



Bar Council response to GDPR Guidance on Contracts and Liabilities between Controllers and Processors

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the ICO's consultation entitled "GDPR guidance on contracts and liabilities between controllers and processors"¹.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Q1: Do you find the draft guidance clear and easy to understand?

4. Yes.

Q2: Does the guidance contain the level of detail that you need?

5. The answer is generally yes, subject to a concern as to the absence of draft standard contractual clauses.

6. At a number of points in the draft guidance (pages 3, 5 and 19), it is noted that "*The GDPR allows for standard contractual clauses from the EU Commission or a supervisory authority (such as the ICO) to be used in contracts between controllers and*

¹ Available here: <https://ico.org.uk/about-the-ico/consultations/consultation-on-gdpr-guidance-on-contracts-and-liabilities-between-controllers-and-processors/>

processors". The draft guidance then goes on to state that "*none have been drafted so far*" (p.5) and thus "*no standard clauses are currently available*" (p.19).

7. Given that the GDPR specifically allows for authorities such as the ICO to provide suitable standard clauses, it is unfortunate that no such clauses are included within the draft guidance. The main purpose of the guidance is for the ICO to assist data controllers and processors to prepare for GDPR compliance, and therefore the guidance ought to include appropriate standard contractual clauses to enable data controllers and processors to ensure that suitable clauses are incorporated into their contracts in advance of the commencement date. At the very least a date for the provision of such clauses should be indicated.

8. We would observe that the process of agreeing contracts between data controllers and processors will necessarily involve a significant degree of pre-planning, with contract terms needing to be agreed substantially in advance of the commencement date. The later the ICO leaves it before publishing suitable standard clauses, the more likely it is that contracts will be drafted and agreed in the interim without the benefit of such guidance. This will not only have a cost implication for controllers/processors who will need to obtain professional advice in relation to the drafting of such clauses, but it also leaves them exposed to the risk of agreeing terms falling short of best practice.

9. Even if no standard clause has yet been drafted by the Commission, we would strongly urge the ICO to draft terms that the ICO considers to meet the necessary objectives and requirements, and for such clauses to be included within the guidance as soon as is possible.

Q3: Does the guidance cover the issues about contracts between controllers and processors under the GDPR that you need to know?

10. Yes, save for the absence of draft standard contractual clauses (see above).

Q4: The GDPR specifies what must be included in a contract between a controller and a processor. Is there anything about this that we need to explain more clearly in the guidance?

11. No, save for the provision of draft standard contractual clauses (see above).

Q5: Processors have new liabilities and responsibilities under the GDPR. Is there anything about this that we need to explain more clearly in the guidance?

12. No.

Q6: Please provide any further comments or suggestions on our draft guidance.

13. We note that in the final paragraph of page 4 of the draft guidance, the statement that “you should already have a written contract” is technically incorrect. It is sufficient to have a contract evidenced in writing (rather than being made in writing) [see schedule 1, Part 2, s.12(a)(i) of the Data Protection Act 1998].

Bar Council
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For further information please contact:
Melanie Mylvaganam, Policy Analyst: Legal Affairs, Practice and Ethics
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7092 6804
Email: MMylvaganam@BarCouncil.org.uk

² Prepared for the Bar Council by the IT Panel