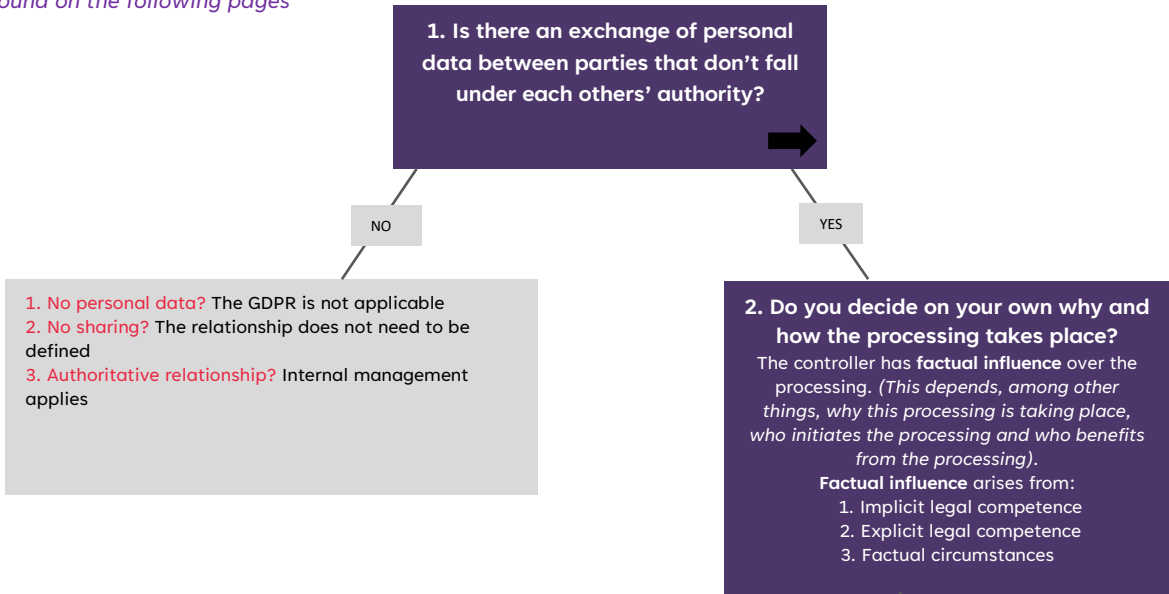


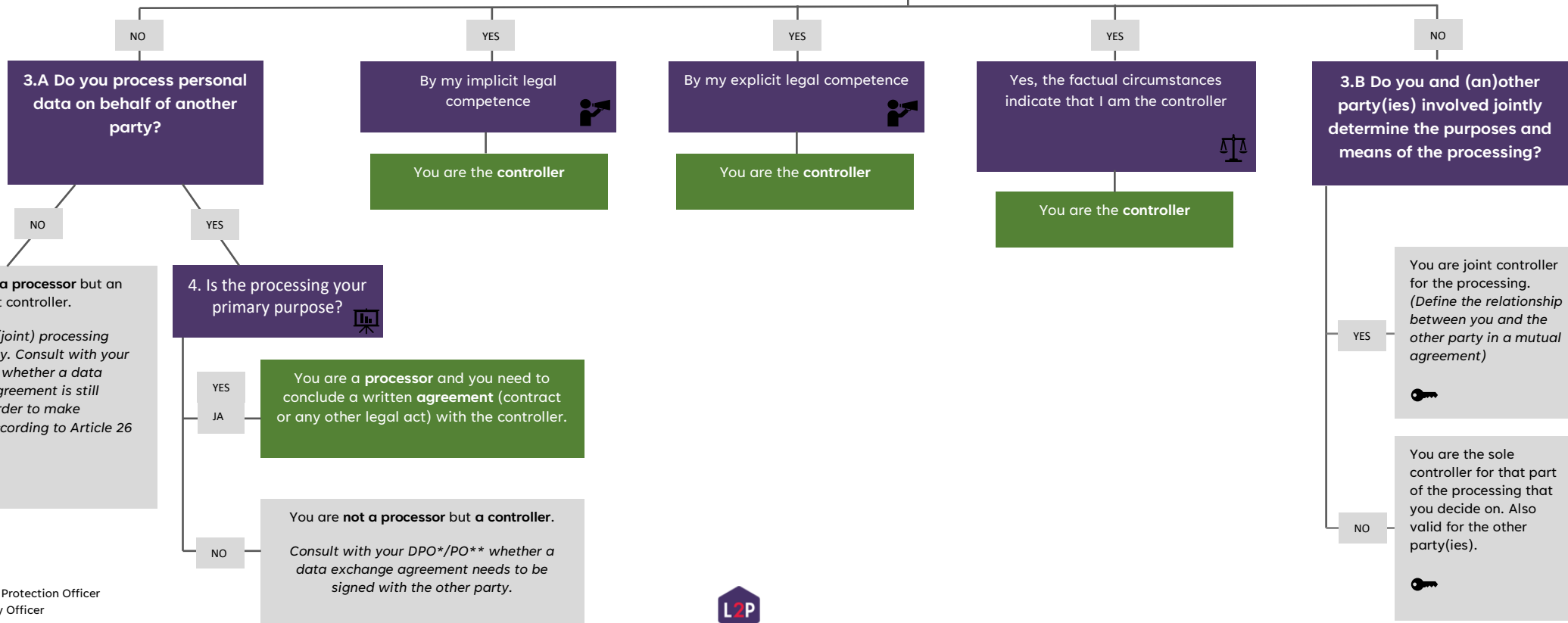
PROCESSOR OR CONTROLLER?

