

The World Employment Confederation

Guidelines on “Independent Controller” or “Processor” as HR-service provider

The private employment industry acts as labour market intermediary to match labour market supply to labour market demand. It does this by providing various services such as agency-work, direct recruitment, Managed Service Provider (MSP) etc. Given the nature of Human Resource services (HR services) it almost always involves the processing of personal data and the exchange of that data with third parties, in particular with clients, for the purpose of matching jobseekers to a job. In this relationship, confusion may exist about which party in that relationship is an independent Controller¹ or processor of that personal data in the sense of the General Data Protection Regulation of the European Union (GDPR). We emphasize that the GDPR did not fundamentally change the positions we describe below and that the previous data protection directive in the EU in this context provided for the same assessment on the role of HR-service providers.

The protection of personal data is a crucial issue to consider when providing or contracting HR services. This means that the HR-services provider and the client might enter into an arrangement or agreement to address the use and flow of personal data in that relationship. The guidance in this document provides insight into that relationship. It identifies various HR services and showcases how the roles of Independent Controller/s and/or processor/s can be allocated in those various services. In doing so it supports clarification on the obligations and responsibilities of the various parties in relationship to the personal data, and which specific arrangements to get in place with the client. This document is therefore meant to clarify the application of the GDPR in the context of the provision of HR services. In this context it is important to note that the services provided by HR-service providers are in no way limited to the services highlighted in this document.

Once the relationship is clarified and established, it is important to note that the assigned roles come with a set of obligations, which are outlined in the GDPR. As this document only serves to support the identification of the specific relationships in various HR-services, these respective obligations will not be covered in these guidelines. For more information, we advise you to consult the website of the European Data-Protection Board and/or your national Data Protection Authority (DPA). An overview of these DPAs can be found [here](#).

In addition, the national association for employment services might provide further support on GDPR implementation and compliance in the HR-services industry in your country.

Disclaimer: This document provides guidance on GDPR compliance regarding talent supply lines. The specific actual service and/or situation in fact and practise determine in the end how these roles should be allocated in accordance with the law. The services offered in practise may deviate from the general descriptions in this guidance. This guidance is in no way compulsory or setting a framework for any new or existing HR-services, neither does it legitimise specific services. Neither should this document be perceived or interpreted as formal or legal explanation of the GDPR. Neither does it replace existing legislation or the responsibility of legal subjects to act in accordance with it. While the World Employment Confederation (WEC) endeavours to ensure that the information contained in this document is accurate at the time of publication, the WEC does not accept any responsibility or liability for the accuracy, content, completeness, legality, or reliability of the information contained in this document. Your use of this document is at your own risk. The WEC will not be liable for any damages, losses or causes of action of any nature arising from any use of this document.

¹ The term independent controller is used in this document and means Controller as defined in article 4 sub 7 of the GDPR. Independent is added throughout this document to highlight the autonomous position of the controller as defined in the GDPR.

General information on the various relationships while sharing personal data in supply chains

When processing personal data three types of relationships exist under the GDPR:

1. Independent Controller to Processor

In this relationship, the Independent Controller contracts the Processor (see art. 28 GDPR) to process personal data on behalf of the Independent Controller. The Processor is a separate legal entity, which receives personal data from the Independent Controller to process these personal data with a specific goal, as instructed and specified in a legal agreement. The Processor is directed by the Independent Controller on how to deal with personal data. Under the GDPR, this relationship requires a contract or other legal act under Union or Member State law, that is binding on the Processor with regard to the Independent Controller, which should particularly set out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the independent Controller (see art. 28 sub 3. GDPR on the minimal legal requirements of an Independent Controller to Processor agreement). Some helpful tips can make the distinction between an Independent Controller and a Processor more clearly:

- The Independent Controller collects the personal data in the first place and contracts the processor to help with the processing.
- The Processor processes the data for and follows the instructions given by the Independent Controller. The Independent Controller determines the purposes of processing, the legal basis for doing so, the retention periods for keeping the data, etc. Exceptionally, the decision on the IT systems may be delegated by the Independent Controller to the Processor, including the way to store, delete and dispose of the data, but still under the instruction of the Independent Controller.

MSP & RPO (see below) are examples of an Independent Controller to Processor relation.

2. Joint Controllers

This description is included in this document for the sake of information and completeness. In none of the services described in this document a 'Joint Controllers' relationship exists.

