# The GDPR and Clinical Trials – Are Study Sites Controllers or Processors?

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## Abstract

Clinical trials inevitably involve sensitive health data, obtained from different sources and processed by a variety of parties with dedicated roles. The application of data protection laws, such as the General Data Protection Regulation (GDPR), in such a context raises thorny questions, for example, in relation to the responsibility of the different parties. This article discusses the designation of research sites (hospitals) as independent "controllers" or as "processors" of the sponsor. The author argues that a data controller designation is more appropriate in light of the research sites' and their investigators' own legal and professional obligations.

## Zusammenfassung

**Die DSGVO und Klinische Studien – Sind Forschungsstandorte Verantwortliche oder Auftragsverarbeiter?**

Klinische Studien beinhalten notwendigerweise sensible Gesundheitsdaten, die aus verschiedenen Quellen stammen und von einer Vielzahl von Parteien mit spezifischen Rollen verarbeitet werden. Die Einhaltung von Datenschutzgesetzen wie der Datenschutz-Grundverordnung (DSGVO) wirft in diesem Zusammenhang heikle Fragen auf, z. B. im Hinblick auf die Verantwortlichkeit der verschiedenen Parteien. In diesem Beitrag wird die Benennung von Forschungsstandorten (Krankenhäusern) als unabhängige Verantwortliche oder als Auftragsverarbeiter des Sponsors besprochen. Der Autor argumentiert, dass es im Hinblick auf die rechtlichen und beruflichen Verpflichtungen der Forschungseinrichtungen und ihrer Prüfärzte angemessener ist, diese als Verantwortliche zu benennen.

## Introduction

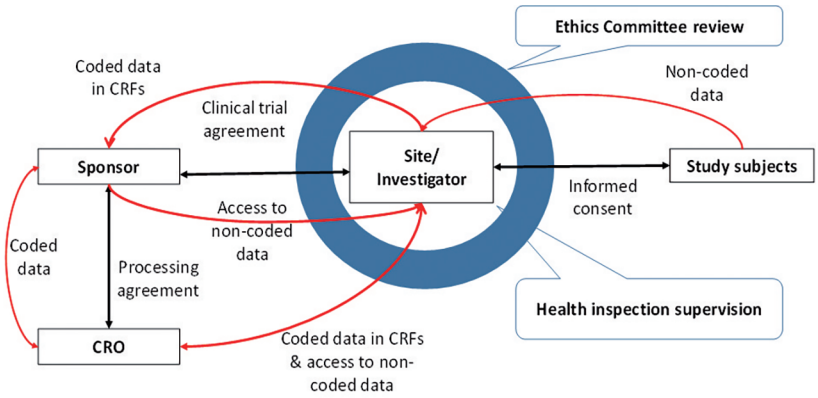
The application of EU data protection law in highly regulated sectors has always been challenging. While the EU's horizontal data protection regime undoubtedly has advantages, one of its disadvantages is that it is not always "in sync" with other legal frameworks. As a result, regulators are sometimes compelled to engage in novel and complex legal reasoning to reconcile conflicting regimes. Despite those efforts, a lack of legal certainty oftentimes remains, with increased costs and delays in the implementation of projects and the roll-out of new services.

Clearly the General Data Protection Regulation (GDPR) has increased this tension in the clinical trial space, resulting in less – rather than more – harmonization in the application of data protection rules. This contribution highlights one example, namely the status of clinical trial sites under the GDPR. But before doing so, we first consider the prevailing *modus vivendi* prior to the GDPR.

## Application of Data Protection Concepts Prior to the GDPR

As background, fig. 1 sets out the main parties in a clinical trial. In

**Figure 1**




***Parties and data flows in clinical trials (Source: Figure made by the author.).***

short, a sponsor of a trial (often a pharmaceutical company developing a new drug) enters into a clinical trial agreement with a study site (a hospital) where an investigator (a physician) performs the trial. (For ease of reference, we only refer to the investigator going forward.) The trial is described in a study protocol (developed by the sponsor in cooperation with the investigator) and approved by an ethics committee. The trial subjects sign an informed consent form to participate in the trial. In most cases, the sponsor hires a contract research organization (CRO) to help execute the trial.

In terms of data, the investigator collects data from the patient records and from the tests performed on trial subjects. The investigator records this data in (electronic) case report forms (CRFs) which identify the trial subjects by assigning each of them a unique code. The sponsor only receives the coded CRFs, while the investigator keeps the key that links the code to a named trial subject. However, the sponsor reserves the right to verify non-coded patient data, either by itself or through its CRO, to ensure that the trial is conducted in accordance with the protocol and that the relevant data are correctly recorded. This verification generally occurs at the study site and under the supervision of the investigator.

