



October 2020

FEDMA position paper on the EDPB guideline 07/2020 on controllers and processors

FEDMA, the Federation of European Direct and Interactive Marketing, would like to share with the European Data Protection Board further comments regarding guideline 07/2020 on the concepts of the controller and processor in the GDPR. FEDMA had previously provided feedback at the stakeholder workshop organized on this topic. We thank you for this new opportunity to provide further targeted comments:

FEDMA is pleased that the guideline is still principle based and has been updated with a section on joint controllership, referring to recent key case law.

FEDMA is equally pleased for the risk-based approach taken; it was important for the EDPB to avoid qualifying each situation specifically but rather to provide a checklist for companies to correctly qualify their relation.

FEDMA is pleased that the new guidelines follow correctly the previous one under the Directive (=WP 169) on the concept of responsibility. Indeed, the concepts controller/processor/joint controller are not new at all.

However, the new guideline tends to over emphasize joint controllership. Joint controllership could indeed apply in the online world as the Case Wirtschaftsakademie (ECJ C-210/16). Nevertheless, there have been no significant changes regarding joint controllership in the traditional world.

FEDMA strongly recommends the EDPB to avoid impacting models, which drive privacy by design and data minimization, by using the notion of joint controllership beyond what the facts require in the traditional world.

Therefore, FEDMA kindly asks the EDPB to take into account these three comments:

1. Changes to the example on market research under paragraph 42 to illustrate how a controller may not necessarily have access to personal data

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This interesting example is missing clarification regarding the “essential means” (as described paragraph 38 of the guideline¹). Indeed, in this case:

- If company ABC decides which questions to ask individuals and decides which data to process (e.g. provides the market research organisation with its customer data), then company ABC is a controller, even if the research results shared by XYZ to ABC are statistical (ABC does not receive personal data from XYZ). In this case, ABC and XYZ need to sign a processing contract (which is not mentioned either in this draft example). This example correctly illustrates paragraph 42 because ABC is a controller (decides on essential means), yet it does not have access to the personal data itself held by XYZ.
- If company ABC does not decide which data to process, then XYZ is the controller. (Eg for independent market research who decides which data to process).

– 2. Changes to paragraph 60 and to the flowchart in annex I on jointly determined purposes

FEDMA agrees that, in principle, it is usually helpful to look at who the commercial beneficiary is, to identify the controller and/or joint controllers. However, an exception needs to be added to this principle. Indeed, in the lettershop practice to send direct mail, an advertiser will be the commercial beneficiary, but the advertiser may be a third party.

Indeed, Art. 6 I f), has a third party beneficiary clause which means that there might be cases according to GDPR when the controller uses data in its role as a controller whilst the benefit of this processing is for a third party who is not covered by a specific data protection role (neither controller, processor nor joint controller).

Example (on the following page):

¹ “Essential means” are closely linked to the purpose and the scope of the processing and are traditionally and inherently reserved to the controller. Examples of essential means are:

- **the type of personal data which are processed** (“*which data shall be processed?*”),
- **the duration of the processing** (“*for how long shall they be processed?*”),
- **the categories of recipients** (“*who shall have access to them?*”) and
- **the categories of data subjects** (“*whose personal data are being processed?*”).

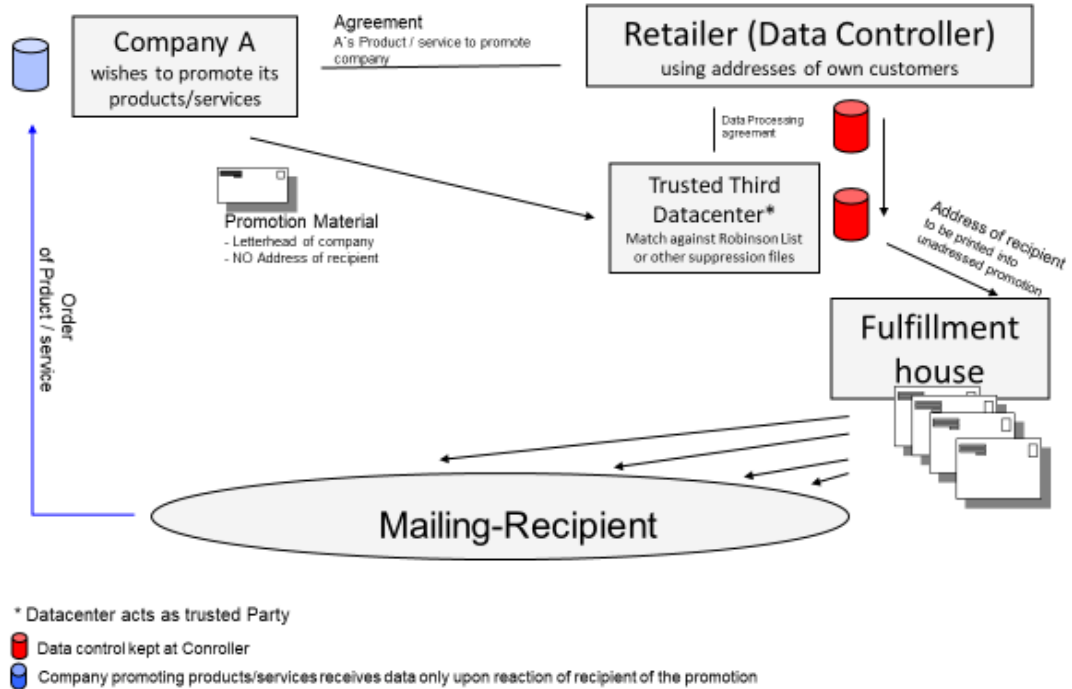
FEDMA

av. des Arts 43 1040 Brussels

www.fedma.org

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Trusted Third-Party model



So, as an exception, identifying the commercial beneficiary does not necessarily have to result in identifying a controller or joint controller or a processor but can lead to identifying a third party.

3. Furthermore, our final comment is to specify that it's not because two parties process a same dataset, that they are joint controllers who decided jointly on purpose and means of processing the data. If a marketing expert provides a company with advice on how to best choose audience and then shares a dataset with that company, the marketing expert still identified the essential means (ie profiling² of data subjects) on its own. Therefore, there is no joint controllership.

² Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, WP251rev.01, p. 7.