

From:

[REDACTED]

To:

[REDACTED]

CC:

[REDACTED]

Sent at:

20/01/22 17:00:56

Subject:

Case 2022-0012: Reply to informal consultation on the
controllership role in the context of subscriptions to
periodicals (via sub-contractor)

Dear [REDACTED]

Please find attached our reply to your consultation request of 20 December 2021 under Article 57(1)(g) of Regulation (EU) 2018/1725 on the controllership role in the context of subscriptions to periodicals (via sub-contractor) (case 2022-0012).

Please note that this is informal advice at staff level and does not bind the EDPS. Should you need a formal reply (letter signed by Head of Unit or Supervisor), we can arrange that as well, but please note that it may take longer.

Best regards,

[REDACTED]



[REDACTED]

European Data Protection Supervisor
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INFORMAL CONSULTATION BY THE LIBRARY OF THE EUROPEAN COMMISSION (EC) ON THE CONTROLLERSHIP ROLE IN THE CONTEXT OF SUBSCRIPTIONS TO PERIODICALS (Case 2022-0012)

On 20 December 2021, the Data Protection Coordinator (DPC) of the Library of the European Commission (EC) consulted informally the European Data Protection Supervisor (EDPS) on the controllership role in the context of subscriptions to periodicals (via sub-contractor). The processing operation at hand is recorded in the DPO register as [DPR-EC-03729](https://ec.europa.eu/dpo-register/detail/DPR-EC-03729) (see <https://ec.europa.eu/dpo-register/detail/DPR-EC-03729>) and the EC Data Protection Officer's team had previously been consulted.

Article 3(8) of Regulation (EU) 2018/1725 (the Regulation) defines as controller "the Union institution or body or the directorate-general or any other organisational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data".

As rightly noted in the consultation, §25 of the [EDPB Guidelines on Controllership 2020/07](https://edpb.europa.eu/system/files/2021-07/eppb_guidelines_202007_controllerprocessor_final_en.pdf) (Version 2.0 adopted on 7 July 2021, see https://edpb.europa.eu/system/files/2021-07/eppb_guidelines_202007_controllerprocessor_final_en.pdf) state under point 27 (under the heading "Control stemming from factual influence") that "...existing traditional roles and professional expertise that normally imply a certain responsibility will help in identifying the controller, for example... a publisher processing personal data about its subscribers...".

The consultation mentions that a UK-based publisher both has a "Processor Addendum" and a "Privacy Notice" in place. The privacy notice includes provisions saying that the publisher shares the personal data of its subscribers among the different offices of the group (which are worldwide), and also share the personal data with affiliated companies. According to this publisher, their "Processor Addendum" does not apply in the case at hand, and, **from their point of view, they are controller of the data and are therefore allowed to determine the means and purposes of processing as described in their privacy notice.**

As described in the consultation and confirmed by the above mentioned record, in the case at hand (and as opposed to the example mentioned in the EDPB Guidelines 2020/07), the relationship between the subscribers (EC staff) and the publisher is not a direct (EDPB Guidelines 2020/07: "its subscribers"), but an *indirect* one, i.e. via the EC Library and its contractor (the wholesaler) as go-between.

Regarding the purpose, the above mentioned record states that "The purpose for data processing is to allow EC Library users to access electronic subscriptions and electronic

resources. The general conditions for the processing of personal data are stated in the framework contracts signed between the contractors and the EC Library."

In this context, the data protection statement (DPR-EC-03729_Privacy_Statement_e-resources_20211027_.docx) states that

- Section 2 (Purpose of the processing operation): "The EC Library collects and uses your personal information in order to provide you with a variety of Library services which you have requested or are using. We may use your personal data in order to give you access to electronic resources (such as electronic journals, e-books, articles and databases) and to ensure that our electronic subscriptions are properly managed. Your data are not further processed in a way incompatible with the purpose for which they are collected."
- Section 7: "the EC Library makes use of external contractors as information services providers and publishers/content providers, to provide services on our behalf such as access to electronic resources. These third party service providers ("Data Processors") use your personal information in order to assist the Library and to provide the agreed service to you on our behalf... All of our contractors are bound by strict contractual terms in order to ensure that your personal information will be protected appropriately".

However, for certain contracts, **the record ("Purpose", section 2) seems to suggest that data subjects agree to a more direct relationship with the publisher** by accepting a separate data protection statement provided by the publisher: "Under contract 10836 and 10837, the contractor serves as agent between the EC Library and publishers of specialist magazines. Once a Commission staff member requests to subscribe to a specialist magazine and the EC Library validates the request, the name and email address of the user are passed on to the publisher. ***The publisher may be based outside the EU/EEA and may ask the user to accept the publisher's privacy statement.***"

For any such "acceptance" by EC staff members as users to be considered valid consent in the sense of Article 3(15) of the Regulation, such "acceptance" would need to be a "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her". In the light of the information given to data subjects on the purpose of the processing operation, any agreement of EC staff as data subjects with the publisher's privacy statement **would not be an adequately informed indication of their wishes**. Given the clear designation of the publishers as processors of the data subjects' personal data on behalf of the EC Library, this is true in particular in light of Section 7 of the data protection statement stating that "These third party service providers ("Data Processors") use your personal information in order to assist the Library and to provide the agreed service to you on our behalf... All of our contractors are bound by strict contractual terms in order to ensure that your personal information will be protected appropriately").

There might be cases where transfers could be acceptable, for example regarding subscriptions/access to specialist magazines of publishers established in third countries, which EC staff members would need for their work. In such cases, the transfer could rely, not on the consent derogation, but on **Article 50(1)(c), i.e. "transfer is necessary for the performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person"**. However, even where transfers based on derogations are acceptable and lawful, EC staff members should not have to *agree* to any privacy notice from the publishers involving the sharing of their data with affiliates in third countries. The record and data protection statement should be aligned accordingly.

Against this background, the EDPS concludes the following:

- The EC Library is the sole controller of the data subjects' personal data in the context of the processing operation at hand;
- The EC should implement this vis-à-vis the publishers chosen to provide the agreed services to EC staff on its behalf and ensure that EC staff is not confronted with the need to accept separate publishers' privacy statements contradicting information provided by the EC in its data protection statement.
- The EC should clarify the record ("Purpose", section 2 and "International Transfers", section 6) accordingly (e.g. by omitting "and may ask the user to accept the publisher's privacy statement" and replacing the consent derogation under Article 50(1)(a) with the derogation under Article 50(1)(c) and by clearly delineating the necessarily limited scope of the derogation).

This is informal advice at staff level, which does not commit the EDPS.

20 January 2022