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RE: Call for Feedback regarding Guidelines 07/2020 on the concepts of controller and processor in the GDPR

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We would like to submit for EDPB's consideration a case study of IAB Europe Transparency and Consent Framework (TCF) v2.0, and in particular, the concrete application of GDPR **concepts of controller and processor in the IAB Europe Transparency and Consent Framework.**

IAB Europe TCF v2.0 is a framework that defines multiple constraints in the definition of purposes and legal basis for data processing on websites and mobile applications. In the context of websites, the framework introduces the ecosystem presented in Fig. 1.

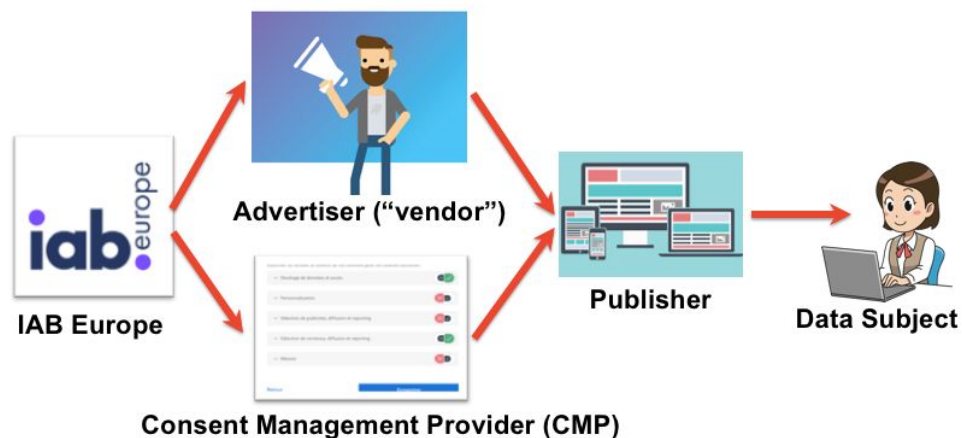


Figure 1. Actors under IAB Europe TCF ecosystem: IAB Europe, Advertisers (called "vendors"), Consent Management Providers (CMPs), Publishers, Data Subjects

All these actors define various constraints and dependencies for other actors of the system.

In the following, we analyse each actor and raise an important question for all websites and mobile apps publishers: what is the role of each actor? Which actors are controllers, processors and joint controllers?

We encourage the EDPB to shed light on the complex, yet very common case study of IAB Europe TCF v2.0 ecosystem, that is present on thousands of popular websites and mobile apps and used by millions of data subjects across the EU.

Following the description of the ecosystem in Fig. 1, we analyse each actor and its possible role in the ecosystem¹.

IAB Europe

Description: IAB Europe TCF v2.0 is the only actor that defines² purposes for data processing. It also provides “Allowable Lawful Basis” for each purpose, and the possible options given are “Consent”, “Legitimate Interests” or “Consent, Legitimate Interests” (see, for example, Purpose 3 “Create a personalised ads profile” where both Consent and Legitimate interest are a possible legal basis)³. Additionally, IAB Europe defines features and special features⁴ that determine the means of processing, such as Feature 1 “Match and combine offline data sources” or Special Feature 1 “Use precise geolocation data”.

IAB Europe actively participates in the determination of purposes of a processing operation by defining a pre-defined restricted list of possible purposes and features to be used in the ecosystem.⁵ Within this digital consent chain, advertisers choose purposes and legal basis, and CMPs depend on the restricted list of purposes established by the IAB Europe. Additionally, advertisers and CMPs depend on the list of features that define means of a processing operation.

Legal analysis: Within the described ecosystem, **IAB Europe seems to match the definition of a controller** because it defines purposes and means of a processing operation.

- I. Determination of purposes: IAB Europe defined 12 purposes and special purposes and 5 features and special features in v2.0 (while there were only 5 purposes and 3 features in IAB Europe TCF v1.1);
- II. Determination of means: IAB Europe determines the means of the processing through the availability of its centralized open-source TCF framework and its key-components

¹ Célestin Matte, Nataliia Bielova and Cristiana Santos. “Do Cookie Banners Respect my Choice? : Measuring Legal Compliance of Banners from IAB Europe’s Transparency and Consent Framework.” 2020 IEEE Symposium on Security and Privacy (SP) (2020): 791-809.

² IAB Europe Transparency and Consent Framework Policies
<https://iab europe.eu/iab-europe-transparency-consent-framework-policies/>

³ IAB Europe TCF v2.0, Purpose 3 “Create a personalised ads profile”,
https://iab europe.eu/iab-europe-transparency-consent-framework-policies/#Purpose_3__Create_a_personalised_ads_profile

⁴ IAB Europe TCF v2.0, Features,
https://iab europe.eu/iab-europe-transparency-consent-framework-policies/#C_Features

⁵ Célestin Matte, Cristiana Santos, Nataliia Bielova. Purposes in IAB Europe’s TCF: which legal basis and how are they used by advertisers?. APF 2020 - Annual Privacy Forum, Oct 2020, Lisbon, Portugal. pp.1-24.

(consent string, Global vendor list, CMPs API, etc.) to collect and store data subject's consent (as per point 65, under Chapter 3.2.2.2, page 20 of the proposed guidelines).

Though IAB Europe processes data subject's consent, it does not necessarily access other types of personal data. Point 54 (under Chapter 3.2.2, page 18 of the proposed guidelines) states that not having access to personal data is not sufficient to exclude joint controllership. Additionally to purposes, IAB Europe v2.0 defines "features" and "special features" that are involved in the determination of means (see Feature 1 "Match and combine data from offline sources", Feature 2 "Link different devices", Special Feature 1 "Use precise geolocation data", or Special Feature 2 "Actively scan device characteristics for identification")⁶.