When two or more Controllers jointly determine the purpose and means of the processing of personal data, they are deemed Joint Controllers (see article 26 GDPR). A simple example can be combined talent pool (a shared infrastructure) of worker- and/or jobseeker-data with a client. Joint Controllers should set up an arrangement that sets out their respective roles, responsibilities and transparency measures. The essence of the arrangement shall be made available to the data subject. They shall also be jointly accountable (and liable) to the data subject in terms of processing and transparency or they can make arrangements on these topics in a clear agreement.

3. Independent Controller to Independent Controller relationship

The Independent Controller-to-Independent Controller relationship is not identified in the GDPR but is well acknowledged when two parties exchange personal data to which they independently act in the responsibility of Independent Controller. This means they do not process personal data on behalf of each other but do so for their own purposes. Although a specific agreement on the conditions is not a legal obligation under the GDPR, it might be helpful to clearly identify and affirm the Independent Controller to Independent Controller relationship as part of an arrangement or agreement with the other independent Controller, for instance on data-sharing. This can be in the form of a short contractual clause or annex, but it need not be as detailed as a data processing agreement. A clause like this would help clarify the respective roles and raise awareness on the responsibilities that come with those respective roles under the GDPR. Yet, such an agreement would not be leading when in fact and practise a different relationship is concluded.

Agency work, Direct Recruitment and Career management/Outplacement(see below) are examples of an Independent Controller to Independent Controller relationship.

Important: The difference between being Joint Controllers and having an independent Controller-to-independent Controller relationship might seem diffuse. Crucial in making the differentiation is to what extent the parties involved truly determine the purpose and means² together or whether every party determines its own purposes and means.

The questions below may help identify and distinguish a joint Controllers relationship from an independent Controller-to-independent Controller:

- Do the parties independently or jointly define:
 - the purpose(s);
 - the data being processed;
 - the means;
 - the storage; and/or
 - the retention period?

Further reading on 'Controller' and 'Processor':

[ICO: Data Controllers and data processors: what the difference is and what the governance implications are](#)

[WP29: Opinion 1/2010 on the concepts of "Controller" and "processor" – WP 169](#)

The variety of HR-services

These guidelines cover the following HR-services. As mentioned earlier the services of HR-service suppliers exceeds this list:

- Agency-work
- Direct Recruitment
- Recruitment Process Outsourcing (RPO)
- Managed Service Provider (MSP)
- Vendor
- Outplacement/Career-management

Agency work

Agency-work (aka staffing or 'dispatch' work) is a triangular employment relationship, meaning the work agency signs an employment contract³ with the worker and then places the worker to a user-company to work under the guidance and supervision of that user-company.

Common misconceptions are that either the user-company is processing data on behalf of the employment agency, or that the employment agency is processing on behalf of the user-company. Often a data-processing agreement is concluded which is generally not appropriate given the respective roles.

When receiving candidate personal data for selection purposes and/or (agency-)worker personal data for an assignment at the client, the client is the data controller of this personal data. This personal data is collected and

² "means" does not only refer to the technical ways of processing personal data, but also to the "how" of processing, which includes questions like "which data shall be processed", "which third parties shall have access to this data", "when data shall be deleted", etc. ([WP29: Opinion 1/2010 on the concepts of "Controller" and "processor" – WP 169](#))

³ For instance, there are three different employment statuses in the UK and the Republic of Ireland– employee, worker and self-employed. Only employees and workers can be agency workers, their differing status being determined by the type of contract they have with the work-agency.

to be processed by the client in accordance with the client's own privacy policy for its own purposes. At the same time the work-agency is also the controller of the personal data of the same candidates and (agency-) workers. The candidate and agency-worker personal data is provided by the work-agency to the client, from independent controller to independent controller; both work agency and the client each independently determine the purposes and means of processing of that personal data and are each independently responsible for compliance with the relevant obligations under data protection legislation.

In short, as each of the employment agency and the user-company each determine the purposes and means of processing data of the agency-worker, they shall each be an Independent Controller. Therefore, the exchange/sharing of data is under an Independent Controller-to-Independent Controller relationship.

Separately, a payment intermediary may be involved which processes the agency worker's pay⁴. The services provided by the payment intermediary determine whether it is a processor or an independent contractor. For example, if it receives personal data and is merely asked to calculate pay, then it is a processor. In contrast if the payment intermediary employs the agency worker then it is an independent controller in its own right vis-à-vis user-company.

