) Legal persons

When working for clients that are legal persons, the role of the translator fits into the above-mentioned approach. The end client (a legal entity) would be the controller as far as the data in the translated content is concerned, because it determines the purpose and the means of data processing. The translator is the processor of these data. This approach - as well as the assumptions above - should be discussed and validated.

But what about LSPs? Many of them are also legal persons.
In general LSPs fulfil the same role in the data processing process as translators: they administer (or manage) translations jobs and client contacts and do translation work, sometimes with the help of external translators. Does this mean that, based on the above mentioned assumption, both the translator and the LSP are:

- controllers insofar as client data for administrative purposes are concerned?
- processors insofar as personal data in the translated documents are concerned?

The same also applies to freelancers who choose to incorporate themselves as companies.

This point of view is quite controversial, as many LSPs are advised to choose the position of controller for both types of data. The role of LSPs in the data processing process should also be discussed and interpreted on a European level in order to come to a consistent interpretation and provide certainty to all actors in the process.

b) Natural persons

Following the par. 17 of the Guidelines, *"under the GDPR, a controller can be 'a natural or legal person, public authority, agency or other body'. This means that, in principle, there is no limitation as to the type of entity that may assume the role of a controller. It might be an organisation, but it might also be an individual or a group of individuals"*.

So a natural person can without doubt become a controller. Still, the role of translators, interpreters and LSPs providing translation services to natural persons is quite problematic and we have encountered very different interpretations (see Annex 2).

Some take the view that the GDPR does not apply to the processing of personal data: " *by a natural person in the course of a purely personal or household activity;* (art. 2(2)(c)) and that a private person cannot be a controller. So a client who is a natural person cannot be the controller for data in the translated content when ordering translation service. Hence, in this interpretation, the translator must be the controller.

This approach is also quite understandable, when we look at the obligations of the controller, which put a heavy burden on anyone without expert knowledge on data protection. For example par. 39 states that: *"Even though decisions on non-essential means can be left to the processor, the controller must still stipulate certain elements in the processor agreement, such as – in relation to the security requirement, e.g. an instruction to take all measures required pursuant to Article 32 of the GDPR. The agreement must also state that the processor shall assist the controller in ensuring compliance with, for example, Article 32. In any event, the controller remains responsible for the implementation of appropriate technical and organisational measures to ensure and be able to demonstrate that the processing is performed in accordance with the Regulation (Article 24)"*.

One can indeed object that a natural, private person might not have the knowledge to fulfil his obligations as a controller and to implement necessary procedures. It is hard to imagine a grandmother ordering the translation of the birth certificate of her granddaughter to be able to assess what technical and organisation measures the translator-processor should take according to article 32 of the GDPR.

But should this have a bearing on the responsibility and role of the translator, interpreter or LSP?

We hold the view that translators, interpreters and LSP should not be burdened with the responsibility of controller just because the factual controller is "defective" and does not possess the required knowledge to fulfill their obligations under the GDPR.

Here we should bear in mind that when processing data for natural persons, translators and LSPs play exactly the same role as when they cooperate with legal persons and perform exactly the same activities. When commissioning the translation of a document containing personal data, should the client – even if he/she is a natural person without any knowledge of data protection – not take full responsibility for the scope and sensitivity of the data and should he/she not have the full authority to use these documents and pass them on to third parties? Does passing on data to a complete stranger – the translator, interpreter or LSP – exclude data processing from the scope of purely personal or household activity?

If indeed the client is the controller in the above mentioned situation – which in our humble opinion is the most logical assumption – this still causes many problems of a practical and formal nature. First of all, if the client-controller is not able to consciously meet their obligations and responsibilities under the GDPR, as they will not be aware of their role in the data processing process, these obligations and responsibilities will in practice be ceded to the processor; a situation that is unwanted and undesirable for parties who find themselves in the position of processor. In this scenario, it will become the task of the processor to prepare an adequate data processing agreement to offer to their client and also to decide on adequate technical and organisational measures to secure the data. This is especially problematic for small entities and freelancers and makes it even more necessary for the processor to be provided with clear guidance to allow him/her to apply the necessary measures, for which he/she will not have received instructions from the controller.

This is definitely an issue that requires clear EDPB guidance, to ensure that conflicting interpretations at national level are avoided.

c) Judicial authorities

Depending on local legislation, this type of client may be served by sworn and court translators or translators who have specific qualifications. Given the sheer diversity of the national approaches taken to sworn/court interpreters/translators[4], it is quite difficult to draft specific guidelines for this issue on a European level.

Nonetheless we can and should address the question of processing data relating to criminal convictions and offences (GDPR, art. 10):

> *"Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. (…)".*

A precise interpretation of the restriction on processing criminal data should be prepared in order to allow all concerned parties – translators, interpreters, LSPs and judicial authorities – to adequately implement data processing rules for the T&I profession.

A related issue is the interface between the GDPR and the Law Enforcement Directive (Directive (EU) 2016/680, since both apply to judicial authorities and criminal data. The GDPR partially exempts judicial authorities from its provisions (art. 2(1)(d)). The exempted areas are subject to the provisions of the Law Enforcement Directive, which contains rules on data protection very similar to those in the GDPR.

An interpretation is required about whether the Law Enforcement Directive applies to translators, interpreters and LSPs when they process personal data on instructions from judicial authorities. And if Directive (EU) 2016/680 does not apply to the translator, interpreter or LSP, then what rules apply to their cooperation with judicial authorities and how should this cooperation be formalised?

This leads us to the issue of the formal requirements that should be met on the part of the controller and the processor, more specifically the data processing agreement.

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[4] Indicatively, see https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf

PART II – CONSEQUENCES OF ATTRIBUTING DIFFERENT ROLES

1 RELATIONSHIP BETWEEN CONTROLLER AND PROCESSOR

If the translator, interpreter or LSP is allocated the role of data processor for data in the translated content, then all the requirements of art. 28 concerning data processing agreements are in force. The general requirements which a data processing agreement needs to fulfil often lead to many questions and doubts in the T&I profession. This is especially the case for freelance translators and interpreters who have no expert knowledge about data processing and fear they might be burdened with unacceptable terms and conditions, as was shown clearly in the survey conducted by FIT Europe.

1.2 Form of the contract or other legal act

First of all, there is doubt about the form of the data processing agreement. According to art. 28 (9) of the GDPR and as pointed out in the Guidelines in par. 99, *"such legal act must be **in writing, including in electronic form**. Therefore, non-written agreements (regardless of how thorough or effective they are) cannot be considered sufficient to meet the requirements laid down by Article 28 GDPR. To avoid any difficulties in demonstrating that the contract or other legal act is actually in force, the EDPB recommends ensuring that the necessary signatures are included in the legal act".*

Doubts concerning the form arise mainly due to different interpretations of the term "in electronic form" in different member states.

Some language versions of art. 28(9), for example the Polish version which uses the phrase "w formie elektronicznej", give rise to the interpretation that a signature is definitely required, as this "forma elektroniczna" in Polish legal terminology means an electronic document signed with a qualified electronic signature, whereas the Greek version of art. 28(9) merely indicates that it must be writing and in electronic form(at): *"Η σύμβαση ή η άλλη νομική πράξη που αναφέρεται στις παραγράφους 3 και 4 υφίστανται γραπτώς (in writing), μεταξύ άλλων σε ηλεκτρονική μορφή (in electronic form(at))"*. The French version talks about "*une forme écrite, y compris en format électronique".* The German version says the contract is "*schriftlich abzufassen, was auch in einem elektronischen Format erfolgen kann"*, where the term *elektronische Format* clearly differs from the term "*elektronische Form*" used in the German Civil Code (Bürgerliches Gesetzbuch §126a) for documents needing a qualified electronic signature.

We understand from the par. 99 of the Guidelines that the EDPB allows a less strict version of this "electronic form" and accepts the data processing agreement to be confirmed by email, as long as the contract is "in writing". Unfortunately, the recommendation to get the necessary signatures under the data processing agreement "to avoid any difficulties" again gives rise to doubts and creates an unclear situation. What difficulties does EDPB expect when confirming a data processing

agreement by e-mail and duly archiving this document? Some examples of these difficulties would be most welcome.

