

## Proposals from The Netherlands Delegation on Chapter III and Articles 22 - 27

**19 September 2012**

(46) The principle of transparency requires that any information addressed to the public or to the data subject should be easily accessible, *where appropriate in electronic form*<sup>1</sup>, and easy to understand, and that clear and plain language is used. This is in particular relevant where in situations, such as online advertising, the proliferation of actors and the technological complexity of practice makes it difficult for the data subject to know and understand if personal data relating to them are being collected, by whom and for what purpose. Given that children deserve specific protection, any information and communication, where processing is addressed specifically to a child, should be in such a clear and plain language that the child can easily understand.

(48) The principles of fair and transparent processing require that the data subject should be informed in particular of the existence of the processing operation and its purposes, how long the data will be stored, on the existence of the right of access, rectification or erasure and on the right to lodge a complaint. *Furthermore the data subject should be informed on the existence of certain processing operations which have a particular impact on individuals, such as those for which a personal data impact assessment indicates a high risk and measures based on profiling, as well as the consequences of such operations and measures on individuals*<sup>2</sup>. Where the data are collected from the data subject, the data subject should also be informed on the consequences, in cases they do not provide such data.

(55) To further strengthen the control over their own data and their right of access, data subjects should have the right, where personal data are processed by electronic means and in a structured (...) <sup>3</sup> format, to obtain a copy of the data concerning them also in (...) electronic format. The data subject should also be allowed to transmit those data, which they have provided, from one automated application, such as a social network, into another one. This should apply where the data subject provided the data to the automated processing system, based on their consent or in the performance of a contract.

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<sup>1</sup> To accommodate data subjects.

<sup>2</sup> Without prejudice to future amendments to Article 20, it should be made clear that transparency is a key value in accepting and accommodating profiling operations, while at the same time strengthening data subjects rights.

<sup>3</sup> In conformity with proposals on Article 18.

# **CHAPTER III**

## **RIGHTS OF THE DATA SUBJECT**

### **SECTION 1**

#### **TRANSPARENCY AND MODALITIES**

##### *Article 11*

##### ***Transparent information and communication***

1. The controller shall provide in a transparent and easily accessible manner the information referred to in Article 14 and information on the exercise of data subjects' rights.<sup>4</sup>
2. The controller shall, having regard to the state of the art, the cost of the implementation, the risks of the processing and the nature of the data to be protected, provide appropriate information and communication relating to the processing of personal data to the data subject in an intelligible form, using clear and plain language, adapted to the data subject, in particular for any information addressed specifically to a child.<sup>5</sup>

##### *Article 12*

##### ***Procedures and mechanisms for exercising the rights of the data subject***

1. The controller shall establish procedures for providing the information referred to in Article 14 and for the exercise of the rights of data subjects referred to in Article 13 and Articles 15 to 19. The controller shall provide in particular mechanisms for facilitating the request for the actions referred to in Article 13 and Articles 15 to 19. Where personal data are processed by automated means, the controller shall also provide means for requests to be made electronically.
2. The controller shall inform the data subject without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and shall provide the requested information. This period may be prolonged for a further month, if several data subjects exercise their rights and their cooperation is necessary to a reasonable extent to prevent an unnecessary and disproportionate effort on the part of the controller. The information shall be given in writing. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.
3. If the controller refuses to take action on the request of the data subject, the controller shall inform the data subject of the reasons for the refusal and on the

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<sup>4</sup> This is to clarify the relation between Articles 11 and 14.

<sup>5</sup> A proportionality test should be introduced.

possibilities of lodging a complaint to the supervisory authority.<sup>6</sup>

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<sup>6</sup> Data controllers should not be burdened with providing legal advice to data subjects. This does not preclude any specific Member State law for public sector data controllers to inform citizens on remedies against administrative acts.

4. The information and the actions taken on requests referred to in paragraph 1 shall be free of charge. Where requests are a manifest abuse of right<sup>7</sup>, in particular because of their repetitive or manifestly unfounded [alternative: vexatious] character, the controller may charge a fee for providing the information or taking the action requested, or the controller may not take the action requested. In that case, the controller shall bear the burden of proving the manifestly excessive or unfounded character of the request.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for the manifestly excessive requests and the fees referred to in paragraph 4.
6. The Commission may lay down standard forms and specifying standard procedures for the communication referred to in paragraph 2, including the electronic format. In doing so, the Commission shall take the appropriate measures for micro, small and medium-sized enterprises. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

### *Article 13*

#### ***Rights in relation to recipients***

The controller shall communicate any rectification or erasure carried out in accordance with Articles 16 and 17 to each recipient to whom the data have been disclosed, unless this proves impossible or involves a disproportionate effort.