Since the definition of "controller" involves "determination of purposes and means", we therefore raise the question of whether IAB Europe would be recognised as a controller. **We hence request EDPB to provide more specific guidelines defining the role of IAB Europe in the described ecosystem.**

Advertisers

Description: Whenever each advertiser registers in the IAB Europe TCF v2.0 system, he is asked to choose among the list of possible pre-defined purposes and possible legal basis options proposed by IAB Europe. Fig. 2 demonstrates the registration page where, among others, an advertiser can choose a Purpose 3 "Create a personalised ads profile" and choose therefrom whether to use consent, legitimate interest, or both as a possible legal basis (thus defining a purpose as "flexible").

Advertisers choose purposes of processing, features, and define legal basis for each purpose at the moment of registration at IAB Europe. Advertisers can also choose "flexible" purposes, i.e. leaving the choice of the legal basis to Publishers, who embed TCF banners in their websites or mobile apps. In this case, publishers are able, under "flexible purposes", to decide upon legal basis. Accordingly, Advertisers define purposes and means of processing, possibly jointly with IAB Europe (as analysed above), Publishers, or separately.

⁶ See footnote 4.

Figure 2. A registration process for an advertiser (“vendor”) under IAB Europe TCF v2.0, screenshot made on 19 October 2020 at <https://register.consensu.org/>

Legal analysis: As Advertisers choose purposes and legal basis, they still exert determinative influence on the purpose and means of processing. **Advertisers seem to match the “joint controller” relationship**, since Publishers and Advertisers jointly determine the purposes and means of processing from a pre-defined list of purposes proposed by IAB Europe. However, **more clear guidance needs to be established by the EDPB on the role of advertisers.**

Consent Management Providers (CMPs)

Description: When a CMP registers in the IAB Europe TCF v2.0, this actor implements purposes, features and adheres to the proposed legal basis by the IAB Europe TCF v2.0 to collect and store data subject’s consent. The CMPs have an additional task: to define possible interfaces of the consent banner that may impact the data subject’s choice. CMPs provide technical implementation of consent banners through which the data subject makes her choices regarding the processing of her data and her consent is stored on the terminal equipment. CMPs provide documentation and propose website publishers to customize banners before installation⁷.

Legal analysis: Chapter 2.1.4 (points 37-39, page 13) of the proposed guidelines refer that the controller’s instructions may still leave a certain degree of discretion about how to best serve the controller’s interests, allowing the processor to choose the most suitable technical

⁷ For instance, OneTrust, on its webpage presenting its CMP solution,⁷ and proposes “*built-in templates to customize (...) banners and notices to match your brand and voice*” <https://www.onetrust.com/solutions/consent-management-platform/>

and organisational “non-essential” means. However leaving such discretion availed to processors makes it difficult to apply to a particular system in question.

We provide our analysis based on the **general assumption that the publisher is defined as a controller and a CMP is a processor**. A CMP proposes several design configurations to publishers. The limited choice and design of configurations has been proven to strongly impact the end-user decision-making towards acceptance through the use of manipulative design choices (also known as “dark patterns”).⁸ In this respect, the freedom to configure the banners which are faced by users deliberately goes beyond the publisher’s instructions, and this amounts to a decision determining the purposes and means of processing, in breach of GDPR Article 28(10). Therefore, a CMP should not be recognised as a processor.

Such threshold of discretion should abide to point 113 and 115 of the proposed guidelines, wherein controllers must provide its processors (in this case, CMPs) a set of documented instructions related to each processing activity, in concrete, regarding to design configuration for these new interface actors. Such instructions can include, for example, permissible and unacceptable handling of personal data, more detailed procedures pertaining to the design configuration and use of visual grammar. **We therefore ask the EDPB to define a threshold on the degrees of discretion, and give guidelines on its application to the CMPs that are often recognised as processors.**

Publishers

Description: Publishers choose a CMP to be included in their website or a mobile app. Publishers also have a certain degree of control on the advertisers included in their website or mobile app.

Legal Analysis:

- I. Publishers in relation to CMPs: publishers have a limited choice among existing CMPs. Within the CMP, a publisher has a limited number of design options to customize the CMP. However, when the publisher customizes the proposed banner and modifies the original behaviour offered by the CMP, then both **Publishers and CMPs seem to qualify as joint-controllers**, as they determine the purposes and the means of processing.
- II. Publishers in relation to Advertisers: publishers have a limited control due to dynamic content inclusion. The dynamic content inclusion can occur due to nested content

⁸ Utz, Christine, Martin Degeling, Sascha Fahl, Florian Schaub and Thorsten Holz. “(Un)informed Consent: Studying GDPR Consent Notices in the Field.” *Proceedings of the 2019 ACM SIGSAC Conference on Computer and Communications Security* (2019):

inclusion or redirection (for example, an advertiser A includes content of advertiser B, that the publisher cannot control). One typical (yet not the only one) example of the dynamic content inclusion appears in a Real-Time Bidding (RTB) system.

Advertisers can declare some purposes as “flexible” (v2.0), and in this case, Publishers can impose “restrictions” and require a certain legal basis for such purposes.⁹ As such, **both Advertisers and Publishers seem to assume the role of joint-controllers.**

Though publishers are often claimed controllers, our analysis shows that they have a limited choice over CMPs in their settings and a limited control over the advertisers included in their websites of mobile apps. We therefore request the EDPB to **make more specific guidelines on the role of publishers.**

⁹ IAB Europe Transparency & Consent Framework Policies, point 4 of chapter 23 “Managing Purposes and Legal Bases”

https://iab europe.eu/iab-europe-transparency-consent-framework-policies/#23_Managing_Purposes_and_Legal_Bases