

The World Employment Confederation Europe is the European body representing private employment services, including agency work, direct recruitment and career management.

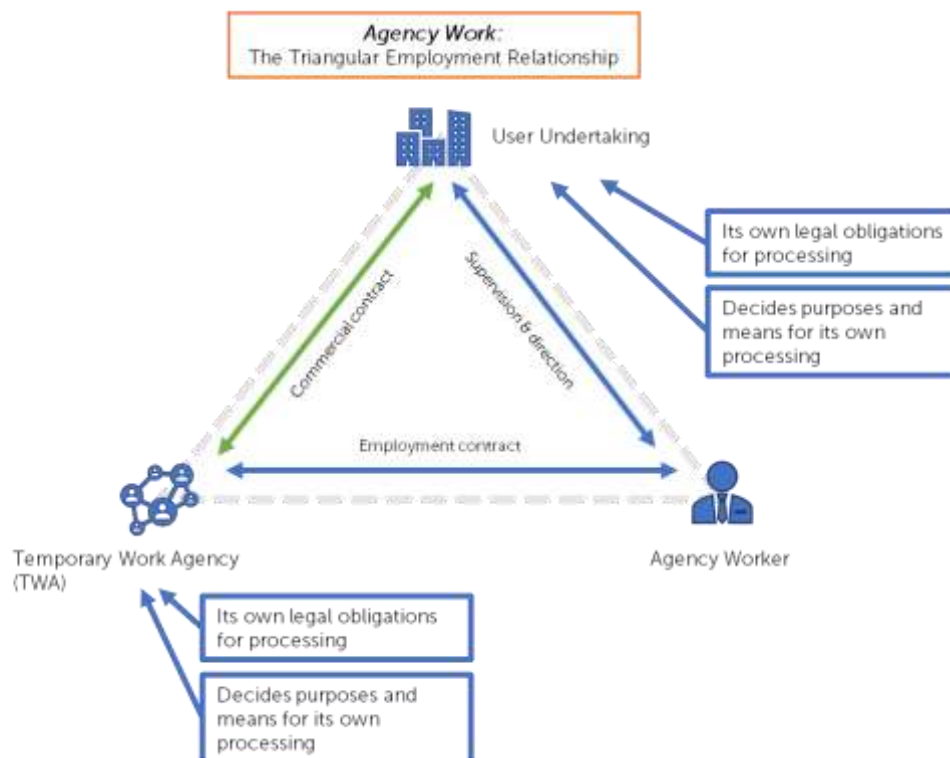
WEC-Europe welcomes the update of these guidelines and highlights the importance of shaping clarity and transparency on this topic. To this end, WEC-Europe in 2018 published its own guidelines for the sector on the concept of controller and processor to support its members with advice that tailors to the specifics of our members' industry, services and day-to-day work. A copy of this document can be found [via this link](#).

We are glad to see that the draft EDPB Guidelines 07/2020 do not contradict the analysis and guidance we provide in our sectoral guidance document. As such, we believe the guidance should not be altered on fundamental points.

We do believe there is room for further clarity and improvement on the following elements:

1. Temporary Agency Work: the Triangular Employment Relationship

- 1.1. Article 3 of Directive 2004/108/EC on temporary agency work describes a temporary work agency as "[...]any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction; [...]"



- 1.2. WEC-Europe members notice that this recognition of the employment relationship between the agency and the agency worker, is often not adequately or correctly understood in the context of the processing of personal data. This leads to a deterioration of protection of personal data as well as labour market rights and obligations as GDPR roles are sometimes inappropriately allocated between the Temporary Work Agency (TWA) and the user-undertaking. This is to the detriment of agency-workers' personal data as it incorrectly assumes responsibility and accountability to parties that do not determine the purpose and means, and have no operational control, involvement or access to personal data that is legally processed in this employment

relationship. It is for that we reason we strongly recommend these guidelines include a specific example on agency work to support workers and business on the ground.