In terms of responsibility under data protection law, prior to the GDPR, the prevailing *modus vivendi* was as follows:

- study subject is a data subject;
- the sponsor is a controller;
- the investigator is a controller; and
- the CRO is a data processor of the sponsor.

For some obscure reason, the GDPR has upset this *modus vivendi*. It is as if a magic wand suddenly transformed investigators into data processors of the sponsor, rather than them being controllers. This is surprising because, first of all, neither clinical trial rules nor the obligations of investigators have changed, and secondly, the definitions of "controller" and "processor" have also not really changed under the GDPR. So there is no obvious trigger for this change in the status of the investigator.

## Role and Designation of the Investigator

As explained above, investigators are generally specialized physicians treating patients with a specific condition. The sponsor, developing an experimental drug to treat a condition, must test the new drug on patients in order to prove its efficacy and safety.

The regulatory framework in which such clinical trials operate is extensive. There is of course the Clinical Trials Directive (2001/20/EC, as amended), as well as its successor the Clinical Trials Regulation (536/2014) which is not yet applicable. In addition, there is an elaborate set of mandatory technical rules, the so-called Good Clinical Practices (GCP) adopted by the European Commission,[1)] together with their associated guidelines.[2)] These rules set out detailed obligations for sponsors and investigators when performing a clinical trial. They are made mandatory by virtue of Art. 1(4) of the Clinical Trials Directive.

As discussed above, under the prior regime the investigator was generally considered a data controller. Recently, however, this approach has been challenged, most outspokenly in two Member States.

In France, the CNIL adopted an amended version of its simplified authorization procedure for clinical trials, the so-called "*méthodologie de référence 001*" (MR-001).[3)] Companies can obtain this simplified authorization if they commit to comply with the conditions of the MR-001. Unlike previous versions of the methodology, the new version specifically designates investigators as processors of the sponsor, without any explanation for this change.

[1)] Commission Directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products, OJ L 91, 9.4.2005, p. 13–19.
[2)] See: Volume 10 of EudraLex and in particular: EMA, "Guideline for good clinical practices E6(R2) of 1 December 2016" (available at: https://www.ema.europa.eu/en/ich-e6-r2-good-clinical-practice).
[3)] CNIL, "Délibération n° 2018-153 du 3 mai 2018 portant homologation d'une méthodologie de référence relative aux traitements de données à caractère personnel mis en œuvre dans le cadre des recherches dans le domaine de la santé avec recueil du consentement de la personne concernée (MR-001) et abrogeant la délibération n° 2016-262 du 21 juillet 2016", JORF n° 0160, 13 July 2018.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In the UK, the Health Research Authority (HRA) claims that trial sites act as processors of trial sponsors for data collected specifically for the study (even if this "direct collection" by the sponsor is actually done through the investigator).[4] For data recorded in the patient file used for health care purposes, the investigator is the controller. According to the HRA, investigators thus change hats depending on what data they use. If they use the patient file for health care purposes, they are a controller; but if they use the CRFs for purposes of the clinical trial, they are a processor of the sponsor.

Aside from these two countries, this new approach now slowly proliferates to hospitals in other countries, in particular in Belgium (not based on guidance from national regulators, but probably influenced by the CNIL/HRA position). In other jurisdictions, such as Germany, Italy,[5] Spain[6] and the Netherlands[7] the old approach – designating the investigator as a controller – remains prevalent. In fact, German Supervisory Authorities have used clinical trials as an example of a joint-controller relationship between the sponsor and the investigator.[8] Furthermore, ethics committees in Germany consider the investigator to be a controller.[9]

## Arguments in Favor of Designating the Investigator as a Controller

So what should it be, controller or processor? Here, it is argued that a controller designation for the investigator would be the most appropriate. Before these arguments are elaborated on, it is important to first acknowledge that the investigator does have certain processor characteristics. For example, the study protocol and the clinical trial agreement are quite detailed and do not grant the investigator much leeway in terms of the categories of data that will be collected or how they will be collected. Often the sponsor will make available (and decide on) dedicated electronic tools to capture the CRFs. Furthermore, a trial is generally initiated by the sponsor, who needs to have its product tested. While the results of the trial are published for the benefit of the larger scientific community, they serve first and foremost to support the sponsor's efforts to have its product approved for the market.