Apart from the fact that it is quite difficult to get some clients to confirm a data processing agreement "in writing", it is even more burdensome to obtain a signature, especially when all correspondence is conducted through email, and these difficulties are compounded when the client is a natural person. Private clients are not willing to print, sign, scan and send back an agreement, usually of several pages, by e-mail or regular post in order to get a translation of a single page document done. We also cannot expect every client to be equipped with an electronic qualified signature to sign these types of documents. This is seen as excessive red tape in comparison to the services requested and performed, and may easily lead to insurmountable barriers to conducting business.

We understand the need for certainty, but expect a clear message from the EDPB that a DPA confirmed by email fulfils the requirements of the GDPR.

1.2 Form of another legal act

A related question concerns the form of the "other" legal acts that can provide a legal basis for data processing by a processor. This mainly concerns freelancers working for public authorities that do not provide the processor with a data processing agreement. Here, one can think of sworn or court translators working for judicial authorities. These professionals do not always receive explicit instructions to process personal data. However, they very often process sensitive and criminal personal data that should be specially protected and therefore they should demonstrate full compliance with the GDPR. The lack of instructions or of a data processing agreement gives rise to doubts and uncertainty about the lawfulness of the data processing.
In this light, what other legal acts guarantee full compliance with the GDPR? As we understand it, all elements mentioned in art. 28 should be also contained in the other legal act, which now is, very often, not the case.
We request guidance and support to solve this problem and guarantee full compliance with the GDPR on both sides. This issue is also related to the above mentioned questions concerning processing of criminal data and data excluded from the scope of the GDPR.

1.3 Content of the contract or other legal act

As par. 109 of the Guidelines points out, *"while the elements laid down by Article 28 of the Regulation constitute the core content of the agreement, the contract should be a way for the controller and the processor to further clarify how such core elements are going to be implemented with detailed instructions. Therefore,* ***the processing agreement should not merely restate the provisions of the GDPR****: rather, it should include more specific, concrete information as to how the requirements will be met and which level of security is required for the personal data processing that is the object of the processing agreement. Far from being a pro-forma exercise, the negotiation and stipulation of the contract are a chance to specify details regarding the processing".*

The situation sketched in this paragraph shows the desired state of affairs, but it is not often what is practiced in the T&I Sector. More often than not, the data processing agreement is just an unwanted pro-forma exercise, done for the sake of going through the motions, to complete the necessary

paperwork and does not specify in any way what is expected from either the controller or the processor. The content is very often a listing of the more or less exact wording of article 28.

For translators, interpreters and LSPs that do not have the financial means to pay for expert advice tailored to their needs, specific instructions about what the data processing agreement should include are vital. And even if they seek expert advice, it is often very general and does not take into account the specific situation of professionals in the T&I Sector. Which brings us back to the beginning: a very vague data processing agreement. The requirements of article 28 are very often copied word for word into the data processing agreement, and are in many cases vague and unclear for professionals who have little or no knowledge of the data processing requirements under the GDPR.

Moreover, freelance translators often feel imposed upon by clients to sign data processing agreements they feel uncomfortable with or clearly do not understand.

On the other hand, some clients do specify the clauses of the data processing agreement in such a way that, again, the processor is not sure whether he/she is willing and/or able to accept the terms of that agreement. This is all the more so when the clauses of the data processing agreement differ in wording from the elements mentioned in article 28 and translators are not able to assess whether the clauses they contain go beyond what the GDPR requires. In addition to this, standard solutions might differ from country to country and translators working for different clients in different countries face different requirements and interpretations, and hence a heightened sense of uncertainty.

Another problem that arises on the side of the client is the lack of GDPR awareness and knowledge - or even deliberately ignoring the GDPR's requirements - which makes it sometimes impossible for the translator to fulfil his/her obligations and fully adhere to data protection requirements. In this case the processor can indeed offer the client his own data processing agreement. As mentioned in par. 107 of the Guidelines *"the fact that the contract and its detailed terms of business are prepared by the service provider rather than by the controller is not in itself problematic [...]"*. But again – due to a lack of knowledge or financial means to seek expert advice – this solution is not always feasible.

Also, with regard to this issue, we have encountered the opinion that the processor cannot be held responsible for an infringement of the GDPR, if the controller does not offer the processor a data processing agreement (see Annex 2 - Example F). This is an approach that is rejected in the Guidelines in par. 101, stating that *"both the controller and processor are responsible for ensuring that there is a contract or other legal act to govern the processing"*, so awareness should definitely be raised.

Problems of this sort could be solved by preparing a model data processing agreement, which could be used by translators, interpreters and LSPs and their clients. This model could, where necessary, set out the specific circumstances, offering examples of good practice, depending on the type of data that is being processed. The model DPA could enumerate the various types of data, categories, technical and organisational measures etc., perhaps in the form of tick boxes, so that the relevant elements could be selected for each job/client.

We seek advice on the possibility of preparing such a model agreement within the framework of standard contractual clauses, offered by art. 28(8). As par. 102-103 of the Guidelines mention *"in order to comply with the duty to enter into a contract,* ***the controller and the processor may choose to negotiate their own contract*** *including all the compulsory elements* ***or to rely, in whole or in part, on standard contractual clauses in relation to obligations under Article 28****. A set of standard*

contractual clauses (SCCs) may be, alternatively, adopted by the Commission or adopted by a supervisory authority, in accordance with the consistency mechanism. These clauses could be part of a certification granted to the controller or processor pursuant to Articles 42 or 43".

The T&I Sector would welcome standard contractual clauses as a tool for promoting uniform and consistent standards of cooperation between market players, where data processing is concerned. Standard clauses would give both freelancers and LSPs the legal and organisational certainty they seek when entering in a business contract under which personal data are processed.

Related to this issue are **standard data protection clauses** for service contracts and data processing agreements with clients outside the EU (art. 46). As many translators, interpreters and LSPs within the EU work for clients outside the EU, data transfer outside the EU is inevitable. Translators, interpreters and LSPs therefore seek guidance on how to incorporate standard data protection clauses for these types of business relations into a model agreement that will fulfil the requirements of the GDPR and provide for secure data processing.

1.3.3 The processor must take all the measures required pursuant to Article 32 (Art. 28(3)(c) GDPR)

Based on the provisions of art. 28(3) with the reference to article 32 (security of processing), clients often impose technical requirements on translators, interpreters and LSPs, which are disproportionate to the financial and organisational capabilities of the processor. This relates in particular to freelance translators/interpreters.

We welcome the idea of preparing an annex to the data processing agreement with the necessary instructions, as mentioned in par. 124 of the Guidelines: *"The level of instructions provided by the controller to the processor as to the measures to be implemented will depend on the specific circumstances. In some cases, the controller may provide a clear and detailed description of the security measures to be implemented. In other cases, the controller may describe the minimum security objectives to be achieved, while requesting the processor to propose implementation of specific security measures. In any event, the controller must provide the processor with a description of the processing activities and security objectives (based on the controller's risk assessment), as well as approve the measures proposed by the processor.* ***This could be included in an annex to the contract.*** *The controller exercises its decision-making power over the main features of the security measures, be it by explicitly listing the measures or by approving those proposed by the processor."*

However, as mentioned before, the "defective" controller is not always capable of providing the processor with a description of the security objectives based on their risk assessment or of explicitly listing the measures that are required. So the solution of approving instructions that are proposed by the processor is indeed a necessary approach. Model instructions in the form of an annex would therefore be a helpful tool in cases where the controller does not have the knowledge to decide what technical and organisational measures should be taken in order to secure the data processing. This is of particular importance in the above mentioned situation where the client-controller is a natural person who does not have the capacity to fully understand the GDPR requirements.

A set of best practices would also be useful for situations which require the transfer of personal data outside the EEA. In this situation, translators, interpreters and LSPs are required to sign a contract containing the standard data protection clauses, including an appendix with a description of the technical and organisational security measures.

Summarising, there is a strong need for guidance, including a set of best practices for translators, interpreters and LSPs that offers a checklist of acceptable minimum technical requirements.

1.3.5 The processor must assist the controller for the fulfilment of its obligation to respond to requests for exercising the data subject's rights (Article 28(3) (e) GDPR).