## **SECTION 2 INFORMATION AND ACCESS TO DATA**

### *Article 14*

#### ***Information to the data subject***

1. Where personal data relating to a data subject are collected, the controller shall provide the data subject, where applicable<sup>8</sup>, with at least the following information:
- (a) the identity and the contact details of the controller and, if any, of the controller's representative<sup>9</sup>;
  - (b) the purposes of the processing for which the personal data are intended, including the<sup>10</sup> and the legitimate interests pursued by the controller where the processing is based on point (f) of Article 6(1);
  - (c) the period for which the personal data will be stored;

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<sup>7</sup> Abuse of right is a broader term in order to imply substantially manifestly unfounded [or vexatious] requests.

<sup>8</sup> Para 1, a- h, do not seem applicable in all cases.

<sup>9</sup> It should be left to the discretion of the data controller whether contact details of a DPO should be revealed.

<sup>10</sup> An overload of information should be avoided in order to reduce administrative burdens and to protect the data subject interests.

- (d) the existence of the right to request from the controller access to and rectification or erasure of the personal data concerning the data subject or to object to the processing of such personal data;
  - (e) the right to lodge a complaint to the supervisory authority and the contact details of the supervisory authority;
  - (f) the recipients or categories of recipients<sup>11</sup> of the personal data;
  - (g) that the controller intends to transfer to a third country or international organisation and on the level of protection afforded by that third country or international organisation by reference to an adequacy decision by the Commission;
  - (h) any further information necessary to guarantee fair processing in respect of the data subject, having regard to the specific circumstances in which the personal data are collected.
2. Where the personal data are collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract<sup>12</sup>, as well as the possible consequences of failure to provide such data.
  3. Where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source the personal data originate.
  4. The controller shall provide the information referred to in paragraphs 1, 2 and 3:
    - (a) at the time when the personal data are obtained from the data subject; or
    - (b) where the personal data are not collected from the data subject, at the time of the recording or within a reasonable period after the collection, having regard to the specific circumstances in which the data are collected or otherwise processed, or, if a disclosure to another recipient is envisaged, and at the latest when the data are first disclosed.
  5. Paragraphs 1 to 4 shall not apply, where:
    - (a) the data subject has already the information referred to in paragraphs 1, 2 and 3; or
    - (b) the data are not collected from the data subject and the provision of such information proves impossible or would involve a disproportionate effort; or

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<sup>11</sup> The definition of recipient should be clarified. NL supports the express inclusion of third parties.

<sup>12</sup> Informing the data subject on the consequences of his refusal to provide data only makes sense if there is a statutory or contractual duty to provide the data. Voluntary data collection is not in accordance with Article 5(c).

- (c) the data are not collected from the data subject and recording or disclosure is expressly laid down by Union or Member State <sup>13</sup>law; or
  - (d) the data are not collected from the data subject and the provision of such information will impair the rights and freedoms of others, as defined in Union law or Member State law in accordance with Article 21;
  - (e) the data are processed for statistical purposes or for the purposes of historical or scientific research, and the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by Union or Member State law<sup>14</sup>.
6. In the case referred to in point (b) of paragraph 5, the controller shall provide appropriate measures to protect the data subject's legitimate interests.
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria for categories of recipients referred to in point (f) of paragraph 1, the requirements for the notice of potential access referred to in point (g) of paragraph 1, the criteria for the further information necessary referred to in point (h) of paragraph 1 for specific sectors and situations, and the conditions and appropriate safeguards for the exceptions laid down in point (b) of paragraph 5. In doing so, the Commission shall take the appropriate measures for micro, small and medium-sized-enterprises.
8. The Commission may lay down standard forms for providing the information referred to in paragraphs 1 to 3, taking into account the specific characteristics and needs of various sectors and data processing situations where necessary. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

#### *Article 15*

#### ***Right of access for the data subject***

1. The data subject shall have the right to obtain from the controller at reasonable intervals<sup>15</sup>, on request, confirmation as to whether or not personal data relating to the data subject are being processed. Where such personal data are being processed, the controller shall provide the following information:
- (a) the purposes of the processing;
  - (b) the categories of personal data concerned;
  - (c) the recipients or categories of recipients to whom the personal data are to be or have been disclosed, in particular to recipients in third countries;
  - (d) the period for which the personal data will be stored;
  - (e) the existence of the right to request from the controller rectification or erasure of personal data concerning the data subject or to object to the processing of such personal data;

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<sup>13</sup> Clarification.

<sup>14</sup> The existing exemption in Directive 95/46/EC for statistical, historical and scientific purposes is still justified.