It might be that agency-workers are guided by the user-company to access and use personal data of the user-company as part of their work (assignment) at the user-company. In this regard, the agency worker acts under the control and supervision of the user-company. The work-agency does not have any access to or knowledge of any of the personal data the client processes. Neither does the work-agency process any of that data. The work agency does not intervene nor decides or is given instructions on how this data should be processed. During the assignment the agency-worker will become part of the day-to-day operations of the client from an operational perspective, there will be no significant difference in the way the agency-worker and the client's workers will be treated.

If the agency-worker handles personal data while on assignment, the agency worker will do so:

- under the client's management, instruction and supervision (and not under the work-agency's management, instruction or supervision); and
- by using only the client's tools, systems and applications.

The employment agency will not be informed of these processing activities nor will it receive any instructions in relation to these processing activities.

In other words, when handling Personal Data as part of his/her Assignment, the agency-worker acts in the same way as the client's own employees that handle the same personal data: as a person who, under the Customer's direct authority, processes the client's Personal Data.

Direct Recruitment

Direct recruitment involves the search and selection of jobseekers and providing clients with pre-selected candidates for particular positions that may or may not lead to the employment of one of the selected/proposed candidates in the position mentioned.

When receiving personal data for selection purposes, the client is the data controller of this personal data. This personal data is collected and processed by the client for its own purposes. At the same time the HR-provider is also the controller of the personal data of the same candidates. The candidate personal data is provided by the HR-provider to the client, from controller to controller; both HR-provider and the client each independently determine the purposes and means of processing of that personal data and are each independently responsible for compliance with the relevant obligations under data protection legislation e.g. each must process the personal data in line with their respective privacy policies.

⁴ The use of payment intermediaries is common in some EU countries.

Generally, when the recruitment service provider proposes an identifiable candidate to a client with a vacancy, the client processes the personal data of the candidate as part of its pre-employment phase. While the recruitment firm supplies the jobseeker from *its own* database, the processing of the data is based upon its own legal grounds and purposes: an independent Controller-to-independent Controller relationship is present.

Recruitment Process Outsourcing (RPO)

Recruitment Process Outsourcing, as opposed to Direct Recruitment (described above), allows for the client to outsource all or a part of its own recruitment process to an external HR-service provider. Meaning that the HR-service provider will organise and coordinate the client's recruitment process on behalf of the client.

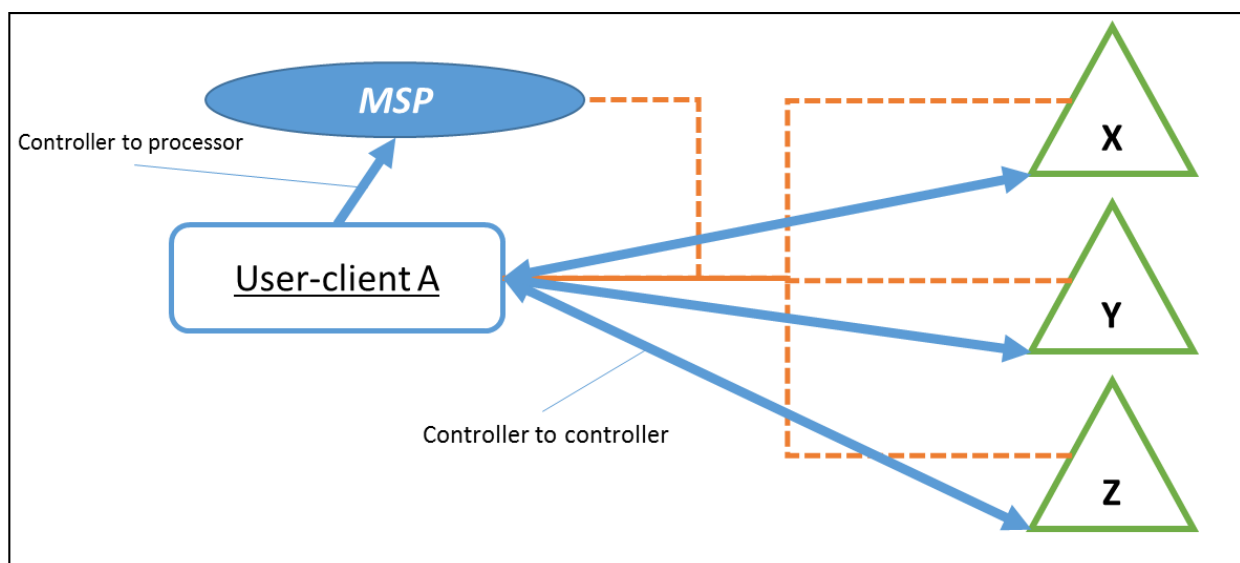
This means that an Independent Controller-to-Processor relationship exists, with the RPO-provider being the processor, processing the personal data on behalf of the client (the Independent Controller).