We fully understand the concept and necessity of guaranteeing that data subjects are able to exercise their rights. However, in the T&I Sector this can lead to challenging situations. Let us give an example: the client-controller delivers an invoice containing his personal data to the translator, in order for that document to be translated into the language of his choosing. The personal data on the invoice contain an error and the client asks the translator to correct the error in the translation. Indeed, under the GDPR, the client has the right to ask for rectification of his data. In many cases, from a translator's point of view, rectifying unmistakable or alleged errors in the source document in the translated document is not something that is done, especially in the case of sworn translations, which should be accurate.

However absurd and illogical this may seem, there is a chance that a client-controller or data subject will make such a request to the translator, interpreter or LSP.

Therefore we seek an official opinion whether the client-controller may request the processor to rectify or delete personal data contained in the source document and translated document, in the course of performing translation services. Translators, interpreters and LSPs should be instructed on how to handle these types of requests. It is our view that the only correct and acceptable approach would be for the client-controller to deliver a new, correct source document accompanied by a request to rectify the previous translation and to delete the source document containing the incorrect personal data.

1.3.7 On termination of the processing activities, the processor must, at the choice of the controller, delete or return all the personal data to the controller and delete existing copies (Art. 28(3)(g) GDPR).

Deleting or returning all personal data after the end of the provision of services – *interpreted as the delivery of the translation* – presents concerns of a legal and practical nature:

- **Computer aided translation (CAT) and translation memories:** Many translators make use of CAT tools to perform translations. Indeed, for decades now they have been fundamental to the way in which the entire sector operates. These tools are designed to register and archive all source documents and translations in so-called translation memories in order to use them for related projects. Over the years, translators have fed documents containing personal data into their translation memories and now have to deal with the (unsolved) problem of anonymising their translation memories. Providers of CAT tools have come up with solutions to avoid feeding new personal data into translation memories, but at the moment there is no effective tool available to clean existing translations memories with 100% certainty of deleting all personal data. Providers of CAT tools are looking into the problem, but have not yet offered a solution that might be fully effective. Given the very broad definition of

personal data, it seems quite improbable that they will come up with an algorithm that is able to delete all personal data from translation memories.

This would mean that translators theoretically have to part with any translation memories containing personal data when the data retention period ends. This is quite inconceivable for most professionals in the T&I profession, and hugely impractical because these memories are a basic working tool and the fruit of many years of work. The same applies for other archives containing documents and translations that were created before the GDPR came into force.

An argument for not deleting these translation memories is the fact that the personal data are stored relatively safely: to open a translation memory, special software is required and the data are "shredded" in small segments. It is very unlikely that by browsing through a translation memory step by step we will find exactly the personal data we are looking for, if we have no access to a source document that shows us what personal data to look for. However, we are aware that from a data protection point of view, this is not sufficient guarantee for data security.

- **Practical aspects**: many translators have a vast archive of documents and translations which serves several purposes. It allows them to: quickly correct mistakes in older documents if they are identified at a subsequent point in time, deliver copies of translations (especially printed sworn translations), make new translations based on very similar documents translated in the past for the same client. Anonymisation or full deletion would make this kind of service impossible or at least raise the cost of these services for both client and translator. The market is not likely to accept the necessity of paying extra for minor adaptations to an already existing translation.

- **Liability**: the GDPR allows personal data to be retained for the "exercise or defence of legal claims". National legislation varies from country to country. Depending on what rules apply, translators and LSPs archive/retain translations for the purpose of defending themselves in the event of a claim. In some cases archiving documents and translations is also a requirement when taking out professional liability insurance. When translators and LSPs fully delete source documents and translations or anonymise them, they lose this safeguard, because they lose the integral result of their work.

We have also encountered the opinion that translators and LSP can archive documents containing personal data for a longer period than mentioned in the data processing agreement, and then would become controllers, deciding themselves on the purpose of the data processing and duration of the retention (see Annex 2 - Example I). It is unclear, whether this approach is acceptable, as the Guidelines point out in par. 79 *"Acting "on behalf of" also means that the processor may not carry out processing for its own purpose(s). As provided in Article 28(10), a processor infringes the GDPR by going beyond the controller's instructions and starting to determine its own purposes and means of processing. The processor will be considered a controller in respect of that processing and may be subject to sanctions for going beyond the controller's instructions."*

A discussion is needed about the implications of the standard terms for data retention in data processing agreements for the T&I profession. Good practices should be developed in order to protect the interests of both clients, translators and LSPs. A tailor-made data retention clause for the T&I Sector should be considered, allowing translators, interpreters and LSP to archive source documents and translations for a feasible period of time, yet without allowing indefinite data retention. In this light, the end of the provision of services might not be the moment the translation is sent back to the client, but could also include the above mentioned advisable period of archiving to allow provision of related services.

1.3.8 The processor must make available to the controller all information necessary to demonstrate compliance with the obligations laid down in Article 28 and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller (Art. 28(3)(h) GDPR).

Often data processing agreements contain very general clauses that assure the controller full, all-inclusive access to the premises and data processing equipment of the processor. However, the scope of any audit or inspection should assure confidentiality of all documents not relevant to the data processing done for the specific client-controller. A solution should be discussed in order to specify exactly what this provision means and secure the confidentiality of all data processed by translators, interpreters and LSPs. Typically they will work for a great many clients.

Request for guidance and cooperation on the project to draft common European GDPR guidelines for the translation and interpreting profession

FIT Europehas partnered with EUATC to draft common European GDPR guidelines for the T&I profession. Actions such as this are part of their mission to promote the interests of translators, interpreters and LSPs by providing a platform for the exchange of information and best practice, to improve the status of the profession and to raise awareness of the importance of translation and interpreting in our daily lives. At another level, such collaboration aims to consolidate divergent practices through interpretation and implementation of the GDPR, and thus aims to protect EU data subjects' rights both at an overarching global level and individually. This collaboration initiative is fully supported by the FIT Europe Board and the EUATC's national member associations.

As mentioned several times above, in order to offer guidance for our profession overall, first of all there is a strong need for a consistent interpretation. We have already explored several possibilities to reach such consistency.

1. Code of conduct or common GDPR guidelines

According to article 40 of the GDPR *"the Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises*". At first glance it might be advisable to prepare a code of conduct for the T&I Sector, because typically such codes seek not only to regulate best practices in the sector, but also function as a kind of safety shield for all professionals adhering to the code.

We note too that in COM(2019) 374 final: Communication from the Commission to the European Parliament and the Council Data - protection rules as a trust-enabler in the EU and beyond – taking stock, the Commission pointed out that *"The adherence to codes of conduct is another operational and practical tool at the disposal of industry to facilitate demonstrating compliance with the Regulation. Those codes should be developed by trade associations or bodies representing categories of controllers and processors and should describe how the data protection rules can be implemented in a specific sector. By calibrating the obligations with the risks, they can also prove to be a* ***very useful and cost-effective way for small and medium size enterprises to meet their obligations****".*

However, during informal consultations with the Polish Data Protection Authorities in 2019, it was suggested to us that a code of conduct may not be the best solution for the T&I profession, because of:

- Compulsory character: if translation associations sign a code of conduct, be it on a local or a European level, the code would be obligatory for all members, whether or not they agree with the solutions proposed by the code. One might fear that such an approach would not be accepted by members, among other things because it would involve financial consequences.

- Financial means: introducing a code of conduct for the T&I profession implies that adherence to the code should be monitored by an independent body. Organisations interested in preparing a code would probably not be willing or able to cover the costs of operating such a body.

Although a code of conduct does not appear to be a feasible solution for the T&I sector, this does not exclude the possibility of preparing a code of good practice for the sector. The EDBP's views on this point would be most welcome.

2. Translating Europe Workshop (TEW) project

In order to tackle the problems of the T&I Sector in the light of the GDPR on a European level, our organisations have sought ways to request advice, come to a consistent interpretation and present a position on the major issues concerning data protection and processing in the sector.
One of the possible approaches is the organisation of a Translating Europe Workshop. The Translating Europe Workshop programme run by the European Commission's DGT provides a vehicle for the dissemination of information and ideas relevant to the T&I Sectors through a series of national or international events.

