

Background Note: Data Controllers and Data Processors in the Research Sector

This Note sets out an overview of the research supply chain and the impact that this has on the determination as to whether research suppliers are Data Controllers or Data Processors under the General Data Protection Regulation (GDPR) and/or UK Data Protection Act 2018 (DPA). Anonymised extracts of client-supplier instructions are also provided separately.

1. Introduction

Market, social and opinion research is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making. Research is founded upon the willing co-operation of the public and business organisations; it depends upon their confidence that it is conducted honestly, objectively, without unwelcome intrusion and with harm to participants.

Collection and processing of personal information is fundamental to the work of researchers. Diverse and evolving techniques, based on qualitative, quantitative or passive methods such as surveys, focus groups, digital measurement, wearable technologies or analytics of large data sets, enable researchers to collect and process personal data to deliver evidence-based insights to clients.

The purpose of research is to collect and analyse information, and not directly to create sales nor to influence the opinions or attitudes of anyone participating in it. It does this by obtaining information from specific samples of individuals and generalising results to the population as a whole. Research focuses on the findings from participants rather than on the individual identity or the identification and attribution of individual participant opinions or attitudes. Participant anonymity is the standard approach and commissioning clients generally do not receive personal data gathered in research.

Market research plays a key role in helping business to better understand consumers, and to develop appropriate goods and services which are essential for economic efficiency, innovation and progress within the UK economy. Social and opinion research is widely used by government and public bodies to understand citizens' preferences and behaviours, measure impact and assist in developing appropriate policies used, for example, in improving educational, healthcare and police services.

Compliance with both legal and ethical requirements for the treatment of personal data is vital for maintenance of consumer trust. Ethical standards are set out in national or international codes including:

- Market Research Society (MRS) Code of Conduct¹
- British Healthcare Business Intelligence Association (BHBIA) Legal and Ethical Guidelines for Healthcare Research²
- EphMRA Code of Conduct³

¹ https://www.mrs.org.uk/standards/code_of_conduct

² <https://www.bhbia.org.uk/guidelines/legalandethicalguidelines.aspx>

³ <https://www.ephmra.org/standards/code-of-conduct/>

- ICC/ESOMAR International Code⁴

These Codes are also supported by detailed guidance on specific aspects of research methodologies and underpinned by disciplinary processes.

2. Structure of Research Sector

In any research project there are likely to be several organisations throughout the research supply chain including the commissioning client, full service agencies, panel providers, fieldwork agencies, viewing facilities, transcription and translation services and freelancers such as recruiters and interviewers.

The research supplier market is dominated by smaller businesses, and in light of the core activities of data collection, the new data protection framework, and the requirements for data collection, research suppliers now have a higher compliance burden which is a significant challenge for the smaller suppliers in terms of building sufficient internal capability.

The MRS Industry Report 2018, which includes the industry League Tables, detailing the largest suppliers of market research, analysis and intelligence ranked by individual company UK-based turnover (£m), indicates that once outside the Top 15 companies, all other suppliers are SMEs and there is a considerable number of small and micro business suppliers⁵.

Research undertaken may be ad hoc research directly commissioned by client (and sometimes using client sample from their customer database), longitudinal (long-term research over multiple years or decades which can include the same individuals, cohorts, over the life of a project) or syndicated research (such as research on an issue which is then sold on to clients or panel research).

3. Impact of naming clients in research projects

Under the GDPR and DPA 2018 there are specific situations which may require commissioning client(s) to be named. It is important to recognise that disproportionate non-risk based application will have significant consequences for many types of research as it will:

- reduce robustness and methodological rigour (e.g. biasing responses where the client's identity is known up front; adversely impact on trend data where attitudes on behaviour etc. are measured over time, as results will not be comparable)
- contravene regulatory controls that seek to ensure there is a clear distinction between direct marketing and other activities (e.g. introducing client name may seem like disguised promotion; routing participants to promotional pages of a client may appear to be a direct marketing activity)
- impact on the use of methodologies such as spontaneous awareness (e.g. measuring how many participants can recall a brand name or company material without any assistance on behalf of the interviewer)

⁴ https://www.esomar.org/uploads/public/knowledge-and-standards/codes-and-guidelines/ICCESOMAR_Code_English_.pdf

⁵ <https://www.research-live.com/industry-report?MKTG=INDUSTRYREPORT2018>

- impact on research that may be 'commercially sensitive' such as when product development or assessing in-licensing opportunities / new assets affects share prices
- contribute to information fatigue such as in omnibus surveys, which collect data for a variety of clients, and may require disclosure of the names of multiple clients and their privacy policies.

