



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

Public Consultation Response

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This response is submitted by:

- **EFAMRO**¹, the European Federation of Associations of Market Research Organisations. Founded in 1992, EFAMRO represents the interests of market, social and opinion research in Europe. Its members are national trade associations for research businesses.
- **EphMRA**² the European Pharmaceutical Market Research Association, develops and improves standards and techniques for global market research in the field of health and healthcare, supports its members in their international activities to create transparency to the general benefit.

In addition, the following associations have joined:

- **BHBlA**³, the British Healthcare Business Intelligence Association, is an industry association representing companies involved in healthcare market research and data analytics. Its members' work supports the measurement and understanding of disease, physician and patient needs, and informs drug development.
- **MRS**⁴ The Market Research Society, is the UK professional body for market, opinion and social research, insight and analytics. MRS is the world's largest research association. MRS promotes, develops, supports and regulates standards and innovation across market, opinion and social research and data analytics via its Code of Conduct.
- **EFPIA**⁵ The European Federation of Pharmaceutical Industries and Associations, represents the biopharmaceutical industry operating in Europe.
- **IPMPC**⁶ the International Pharmaceutical & Medical Device Privacy Consortium is comprised of chief privacy officers and other data privacy and security professionals from a number of research-based, global pharmaceutical companies and medical device manufacturers. The IPMPC strives to be a leading voice in the global pharmaceutical and medical device industries to advance innovative privacy solutions to protect patients, enhance healthcare, and support business enablement.

¹www.efamro.eu EU transparency Register ID Number: 90847842431-88

² www.ephemra.org

³ www.bhbia.org.uk

⁴ www.mrs.org.uk

⁵ www.efpia.eu

⁶ More information about the IPMPC is available at www.ipmpc.org. This filing reflects the position of the IPMPC as an organization and should not be construed to reflect the positions of any individual member.

Background information about market and social research

Market, social and opinion research plays a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences and measure key performance indicators, for example the Eurobarometer surveys carried out by the European Commission, and government studies used for improving educational, healthcare and police services.

Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers to test their products or messages, it is not a commercial communication.

EFAMRO, EphMRA and BHBIA members have a long-standing tradition in promoting, developing, supporting and regulating standards and innovation in the realm of privacy and data protection via the associations' Codes of Conduct and accompanying guidelines which underpin membership of the member associations.

Guidelines on the concepts of Controllers and Processors in the GDPR

The Guidelines explain that:

'It is not necessary that the controller actually has access to the data that is being processed. Someone who outsources a processing activity and in doing so, has a determinative influence on the purpose and (essential) means of the processing (e.g. by adjusting parameters of a service in such a way that it influences whose personal data shall be processed), is to be regarded as controller even though he or she will never have actual access to the data.'

The Guidelines then provide an example of the application of this statement to a market research scenario:

Company ABC wishes to understand which types of consumers are most likely to be interested in its products and contracts a service provider, XYZ, to obtain the relevant information.

Company ABC instructs XYZ on what type of information it is interested in and provides a list of questions to be asked to those participating in the market research.

Company ABC receives only statistical information (e.g., identifying consumer trends per region) from XYZ and does not have access to the personal data itself. Nevertheless, Company ABC decided that the processing should take place, the processing is carried out for its purpose and its activity and it has

provided XYZ with detailed instructions on what information to collect. Company ABC is therefore still to be considered a controller with respect of the processing of personal data that takes place in order to deliver the information it has requested. XYZ may only process the data for the purpose given by Company ABC and according to its detailed instructions and is therefore to be regarded as processor.

This example provides an overly simplistic description of how market research often takes place, particularly in healthcare market research.

Typically, market research starts with a company (the client) needing information to help it understand or assess opinions or behavior within a specific sphere or market. The client then commissions a market research agency who assist in designing and executing a research project to obtain this information. In some cases, generally because of limitations in time or in-house market research expertise, the client may give the market research agency complete latitude to determine how to design and execute the project to best meet the client's information needs. In other cases, the client and market research agency may work collaboratively to develop research questions, identify the target audience, and decide on the approach to be taken (e.g. qualitative or quantitative, face-to-face, or online) and the topics to be addressed during fieldwork.

So, there are a range of approaches that can be taken to the commissioning, design, and execution of market research that involve different working and decision-making relationships between the client and the agency⁷.

The example and analysis provided in the Guidelines suggests that in most, if not all, circumstances, a market research agency or supplier will be a processor on behalf of the organization that commissioned the market research (the client).

⁷ As a further example of the complexity of various market research arrangements, and the fact that this is recognised by the ICO, see the market research example provided by the UK ICO at <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/controllers-and-processors/how-do-you-determine-whether-you-are-a-controller-or-processor/>.

A bank contracts a market-research company to carry out some research. The bank's brief specifies its budget and that it requires a satisfaction survey of its main retail services based on the views of a sample of its customers across the UK. The bank leaves it to the research company to determine sample sizes, interview methods and presentation of results.

The research company is processing personal data on the bank's behalf, but it is also determining the information that is collected (what to ask the bank's customers) and the manner in which the processing (the survey) will be carried out. It has the freedom to decide such matters as which customers to select for interview, what form the interview should take, what information to collect from customers and how to present the results. This means the market-research company is a joint controller with the bank regarding the processing of personal data to carry out the survey, even though the bank retains overall control of the data because it commissions the research and determines the purpose the data will be used for.

This would have implications in terms of (i) GDPR transparency requirements - i.e., potentially requiring identification at the time when the personal data are obtained of the client as the 'controller' of the data; and (ii) data subjects rights - i.e., potentially imposing an obligation on the client to respond to data subject requests to exercise their rights. As further described below, the example's construction raises a number of challenges.

First, disclosing the name of the client up front may introduce bias (which undermines the scientific integrity of the research). Naming the client (or the sponsor of the research) also creates possible conflicts with other sector relevant regulations. The client may wish to avoid reference to any corporate or brand names so as to avoid any risk of the market research being viewed as promotional (which raises particular concerns in the context of prescription medicines and medical devices) and to avoid any risk of conflict with anti-corruption legislation (which is of particular concern in the context of pharmaceutical and medical device company interactions with health care professionals). In these circumstances, the market research agency often acts with a significant degree of independence, for example in deciding what information to use, how to use it and choosing the respondents. The market research agency may recruit participants from its own pool of potential subjects, independently determine the sampling techniques and develop the questions to ask research subjects, use its own notice and consent forms, follow its own policies and procedures, and have autonomy in determining what information to include in the final report provided to the client. In these circumstances, the market research agency could possibly be viewed as the controller of personal data processing, and the client could be viewed as simply the recipient of a report containing aggregate, anonymized data.

Second, the example may lead to confusion with respect to the exercise of data protection rights and thereby actually prove detrimental to data subject rights. The client ordinarily has no ability to respond to data subject requests as the client receives no information identifying participants. The client would need to forward such requests to the market research agency for action, resulting in a delay in responding.

All of these issues support assessing the data processing roles within market research work on a task-by-task basis. To avoid the example provided in the Guidelines being presumed to be representative of all market research and the data protection conclusions misapplied to other market research scenarios, we recommend either providing additional examples that address a broader range of market research scenarios or deleting the example in this guidance document and instead working with the industry to provide more holistic guidance concerning the application of the GDPR to market research.

We would welcome the opportunity to discuss this latter option with the EDPB should it be of interest.

Points of contact



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