The original idea was to submit the application in 2020 and host the event in 2021 but the COVID pandemic changed that. FIT Europe and EUATC in cooperation with other partners plan to submit an application for funding to host such an event which will bring together experts who will present their positions on issues critical to GDPR implementation for the T&I Sector. The idea is that the event at which their views are presented would be preceded by them working individually on their positions and then a 1-2 day meeting being held at which they brainstorm their individual positions and strive to reach common ground.

We kindly request participation of a representative of EDPB for this event and hope this will contribute to the development of a sound interpretation of the GDPR that will protect the interests of both data subjects and professionals in the T&I Sector.

Conclusion

The issues discussed above and the examples in Annex 2 clearly show that there is still a lot of inconsistency in the interpretation of the concepts of controller and processor in the T&I Sector. The correct understanding of these concepts has a direct influence on the obligations of all parties, such as:

- the legal basis for data processing;
- the form of the contract between client and LSP, translator and interpreter;
- the liability of the contracting parties;
- decisions about technical and organisational measures;
- the duration of data retention.

It is of crucial importance that a consistent interpretation is reached on a European level in order to allow all market players to comply with the GDPR in a substantiated manner.

We invite the EDPB to enter into discussion with our organisations and we would like to count on its support to prepare common European data protection guidelines for the T&I Sector.
We will be happy to answer any questions that arise after reading this document and invite the EDPB to contact us:

Contact data

FIT Europe
Address: c/o CBTI-BKVT, Rue Montoyer 24, bte 12, 1000 Brussels, BELGIUM
email: privacy@fit-europe-rc.org

EUATC
Address: EUATC AIBSL, 4 rue de la Presse, 1000 Brussels, BELGIUM
email: secretary@euatc.org

Annex 1 - Summary of issues where guidance is requested

Below we present a summary of problematic issues for the T&I Sector. This is not necessarily strictly related to the Guidelines on the concept of controller and processor but serves as background for the above mentioned comments.

We are of the opinion that clarification of the many issues we have raised in relation to the concept of controller and processor will enable many of these other questions to be more easily answered.

1. Should the translation/interpreting of content containing personal data be considered as data processing under the GDPR?

If so:

2. What is the role of the translator in the data processing process (controller or processor?):

- taking into account the type of data:
  - administrative client data
  - personal data in the interpreted content
- taking into account the different types of clients:
  - natural persons
  - legal persons
  - language service providers

3. What is the role of the interpreter in the data processing process (controller or processor?):

- taking into account the type of data:
  - administrative client data
  - personal data in the interpreted content
- taking into account the different types of clients:
  - natural persons
  - legal persons
  - language service providers
- taking into account the process of interpreting: when can interpreting personal data be seen as data processing?
- taking into account the process of sign language interpreting: when can interpreting personal data be seen as data processing?

4. What is the role of the language service provider in the data processing process (controller or processor?):

- taking into account the type of data:
  - administrative client data
  - personal data in the translated/interpreted content
- taking into account the different types of client:
  - natural persons
  - legal persons

5. Under what circumstances are translators,interpreters and LSPs allowed to process criminal data under art. 10,

- taking into account the specific situation of court translators/sworn translators?
- taking into account the national conditions and legislation in every member state (detailed information on the local legislation will be provided)?

- What is the role of the translators/interpreters/LSPs in data processing for judicial authorities depending on the form of cooperation in different member states: controller or processor or processing under art. 29 and what is the interface between the GDPR and the Law Enforcement Directive for this type of data processing?
- What are the legal grounds for data processing in the above-mentioned situations?

6. What standard rules apply for responding to requests from data subjects? How should translators/interpreters/LSP's respond to requests concerning personal data processed as data processors?
7. In what situations can the translator/interpreter/LSP process personal data under art. 29?
8. What is the retention period for personal data (general rule that can be adapted to local conditions and legislation in each member state) for the following situations:
    - client data processed for administrative purposes (correspondence, accountancy, client management, marketing,...)
    - personal data in the translated content

    taking into account:
    - the role of the translator/interpreter/LSP as controller or processor
    - contract liability
    - (standard) clauses of art. 28
9. On what legal grounds may personal data collected before 25 May 2018 be retained:
    - general rule
    - data contained in translation memories
10. How can the standard contractual clauses of art. 28 be implemented in data processing agreements between translators/interpreters/LSPs and end clients in order to secure the rights of all parties and the data subject? (this should lead to general guidelines for data processing agreements and a model agreement)
11. How can the standard data protection clauses of art. 46 be implemented in data processing agreements between translators/interpreters/LSPs and end clients in order to secure safe data transfer to countries outside the EU? (this should lead to general guidelines for data processing agreements and a model agreement for clients outside the EU)
12. When are translators/interpreters/LSPs obliged to keep a record of processing activities (general guidelines)?
13. When are translators/interpreters/LSPs obliged to perform a data processing impact assessment (general guidelines)?
14. When are translators/interpreters/LSPs obliged to designate a data protection officer?

Annex 2 - Examples of inconsistent interpretations

Example A - Excerpt from an agreement between a large LSP and freelancer in which both are defined as joint controllers

Whereas the translation services involve the Processing of Personal Data, the purposes and means of which are jointly determined by the parties who therefore act as Joint Controllers.

Whereas, pursuant to the Data Protection Regulation, the Parties have decided to enter into a Joint Controller Agreement (hereinafter the "**Agreement**") to determine their respective obligations and commitments in terms of Personal Processing activities.

Example B - Excerpt from a Dutch model contract presented to freelancers, in which the client is the controller, without a distinction being drawn between end client and LSP

Verwerkersovereenkomst NAAM BEDRIJF

Datum: INVOEREN DATUM

Contractspartijen:

1. Verantwoordelijke te weten STATUTAIRE NAAM, statutair gevestigd te PLAATS, vertegenwoordigd door NAAM EN/OF NAAM BESTUURDER

hierna te noemen: "**Ik**",

en

2. Verwerker te weten STATUTAIRE NAAM, statutair gevestigd te PLAATS, vertegenwoordigd door NAAM EN/OF NAAM BESTUURDER

hierna te noemen: "**Jij**",

gezamenlijk aan te duiden als: "**Wij**";

Example C - Excerpt from a Polish contract between an LSP defined as controller and a freelancer defined as processor

UMOWA

powierzenia przetwarzania danych osobowych

zawarta w dniu 21.05.2018 r. roku pomiędzy:

zwaną w dalszej części umowy **administratorem**

a

XXX

reprezentowana przez:

XXX

zwana w dalszej części umowy **przetwarzającym**

Mając na uwadze, że w ramach realizacji usług zleconych przetwarzającemu przez administratora a polegających na tłumaczeniu materiałów mogących zawierać dane osobowe, Strony zgodnie postanawiają zawrzeć przedmiotową umowę regulującą zasady dostępu do danych osobowych.

Example D - Changing interpretations of the role of the sworn translator related to data processing in the Polish Act on the Profession of Sworn Translator/Interpreter - excerpt from an analysis prepared by Polish organisations representing the T&I Sector

Summarizing: in the first draft of the new legislation adapting existing legislation to the requirements of the GDPR, sworn translators were regarded as controllers. In the second draft their role was not mentioned in the legislation, only in the explanatory memorandum, and was defined as processor. The third version does not define the role of the sworn translator as, according to the explanatory memorandum, "this is not necessary, because it is clear from the content of the Act who is controller". The explanatory memorandum and the content of the new legislation however suggest that the sworn translator is controller, without drawing the distinction between the different types of personal data, speaking only of data obtained in relation to the translation. Other inconsistencies can be found in the text, which were subject to the analysis.

"W pierwszej wersji projektu ustawy o zmianie niektórych ustaw w związku z zapewnieniem stosowania rozporządzenia 2016/679 z dnia 12 września 2017 r. tłumacz przysięgły został

określony jako administrator "*w przypadku danych, o których dowiedział się w związku z tłumaczeniem*". (art. 29a.1.3)

W drugim projekcie z dnia 28 marca 2018 r. rola tłumacza przysięgłego nie została określona przepisem, lecz w uzasadnieniu czytamy, że "*zauważenia wymaga natomiast, że administratorami danych osobowych nie będą tłumacze przysięgli. Tłumaczenie poświadczone wykonywane jest bowiem na zlecenie podmiotów zewnętrznych, w tym organów wymiaru sprawiedliwości, które decydują o celu i sposobie sporządzenia tłumaczenia. W takich sytuacjach to podmiot zlecający tłumaczenie jest administratorem danych osobowych*."

