



Brexit and research: **Appointment of EU representative**

This Note is part of a series of Brexit notes for research practitioners on the implications of the EU withdrawal from the EU on 29 March 2019. It sets out the issues that researchers need to consider in deciding whether to appoint an EU representative for data protection purposes.

MRS is providing this data protection guidance as general information for research practitioners. It is not legal advice and should not be relied upon as such. Specific legal advice should be taken in relation to any specific legal problems or matters.

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Overview

The UK will formally leave the European Union on 29 March 2019. At the time of the publication of this note, the terms of the future relationship had not yet been agreed. If there is no deal the UK will become a third country for the EU General Data Protection Regulation (GDPR) purposes on 29th March 2019. In that case the extra territorial jurisdiction of the GDPR will apply to UK organisations. This means that you still need to comply with the GDPR for data processing that affects even if you are not established in the EU but offer goods or services to or monitor the behaviour of individuals in the individuals in the European Economic Area (EEA) EU.

One of the requirements under the extra territorial jurisdiction of the GDPR is that organisations outside the EEA must, in certain specified circumstances, appoint a representative in an EU Member State. The EU representative acts as a liaison with EU data subjects and maintains records of processing which must be made available to the data protection authority (DPA).

Failure to appoint an EU representative, where required, makes the organisation required to appoint liable to a GDPR fine of up to 2% of worldwide turnover or 10 million euros. The representative will be subject to enforcement actions by a DPA in the event of non-compliance of its own obligations under the GDPR.



Appointment of an EU representative

Do you need to appoint an EU representative?

Yes	No
We monitor the behaviour of individuals in the EEA.	<input checked="" type="checkbox"/> We only do occasional processing in the EEA.
We offer goods and services to individuals in the EEA.	<input checked="" type="checkbox"/> We only carry out low risk data processing.
We do not have an office, branch or establishment in the EEA.	<input checked="" type="checkbox"/> We do not process special category (i.e. personal data relating to racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health, sex life or sexual orientation, etc) or criminal convictions data on a large scale.
	<input checked="" type="checkbox"/> We are a public authority.

A key criteria is whether you are monitoring the behaviour of individuals in the EEA. Draft guidance published by the European Data Protection Board (EDPB) makes it clear that monitoring of individuals covers a broad range of activity including market surveys and other behavioural studies based on individual profiles.¹

¹ EDPB Guidelines 3/2018 on the territorial scope of the GDPR. Adopted on 16 November 2018. Available here: https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_3_2018_territorial_scope_en.pdf



Who can be appointed?

The representative can be an individual, company or organisation established in the EEA. They must be capable of communicating with data subjects and co-operating with data protection authorities. A key criteria for the establishment of the representative is the location of data subjects whose personal data are being processed. It is appropriate to appoint the EU representative in the Member State where the majority of your data subjects are located. They will still need to be easily accessible to data subjects and the data protection authorities in other Member States.

A processor cannot also serve as a representative for a controller so if you are the controller for a research project and you have appointed a processor in an EU Member State to carry out research services on your behalf then they cannot act as your EU representative.

The role of the representative is also different to that of a data protection officer who takes a more active and independent role in advising and ensuring data protection compliance. In light of this an external data protection officer should not also be appointed as your EU representative.

What is the process for appointment?

The representative will need to be authorised to act on your behalf. The appointment must be made in writing but this can be done by a simple contract between the parties. The appointment should also be highlighted in your privacy notice or in any information provided to research participants at the start of the research project.



Checklist

Decide whether and who to appoint:

- Decide based on the type of your data processing if you need to appoint an EU representative.
- Document your internal analysis and review, especially if you decide not to appoint one, showing that you have taken all relevant factors taken into account.
- Consider and ensure there are no conflicts of interests with the nominated representative.

Pre appointment:

- Ensure that your representative is based in the most appropriate EU Member State taking into account the country that the majority of data subjects whose data you are processing are located.
- Analyse the competency of the representative to liaise with data subjects and data protection authorities on your behalf, taking into account ability to communicate in the appropriate language.
- Draft an appropriate written contract with clear terms of reference.

Post appointment:

- Publish the contact details of the EU representative in your privacy notices so that data subjects can easily access them.
- Publish details of the EU representative on website so that they are also easily accessible to the data protection authority.