The crucial difference with Direct Recruitment is that in RPO candidates register directly with the client⁵, rather than with the HR-service provider. The RPO-service supports the clients in dealing with those registrations/application in a capacity of a Processor of the data. The client is the Independent Controller directing the RPO on the process of the personal data.

Managed Service Provider (MSP)

Important in this context is that the determination of the actual relationship is determined by the actual facts. The actual MSP service can deviate from the general description provided below and naturally determines the roles under the GDPR and the various relationships.

The MSP supports clients in the management, compliance, standardization, alignment and/or coordination of different suppliers and contractors providing workforce solutions to the client. Yet the MSP does not place or source the client with staff it employs or engages itself, but functions as an intermediary. In order to do so the MSP provider processes workforce-information (including personal data of the candidates, the workers and/or self-employed) coming to the clients. It does this on behalf of the client, who determines the purposes and means of the processing. Therefore, the client is most likely to be the Independent Controller and the MSP is the Processor of the data on behalf of the client. This can be identified as an Independent Controller-to-Processor relationship. In order to manage this multiparty procurement relationship, it is important to coordinate and align the various GDPR related agreements in the talent supply chain to avoid confusion and ensure the compliant use of personal data.



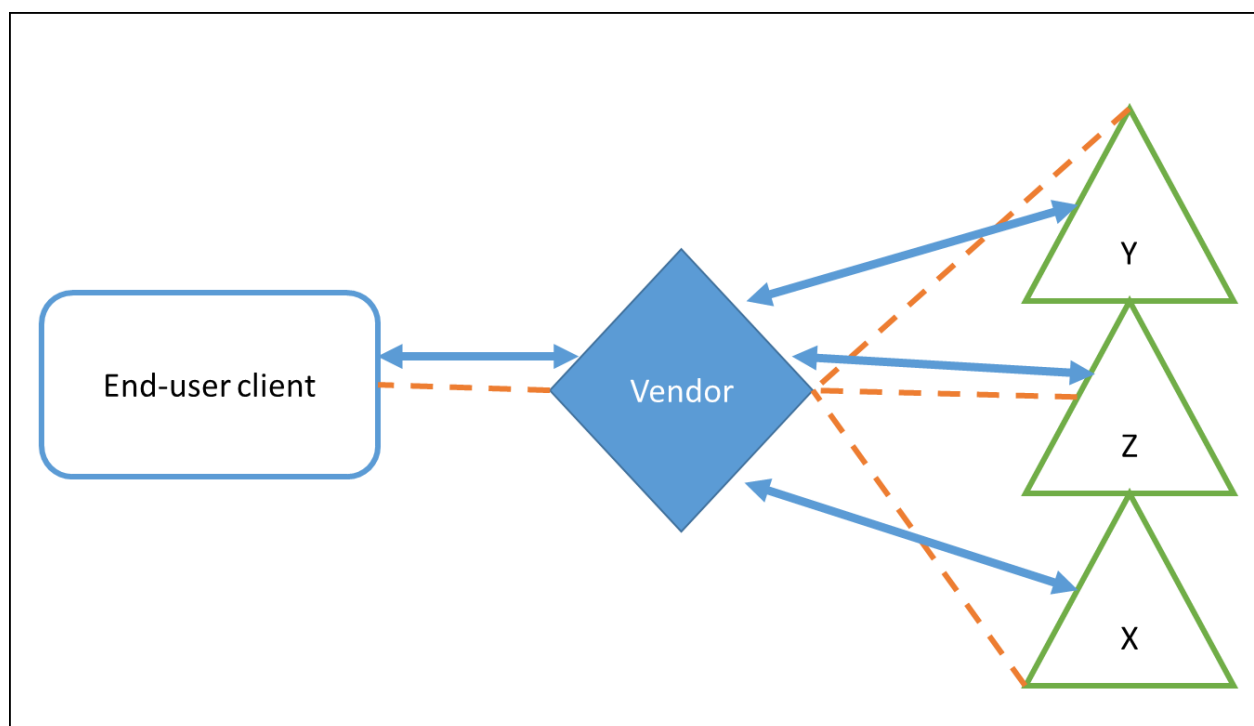
⁵ It could be that RPO services are provided together with Direct Recruitment Services. In which case the different services will have different roles to be considered.