W trzecim projekcie przepisów z dnia 7 czerwca 2018 r. również nie znajdujemy określenia roli tłumacza w samych przepisach, lecz autor uzasadnienia twierdzi, iż "*odrębne określanie administratorów danych osobowych w ustawie o zawodzie tłumacza przysięgłego nie jest konieczne albowiem wprost z ustawy wynika kto jest administratorem danych osobowych oraz jaki jest zakres przetwarzanych danych osobowych*." Dalsze treści uzasadnienia obecnego projektu oraz sam kształt przepisów zdają się sugerować, że tłumacz przysięgły jest administratorem danych, bez rozróżnienia poszczególnych sytuacji, w których tłumacz przysięgły przetwarza dane osobowe."

Ustawa o zawodzie tłumacza przysięgłego z dnia 25 listopada 2004 r.

Rozdział 4a. Przetwarzanie danych osobowych.

Art. 29a [Tajemnica zawodowa]

1. Przepisy art. 15 ust. 1 i 3, art. 18 i art. 19 rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych) (Dz.Urz. UE L 119 z 04.05.2016, str. 1, z późn. zm.6)), stosuje się w zakresie, w jakim nie naruszają obowiązku zachowania przez tłumacza przysięgłego tajemnicy zawodowej, o której mowa w art. 14 ust. 1 pkt 2.

2. Przepisu art. 21 ust. 1 rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych), **w przypadku danych osobowych pozyskanych przez tłumacza przysięgłego w związku z tłumaczeniem,** nie stosuje się.

Art. 29b [Żądanie ujawnienia informacji przez Prezesa Urzędu Ochrony Danych Osobowych] Obowiązek zachowania tajemnicy, o której mowa w art. 14 ust. 1 pkt 2, nie ustaje w przypadku, gdy z żądaniem ujawnienia informacji uzyskanych w związku z tłumaczeniem występuje Prezes Urzędu Ochrony Danych Osobowych.

Art. 29c [Okres przechowywania] Okres przechowywania **danych osobowych zgromadzonych przez tłumacza przysięgłego w związku z tłumaczeniem** wynosi 4 lata od zakończenia roku kalendarzowego, w którym dane zostały zgromadzone. Po upływie tego okresu dane osobowe podlegają usunięciu, chyba że dalsze ich przechowywanie jest niezbędne dla ochrony praw lub dochodzenia roszczeń.

Example E - Opinion of the Bayerisches Landesamt für Datenschutzaufsicht with situations not considered to be data processing by a processor

Link to the opinion:
https://www.lda.bayern.de/media/FAQ_Abgrenzung_Auftragsverarbeitung.pdf

Frage: Was ist Auftragsverarbeitung und was nicht?

Antwort: Auftragsverarbeitung im datenschutzrechtlichen Sinne liegt nur in Fällen vor, in denen eine Stelle von einer anderen Stelle im Schwerpunkt mit der Verarbeitung personenbezogener Daten beauftragt wird.

Die Beauftragung mit fachlichen Dienstleistungen anderer Art, d. h., mit Dienstleistungen, bei denen nicht die Datenverarbeitung im Vordergrund steht bzw. **bei denen die Datenverarbeitung nicht zumindest einen wichtigen (Kern-)Bestandteil ausmacht, stellt keine Auftragsverarbeitung im datenschutzrechtlichen Sinne dar.**

Keine Auftragsverarbeitung im Sinne von Art. 4 Nr. 8 DS-GVO (sondern eigene Verantwortlich-keit) ist z. B. regelmäßig:

[...]

b) **im Kern keine beauftragte Verarbeitung personenbezogener Daten**, sondern der Auftrag zielt auf eine andere Tätigkeit:

- **Übersetzung von Texten in/aus Fremdsprachen**.

Example F - discussion in the Facebook Group "GDPR for Translators"

Post dated 23 May 2018 – discussion on the obligation to sign a DPA, showing also confusion about the legal basis for controllers applied to processing of data as a processor

"... Right, just finished the second BDU webinar with Mr ABC. Excellent as ever and I can only recommend that German-speaking colleagues order the recordings.

On the issue of **whether we need DPAs with clients**, which has been racking my brain for weeks:

Technically speaking, you do need one if you are processing personal data on behalf of someone else (i.e. an agency). HOWEVER, it is the client's job to contact you about this. If they don't, you don't need to worry. All we need to worry about is sorting DPAs with the companies who process data on OUR behalf (webhoster, Google Analytics, mailing list providers, any colleagues who we work with, etc. and so on).

I'll go through the recording again to make sure I understood everything correctly but Mr ABC made it pretty clear that we can relax on this issue.

There is also no need for a DPA with tax advisors or accountants (at least not in Germany), because they are subject to professional secrecy laws.

> **ITI gave the same advice**, I think

[⋯]

> That's the way I understood it as well.

[⋯]

> So if we work with colleagues, is a DPA in addition to an NDA, or are they exchangeable?

[...]

> Not interchangeable, unfortunately. **The DPA is only allowed to contain information written in the GDPR law**, while NDAs often include other things like not going to work directly for the client.

> Where do you get that a DPA is only allowed to contain GDPR-related details? That sounds like a strange requirement to me⋯

> From XYZ's talk. **She said DPAs should all be basically identical because they're only allowed to contain what's in the GDPR**.

> I'm reading article 28 of the GDPR, and I can't see any such requirement. **It's an important point, because I reckon you have to have the DPA as part of the General T&Cs, so you wouldn't need a separate agreement.** This seems the most natural way to do it from a business perspective.

> I'd think so too.

[⋯]

> This sounds a bit tricky to me. **If you don't have a DPA, I guess you illegally process data... Without DPA you do not have a legal ground for processing them.**

> **Consent, fulfilling a contract, etc,?**

> Yes, **you're still fulfilling a contract. And it's not you who's breaking the law, if indeed it is illegal, it's the agency**. **Or if you have a direct client, then you have their consent, which is implied when they willingly send you the document.**

> You can't have implied consent under the GDPR. However this doesn't matter as you are still performing a contract. In fact, **you can only use article 6(1)(b) (performance of contract) with direct clients, not with agencies, because the contract you're performing has to be with the data subject.**

> **That's not what XYZ said. By sending you the job, they are consenting to your handling the data within it.**

> Please, keep in mind that the agency also can forward personal data from the client with their consent! **The agency needs either a DPA from us or consent from the client**. **The only fact that they don´t ask us for a DPA doesn´t necessarily mean that they are not GDPR compliant**. And of course it doesn´t mean in any case that we would be handling data illegally.

> **Either way: it´s not our problem.**

> Glad I finally got a concrete answer on this. Sounds like a hell of paperwork just so I can go "insert source into target" for contact details at the end of a press release...

> Right. To give a concrete example, this afternoon I am translating a hospital discharge report relating to Mr X, who has squamous-cell carcinoma of the base of the tongue and is taking part in a clinical trial. I'm certain that Mr X has given his explicit consent for his data to be processed because that's how clinical trials work. But if there's been a mix up and he hasn't and he decides to sue, there are about three layers of people above me who he will sue first before he gets to me! And I know my General T&Cs require my client to hold me harmless for any actions in which they don't have the right to have the document translated (among other things). So I reckon I'm pretty safe

> I don't really agree. As far as data in documents are concerned, we are data processors. This means our legal ground is a DPA. We don't have a contract with the data subject! The agency can use consent only as far as the data of its employees is concerned. But **consent is not a legal ground for a data processor to process data. It's only the legal ground for the data controller. The agency is obliged under GDPR to only transfer the data to data processors under condition of DPA.** And the data processor (i.e. the translator) is obliged to: "With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions". (art. 28.3.h).

> Uff... AA, **I've heard that from two different data protection supervisors and a lawyer. Believe me, it's NOT our problem**. Can anybody please explain it better than me? It would be awesome if we could finally get consensus on this without it being asked or doubt again and again.

> But, of course, if an agency asks us for a DPA, then we should provide them one (or agree on the one they might provide).

> T**he problem is every lawyer has his own opinion I received a completely different opinion from at least two others.** If we want to abide with GDPR, we have to prove we legally process data. No matter what any lawyer says.

> We do. We have a contract to fulfill.

