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NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- Article 26

Delegations will find attached the Presidency's proposals regarding Article 26.

Article 26

Processor

1. (...)The controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures (...) in such a way that the processing will meet the requirements of this Regulation (...).

- 1a. The provision of sufficient guarantees referred to in paragraph 1 may be demonstrated by means of adherence of the processor to codes of conduct pursuant to Article 38 or a certification mechanism pursuant to Article 39.

2. The carrying out of processing by a processor shall be governed by a contract setting out the subject-matter and duration of the contract, the nature and purpose of the processing, the type of personal data and categories of data subjects or other legal act binding the processor to the controller and stipulating in particular that the processor shall:
 - (a) process the personal data only on instructions from the controller (...), unless required to do so by Union or Member State law to which the processor is subject and in such a case, the processor shall notify the controller unless the law prohibits such notification;
 - (b) (...)
 - (c) take all (...) measures required pursuant to Article 30;
 - (d) determine the conditions for enlisting another processor (...);
 - (e) as far as (...) possible, taking into account the nature of the processing, assist the controller in responding to requests for exercising the data subject's rights laid down in Chapter III;
 - (f) determine the extent to which the controller is to be assisted in ensuring compliance with the obligations pursuant to Articles 30 to 34;

- (g) return the personal data after the completion of the processing specified in the contract or other legal act, unless there is a requirement to store the data under Union or Member State law to which the processor is subject;
- (h) make available to the controller (...) all information necessary to demonstrate compliance with the obligations laid down in this Article.

2a. Without prejudice to an individual contract between the controller and the processor, the contract referred to in paragraph 2 may be based on standard contractual clauses referred to in paragraphs 2b and 2c or on standard contractual clauses which are part of a certification granted to the controller or processor pursuant to Articles 39 and 39a.

2b. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 2 and in accordance with the examination procedure referred to in Article 87(2).

2c. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 1 and in accordance with the consistency mechanism referred to in Article 57 and adopted by the Commission pursuant to the examination procedure referred to in Article 87(2).

3. The contract referred to in paragraph 2 shall be in writing or in an electronic or other non-legible form which is capable of being converted into a legible form.

4. (...)

5. (...)

New recital 63a:

To ensure compliance with the requirements of this Regulation in respect of the processing to be carried out by the processor on behalf of the controller, when entrusting a processor with processing activities, the controller should use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organisational measures will meet the requirements of this Regulation, including for the security of processing. Such sufficient guarantees may be demonstrated by means of adherence of the processor to a code of conduct or a certification mechanism. The carrying out of processing by a processor should be governed by a contract setting out the subject-matter and duration of the contract, the nature and purpose of the processing, the type of personal data and categories of data subjects or other legal act binding the processor to the controller, taking into account the specific tasks and responsibilities of the processor in the context of the processing to be carried out. The controller and processor may choose to use an individual contract or standard contractual clauses which are either adopted by the Commission or by a supervisory authority in accordance with the consistency mechanism and adopted by the Commission, or which are part of a certification granted in the certification mechanism.
