



# The impact of the GDPR on data controllers in relation to the outsourcing of data processing activities

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# Outsourcing of data processing activities

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- ❖ Outsourcing data processing activities
  - ❖ Relying on a third party to process personal data
  - ❖ Definition of “processing” is large
- ❖ Data processor
  - ❖ Entity that processes personal data on behalf of a data controller
  - ❖ No substantial change in the definition compared to Directive 1995/46/EC
  - ❖ Article 29 WP guidance is still relevant
- ❖ GDPR radically changes approach towards data processors
  - ❖ Directly applicable legal regime for data processors
  - ❖ Direct enforcement of GDPR is possible

# Basic approach for data controllers

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- ❖ Document and analyze existing and planned data processing activities
- ❖ Assess the existing agreements and policies within the organization
  - ❖ Record of processing activities
  - ❖ Standard agreements and disclaimers
  - ❖ *Ad hoc* agreements (data processing agreements)
- ❖ Adapt existing data processing activities if necessary or useful
  - ❖ Compliance and/or practical approach
  - ❖ Create and/or update the required documentation, agreements and policies

# Record of processing activities

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- ❖ Obligation to maintain a record of processing activities
  - ❖ Data controller
  - ❖ Data processor
- ❖ Why is this important for the data controller in this context?
  - ❖ Categories of recipients
  - ❖ International data transfers
  - ❖ Security measures
- ❖ Obligations of the data processor
  - ❖ Name and contact details of data processor and data controller
  - ❖ Categories of processing
  - ❖ International data transfers
  - ❖ General description of security measures

# Actions based on the record of processing activities

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- ❖ Review record of processing activities
  - ❖ Identify and assess the suitability of data processors
  - ❖ Review the contractual arrangements if they remain applicable after 25 May 2018
  - ❖ Adapt standard data processing agreements
  - ❖ Adapt the privacy notices/disclaimers to data subjects
  - ❖ Request a copy of the data processor's record of processing activities
- ❖ Identify and assess the security measures in place

# Obligations of the data controller

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- ❖ Choice of the data processor
  - ❖ Restriction applicable to data controllers
  - ❖ Use only data processors providing sufficient guarantees
    - Appropriate technical and organizational measures
    - Comply with GDPR and ensure the data subjects' rights
    - Broader scope than mere security
  - ❖ Practical assessment
    - Assessment during selection / contract negotiation phase
    - Certification
    - Codes of conduct
    - Document the choice of the data processor (accountability principle)
- ❖ Implement a data processing agreement

# Obligations of the data controller

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- ❖ Disclaimer = information obligation
- ❖ Increased transparency under the GDPR
  - ❖ Identity of the data controller and its DPO
  - ❖ Purposes and legal basis for processing
  - ❖ Legitimate interests, if applicable
  - ❖ (Categories) of recipients and personal data
  - ❖ International data transfers
  - ❖ Data retention periods
  - ❖ Data subject rights
  - ❖ Existence of the right to withdraw consent
  - ❖ Existence of right to file a complaint
  - ❖ ...

# Obligations of the data processor

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- ❖ Appoint a representative established in the EU if not established in the EU
- ❖ Implement and comply with an adequate contractual framework (data processing agreement)
  - ❖ Data controller
  - ❖ Sub-data processors
- ❖ Restrict the appointment of sub-data processors
- ❖ Keep a record of processing activities
- ❖ Cooperate with the supervisory authorities
- ❖ Implement adequate security
- ❖ Notify personal data breaches to the data controller



# Restrictions in relation to the appointment of sub-data processors

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- ❖ Limitations in relation to the appointment of sub-data processors
  - ❖ Prior consent of the data controller
    - Specific
    - General
      - In case of changes: information duty
      - Right to object for the data controller
        - Impact on standardized services?
- ❖ Forward contractual obligations
  - ❖ “Unbroken chain” of data processing agreements

# Data processing agreements

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- ❖ Contracts in relation to the processing of personal data
  - ❖ Essentially data protection agreements and/or clauses
  - ❖ Focus
    - GDPR requirements
    - Liability and indemnification
- ❖ GDPR impact on contractual liability between the contracting parties?
  - ❖ Common law: unlimited liability, but rather unusual in commercial contracts
  - ❖ Tendency towards unlimited or higher liability for data protection breaches
    - High administrative fines shall probably reinforce this tendency
  - ❖ Direct liability of the data processor towards data subjects is possible

# Data processing agreements

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- ❖ Shared obligation to implement a data processing agreement
  - ❖ Formal requirements
  - ❖ Substantive requirements
- ❖ Formal requirements
  - ❖ In writing, including in electronic form
  - ❖ Distinction is irrelevant under Belgian law
  - ❖ Article XII.15 Code of Economic Law (writing)
    - a sequence of intelligible marks that are accessible to a later consultation, irrespective of the support or the methods of transmission thereof

# Data processing agreements

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## ❖ Substantive requirements

### ❖ General description of major elements of the agreement

- Subject-matter and duration of the processing
- Nature and purpose of the processing
- Type of personal data and categories of data subjects
- Obligations and rights of the data controller

### ❖ Compliance may be difficult under specific circumstances

- Hosting of encrypted data
- Hosting of unstructured data
- Impact on liability exemption of information society service providers (article XII. 19 Code of Economic Law)?
  - Consideration 21 of the GDPR
  - Article 2, 4° of the GDPR

# Data processing agreements

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## ❖ Substantive requirements

### ❖ Explicit provisions

- Data processor may only process on documented instructions from the data controller, except legal requirements otherwise (subject to prior information of that legal requirement)
  - Information duty concerning unlawful instructions
- Obligation to ensure confidentiality with regards to persons authorized to process the personal data
- Implement appropriate measures to assist the data controller with data subject rights
- Assist the data controller with its own compliance obligations
- Implement security measures
- Exit assistance upon termination or expiry of the agreement
- Provide information demonstrating compliance, allow and contribute to audits
- Provisions regarding the appointment of sub-data processors



Compliance will be a shared obligation!