Example: Response bias from naming the survey sponsor up front

Three research projects asked a commonly used research question: On a scale of 0-10, how likely is it that you would recommend [FIRM'S] services to other people? Where 0 equals extremely unlikely and 10 is extremely likely.

All were analysed by the well-known, net promoter score (NPS) technique, with % of 0-6 scores subtracted from the % of 9-10 scores to provide an NPS score. The three surveys produced the following NPS results:

- *Telephone interview with sponsor revealed towards the end: +9*
- *Online survey with sponsor revealed up front: +36*
- *Face to face survey with sponsor revealed up front: +53*

All three of the projects contained several thousand business participants. The difference in responses was due to how the research was positioned. Only the research project with the sponsor revealed towards the end produced an unbiased result.

Source: A leading global professional services organisation

Example: Disguised promotion

Introducing the sponsor's name may lead to complaints of disguised promotion under the Association of the British Pharmaceutical Industry (ABPI) Code of Practice. The pharmaceutical industry is particularly sensitive to the issue of disguised promotion i.e. so called surveys being used for promotion rather than information gathering.

Clause 12.2 of the ABPI's Code of Practice specifically states that "Market research activities, PMS studies, clinical assessments, experience programmes, post authorization studies, etc. must not be disguised promotion". Additionally the BHBIA's Legal and Ethical Guidelines contain detailed guidance for market researchers to help them to make sure their market research is not misinterpreted as disguised promotion, included within this is the advice never to use names (company or brand) unless essential to the research objectives.

4. Determining Roles - Data Controller, Data Processor, Third Party

The determination of who is a controller (DC), joint controller (JDC), data processor (DP) or third party is a question of fact rather than contractual stipulation. It is based on a determination of the purposes and means of the processing, and essentially the level of decision-making power exercised.

Dependent on type of research project a client may be a third party, sole data controller or joint data controller in line with the level of autonomy and responsibility the client exercises over the personal data being collected. Similarly a research supplier may be a processor, joint controller or sole controller.

Different levels of decision making authority

Decision-making authority by the parties is evident along the documented contracting process:-

- Client Brief - Client determines/establishes overall commercial need for insights, analysis or research – the research challenge to be addressed. The level of instruction and degree of specificity for a research approach will depend on the commissioner's needs, their experience and whether they themselves are researchers. For many ad hoc projects a client brief will not set out how personal data should be collected or give a precise means or methodology. The research brief will focus on the challenge to be addressed, the population of interest to be researched, the budget and the timescale.
- Supplier Proposal – sets out a detailed response to the client brief and will address specific research objectives; proposed research design, including sample approach, size and structure for primary data collection; proposed research methodology/s; techniques to avoid bias and other methodological rigour; research outputs including whether research results to be shared will be aggregate or individual results; costs; timescales and relevant legal and ethical issues.
- Contract – Reflects agreement based on the supplier proposal; commercial terms and conditions (all); mandatory GDPR requirements (if DC/DP); allocation of responsibilities (if JDC).
- Transparency and risk tools - Research information statements, privacy policies, legitimate impact assessments, data protection impact assessments may be applicable depending on the research project.
- Data collection instruments - Research documents e.g. pre-engagement letters; recruitment screeners; questionnaires, discussion guides, stimulus materials, etc.

