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CODES OF CONDUCT

The GDPR sets high standards of protection for Data Controllers and Data Processors who wish to be compliant with the new regulation. In order to reach such level of protection and simplify every company's path, the GDPR suggests and endorses the creation of codes of conduct by regulators, as well as by associations and representative bodies of Data Controllers and Data Processors. For the purpose of the GDPR, a "code of conduct" is a set of rules and/or guidelines (usually prepared by associations or organisations operating within the same industry or engaging in similar types of processing) which provide useful guidance on industry-standard approaches to privacy-related issues. Compliance with a code of conduct may constitute a relevant evidence of compliance with the GDPR.

Current situation

Directive 95/46/EC already encourages the drawing up of Codes of Conduct “*intended to contribute to the proper implementation of the national provisions adopted by the Member States*” (article 27 of the Directive). However, such Codes of Conduct have not played a major role under the Directive, in addition to being restricted to being applicable within a single Member State’s territory.

What’s new?

The provision of Codes of Conduct contained in the GDPR certainly takes its inspiration by the Directive but the Regulation goes even further, by identifying areas of processing with the most important principles to be compliant with for which Codes of Conduct may provide guidance to Data Controllers and Data Processors.

The areas of processing identified under Article 40(2) of the GDPR include:

1. fair and transparent processing;
2. the legitimate interests pursued by Data Controllers in specific contexts;
3. the collection of personal data;
4. the pseudonymisation of personal data;
5. the information provided to the public and to data subjects;
6. the exercise of the rights of data subjects;
7. information provided to and the protection of children and the manner in which the consent of the holders of parental responsibility over children is to be obtained;
8. general data protection obligations of Data Controllers, including privacy by design and measures to ensure security of processing;
9. notification of personal data breaches to supervisory authorities and communication of such personal data breaches to data subjects;
10. transfer of personal data to third countries or international organisations; and
11. out-of-court proceedings and other dispute resolution procedures for resolving disputes between Data Controllers and data subjects with regard to the processing, without prejudice to the rights of data subjects.

Once drafted, a code of conduct must be submitted to the relevant supervisory authority of the Member State where the processing activities take place for approval. Where processing activities take place across different Member States, the supervisory authority must submit the code of conduct to the European Data Protection Board (“EDPB”) for approval.

Should the draft code of conduct provide “*sufficient appropriate safeguards*”, the relevant supervisory authority or the EDPB (as the case may be) will approved the code of conduct and it may receive publicity by being added to public registers.

Data Controllers and Data Processors may adhere to codes of conduct that are consistent with its data processing activities. Data Controllers and Data Processors who are not subject to the Regulation may also adhere, in specific cases, to certain codes of conducts *“in order to provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations. Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards including with regard to the rights of data subjects”*.

However, the mere adherence to a code of conduct does not automatically prove an organisation is fully compliant with the GDPR. Article 32 clearly states that *“Adherence to an approved code of conduct (..) may be used as an element by which to demonstrate compliance with the requirements set out”* in the GDPR.

Another interesting innovation of the Regulation is the provision that independent bodies may be designated to monitor the compliance with a certain code of conduct. Obviously, such bodies must have the appropriate level of expertise in relation to the subject matter of the code, as well as being accredited by the competent supervisory authority.

Data Controllers and Data Processors who are found by the body monitoring compliance of a code of conduct to have infringed a relevant code of conduct may be suspended, or even excluded, from participation to such code and can be reported to the supervisory authority.

What to do to adapt?

To the extent Data Controllers and Data Processors are already adhering to codes of conduct relating to data processing, they should continue to adhere to such codes but also be aware of any propose changes to the code by the relevant representative body, association or supervisory body to ensure it continues to be compliant.

Data Controllers and Data Processors should also consider identifying other associations or representative bodies with codes of conducts that they may adhere to that reflects their own activity, industry or circumstances relating to personal data processing. This will further assist them on becoming compliant with the GDPR.

Practical example

Newspapers and the press in general often process personal data concerning people they write about as part of their activities. Most Member States' press associations or supervisory authorities have drawn up codes of conducts regulating activities in journalism it ensure compliance with EU and national laws on the processing of personal data.

Such codes of conduct may be amended or substituted to ensure compliance with the GDPR.

The new/amended codes of conduct will provide new measures to be adopted by newspapers and their journalists in their activities regarding the processing of personal data or processing of special categories of data.

The new/amended codes of conduct are also likely to determine and govern the relationship between activities, of the newspaper and their journalists, citizens' right to information and freedom of the press (censorship), as well as obligations to rectification and limitations of such activity.

Newspapers should therefore ensure they are regular contact with their respective associations so that they will be fully aware of when any new or amended codes of conduct will be released.

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