<sup>15</sup> This is to avoid excessive administrative burdens for data controllers.

- (f) the right to lodge a complaint to the supervisory authority and the contact details of the supervisory authority;
  - (g) communication of the personal data undergoing processing and of any available information as to their source;
  - (h) the significance and envisaged consequences of such processing, at least in the case of measures referred to in Article 20.
2. The data subject shall have the right to obtain from the controller communication of the personal data undergoing processing. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.
- 2a. Paragraph 1 shall not apply where the data are processed for statistical purposes or for the purposes of historical or scientific research, and the exercise of the right of access proves impossible or would involve a disproportionate effort<sup>16</sup>.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the communication to the data subject of the content of the personal data referred to in point (g) of paragraph 1.
4. The Commission may specify standard forms and procedures for requesting and granting access to the information referred to in paragraph 1, including for verification of the identity of the data subject and communicating the personal data to the data subject, taking into account the specific features and necessities of various sectors and data processing situations. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

## **SECTION 3**

### **RECTIFICATION AND ERASURE**

#### *Article 16*

#### ***Right to rectification***

1. The data subject shall have the right to obtain from the controller the rectification of personal data relating to them which are inaccurate. The data subject shall have the right to obtain completion of incomplete personal data, including by way of supplementing a corrective statement.
2. Paragraph 1 shall not apply where the data are processed for statistical purposes or for the purposes of historical or scientific research, and the exercise of the right of rectification proves impossible or would involve a disproportionate effort<sup>17</sup>.

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<sup>16</sup> The existing exemption in Directive 95/46/EC for statistical, historical and scientific purposes is still justified.

<sup>17</sup> The existing exemption in Directive 95/46/EC for statistical, historical and scientific purposes is still justified.

## *Article 17*

### ***Right to be forgotten and to erasure***

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:
  - (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
  - (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;
  - (c) the data subject successfully objects to the collection or retention of personal data pursuant to Article 19<sup>18</sup>;
  - (d) the processing of the data does not comply with Articles 5, 6, 8 and 9<sup>19</sup>.
2. Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.
3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:
  - (a) for exercising the right of freedom of expression in accordance with Article 80;
  - (b) for reasons of public interest in the area of public health in accordance with Article 81;
  - (c) for historical, statistical and scientific research purposes in accordance with Article 83;
  - (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;
  - (e) in the cases referred to in paragraph 4.

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<sup>18</sup> Clarification. The right to object has no absolute character.

<sup>19</sup> Clarification. Other articles can be added.



4. Instead of erasure, the controller shall block or otherwise <sup>20</sup>restrict<sup>21</sup> processing of personal data where:
  - (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data<sup>22</sup>;
  - (b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof or the settlement of disputes<sup>23</sup>;
  - (c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;
  - (d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2).
5. Personal data referred to in paragraph 4 may, with the exception of storage, only be processed for purposes of proof or the settlement of disputes, or with the data subject's consent, or for the protection of the rights of another natural or legal person or for an objective of public interest.
6. Where processing of personal data is restricted pursuant to paragraph 4, the controller shall inform the data subject before lifting the restriction on processing.
7. The controller shall implement mechanisms to ensure that the time limits established for the erasure of personal data and/or for a periodic review of the need for the storage of the data are observed.
- 8<sup>24</sup>. Where the erasure is carried out, the controller shall not otherwise process such personal data.
9. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying:
  - (a) the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;
  - (b) the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2;
  - (c) the criteria and conditions for restricting the processing of personal data referred to in paragraph 4.

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<sup>20</sup> A clarification in order to retain the possibility of blocking data.

<sup>21</sup> The definition of "restriction of processing" in Article 3(4) of the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, should be inserted in Article 4 of the Regulation.

<sup>22</sup> It should be considered to regulate the blocking or restrictions on processing contested data in Article 16.

<sup>23</sup> Retention of data for purposes of proof usually implies other purposes such as the settlement of disputes in our out of court.

<sup>24</sup> Striking this paragraph should be considered, since erasure should imply definite destruction of the data concerned.

*Article 18*  
***Right to data portability***<sup>25</sup>

1. The data subject shall have the right, where personal data are processed by electronic means and in a structured format, to obtain from the controller a copy of data undergoing processing in an electronic and structured format which is commonly used or based on open standards<sup>26</sup> and allows for further use by the data subject.
2. Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn.
3. The Commission may specify the electronic format referred to in paragraph 1 and the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

**SECTION 4**  
**RIGHT TO OBJECT AND PROFILING**

*Article 19*  
***Right to object***

1. The data subject shall have the right to object, on grounds relating to their particular situation, at any time to the processing of personal data which is based on points (d), (e) and (f)<sup>27</sup> of Article 6(1), unless the controller demonstrates compelling legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject.
2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object free of charge to the processing of their personal data for such marketing. This right shall be explicitly offered to the data subject in an intelligible manner and shall be clearly distinguishable from other information.
3. Where an objection is upheld pursuant to paragraphs 1 and 2, the controller shall no longer use or otherwise process the personal data concerned.

