

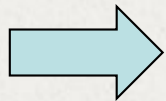
Distribution network actors and personal data protection compliance : who is responsible?

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Evaluation : one year after the entry into force of the GDPR

- Numerous actions before the CNIL (French supervisory authority) : + 32% of complaints
- Heavy financial sanctions: French record of 50 millions € + “reputational damage” (up to 20 M. € or 4% of your company’s global turnover for certain breaches)



Need to clarify the role of each actor of the distribution network : to allocate roles and therefore the responsibility between network principals and retailers

Who is responsible in a distribution network according to the GDPR?

- Several hypotheses are possible about customer data :
 - 1. A unique responsibility of the principal/manufacturer : the controller
 - 2. Joint responsibility with retailer
 - 3. The outsourcing between principal/ manufacturer and retailer

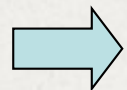
1. The single responsibility of the principal/manufacturer

- In principle: the manufacturer/franchisor will be controller
- Legal base: it determines the purposes and how the data will be collected.

Controller (art. 4 7) : “ the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data”

To be responsible :

- Territorial scope of the GDPR : establishment in the Union, or activities related to EU (art. 3)
- Material scope : processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system (art. 4 1)



So any actor in a distribution network necessarily uses personal data processing

Qualification of the principal/manufacturer as a controller

- Determination of the purpose and means of data processing, and more broadly of the organization of the network :
 - Software made available to distributors for the exercise of activity in the network: software allowing the collection of data
 - Use of CRM.

Conviction of controllers with the GDPR

- Condemnation of a franchisor: Optical Center € 200,000 (breach of the obligation of security) - decision of the French “Conseil d’Etat” April 17, 2019
 - Others : Google 50 millions € (lack of transparency, unsatisfactory information and lack of prior consent) : the CNIL January 21, 2019
 - Conviction € 75,000 (lack of security) : CNIL April 17, 2019
- ➔ Now: end of the tolerance of the CNIL related to the compliance of the GDPR.

2. The joint responsibility between manufacturer/franchisor and retailer

- Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers.

They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation (**art. 26**)

Assumptions

- A collection of data shared between the parties.
- Distributor's intervention on the database:
 - To integrate customer data
 - To manage it (example: choice of the operating methods among the possibilities offered by the head of the network)

Issue: joint liability of each actor (art. 82 4)

- Objective: to guarantee to the person an effective repair
- Condition: personal imputability of the fact (no automatic solidarity)
- Consequence: each actor responsible for the damage in its totality.
- Possible action against the other controllers (art. 82 5).

The designation of the joint controller by the contract

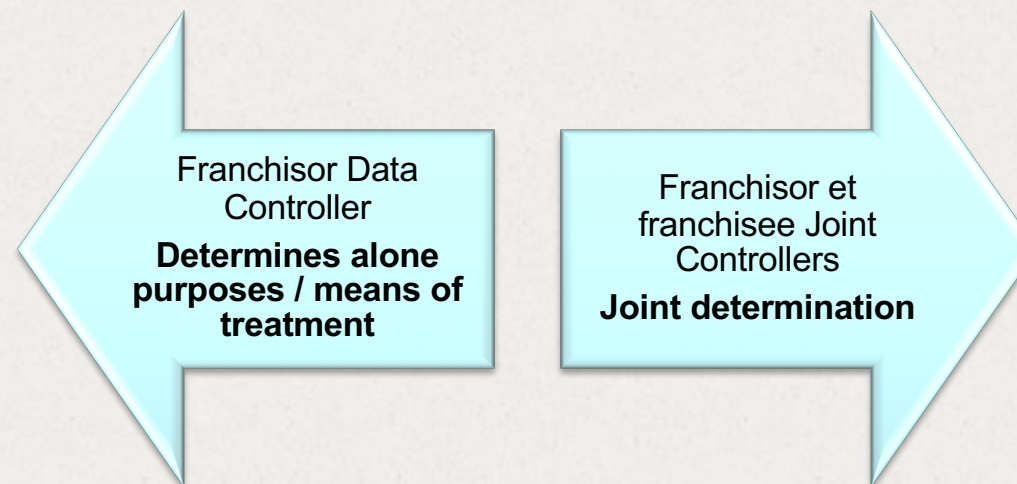
- New legal regime: possible contract to structure the relationship between franchisor and franchisee
- To determine the respective roles and responsibilities
Purpose: in case of violation of the regulation, identification of the responsible party (and exclusion of joint liability).
- The contract must reflect the reality: otherwise a possible requalification in controller (art. 28 10)

A requalification as joint controller

- If participation in different operations of the treatment, simultaneously or in several steps
- Interference on the treatment : what degree of requirement?
- Even partial control is enough:
 - CJEU 13 mai 2014, aff. C-131/12, Google Spain
 - French Conseil d'Etat 12 mars 2014, n° 354629, Sté Foncia Groupe

Jurisprudential development of Joint controllers

- Broad interpretation of the data controller
- Important risk for the actors of the distribution networks.
- Criterion? Involvement in the determination of the purpose and / or the means



Recent case law

- CJEU June 5, 2018 (aff. C-210/16 Facebook) : the administrator of a fan page hosted on Facebook is a joint manager.
- CJEU July 10, 2018 (aff. C-25/17 Jehovan todistajat) : the religious community is jointly responsible with its members.
- CJEU December 19, 2018 (aff. C-40/17 general counsel, Facebook's "Like" button) : the editor of a website that has inserted Facebook's "Like" button risks becoming a joint controller.

3. The outsourcing

- The processor: a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller (art. 4 8)
- Processing data only on documented instructions from the controller: it can not define the purposes or the means
- Written contract (art. 28 9 - Non-compliance: fine up to € 10 millions €, or 2% of global turnover)

Liability framework (art.82.2)

- Compliance with obligations similar to those of the controller
- Joint liability of the processor if :
 - Failure to comply with specific obligations of processors
 - Or when he has acted outside or contrary to lawful instructions of the controller

A relevant qualification for a distribution network ?

- Franchisor – Controller and Franchisee – Processor: if the franchisee can process the data only under the authority, on documented instructions and on behalf of the Franchisor.
- Subcontracting contract separated from the distribution contract
- Risk that this **very narrow qualification** of the processor does not correspond to the broader cooperation between the actors

CONCLUSION

- Delicate border in the distribution networks between the roles of controller, joint controller and processor : many grey areas.
- Valuable adoption of contractual provisions specifying the roles
- If lack of clarity, solution according to indices: level of instruction given by the manufacturer, the degree of control of the treatment, interactions with the franchisor and franchisee on the file, role in the creation and use, ...

Next steps

- Report of the European Commission on the application of the new rules planned for 2020: June 13, 2019.
- European Data Protection Board (EDPB): update of the G29 opinion on the concepts of controllers, joint controllers and processors in 2019-2020
- Perhaps new clarifications in terms of liability ...



Thank you for your attention

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