An explanation of this flowchart can be found on the following pages

This flowchart can be used to find out whether you are a processor, (joint) controller, recipient and/or supplier. In case of a processor, a data processing agreement is mandatory.
 Note: the fact that there is no processor-controller relationship, does not take away the fact that a data exchange agreement may be needed.



1. **No personal data?** The GDPR is not applicable
 2. **No sharing?** The relationship does not need to be defined
 3. **Authoritative relationship?** Internal management applies



* DPO = Data Protection Officer
 ** PO = Privacy Officer



Definitions as mentioned in Article 4 GDPR

- **Personal data:** “Any information relating to an identified or identifiable natural person.”
- **Controller:** “A 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.”
- **Processor:** “A natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.”

Explanation of question 1: exchange/sharing of personal data 

When a party is subordinate to the controller, or there is a hierarchical relationship (for example secondment), this party falls under the direct authority of the controller and is therefore **not a processor**.

Explanation of question 2: the flexibility of the processor 

The **controller** determines the purpose and the essential means of the processing to achieve that purpose. There is some margin for manoeuvre (leeway) for the **processor** in making decisions. The **processor** can decide about certain resources, as long as they are non-essential.

Essential vs. non-essential means:

Essential means	Non-essential means
<ul style="list-style-type: none"> - Access to personal data - Type of personal data - Retention period(s) - The categories of people involved - The categories of recipients 	<ul style="list-style-type: none"> - Soft- and hardware - Technical measures - Organizational measures

Explanation of the answers for question 2: the factual influence of the processor

The processor has **factual influence** in deciding the purpose and the means of the processing. By ‘means’ we refer to the way the processing is set up. By ‘means’ we don't refer to providing financial resources.



The **factual influence** can be determined in three ways:

1. **Explicit Legal Competence:** By law (according to a legal act) your organization may/must process personal data.
 - For example, an employer who processes the social security number of its employee based on the Wage Tax Act.
2. **Implicit Legal Competence:** it is not explicitly stated by law (in a legal act) that you may/must process personal data. However, it is necessary for you to do so.
 - For example, an employer who processes personal data of its employees; or an association that processes information about its members.
3. **Factual circumstances:** your organization has the authority to determine the policy for the purpose of processing the personal data and the way to carry out the process. The other party follows your instructions and has no policy freedom.

Explanation of the answer for question 2: factual circumstances 

Whether it results from the actual circumstances that a party is the responsible, depends on the coherence between certain points of view. First check whether you are the controller based on the contractual agreements, and then compare this to the actual situation. The diagram below can **help** in determining which party is the controller. The party to which the most points apply may assume that it is a controller.

Controller	Processor
<ol style="list-style-type: none"> 1. You are appointed as controller according to a legal act. 2. You decide which personal data shall be collected. 3. You decide which categories of individuals the processed data will refer to 4. You decide who shall get access to the personal data. 5. You decide for how long the personal data will be stored. 6. You decide to whom the processed data will be disclosed. 7. You initiate the processing: without you this processing would not take place. 8. You give instructions on how the other party should complete their part of the processing. 9. You check whether the other party completes the processing properly. 10. You have a role to which responsibility is attributed by default. 11. You are the controller based on the expectations from the others involved and what they get to see. 12. You make autonomous decisions regarding the processing. 13. You get commercial benefits from the processing. 14. You still have the personal data even if the processing does not take place (anymore). 15. You are interested in the final result of the processing. 	<ol style="list-style-type: none"> 1. The processing of personal data is your primary task. 2. You get instructions from the other party on how you should complete your part of the processing. 3. The other party checks whether you follow the instructions properly. 4. You would not have performed the processing if the other party didn't initiate it. 5. You do not decide the legal basis. 6. You do not decide for how long the personal data will be stored. 7. You do not decide about the access to the data. 8. You do not decide which personal data will be collected. 9. You do not decide which categories of individuals the processed data will refer to. 10. You have expertise in a specific area to which the processing relates. 11. You do not decide to collect the personal data. 12. You cannot make autonomous decisions about the processing, only about (technical or organizational) measures.

