
Public consultation on EDPB guidelines 05/2021

We would like to raise the issue of transfer of personal data in research collaborations. In many research projects data is shared between researchers from different institutions; both within the country and internationally. Sharing data is integral for research in its nature and for it to be able to generate and share knowledge. The demands in Chapter V in the GDPR can make research collaboration complicated, or even impossible.

The GDPR has numerous provisions that promote the opportunity for research to be performed, however, no such specific provisions exist with regards to Chapter V and international data transfers to third countries or international organisations.

In the following, we will argue that an external researcher should under some circumstances be considered internal to a data controller, and that a data transfer between two or more researchers from different institutions will not trigger the requirement for a legal basis for transfer in Chapter V.

The overarching purpose of Chapter V is to ensure that the level of protection guaranteed by the GDPR is not undermined when personal data are transferred to third countries or to international organisations.

The EDPB has in its guidelines identified the following criteria to qualify processing as a transfer:

A controller or a processor is subject to GDPR for the given processing

This controller or processor (“exporter”) discloses by transmission or otherwise makes personal data, subject to this processing, available to another controller, joint controller or processor (“importer”).

The importer is in a third country or is an international organization.

In many research collaborations the participating institutions will be joint data controllers. Any transfers of personal data to an entity outside of EU/EEA would, in such cases, be subject to Chapter V in the GDPR, and any transfers must meet the requirement set out in Chapter V.

However, many research projects will also have a sole data controller, but still collaborate with researchers from different institutions. These can often be from outside of the EU/EEA. Our question is therefore: will sharing of personal data between collaborating researchers in these projects always be considered as data transfers, or can there be exemptions?

Furthermore, if an exemption can be made, what criteria must be in place for such a collaboration and data sharing for it not to be considered as a data transfer? Looking at the guidelines cited above, it is only a transfer when transferring to “another controller, joint controller or processor (“importer”)”. Could the data importer from a different research institution be seen as neither of these, but rather as equivalent to an internal employee of the data controller?



According to guidelines 07/2020, a data processor must be «a separate entity». In the guidelines, a separate entity means that the controller decides to delegate all or part of the processing activities to an external organization. However, this is not necessarily how collaboration works in research projects. In many cases, you don't delegate a part of the work to a separate entity, but rather pool your resources, share ideas, and together try to generate knowledge. This is also the case when a sole institution is data controller and determines the purposes and means of the processing. The problem arises when this involves the sharing of personal data between researchers from different institutions, particularly if some of the researchers are based outside of the EU/EEA.

For research collaboration, we could argue that the researcher in question could be regarded as equivalent to a project employee internal to the data controller. This would apply in cases where the researcher is given access to a read-only file by remote transfer or given access to a specific work area on the data controller's internal systems. We would also argue that there is a difference between transferring data to a data processor in another country and giving an individual researcher access to a designated part of your systems or workspace.

To ensure that appropriate technical and organizational measures are in place, a data processor agreement is required for processors to provide sufficient guarantees. The agreement is needed for the data processor to be able to receive instructions on the purpose of processing, and account for safe processing. When the data controller has relative "control" over the information in its internal systems it seems less necessary to enter into a data processing agreement with the collaborating external researcher.

Furthermore, a research collaboration will mean that the participating institutions will have a written agreement which normally includes a description of the purpose of processing. We would argue that this agreement should be sufficient for an external researcher to be considered to be under instruction from the data controller, even if not directly employed by the data controller.

So, to sum up: Our argument is that a researcher from another institution could be considered "internal", and the access of data in the clear would not be considered a transfer under these specific, cumulative criteria:

An agreement between the institutions that includes the purpose of processing is made.

The data receiver is given access to a specific area by the data controller.

All processing of personal data happens within this specific area, even if the area can be accessed remotely.

Finally, we stress that giving access to external researchers shouldn't be taken lightly, and we fully agree with the emphasis in guidelines 05/2021: "If the sender and the recipient are not different controllers/processors, the disclosure of personal data should not be regarded as a transfer under Chapter V of the GDPR – since data is processed within the same controller/processor. In this context, it should be kept in mind that controllers and processors are nevertheless obliged to implement technical and organizational measures, considering the risks with respect to their processing activities, in accordance with Article 32 of the GDPR."

We would welcome you to touch upon the case of research collaboration and data sharing across borders in your guidelines 05/2021.

Kind regards

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