Client as a third party

In some instances the client will clearly be a third party such as in syndicated research projects where the research is not directly commissioned by the client but subsequently purchased from research supplier. However in light of the consequences for research of naming the commissioning client in other situations it is essential to be clear about the basis for this requirement. Whilst recognising that the determination of roles is always fact specific there are arguments for a commissioning client not necessarily being a data controller. These include:

- Lack of access to personal data - The GDPR lays down rules relating to the protection of natural persons with regard to the processing of personal data. Considering a commissioning client that neither supplies nor has any access to any personal data at any time during a research project seems to be an extrapolation of the scope of the GDPR beyond that intended. Whilst the data processing is taking place because of an information demand from the commissioning client, they did not initiate the data processing. If initiating the demand is considered the only qualifying criteria for a data controller then every individual service user would be a data controller for any service they use.
- No determination of both the purposes and the means - The GDPR definition states that data controllers determine both the purpose and means of the data processing. Whilst commissioning client companies may be considered to provide the purpose as they have the information need (however ill-defined), they do not generally get involved in defining the means. The means i.e. the methodology, sample size and structure, are defined by the agency to whom the work is sub-contracted. Commissioning clients do not often meet both qualifying criteria for data controller.
- Wide meaning of purpose - The meaning of 'purpose' when referring to the purpose of data processing could be construed widely. In the research context it could mean anything from a vague need for information e.g. "*we need to understand more about what's happening in area x*" to a detailed and tightly defined set of objectives. At what point on this spectrum does a vague research need become a specific purpose?

Application of key factors in ICO Guidance to research projects

The tables overleaf build on the ICO Guidance and list of key factors to explore the application to different research scenarios.

Tables: Who decides? Client or Researcher

Based on situation where client provides instructions to the research supplier		Client decides?	Research Supplier decides?
<i>To undertake research, insight or analytics exercise</i>	Commissioning client will determine the need for some primary research to be undertaken	√	X
<i>To collect personal data in the first place and determine legal basis for personal data collection</i>	Commissioning client will determine what type of data will be needed (e.g. opinions on products) whilst research supplier will determine a sample frame as who will be contacted to obtain the required data. Personal data is not generally shared with the client but data such as photographs, film, video, audio or transcripts of interviews may be shared with consent of participants.	√	√
<i>Which items of personal data to collect, i.e. the content of the data;</i>	A commissioning client will determine what type of data will be needed (e.g. opinions on products) whilst research suppliers will determine a sample frame i.e. who will be contacted to obtain the required data.	√	√
<i>Purpose or purposes the data are to be used for</i>	A commissioning client will determine the purpose – i.e. to address a specific business question.	√	X
<i>Which individuals to collect data about</i>	A commissioning client will determine the overall types of participants e.g. customers in the UK, 18-14 year olds, etc. Research suppliers will determine which individuals will be targeted as part of a sample frame.	√	√
<i>Whether subject access and other individuals' rights apply</i>	A commissioning client will propose and any requirements will be incorporated by research suppliers into the research and data collection design.	√	√
<i>Whether to disclose the data, and if so, who to;</i>	A commissioning client will propose what it wants and this requirement will be incorporated by research	√	√

Based on situation where client provides instructions to the research supplier		Client decides?	Research Supplier decides?
	suppliers into any resulting research and data collection design.		
<i>How long to retain the personal data</i>	Retention of data will be determined by the data retention policies of commissioning clients and research suppliers (and the periods may be different) The important point to note is that the data shared with commissioning clients from a research project will usually be an aggregated data set of participant responses i.e. contain no personal data. Research suppliers will have the identifiable data set – and this data will not be shared with clients nor will it be used for any other purpose by research suppliers.	√	√
<i>Whether to make non-routine amendments to the data.</i>	Research suppliers will ensure integrity and robustness of any resulting data sets	x	√

Based on an example of a commissioning client providing a non-detailed brief to a market research agency		Client decides?	Research Supplier decides?
<i>To undertake research, insight or analytics exercise</i>	A commissioning client states an information need or gap	√	X
<i>To collect the personal data in the first place and the legal basis for doing so;</i>	Research suppliers determine whether tad hoc primary research should be undertaken to meet the information need/fill the gap. Research suppliers will provide specific research objective, recommend a methodology, sample sizes and structure, outputs to be expected, timeframes and budgets. A commissioning client accepts or declines a research proposal, some items may be negotiated e.g. reduce the sample size to reduce costs.	X	√
<i>Which items of personal data to collect, i.e. the content of the data;</i>	A research supplier will determine what type of data will be needed both in terms of personal data and	X	√