As a processor, you have no control over the processing. You may only act under the responsibility of the controller and on his instructions. But as soon as you, as a processor, start making independent decisions about the purposes and means of the processing, you will become responsible for those (new) purposes of data processing on the basis of Article 28 paragraph 10 GDPR. For example, if an accounting office decides to email the employees who are included in the payroll and ask whether they also want to become a customer of the accounting office, then the office decides the purpose and the means and will itself become the controller for this new processing. In this case the accounting office is both processor and controller at the same time.

Explanation of question 4: the primary task of the processor 

Being a processor depends on whether the **primary purpose** of the received task is processing personal data. For examples of 'primary purpose', see the appendix on page 4.

Note: joint controllers as referred to in Article 26 GDPR 

The determining factor in deciding whether there is a joint or sole processing responsibility is whether the controllers process personal data for their own purpose or whether the processing takes place by both parties for a shared purpose. An important starting point for this is whether there are converging decisions. A criterion to identify converging decisions in this context is whether the processing would not be possible without both parties' participation in the purposes and means in the sense that the processing by each party is inseparable, i.e. inextricably linked. These decisions should concern the purposes and the means of the processing, not other aspects of the commercial relationship between the parties.

Joined responsibility does not necessarily mean equal responsibilities. The degree of responsibility of the parties should be estimated based on relevant circumstances, starting from the premise that the responsibility does not go beyond the competence of the controller. There is joint responsibility only if the processing cannot be possible without the participation of both parties, meaning that the processing cannot be carried out by each party individually.

In addition, each joint controller must separately ensure that there is a legal basis for the processing and that the data is not processed in a way that is incompatible with the purposes for which the data was collected by the controller.

In the appendix there are examples of situations in which a party can be a processor or a controller. These examples come from the fact sheet “Is my supplier a processor or not?” from the Information Security Service (ISS) and have sometimes been edited for clarification.

1. Cloud

An organization purchases a cloud storage service from a supplier and also wants to store personal data in it. The **primary purpose of the assignment** is to store personal data. In addition, the cloud is managed externally, so the supplier has independent access to the personal data. This makes the supplier a **processor**.

2. On-premises software

An organization installs an on-premises application. Personal data is processed in this application. The application is hosted by the organization internally on its own server. The supplier only delivers the software package and has no access to the personal data. There is no processing of data and the supplier is therefore **not a processor**. The supplier can offer the organization technical support in software maintenance. Occasional access to the system does not imply that the supplier is a processor. Software maintenance remains the main goal. In addition, the supplier gets access to the application only with the permission of the organization (client).

3. On-site support

A supplier gives trainings or work instruction at the customer's location. The **primary purpose of the assignment** is the training / work instruction. The fact that the supplier sees personal data does not mean that the supplier is a processor.

4. Remote support

A supplier handles (support) requests remotely, for which the client delivers a print screen (or another attachment). This print screen contains personal data. The **primary purpose of the assignment** is support. The fact that the supplier sees personal data **does not mean that the supplier is a processor**.

5. Accountant

An organization hires an accountant to approve the financial statements. The **primary purpose of the assignment** is to approve the financial statements. In addition, the accountant determines the purpose and means of the processing. The accountant is **not a processor**.

6. Payroll administration

An organization hires a business service provider for the initial processing of the payrolls, i.e. entering of supplied data into the existing IT infrastructure. The main task is **the processing of personal data** and the client decides the purpose and means of the processing. That means that the service provider is a **processor**. If not only IT infrastructure is made available, but the business service provider also performs monitoring and advisory activities, such as advising on the set-up of the payroll administration, checking and where necessary correcting the data supplied and checking whether everything is in accordance with the law and regulations (tax regulations, collective labor agreements, pension agreements, etc.), the business service provider is a **controller** for all services.

7. Engaging an occupational health unit/physician for occupational health activities

An organization engages an occupational health unit/physician to supervise sick employees and to conduct occupational health medical examinations. Article 14 of the Working Conditions Act lists the situations in which the employer is obliged to be assisted by an occupational health physician. The occupational health physician has his/her own statutory duties under the Working Conditions Act and carries them out under his/her own responsibility. For that reason, the occupational health physician is **not a processor** for the situations referred to in Article 14, but a **controller**.

8. An organization buys work clothing for the employees

An organization buys work clothing for the employees. The supplier needs some personal data from the employees (name, clothing size). The service they offer is the delivery of work clothing. In addition, the contractor determines the purpose and means of the data processing. The supplier is a **controller**.