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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 revised proposals regarding Article 26.

- 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 **which** 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 or other legal act binding the processor to the controller, 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, taking into account the specific tasks and responsibilities of the processor in the context of the processing to be carried out and the risks for the rights and freedoms of the data subject. 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. **If a processor processes personal data other than as instructed by the controller, the processor should be considered as a controller in respect of that processing. After the completion of the processing on behalf of the controller, the processor should return or delete the personal data, unless there is a requirement to store the data under Union or Member State law to which the processor is subject; in that case the processor should implement appropriate measures to ensure the security and confidentiality of the personal data and should not actively process the personal data anymore.**

Article 26

Processor

1. (...) ¹ The controller shall use only processors providing sufficient guarantees² to implement appropriate technical and organisational measures (...) in such a way that the processing will meet the requirements of this Regulation (...) ³.
- 1a. The provision of sufficient guarantees referred to in paragraphs 1 and 2a may be demonstrated by means of adherence of the processor to a code of conduct pursuant to Article 38 or a certification mechanism pursuant to Article 39.
2. ⁴The carrying out of processing by a processor shall be governed by a contract **or other legal act**⁵ **binding the processor to the controller**, 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 (.....) 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 Union law or the law of the Member State to which the processor is subject prohibits such notification on important grounds of public interest⁶;

¹ DE proposed starting the sentence by stating that the controller shall be responsible for ensuring compliance with data protection rules. Some delegations thought it should be explicitly stated that the rights of the data subject and the right to compensation for damages must be asserted against the controller.

² DK and FR thought the 'sufficient guarantees' should be detailed.

³ The latter part of the article was deleted as it added nothing substantial: IE, NL and SE. DE thought it could be put in a separate sentence.

⁴ Some delegations (UK, IE) thought this requirement was too onerous for one-off transactions especially in the case of single traders/practitioners or SMEs who used services of a subcontractor.

⁵ FR wanted to know what was meant by an 'other legal act'. SE thought a recital should clarify it could cover Member State legislation. AT suggested that the details referred to for the contract should also apply to 'other legal act'.

⁶ Further to PT suggestion. Several delegations (ES, FR, PT) were concerned about the possibility for Member State law to restrict the possibility of prohibiting such notification.

- (b) (...)
- (c) take all (...) measures required pursuant to Article 30;
- (d) ¹determine the conditions for enlisting another processor (...), **such as a requirement of specific prior consent of the controller**²;
- (e) as far as (...) possible, taking into account the nature of the processing³, assist the controller in responding to requests for exercising the data subject's rights laid down in Chapter III;
- (f) determine how the controller is to be assisted in ensuring compliance with the obligations pursuant to Articles 30 to 34;
- (g) return **or delete**, at the choice of the controller, the personal data after the completion⁴ 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; **in that case the processor shall implement appropriate measures to ensure the security and confidentiality of the personal data;**
- (h) make available to the controller (...) all information⁵ necessary to demonstrate compliance with the obligations laid down in this Article.

2a. Where a processor enlists another processor for carrying out specific processing activities on behalf of the controller, the other processor shall provide sufficient guarantees to implement appropriate technical and organisational measures (...) in such a way that the processing will meet the requirements of this Regulation.

¹ UK thought this overlapped with other parts of the Regulation (Article 26,(2)(a) and 30). DE thought the requirement should have been limited to establishment of contractual relationships. AT and SK scrutiny reservation: SK thought there were many questions surrounding the relation with this 'secondary' processor.

² BE had suggested to draw inspiration from Article 11(1) of Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC.

³ FR thought this was unclear and should possibly be replaced by a reference to risk. IT thought different types of risk could be referred to here.

⁴ FR, ES and NL request that there should be an obligation to return the data.

⁵ DE referred to 'the principal's rights of supervision and the contractor's corresponding rights of tolerance and involvement', for instance rights of entry, certified auditor's obligations to report periodically.

- 2aa. Where a processor enlists another processor for carrying out specific processing activities on behalf of the controller, in a contract or other legal act the same obligations shall be imposed on that other processor as set out in the contract or other legal act between the controller and the processor as referred to in paragraph 2.**
- 2ab. Without prejudice to an individual contract between the controller and the processor, the contract or the other legal act referred to in paragraphs 2 and 2aa may be based, in whole or in parts¹, 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 39a².**
- 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)³.**
- 2c. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 2 and in accordance with the consistency mechanism referred to in Article 57.**
- 3. The contract or the other legal act referred to in paragraphs 2 and 2a 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. (...)⁴**

¹ ES suggestion.

² IE reservation.

³ PL was worried about a scenario in which the Commission would not act. CY and FR were opposed to conferring this role to COM (FR could possibly accept it for the EDPB).

⁴ COM reservation on deletion.