> But it's not a contract as stated in GDPR, not a contract with the data subject ...

> Ok, I´m out. Really, I can´t explain it better than I already did. Please, anyone might join this conversation? Pretty please?

> Please ask your lawyer if he considers you a data controller or data processor as far as the data in the documents are concerned. This should be the first question, then we can mayb solve the dilemma.

> I can answer that myself: **the agency is the data controller and I am the data processor. If the agency, as a controller, has consent from the end client, then they are GDPR compliant. But even if not and IF they don´t ask me for a DPA, it´s not my problem**. They would be the ones not complying. I would.

> **I really don´t see how we could get into trouble because an agency don´t asks us for a DPA**. They could be GDPR compliant or not, we wouldn´t necessarily know, but who cares. As far as I am concerned, I would be GDPR compliant.

> I think what he meant is that **if they don't ask us for a DPA, then, strictly speaking, they are not GDPR-compliant with regard to their client**. **However, we are still GDPR-compliant if we process the data in line with the GDPR requirements** (safe storage etc.).

[⋯]

> If you are data processor, then please point out your legal ground for processing according to article 6.1.

> **You're under contract to the agency. Therefore you are legally processing the data they sent you, whether or not they gave you a DPA. The DPA is to cover their asses, not yours**.

> Ok, so this would be the **legitimate interests pursued by the controller or by a third party (which is the translator)**?

> It's in your legitimate interest to carry out a job you've been hired to do, isn't it? (I'm not trying to be sarcastic now, I'm really asking. It should be, shouldn't it?)

> Ok, I see this is your legitimate interest, but I still have a great many doubts about this approach. article 28 states literally that "processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular (...)". **So any contract should fulfill these requirements, also your contract with the agency. How can you process without this contract or legal act? This obligations rest also on the processor, doesn't it? The more discussions, the more doubts** ;-(

> **You have an e-mail saying, "Can you translate this job by Thursday?" and a file attached. The file contains the nature and subject matter. The e-mail states the duration. And you answer yes. That's a contract. I seriously doubt any translation agency is going to go through and find mentions of people's names and list the categories of data subjects. That's never going to hold water.** They'd have to double their fees for all that extra work. That's a clause that's never going to work in our line of business.

> I do agree that this might be problematic in real life, but it doesn't change my point of view that we do need a full DPA for all personal data. And if the agency doesn't provide it, then we should?

> It certainly can't hurt. Although technically the controller provides the DPA and the processor signs it. But if they don't step up, then why not turn the tables on them? ⋯"

Example G - discussion in the Facebook Group "GDPR for Translators"

Post dated 31 May 2018 – discussion on the retention period for translations related to the issue of liability, showing also confusion about the legal basis for controllers applied to processing of data as a processor

".... Just got the following email from BDU (I asked that at the webinar but Mr. ABC wasn´t 100 % sure of the answer, so probably he did his research later):

"Sehr geehrte Frau XYZ,

zu Ihrer im Webinar gestellten Frage:

Wie lange können wir rechtlich für eine Übersetzung haftbar gemacht werden? D.h. wie lange kann ein Kunde rechtlich gegen eine angeblich falsche Übersetzung vorgehen und wann ist die Angelegenheit verjährt?

Hier die Antwort des Referenten: 3 Jahre.

Für weitere Auskünfte und Rückfragen stehen wir Ihnen gern zur Verfügung."

First of all: Anyone who still says that not all questions are answered in the [...] webinars (as seen in at least another group) have no clue at all.

Anyway, this is useful for the ones of us based in Germany, because that means that **we don´t need to keep translations longer than 3 years to protect ourselves from legal claims. After 3 years nobody can come and say we did a bad translation. If we want to keep them longer than 3 years, then we will have to look for another legitimate interest. It could be consistency, for example. Right?**

> Interesting! I wonder where I could find out what applies in Sweden? There's a certain "limitation period" in business law that's ten years. As far as I know, that mainly applies to how long you can appeal decisions by the tax authorities, but it may apply to any kind of conflict between businesses. That's why I put ten years on mine.

> In Germany it´s 10 years for tax related documents (invoices and such) but not for business communication (that would be 6 years if I remember correctly, have to watch the recording again). Then **I asked this particular question because I was curious and also a lot of people are basing their "translation retention times" in TMS for example on legal claims.** That´s why I wanted to know what actually legally applies. After this answer **I know I can´t put 10 years based on possible legal claims. I will have to find another legitimate interest if needed.**

> **I still think we might make a strong argument for consistency**. How did I translate that guy's job title last time? That's important to know. Or perhaps rather: What is the CEO title at this company called, because people don't necessarily stay in the same job position for ten years at a time.

> Yes, I guess consistency could make a valid legitimate interest.

> I think that it's "3 Jahre nach Bekanntwerden des Schadens" which is a different situation altogether.

> That´s what somebody said during the webinar, and he said "OK, thanks, I´ll look into it anyway" or something like that. Then I got the email above a few minutes ago, so he surely did his research, I assume.

> Could you ask him to provide a link or source? Because I only find (1) Der Anspruch nach § 1 verjährt in drei Jahren von dem Zeitpunkt an, in dem der Ersatzberechtigte von dem

Schaden, dem Fehler und von der Person des Ersatzpflichtigen Kenntnis erlangt hat oder hätte erlangen müssen.

[⋯]

> I guess 3 years is OK because we actually deliver the translation and time starts counting. It´s not my problem if they read it 1 year later.

> The job has to be usually accepted within 1 month. If they have any claims, the client has to tell me not later than 30 days. After that time or by the time they pay (I give them 30 days, whatever happens first) my translation is considered accepted.

> So I guess they have 3 years from that to make any legal claims against that. As I said, they could come 15 years later, that cannot be reasonable nor supported by law.

> is correct, as far as I understand German law, and most jurisdictions are similar on this point (only the time period differs, along with the precise details of 'Bekanntwerden des Schadens'). Most places have the saving that it's not the actual⋯

> Yes, that´s what I think too. This "Bekanntwerden des Schadens" doesn´t necessarily mean that it is incompatible with the 3 years that I got today as an answer.

> I also think it's 3 years after accepting the translation, it would be unworkable, if a client comes back to you after 5 years, and tells you he found a mistake the day before (and has proof of that). That way, you would be liable the rest of your life,⋯

> that's actually the case in English law. BUT what is the chance of that happening in practice? Especially with the saving that it is not *actual* knowledge of the problem that counts, but when the client *should* have been aware of the problem. I agree that it's a grey area, and construction lawyers make M£$€ arguing over it, but in practice it's not difficult to get a translation checked, so it’s not unreasonable to expect someone to have had a translation checked if it's so valuable that they're willing to take the case to court many years later⋯

> there's been a huge trail on this in NL (won't name the parties, agency is a bottom-feeder). Client had a tourist book translated in 8 languages. Client did inform the agency of the poor quality w/i a reasonable period, but decided to go on and print the book. They had several conversations with

said agency, but never allowed them to improve the translation. Clients of the client, especially in Japan and China, were so appalled by the poor quality, they returned their copies. Ergo, damage of €1.1 mio.

The T&C of the agency state, they have to have the possibility to correct mistakes, and that's what saved them. Although the judge did point out that the print referring to the T&C couldn't have been any smaller . It did save them in the end, they didn't have to pay the damage.

Sad fact, the client did go bankrupt this January.

So good T&C do help.

> I'm aware of that Dutch case. There's an older one in the UK, I can't find the exact reference to the details (and ___, who probably knows, isn't in this group), but anyway… Translator gets a job with a direct client to translate their sales brochure, and does an incompetent job. The client doesn't notice until it's printed the brochures with pictures on glossy paper (this is in the days before widespread internet). The client had to pulp all the brochures, get them retranslated correctly and reprinted. The cost to the translator, after court action (I think for negligence, but it might have been breach of contract), was in the mid-five-figures of GBP in damages, and probably a similar amount in legal costs. Moral of the story: carry professional liability insurance!

>**This is very interesting. Many of our clients are now requiring us to sign NDAs that state that we will destroy /delete all documents connected with the translation "as soon as the job is completed". How will we stand if a client takes legal action 2 or 3 years later and we have no documentation to rely on? Our professional indemnity insurers have not come up with an answer so far.**

>I´d say either **you don´t sign such a clause OR make them sign a waiver that prevents them from making any further claims** once you have delivered and deleted the material.

