

EDPB Guidelines on the concepts of controller and processor in the GDPR

Science Europe Response to the EDPB Consultation

Science Europe welcomes the opportunity to provide feedback on Guidelines 07/2020, issued by the European Data Protection Board (EDPB), on the concepts of controller and processor in the EU General Data Protection Regulation (GDPR). The Guidelines address a topic that is of high importance for Science Europe Member Organisations, which are major national public research funding and research performing organisations (hereafter jointly referred to as public research organisations).

Context: Challenges Encountered by Public Research Organisations in International Collaborations

Public research organisations often conduct and fund research in cross-border collaborations, both within the European Union and beyond. These collaborations are often set up with multiple partners from the public sector. The processing of personal data is unavoidable in setting up and running such collaborations: for instance, when researchers apply for funding, receive funding, or submit scientific papers to be reviewed, personal data are processed. In addition, researchers collect, generate, and share data (including personal data) across borders with colleagues they work with.

The GDPR therefore has a strong influence on how research is conducted and how research projects are managed. Public research organisations strive to be GDPR-compliant in their work, but currently encounter some challenges. These were addressed in a [paper](#) that Science Europe sent to the EDPB Chair on 1 July 2020. In summary, research organisations found that the provisions in the GDPR governing data controlling and processing are ambiguous and experienced that these provisions are interpreted differently by different organisations. Additionally, in cases of collaboration with non-EU partners, a lack of comprehension on the scope of application of the GDPR causes further challenges. Both issues lead to difficulty for organisations to agree on the kind of controlling and agreements that are needed.

Science Europe Welcomes the EDPB's Detailed Guidance

The EDPB Guidelines address two of the main challenges encountered by Science Europe Member Organisations: identifying whether controllership is joint or separate within a given collaboration and identifying an appropriate legal form to establish an agreement.

The EDPB Guidelines clarify these aspects to a large extent, as they address the differences between joint and separate controlling in a detailed manner. This allows organisations to apply this information to their specific collaborations. The variety of included examples is also very useful. Science Europe particularly appreciates that the examples of joint controllership include a joint research project and a clinical trial; this is most helpful for public research organisations, who often operate under different

legal circumstances than companies from the private sector do. Science Europe would also like to compliment the EDPB for the flowchart annexed to the Guidelines, which will be a useful tool to provide clarity on the roles and responsibilities in a specific data processing activity.

Further Needs for Clarification

Science Europe would, however, like to point out some aspects where further clarification through the EDPB Guidelines would be helpful for public research organisations:

1) Broaden the Scope of the Guidelines

Research collaborations often include multiple partners from within and outside of the EU. The current scope of the EDPB Guidelines raises concerns on whether a third-country partner can be a controller and whether joint controllership with a third-country partner is possible. These options are not addressed in the Guidelines. Some guidance in the case of international collaborations (beyond EU borders) is needed.

The Guidelines state:

“The legal form of the arrangement among joint controllers is not specified by the GDPR. For the sake of legal certainty, and in order to provide for transparency and accountability, the EDPB recommends that such arrangements be made in the form of a binding document such as a contract or other legal binding act under EU or Member State law to which the controllers are subject.”

When multiple partners are based both in- and outside of the EU, joint controllers may not be subject to the same Member State or even EU law. Additional guidance should be provided on how such collaborations should be set up to ensure legal certainty, transparency, and accountability, and under which law(s) these collaborations could take place.

In general, public research organisations would appreciate more guidance applicable to public sector organisations, as the Guidelines in their current form seem to be mainly focused on businesses.

2) Legally Binding Forms of DPAs for Public Sector Organisations

Another challenge for public research organisations is choosing the legal form for a data protection agreement (DPA) among partners.

While the clarifications on the legally binding form of the arrangement, as detailed in part 2, section 2.2.1, are welcome, they often do not apply to research collaborations. Other than in commercial relations where contracts are the common choice, international research collaborations are often set up by means of Memoranda of Understanding, which are not legally binding. Research organisations often encounter reluctance from their international partners to sign legally binding documents on data protection in addition to the Memorandum of Understanding. Some more guidance on how public-public partnerships can establish their DPAs in a GDPR-compliant form would therefore be very useful. Science Europe would also like to suggest an additional annex to the Guidelines, indicating the minimum requirements on which elements need to be addressed in a data protection agreement. This would support public sector organisations for whom concluding contracts is not part of their usual business, as is often the case for private sector entities.

3) More Types of Examples

To reflect on the issues raised above under points 1 and 2, Science Europe would like to suggest adding some examples that address the situation of data exchange between public entities with at least one partner from outside the EU.

It would be helpful if the Guidelines include examples on multiple-international-partner collaborations, as most of the examples presented consider the case of only two joint controllers.

As regards the example 'Research project by institutes' (p. 21), it is currently not clear whether the example concerns the retrospective use of data that is already held in the institutions, or the data that institutes are currently collecting. Both cases are common in research collaborations. In case of the latter, it needs to be stressed how far the institutes would need to agree on the means and purpose of the data collection.

Issues to be Addressed Beyond These Guidelines

While the EDPB Guidelines address two important issues that currently challenge public research organisations, there are further aspects for which additional guidance is necessary. These aspects are linked to the use of Standard Contractual Clauses (SCCs) in collaborations with organisations from third countries.

1) Guidance on the Use of SCCs in Non-commercial Partnerships

Science Europe understands that the European Commission is currently updating the SCCs to adjust them to the requirements of the GDPR. To better support organisations from the public sector in the future, further guidance on how SCCs can be applied in non-commercial partnerships would be very helpful.

2) Consequences of Schrems II Judgement: In Which Countries Can National Law Overrule SCCs?

In its judgement in the case Schrems II (C311/18), the European Court of Justice (ECJ) has declared the decision of the European Commission on SCCs as valid. However, it will depend on the national legislation of the respective third country whether the SCCs do provide the necessary data protection. Only if the legislation applicable to the third-country partner cannot not overrule SCCs,¹ can the SCCs provide sufficient data protection guarantees. In practical terms, it will be impossible for an individual research organisation to analyse all national laws applicable to their potential partners. An overview of countries whose national laws might be able to overrule SCCs would therefore be useful. This is especially important as there are not many countries for which adequacy decisions exist that also apply to public sector organisations.

Science Europe would like to thank the EDPB for the further development of the Guidelines on the concepts of controller and processor in the GDPR. Science Europe reiterates its readiness to work

¹ For example by stipulating that personal data received must be put at the disposal of national authorities in a way that would not be possible under EU law, or that the rights of EU data subjects can be restricted in a manner contrary to the GDPR or Charter of Fundamental Rights.

together with the EDPB office to explore how its members' expertise can contribute to the important work of the EDPB.

About Science Europe

Science Europe represents major public organisations that fund or perform excellent, ground-breaking research in Europe. It brings together the expertise of some of the largest and most respected European research organisations to jointly push the frontiers of how scientific research is produced and delivers benefits to society. Science Europe's 37 members manage a large variety of national and international funding programmes, from bottom-up schemes to mission-oriented research. They collectively invest €18.5 billion in 27 countries each year.