- 1.3. Indeed, as the draft guidelines already extensively cover, a complex of obligations for processing personal data rests upon employers. These are put in place for good reasons: **the protection of workers' rights**, efficient labour market administration, labour market transparency, compliance and a level playing field, and the collection of taxes and social protection contributions amongst many others. These obligations are indiscriminately in place for temporary work agencies as well.
- 1.4. Moreover, TWAs determine to process personal data not just for the purpose of one agency work assignment to a specific user-undertaking alone. Jobseekers expressly reach out to TWAs for gaining work experience and income from several different jobs; successive or overlapping (for instance, students often work at several different hospitality clients in one week. In the same way, IT specialist are often assigned to several companies over the course of their engagement with an employment agency). In fact, not seldomly legal obligations exist to track these successive consecutive assignments to determine (a built up of) **workers' and social protection rights**. Indeed, it is the TWAs ambition to secure as much work at through temporary assignments at one or various user-undertakings as possible.
- 1.5. Thus, a structural and deep relationship exists between the agency and the agency worker beyond one single job interview, assignment and/or user company alone. As such, it is in the driving seat to unilaterally determine the purposes and means of processing.
- 1.6. Although there could be situation a TWA and a user-company process the same information (for instance on performance, training, working hours or migration status) they do not jointly determine the purposes and means of this processing. First, authorities often require - not necessarily overlapping - obligations for both of them to keep certain pieces of personal data. Secondly should both the TWA and the user-undertaking track performance and/or other HR related data this is done separately from each other for their respective purposes: the user-company will track performance to determine the continuation of an assignment or potentially to directly recruit an assigned agency worker, while the TWA will process this to enhance the profile of the worker for future assignments and other jobseeking and career support. As such, as a rule of thumb and irrespective of there being a mutual benefit to the partnership, the TWA and its client do not jointly determine the purposes and means of the processing.
- 1.7. As such, to the extent a user-undertaking receives personal data from a TWA, it needs to be seen as third party recipient of the data that must be considered a controller for the processing that it carries out for its own purpose(s) after it receives the personal data.
- 1.8. From this it strikes odd that confusion exists on the recognition of the agency as sole controller. Some private and public organisations deem the agency to be a processor on behalf of the user-company. This is an inherent flawed reasoning, contrary to these draft Guidelines as well as Guidance from the Article 29 Working Party they seek to update. These updated Guidelines on the various GDPR roles are an opportunity to create clarity on this by explicitly addressing the agency work employment relationship.
- 1.9. In the space of the labour market, The Draft Guidelines already address **recruitment ('headhunters')** and payroll services. Agency work services are distinctly different from both a legal and market perspective. Providing further clarity on this would improve the Guidelines.
- 1.10. Not doing so would persist this unclarity to the detriment of the protection of personal data, and data subjects' rights as well as labour market protection, oversight and policymaking. It creates the situation that authorities and data subjects will not be able to recover information from the agency and will need to address a party that holds no legal ground for keeping all the relevant (sometimes sensitive) information on the agency workers who temporarily work under their supervision. Workers, businesses as well as labour market and data protection authorities need transparency on the allocation of roles and responsibilities in the triangular employment relationship.

As such we propose to include the following example in the Final version of the Guidelines. In light of the description in the Guidelines this should be added to section 3.2.3. 'situations where there is no joint controllership': .

Example: Temporary Agency Work

Sharon is a gardener. She is employed by Temporary Work Agency X and is on an assignment at Client Y. Client Y is responsible for the operational supervision and direction of Sharon. As employer, Temporary Work Agency X is legally obliged to process data of Sharon and all the other agency workers it employs for example for payroll purpose. At the same time also Client Y has legal obligations to process personal data on Sharon for example on whether she is allowed to work in the country and the amount of hours Sharon works to ultimately check the invoice from Temporary Work Agency X. Both Temporary Work Agency X and Client Y have respective responsibilities with regards to their compliance of legal requirements. They each have to implement measures to meet these requirements. As such, Temporary Work Agency X is not the processor of Client Y with regards to these purposes, or the other way around.

During the assignment, Client Y provides an occupational health & safety course for all its gardeners to improve the safety of their work. To track participation, Client Y registers all gardeners who have taken the course. Sharon completes the course and Client Y registers her completion in the overview. In this Client Y acts as a sole controller of this data processing. Temporary Work Agency X is not involved in the determination of the purpose or means.

During the assignment Sharon is directed by Client Y to register customers' gardening requests and preferences into a database for Client Y to improve its service delivery. In doing so Sharon has access to personal data of the customers of Client Y. Even though Sharon is employed by Temporary Work Agency X, she works under the supervision and direction of Client Y. Hence, **she's under** the direct authority of the controller and is authorised to process personal data. Client Y remains controller and Temporary Work Agency X does not become controller or processor of this data, nor does Sharon.

- 1.11 in this context we would also advise to add the wording "or **alternatively**" could be added to pt. 70 after 'successively' for further clarification that various actors do not just process data successively:

"[...] where various actors successively (ADD **or alternatively**) process the same personal data in a chain of operations, each of these actors [...]"

2. Persons authorised to process data

- 2.1. WEC-Europe aligns with the analysis under pt. 86 that 'interim staff provided via a temporary employment agency' indeed are under the direct authority of the controller (i.e. user -undertaking under which supervision and direction the agency worker works). This indeed would align with the wording of Directive 2004/108/EC on temporary agency work.

- 2.2. For the sake of clarity, we would suggest specifying the wording to explicitly include the agency worker:

Pt/ 86 "[...]as they are authorized to process personal data. An employee, {ADD: an **agency worker**}, etc. who obtains [...]"

- 2.3. It is in this context we also welcome the guidance in pt. 76. Also here we believe the addition of 'or agency worker' would further clarify to clearly differentiate the triangular employment relation from the bilateral employment relation:

Pt. 76: "[...] the direct authority of the controller, such as temporarily employed staff {ADD: **and/or agency workers**}, are not to be seen as processors[...]"

3. Technical cooperation

We understand we bring forward a specific and technical dimension where labour market regulation and the protection of personal data intersect. WEC-Europe is more than happy to facilitate a further discussion to flesh out the specific legal and operational technicalities related to the protection of personal data in the context of temporary agency work, or other elements of this input.

Should you wish further information, please contact Jochem de Boer at the WEC-Europe Head Office via jochem.deboer@wecglobal.org.