> **But you can´t delete everything related to the job.** You could delete the translation and the original text, but not the emails, invoices and other business records you might have, because you are legally required to keep them for a certain amount of time, depending on your country.

> However, this isn´t something GDPR specific. I posted that information as an orientation i**n case that we want to keep translations (that contain personal data!) for X years to protect ourselves from legal claims and put this into our record of processing activities** because, if we do, we have to be aware of the time a client can make such a claim. This, of course, will vary depending on the country. **We can´t state that we keep translations for 10 years to protect ourselves from legal claims if clients can only make claims within 3 years, for example. We´d have to find another reason to justify why we keep them for a longer time if we want to.**

> **Refusing to sign such a clause used to be our policy, but, in the GDPR climate I don't think we would have many clients left, judging by the flow of updated NDAs coming our way.**

> A waiver may be worth trying, thanks for the suggestion.

> I understand... Then it would only be right to make them sign the waiver regarding **translation content you will not have any further proof of, and of course making them realise that you can´t delete *everything* related to the job, just the content**. …”

Example H - discussion in the Facebook Group “GDPR for Translators”

Post dated 10 April 2018 – discussion on the role of controller or processor

“... Hello everybody, I just joined the group because I would like to share experience with people from other countries regarding guidelines for translators concerning compliance with GDPR. In Poland we're working on such guidelines and one of the main discussion is **whether translators are 'controllers' or 'processors'**. We had quite some problems defining our roles in each and every situation translators have to deal with in their professional environment (eg. difference between data in translated documents <-> clients contact data, situation of sworn translators when working for justice). Is there any local legislation or official interpretation defining the role of the translator in your countries?

> Hi AA, I asked the **ICO (Information Commissioner's Office) this question in the UK and I was told that as a translator I may be both a controller and a processor. A controller when I work with clients directly without third parties and a processor when work is undertaken via an agency.**

> Ok, that's a quite clear distinction. Here in Poland we are still waiting for an opinion, but the translator will be rather defined as processor only because he doesn't define the purpose of the processing (our client defines it, no matter what kind of client he is). If we are controllers, then we would have the following problem, mainly concerning the lawfulness of the processing: **what happens when a client delivers a document containing data concerning other people. E.g. mother delivers a marriage certificate for her son, or ex-husband delivers a divorce decision, where the data of his ex-wife are mentioned. If we are controllers in such cases, it will be quite difficult to fulfill our responsibilities (art. 24) and define the legal basis.**

> This document from the **ICO** seems to support this view: https://ico.org.uk/.../data-controllers-and-data...See §22: "For example, a bank hires an IT services firm to store archived data on its behalf. The bank will still control how and why the data is used and determine its retention period. In reality the IT services firm will use a great deal of its own technical expertise and professional judgement to decide how best to store the data in a safe and accessible way. However, despite this freedom to take technical decisions, the IT firm is still not a data controller in respect of the bank’s data. This is because the bank retains exclusive control over the purpose for which the data is processed and the content of the data, if not exclusively over the manner in which the processing takes place. A key consideration is who exercises control over the content of the personal data."

> I agree, this is quite clear when our client is a company. but BB mentioned **that ICO suggested we would be controllers if we work for individual clients**. **This would be quite problematic in the above situations, when the translator in theory would have to contact the data subject. This would lead to quite absurd situations.**

> **I just got off the phone with a lawyer who knows GDPR like the back of his hand, and he confirmed that we as translators are processors when dealing with texts that contain personal data, since we don't process the data for our own purposes. Working for businesses or individuals shouldn't come into account. Of course, when processing client data for our own purposes (e.g. to send them quotes, invoices, etc.) we are controllers, whether our clients are agencies or direct clients (whether businesses or individuals).**

If you have specific questions regarding RGPD, I can ask him - he just won't have time to give detailed answers.

[...]

> I asked the UK regulator for some guidance 2 or 3 years ago, I'm still waiting for a reply. I'm registered as a data controller, just to be on the safe side. ...".

Example I - discussion in the Facebook Group "GDPR for Translators"

Post dated 2 May April 2018 – discussion on the role of controller or processor

".... Unanswered question:

- if a direct client (company) works with us as translators, I believe we are processors of whatever personal data they send us

- if an individual (data subject) comes to us with a document to translate (e.g. a cv), does that make that person the controller, or do we take on that role?

> **As far as I could gather, if an individual comes to you as a client to have his/her own CV translated, you are the Data Controller. If a colleague freelancer or agency comes to you to have another person's CV translated, then your client is the Data Controller and you are Data Processor on their behalf.** That's my opinion, anyone with a better understanding is welcome to disabuse me

> That sounds about right. Thanks for the sanity check!

> That's my understanding too.

> I agree with

> But taking a step further for the agency/translator scenario, in the eCPD webinar they said, as we thought, the **agency is the data controller and we are the data processor. But once we store the translation job and keep it in our files for an x period of time, we become the data controller of that data, too, with regards to how we store and keep it safe.** (If that makes sense).

> Must confess to not understanding this interpretation of the GDPR re translation. **Neither the agency nor their subcontractors (we freelancers) are controllers, since they do not control how the data is processed or used.** They simply perform the processing for the client. **I have signed one DPA with one of my biggest agencies and nowhere does this document define the agency or me or my subcontractors (other colleagues I might ask to work on the project) as a controller**.

> **If you have collected personal data from an individual, then you are the controller of that data. So if you're working with a direct client, you're the data controller.** If working through an agency or other freelancer, they have collected the data from the individual so they are the data controller and you are the data processor.

> Hummm, we've had this discussion with our team in Poland and this is what we came up with: **1. we are controllers as far as the contact data of our client is concerned. We define the purpose of the data processing (we need is to serve our client, to do the administrative part). 2. We are processors as far as the data in the documents are concerned. Our client defines the purpose of the data processing (translate from language A to language B). This would also be the case for a private client/individual. That's also the opinion of the legislator (for the time being, they might**

change their mind again...). It would be great if this could be sorted out once and for all, so we could all do the same thing

> My analysis is similar to CC's. For one thing, and just concentrating on the translation for a moment, **it shouldn't matter whether our client is an individual or a company**. The translation is done according to a contractual arrangement, and therefore we are data processors. **However, if we decide to store that translation (which most of us do), we become data controllers of any personal information in the translation. We are also data controllers of any personal information we keep for other purposes (eg invoicing, marketing).**

Hopefully this will be clarified when we get the first codes of conduct approved under article 40.

> I'd say all of your comments and interpretations are true (in parts), but the basis is 'wrong'. According to Art. 29, the following is true:

The processor and ***any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller***, unless required to do so by Union or Member State law.

This tells us that the processor (translator) works under the authority of the controller (client). BUT:

Article 4 (8) says: 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

One would think that whether or not we see ourselves as controllers is irrelevant. Towards our clients (individuals or agencies or companies), we are data processors. Right? Well, not quite.

Unless you translate directly in the client's system (for instance using the client's Across Translation Server) you DO decide ALONE about the purpose or the means of the processing. Processing here does not refer to the translation itself and its purpose, but to how you store and process the files themselves. **You have full authority over what happens to those files. And that is the determining part.**

For myself, the situation looks like this:

My clients send me files via email. I decide alone how I handle the files, where I import them, where I back them up, whether or not I use a CAT tool and which. Hence, I am the data controller. And as such I do not need a DPA with my translation clients.

At least this is my take on it all and I'll stick to that until legislation shows me otherwise.

> Let me try to show you otherwise .

We have some ways to figure out who is the controller and who is the processor in a certain situation. After all, GDPR didn't fall out of the sky. Rather, it is a continuation of the "old" Directive 95/46/EC, which contains pretty much the same definitions. As this was a directive, it had to be put into national law - which also means that there is also a lot of interpretation available.

Such as this document: https://ico.org.uk/.../data-controllers-and-data...

This interpretation will not suddenly change.

I'm going to pick out the elements that, in my view, are the most important (number 27 in this document offers a good example):

1) Can the client give instructions about what, why and how the document is to be processed?

2) Do I collect personal data other than what I get from the client (or: who exercises control over the content of the personal data)?