Notwithstanding these observations, there are strong arguments in favor of designating the investigator as a controller. These arguments are legal, ethical and practical in nature.

### ■ Legal

The regulatory framework for clinical trials imposes obligations on the investigator with respect to clinical trial data that cannot be reconciled with a mere processor designation. The most relevant examples of these obligations are:

*Commission Directive 2005/28/EC*

- Art. 4(2): The investigator *and* sponsor must consider all relevant guidance with respect to commencing and conducting a clinical trial – this is a shared responsibility.
- Art. 8(1): The investigator brochure must enable the investigator to assess the appropriateness of the clinical trial – this indicates a degree of autonomy, not the investigator simply executing the orders of the sponsor.
- Art 10(b): Investigators have an independent obligation to report events that jeopardize the safety of trial subjects to competent authorities.

*GCP Guideline E6*

- Section 4.9.1: Investigators have an obligation to ensure the accuracy of any data reported to the sponsor.
- Section 4.9.3: Investigators have to endorse any modification made in the case report forms – they do not simply do as they are told. In reference to the HRA position, these are obligations of the investigator in relation to the sponsor's CRFs, not the patient file.
- Section 4.9.4: Investigators have an obligation to keep a copy of all clinical trial documentation and to keep it secure. The sponsor cannot order the investigator to send over all the data after the trial and delete remaining copies.
- Section 4.9.5: The GCP (not the sponsor) set out how long investigators must retain clinical trial records; the sponsor may ask an investigator to store the data for longer, if required.
- Section 4.9.7: Investigators must make the data available to competent authorities upon their re-

[4] See: *https://www.hra.nhs.uk/planning-and-improving-research/policies-standards-legislation/data-protection-and-information-governance/gdpr-guidance/what-law-says/data-controllers-and-personal-data-health-and-care-research-context/*

[5] The author is not aware of any specific recent guidance by regulators, but the template consent forms used by major Italian hospitals designate the site as a controller.

[6] Agencia Española de Medicamentos y Productos Sanitarios, "Anexo VIIIC – Instrucciones para la actualización del apartado Protección de datos personales en la hoja de información al sujeto (HIP/CI) en lo relativo al Reglamento (UE) nº 2016/679 General de Protección de Datos", 16 May 2018 (available at: *https://www.aemps.gob.es/investigacionClinica/medicamentos/docs/anexo8c-Ins-AEMPS-EC.pdf*).

[7] Centrale Commissie Mensgebonden Onderzoek, "Model Onderzoekscontract (Clinical Trial Agreement)", 18 December 2018 (available at: *https://www.ccmo.nl/onderzoekers/publicaties/formulieren/2018/12/18/k3-model-onderzoekscontract-clinical-trial-agreement*).

[8] Datenschutzkonferenz, "Kurzpapier Nr. 16 Gemeinsam für die Verarbeitung Verantwortliche, Art. 26 DSGVO" (available at: *https://www.datenschutzzentrum.de/uploads/dsgvo/kurzpapiere/DSK_KPNr_16_Gemeinsame-Verantwortliche.pdf*).

[9] Arbeitskreis medizinischer Ethik-Kommissionen in der Bundesrepublik Deutschland, "Wirksamwerden der DSGVO – Handreichung für Ethik-Kommissionen für die Beratung bzw. Bewertung von Studien", 25 June 2018 (available at: *https://www.ak-med-ethik-komm.de/docs/intern-2018/DSGVO_Empfehlungen.pdf*).

quest.[10] The sponsor has no say in this and cannot block the disclosure.

- Section 4.10: Investigators have independent reporting obligations to competent authorities about any aspect of the trial that could affect the risk to participants (see also Section 4.13).
- Section 4.11.1: Investigators have independent reporting obligations to competent authorities in relation to adverse events.
- Section 4.12.1: Investigators can independently terminate or suspend the clinical trial.
- Section 8.1: Significantly, *"[t]he sponsor should ensure that the investigator has control of and continuous access to the CRF data reported to the sponsor. The sponsor should not have exclusive control of those data. [...] The investigator/institution should have control of all essential documents and records generated by the investigator/institution before, during, and after the trial."*
- Section 8.3.13: Investigators keep the signed copies of the informed consent forms.
- Section 8.3.21: Investigators keep the list of names of study participants.

These are all obligations that are imposed on the investigator by law. The obligations apply not only to the personal data contained in the patient file, but also to the data in the CRFs that are shared with the sponsor. Certainly, the regulatory framework also imposes obligations on the sponsor with respect to this personal data – yet no one contests the fact that the sponsor is a controller. The point here is that the framework imposes too many obligations on the investigator for the investigator to be designated as a mere processor.