This does not exclude identifying an Independent Controller-to-Independent Controller relationship between the client and the workforce solution providers. For example, when company A hires an MSP to manage its three different employment agencies (X, Y, and Z) Company A has an Independent Controller-to-Independent Controller relationship with each of the employment agencies. Companies X, Y, Z, transfer independently personal data to the MSP, which occurs as an intermediary (and Processor) of company A and/or directly to company A. The companies X, Y, Z are Independent Controllers as they process personal data in accordance with their own purpose.

Vendor

Important in this context is that the determination of the actual relationship is determined by the actual facts. The actual Vendor service can deviate from the provided general description and naturally determines the roles under the GDPR and the relationship. Also as with all services mentioned the provision of this service is subject to national law and regulation.

The Vendor contracts third-party labour providers to supply human resources to the end-user client⁶. As opposed to MSP (see above), there is no direct relationship between the labour provider (X,Y & Z) and the end-user client. See the model below.



There are separate relationships in terms of data-protection. First of all, the relationship of the Vendor and the client. This relationship should in all instances) be defined as an Independent Controller-to-Independent Controller relationship as both parties (Vendor and client) individually determine the purposes and means of the data of the workers supplied.

Secondly there is the relationship with the second-tier workforce suppliers. Most commonly this will also be defined by an Independent Controller-to-Independent Controller agreement given the workers cascaded through the Vendor are typically employed/engaged by the second-tier supplier.

Sometimes, the Vendor may additionally also perform additional activities on behalf of the client (comparable services to MSP) and, in such cases and for the strict scope of such activities performed on behalf of the client

⁶ This applies to both the Neutral and the Master Vendor. The difference being that a Neutral does not supply it's own staff in addition to the staff of third-party labour suppliers.

(where the client defines the purposes and means of the processing), the Vendor may act as Processor and a data processing agreement may be required between the Vendor and the client for these specific activities.

As with MSP, it is important to align and demarcate the various agreements to ensure the compliant processing of personal data throughout the talent supply line by the different parties.

Career-management / Outplacement

Career-management & outplacement services typically support clients in reducing their own-staff workforce while providing labour market tools, training, financial planning, social security navigation, career-advice, assessments and other forms of support to the respective (future) displaced workers to make a successful transition on the labour market and find new work, start a business etc.⁷ These services often continue once an employment contract between the client and the relevant worker has been terminated in order to keep the support to the displaced workers going.

Typically, the workers involved are still employed by the client as outplacement services are procured and implemented. Given the distinct service of career-management in the situation of (future) displaced workers, where each of the client and the Career-management/Outplacement company determine their own purposes and means of processing of the relevant personal data, an Independent Controller-to-Independent Controller relationship can be determined.

The outplacement services to the displaced worker do not necessarily end as the employment relationship end. When this is the case, the outplacement then continues a relationship directly with the displaced worker (i.e. career management). A further agreement with the (former) employer of the displaced worker is not necessarily required in this regard.

Finally, outplacement services might be covered by a specific national regulatory framework determining the scope/specifics of their service and/or their independence from the (former) employer of the (future) displaced worker. In that situation the outplacement firm is an Independent Controller in its own rights, meaning the relationship is an Independent Controller-to-Independent Controller, because of the national legal assignment that is allocated to the outplacement service provider.

About the World Employment Confederation–Europe: The World Employment Confederation–Europe is the voice of the employment industry at European level, representing labour market enablers.

With 30 countries and 7 of the largest international workforce solutions companies as members, the World Employment Confederation–Europe is fully representative of the industry, both in size and diversity. It brings a unique access to and engagement with European policymakers (EU Commission, European Parliament, and Council) and stakeholders (trade unions, academic world, think tanks).

The World Employment Confederation–Europe strives for a recognition of the economic and social role played by the industry in enabling work, adaptation, security and prosperity in our societies. Its members provide access to the labour market and meaningful work to more than 11 millions of people in Europe and serve around 1,5 million organisations on a yearly basis.

⁷ Career-management service also include services to individual jobseekers/workers without the involvement of a future, current or past employer. As these are not involved, these types of career-management services are not covered in these guidelines.