Based on an example of a commissioning client providing a non-detailed brief to a market research agency	Client decides?	Research Supplier decides?	
	<p>primary data (e.g. opinions on products) to meet the objectives. Research services sub-contractors may be appointed to contact potential participants such as or to conduct the fieldwork.</p> <p>It is standard practice not to share participant's personal data with commissioning clients.</p> <p>Exceptions may be made if consent is given by participants for commissioning client companies to listen to or view recordings of fieldwork for the sole purpose of better understanding the research.</p>		
<i>The purpose or purposes the data are to be used for;</i>	A commissioning client will determine the purpose – i.e. to address a specific business question but research suppliers may also have a role to play here too in developing the specific objectives.	√	√
<i>Which individuals to collect data about;</i>	A research supplier will determine which individuals will be targeted as part of a sample frame.	X	√
<i>Whether to disclose the data, and if so, who to;</i>	A commissioning client may request access to non-anonymised fieldwork but research suppliers must agree to this and set it up - this requirement will be incorporated by research suppliers into any resulting research and data collection design.	√	√
<i>Whether subject access and other individuals' rights apply i.e. the application of exemptions; and</i>	A research supplier will specify which data subjects' rights will apply and how these will be met.	X	√
<i>How long to retain the data</i>	<p>This will be determined by the data retention policies of commissioning clients and research suppliers (and the periods may be different).</p> <p>The important point to note is that the data shared with commissioning clients from a research project will usually be an aggregated data set of</p>	√	√

Based on an example of a commissioning client providing a non-detailed brief to a market research agency		Client decides?	Research Supplier decides?
	participant responses i.e. contain no personal data. Research suppliers will have identifiable data sets – and such data will not be shared with clients nor will it be used for any other purpose by research suppliers.		
<i>Whether to make non-routine amendments to the data.</i>	This will be determined by research suppliers.	X	√

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APPENDIX

A. Legal obligation to name clients

In line with the GDPR the obligation to name clients may arise in 3 main scenarios:-

- client is data controller or joint data controller relying on the consent/data controller collecting personal data; ⁶
- client is the source of the personal data;⁷
- client is receiving personal data from the research activity.⁸

Named as Data Controller

- Data controller(s) relying on the consent must be named at the time the personal data is obtained.⁹ EU regulator guidance makes it clear that consent must always be obtained before the controller starts processing personal data for which consent is needed (Recital 42)
- data controllers collecting personal data must provide details of data controller (Article 13(1)(a))

Named as Source of Data

- Personal data not obtained from data subject then under Article 14 information requirements source must be disclosed.

Named as Recipient of Data

- Recipients or categories of recipients of data must be named under Article 14, if relying on consent then need to name but if relying on LI can be named as part of category.

B. Summary of MRS Guidance on naming controllers

MRS is aware that a requirement to name the end-client upfront at the start of a research exercise such as a survey may have significant consequences in certain research projects such as:

- spontaneous awareness research (assessing whether participants can quote/recall a brand name without prompting)
- reducing methodological rigour including biasing responses where the client's identity is known up front or adversely impacting on trend data where attitudes on behaviour etc are measured over time, as the results will not be comparable.

MRS interprets the requirements in the GDPR on naming the data controller as providing some leeway on the point in time that the controller must be named. It is important that the data controller is named as part of the single process of collecting personal data but this may be more appropriately done at the end rather than at the beginning of a survey. This may be appropriate in those circumstances where researchers, in their

⁶ GDPR Article 13 (1)(a)//Article 13 (1)(e)

⁷ GDPR Article 14(2);

⁸ GDPR Article – consider if relying on consent Recital 42

⁹ Recital 42. Also arguable that if no personal information which can identify an individual is passed to client, then client is not relying on consent for the processing, but its legitimate interest.

documented professional judgement, consider that it will adversely impact the rigour and robustness of the research to name clients at the start of a survey the data controller client must be named at an alternative appropriate point in a data collection exercise subject to the following:-

- it must be made clear to data subjects that the data controller will be named at the end of the data collection exercise
- assurances must be provided to data subjects that any personal data collected will be deleted if at the point that the data controller is revealed they object, wish to withdraw their consent and/or no longer wish to participate.

This approach is most appropriate when no personal data is being shared with the end client but researchers may also consider using it in other circumstances.