## ■ Ethical

From an ethical perspective, the designation of the investigator/physician as a mere processor of the sponsor/pharmaceutical company is questionable at best. Like most liberal professions, physicians have ethical duties that supersede any contractual obligations that may be in place, whether those obligations are imposed by a clinical trial agreement, a study protocol, or otherwise. A physician's ethical obligations vis-à-vis a patient are broad and also include protecting the confidentiality of patients' personal data. It is difficult to square these ethical obligations with a processor designation. In fact, the GCP rules discussed above support this by granting the investigator complete control over all clinical trial data. Apparently, this control is considered essential for physicians to meet their obligations towards patients.

In the same vein, investigators can often use the clinical trial data for their own research. The ethical consideration here is to prevent "publication bias" by ensuring that clinical trial results are published even if they do not support the sponsor's expected outcome. In Germany, for example, the investigator's *right* to use this data has its origin in the constitutional right to freedom of research and in copyright law. Restrictions to this right in a clinical trial agreement are considered invalid, subject to very limited exceptions.[11] Once again, such permissible further use of clinical trial data by the investigator does not seem compatible with a processor designation. While clinical trials may be initiated by the sponsor to perform scientific research on an experimental drug, the sponsor has no exclusive control over the resulting data. Investigators have control over the CRFs per GCP rules and can use the data for their own research and publications.

## ■ Practical

Aside from the legal and ethical considerations, there are also some practical reasons why a processor designation for the investigator is not constructive.

First, it adds no value for the study participants in terms of protecting their privacy rights. In fact, in some ways it could decrease their protection – especially in multicenter trials. Take the example of a trial sponsored by a German company relying on trial sites in the UK and the Netherlands. In the UK, according to the HRA, the investigator is a processor of the German company (at least for the CRFs), which limits the competence of the Information Commissioner's Office to properly supervise these processing operations. Presumably, the relevant German Supervisory Authority will be competent given that the bulk of obligations under GDPR still falls on the controller, not the processor. In the Netherlands, however, the investigators are controllers. They fall under the direct responsibility of the Dutch Supervisory Authority, including for the way in which they handle CRFs.

Second, it complicates matters extraordinarily. The dual controller-processor role of the investigator has important implications for the clinical trial agreement. The agreement will have to clearly define both roles and, for the processor role, impose GDPR Art. 28 obligations. In practice, agreements proposed by investigators, who claim to be processors, generally do not meet these requirements. Invariably, investigators want to preserve control and

[10] In this respect one can reference the Belgian SWIFT case. The fact that SWIFT decided alone to make data available to public authorities was one of the main arguments to qualify it as a (joint) controller instead of a processor. Belgian Privacy Commission, "Decision of 9 December 2008, Control and recommendation procedure initiated with respect to the company SWIFT scrl" (available at: *https://www.gegevensbeschermingsautoriteit.be/sites/privacycommission/files/documents/swift_decision_en_09_12_2008.pdf*).

[11] Pramann, O., "Publikationsklauseln in Forschungsverträgen und Forschungsprotokollen klinischer Studien", MedR Schriftenreihe Medizinrecht, Springer, 2007, pp. 107–109.


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impose obligations on sponsors that are not compatible with the investigator's alleged processor designation. Moreover, they seldom delineate in a clear way where the controller status stops and the processor status starts. In the end, these contracts become very complex. At best, they are a paper tiger without real impact in the field; at worst, they render the responsibility allocation incomplete and opaque, with the potential to dilute any true sense of responsibility.

Finally, the investigator's processor designation is disconnected from everyday practice. In a clinical trial, the investigator and the sponsor work closely together. This is a collaborative effort in which highly qualified professionals exchange ideas, analyze data together, and discuss and agree on next steps. In practice, the sponsor and investigator typically develop the protocol together and the investigator also has to sign off on it before it is submitted for approval to the ethics committee. Fortunately, this is not a one-directional relationship in which a physician simply executes the instructions of a company.

## Conclusion

For the many reasons set out above, the author does not believe that the investigator in a clinical trial can be processor of the sponsor. While the contractual and legal frameworks convey processor characteristics to an investigator, no magic wand should be sufficiently powerful to fully effectuate this transformation. At the very least, whatever the outcome, one would hope that the GDPR can bring about harmonization among Member States on this point, rather than obliterating the *modus vivendi* that worked for decades without significant problems.

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