3) Is there an obligation for me to keep the personal data, provided by the client (so what is contained in the documents), to fulfil my own obligations?

In my work, the answers are yes, no and no. To me, it is clear that, within the boundaries of my contract as a translator, I am the processor.

Outside of these boundaries, we're talking about a different processing activity. **Storing data in a TM? Keeping documents in archives? For that activity, I am a controller, even if this is data I got from someone else (my client).**

CRM data? Marketing? For that, I'm obviously the controller.

ICO rightly notes "It is also important that, as far as is practicable, systems and procedures distinguish between the organisation's 'own' data and the data it processes on behalf of the other data controller."

So, to consider the previous post: "Unless you translate directly in the client's system (for instance using the client's Across Translation Server) you DO decide ALONE about the purpose or the means of the processing."

I would disagree with that. You have some freedom about how you organise things, but it is within the right of your client to give you precise instructions (even if he doesn't). In other words, you may have some organisational freedom, but not the final say.

"Processing here does not refer to the translation itself and its purpose, but to how you store and process the files themselves."

True. To keep it simple, processing is just about everything.

"You have full authority over what happens to those files."

You don't. At least not within your task as a translator. As a translator, you are supposed to do what is agreed with the client - to translate using the tools of the trade, to send the translation back, and to invoice.

Putting things in a TM and re-using segments for others is a different processing activity. For that different activity, you are indeed the controller - but that does not change the qualification for the original processing activity.

To approach this practically, it helps to draw up a workflow and to draw a box around what you do in the framework of your contract with your client. Did your client ask you to do it, or do you really really need to do it because otherwise, it would not be possible to do your job? There is a good chance that you are the processor for that.

Anything out of the box? Controller.

"My clients send me files via email. I decide alone how I handle the files, where I import them, where I back them up, whether or not I use a CAT tool and which. Hence, I am the data controller."

By that logic, you would be a controller for just about every processing activity.

"And as such I do not need a DPA with my translation clients."

As I think the other way, I obviously think that you do. Which doesn't mean that you have to take the initiative.

One caveat: **I don't know how it is with certified translators. Obviously, they do have a larger role as to following instructions (or rather: not following them), saving documents, reporting fraud etc. If I were a certified translator (which I am not), I would ask advice from the authority that has certified you. They should know (or should find out).**

> totally see your points. I still interpret it differently, despite the fact that with the role of the controller comes greater responsibility. But also more rights.

> Perhaps Dr. XX could add to this?

> I'll ask him.

> DD, as I see it, for the documents we receive, the purpose is translating from A to B. You don't decide yourself what the target language is. The client has to indicate this. I agree that we partly decide about the means, but still the client decides whether he wants a word document, a CAT file, ..., so this would get tricky, what is more important: deciding about the purpose or about the means. The Polish legislator made a comparison with lawyers, who receive documents from their clients, which they process creatively: they use the data to create a new document, to file a case in court etc. The translator does not: we only do what the client asks us to.

> **I have another question about becoming data controller of the source documents and translation, when storing them after sending it back to the client. this is an issue that also appeared in other posts.** Would this mean we have to inform the data subject about this (art. 14)? In case of working for agencies, this would mean some kind of confidentiality breach. Not mentioning how difficult it might be to contact the data subject. I can't really see how this would work in real life. If I understand well, even as a processor we could keep the data as third party, based on our legal interest (art. 6.1.f). But somehow this should be mentioned in the DPA. If we could keep all translation for the same legal interest period as the data controller, this would solve the problem?

> **The way I'm getting around that is to say that I have a legal requirement to store them as evidence of performance of the contract [art. 6(1)(c)]. You could also argue that you have a legitimate interest in keeping them in case you are sued by your client [art. 6(1)(f)]. In both cases, there is no need for consent from the data subject, but you should probably not store them indefinitely.**

> The principle of data minimisation also applies, so if it's feasible to remove personal data before archiving, you should do.

> but even if there is no requirement for consent, there is still the obligation to inform the data subject?

> and someone earlier pointed out that the contract is between the data subject and the controller, so it's not the legal ground for us as a processor?

> I think Art. 14(5) gives us a wealth of arguments for not informing the data subject: it would prove disproportionate if not impossible and it might breach our duty of confidentiality.

> Ok, this seems quite a solid way of reasoning. Still I wonder why we should complicate and change status from processor to controller if we can continue being processor and stipulate this in a correct way in the DPA.

> I think you **can avoid becoming a controller (with respect to translations) by simply deleting the personal data at the end of the processing (translation) contract**. That's what I'm doing for my most sensitive personal data, which also happens to be the stuff with the least value in archiving.

> yes, **this is a solution, but this could be problematic when our client comes back with a claim, e.g. when we made a mistake in the personal data.** For example: translation of a birth certificate, mistake in the names of the parents or any other important data. If we delete these data form our translation, we will have no way to check if the mistake was ours. So our legal interest is not covered.

> I consider all complaints null and void as soon as the invoice has been paid. After that, it is up to the client to prove their claim.

> Is this standard procedure? I wonder whether Polish courts would accept such an explanation. My private clients often pay on receipt of their translation, and cannot check the quality of the translation into a foreign language until it is used abroad (sometimes a long time after paying). Mistakes happen, sometimes it's just a minor typo, but it might be something heavier. And sometimes clients do strange things with translations and source documents after they received our translation ;-(

> I only do B2B, which means that I can set my own terms (within reason, of course). I'm sure you can also work with a certain period during which clients can come back. Or you can check how often your scenario happens and for example just assume that it is your fault (instead of investing in ways to prove that it is not).

Or - perhaps a better option - **you could archive the documents in encrypted storage, just in case you need to retrieve them. Encryption doesn't take away the fact that it is personal data, but it removes the burden of having to report breaches (if at least you also don't lose the key).**

I'm on the fence about encrypted storage (such as Tresorit). It is more expensive, and the little personal data I use is easy to remove. But it seems like a good solution for others.

> Encryption or not, we would still store them. In Poland, the period for civil law claims is 10 years ...

> Sure, but if you encrypt and archive the project files and don't keep them readily accessible, the security risk is much lower (which might affect your obligation to inform people about it).

> I think encryption is overkill for most translators, in that it doesn't really give greater protection on what is already a low risk. But simple archiving onto storage media that are not connected to the internet and are kept in a safe place is a good, relatively simple protection measure.

> AA, **if the period for civil law claims is 10 years, that that's your lawful grounds for storage right there. Such laws top GDPR.**

> In England, the time bar for most civil law claims is six years. The tax authorities require us to keep business records for 10–22 months longer than those 6 years (yes, it's complicated!) So by keeping my business records for the period required by the tax authorities, I'm also covered against pretty much any realistic civil claim.

> BB, Agree, **10 years would be great, but according to the posts above I would have to changes roles from processor into controller to keep documents for 10 years. I would decide about the purpose (secure myself against claims), not the client. I wonder how we can fit all this into the right agreements.**

> Would you define court documents and medical documents as low risk? These are sensitive data, in my humble opinion carrying quite some risk, and I guess the storage security of the average translator is not exactly high profile. Encryption doesn't seem to be overkill in some cases?

> I do define my case as low security risk, even though I deal with some article 9 and article 10 data.

(1) Most of the sensitive data I receive is already anonymised. However, mistakes get made from time to time in the anonymisation process, so I don't rely on this alone.

(2) The amount of personal data I process is relatively small, which affects the argument of proportionality.

(3) I have no choice or control over whose data I receive. I effectively process a random set of data from around the world. I'm not your local hospital, you can't hack into my computer expecting to find data on a specific person.

If you hack into my computer you will find a small amount of personal data about random people – what's the point? I can't just say "what's the point" to the ICO, so I would point out that I do have security measures in place, but they don't go as far as complete-disc encryption. **I would be happy to talk to the ICO about what some commercial clients consider adequate data security for data that is frankly much more sensitive than the personal data I handle; I won't do it on Facebook though, for obvious reasons!**

I think one of the problems with the GDPR as it stands at the moment is that each professional has to make a judgment as to the data they're handling and the processing they are doing. Hopefully this will become clearer once we get the first codes of practice under article 40, which will be approved by the data protection authorities. Until then, we just have to do the best we can, supported by informed debate in communities such as this. ⋯”