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<sup>25</sup> It could be considered limiting the right of dataportability to user generated content published through information society services only, in order to target social media directly and to clarify the relation with Article 15.

<sup>26</sup> To avoid unnecessary restrictions on the use of formats.

<sup>27</sup> The relation of the weighing of interests by the controller pursuant to Article 6 (f) and the weighing of interests pursuant to Article 19, para s 1 and 3 should be clarified. Is it meant that when the controller concludes that the processing of personal data is justified under Article 6(f), he will have to make a second weighing of interest after having received an objection from the data subject in which he now has to demonstrate *compelling* grounds for processing?

4. Paragraph 1 shall not apply where:

- (a) the data are processed in public records or other registrations established by Member State law<sup>28</sup>;
- (b) the data are processed for statistical purposes or for the purposes of historical or scientific research, and the exercise of the right to object proves impossible or would involve a disproportionate effort<sup>29</sup>.

#### *Article 20* ***Measures based on profiling***

1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict such as<sup>30</sup> the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.
2. Subject to the other provisions of this Regulation, a person, not being a child<sup>31</sup>, may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:
  - (a) is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention and arrangements allowing him to put his point of view<sup>32</sup>; or
  - (b) is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests; or
  - (c) is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.
3. Automated processing of personal data intended to evaluate certain personal aspects relating to a natural person shall not be based solely on the special categories of personal data referred to in Article 9.
4. In the cases referred to in paragraph 2, the information to be provided by the controller under Article 14 shall include information as to the existence of processing for a measure of the kind referred to in paragraph 1 and the envisaged effects of such processing on the data subject.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable

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<sup>28</sup> The right to object is incompatible with the statutory duty of governments to provide for public registers such as vehicle registrations, land registers etc.

<sup>29</sup> The existing exemption in Directive 95/46/EC for statistical, historical and scientific purposes is still justified.

<sup>30</sup> Clarification on the status of the enumeration.

<sup>31</sup> This is to align article 20, para 2, with recital 58.

<sup>32</sup> This addition stems from Article 15 of Directive 95/46/EC which still seems to be adequate.

measures to safeguard the data subject's legitimate interests referred to in paragraph 2.

## **SECTION 5 RESTRICTIONS**

### *Article 21 Restrictions*

1. Union or Member State law<sup>33</sup> may restrict by way of a legislative measure the scope of the obligations and rights provided for in points (a) to (e) of Article 5 and Articles 11 to 20 and Article 32, when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard:
  - (a) public security
  - (b) national security<sup>34</sup>;

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<sup>33</sup> It could be considered addressing the data controller directly as an alternative to Union or Member State law regulating restrictions.

<sup>34</sup> The present exemption on national security of Article 13 of Directive 95/46/EC should be retained.

- (c) the prevention, investigation, detection and prosecution of criminal offences;
  - (d) other public interests of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters and the protection of market stability and integrity;
  - (e) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
  - (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (a), (b), (c) and (d);
  - (g) the protection of the data subject or the rights and freedoms of others.
2. A<sup>35</sup>ny legislative measure referred to in paragraph 1 shall contain specific provisions at least as to the objectives to be pursued by the processing and the determination of the controller.

## **CHAPTER IV**

### **CONTROLLER AND PROCESSOR**

#### **SECTION 1**

#### **GENERAL OBLIGATIONS**

##### *Article 22*

##### ***Responsibility of the controller***

1. The controller shall adopt policies and implement appropriate measures to ensure and be able to demonstrate that the processing of personal data is performed in compliance with this Regulation.
2. The measures provided for in paragraph 1 shall in particular include:
  - (a) keeping the documentation pursuant to Article 28;
  - (b) implementing the data security requirements laid down in Article 30;
  - (c) performing a data protection impact assessment pursuant to Article 33;

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<sup>35</sup> Clarification of the text.

(d)complying with the requirements for prior authorisation or prior consultation of the supervisory authority pursuant to Article 34(1) and (2);

(e)designating a data protection officer pursuant to Article 35(1).

3. The controller shall implement mechanisms to ensure the verification of the effectiveness of the measures referred to in paragraphs 1 and 2. If proportionate, this verification shall be carried out by independent internal or external auditors.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of specifying any further criteria and requirements for appropriate measures referred to in paragraph 1 other than those already referred to in paragraph 2, the conditions for the verification and auditing mechanisms referred to in paragraph 3 and as regards the criteria for proportionality under paragraph 3, and considering specific measures for micro, small and medium-sized-enterprises<sup>36</sup>.

### *Article 23*

#### ***Data protection by design and by default***

1. Having regard to the state of the art and the cost of implementation, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures and procedures in such a way that the processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.
2. The controller shall implement mechanisms for ensuring that, by default, only those personal data are processed which are necessary for each specific purpose of the processing and are especially not collected or retained beyond the minimum necessary for those purposes, in terms of the amount of the data, the time of their storage and their accessibility.<sup>37</sup> In particular, those mechanisms shall ensure that by default personal data are not made accessible to an indefinite number of individuals.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of specifying any further criteria and requirements for appropriate measures and mechanisms referred to in paragraph 1 and 2, in particular for data protection by design requirements applicable across sectors, products and services.
4. The Commission may lay down technical standards for the requirements laid down in paragraph 1 and 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

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<sup>36</sup> There is a need to assess the relation between the principle of accountability and existing Union law on regulated professions or sectors, such as the financial sector, in order to accommodate existing limitations on adoption of measures or duties to inform the general public on the processing of data.

<sup>37</sup> A clarification to ensure a better connection between the second and third sentence as well as an additional encouragement to data controllers to restrict access to data as much as possible.

*Article 24*  
***Joint controllers***

Where a controller determines the purposes, conditions and means of the processing of personal data jointly with others, the joint controllers shall determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the procedures and mechanisms for exercising the rights of the data subject and their respective duties to provide the information referred to in Article 14<sup>38</sup>, by means of an arrangement between them, or on the basis of a specific legal basis in Union or Member State law<sup>39</sup>.

*Article 25*  
***Representatives of controllers not established in the Union***

1. In the situation referred to in Article 3(2), the controller shall designate a representative in the Union.
2. This obligation shall not apply to:
  - (a)<sup>40</sup> a controller established in a third country where the Commission has decided that the third country ensures an adequate level of protection in accordance with Article 41; or
  - (b) an enterprise employing fewer than 250 persons; or
  - (c) a public authority or body; or
  - (d) a controller offering only occasionally goods or services to data subjects residing in the Union.
3. The representative shall be established in one of those Member States where the data subjects whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, reside<sup>41</sup>.
4. The designation of a representative by the controller shall be without prejudice to legal actions which could be initiated against the controller itself.

*Article 26*  
***Processor***

1. Where a processing operation is to be carried out on behalf of a controller, the controller shall choose a processor providing sufficient guarantees to implement appropriate technical and organisational measures and procedures in such a way that the processing will meet the requirements of this Regulation <sup>42</sup>in particular in respect

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<sup>38</sup> Clarification in order to express that joint controllers should also determine their respective duties under Article 14.

<sup>39</sup> Relations between joint controllers should also be established by a specific Union or Member State law.

<sup>40</sup> Striking of this exception should be considered, since the level of data protection in any given third country does not necessarily assist in enforcement of the Regulation by the DPA in the EU Member State concerned.

<sup>41</sup> The Member State in which a representative is established is not necessarily decisive in designating a DPA under Article 51, para 2.

<sup>42</sup> Protection the interests of the data subject is the prime responsibility of the controller, not the processor.

of the technical security measures and organizational measures governing the processing to be carried out and shall ensure compliance with those measures.



2. The carrying out of processing by a processor shall, where appropriate,<sup>43</sup> be governed by a contract or other legal act binding the processor to the controller and stipulating in particular that the processor shall:
  - (a) act only on instructions from the controller, in particular, where the transfer of the personal data used is prohibited;
  - (b) employ only staff who have committed themselves to confidentiality or are under a statutory obligation of confidentiality;
  - (c) take all required measures pursuant to Article 30;
  - (d) enlist another processor only with the prior permission of the controller;
  - (e) insofar as this is possible given the nature of the processing, create in agreement with the controller the necessary technical and organisational requirements for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;
  - (f) assist the controller in ensuring compliance with the obligations pursuant to Articles 30 to 34;
  - (g) hand over all data<sup>44</sup> to the controller after the end of the processing and not process the personal data otherwise;
  - (h) make available to the controller and the supervisory authority all information necessary to control compliance with the obligations laid down in this Article.
3. The controller and the processor shall be able to demonstrate the existence and execution<sup>45</sup> of the controller's instructions and the processor's obligations referred to in paragraph 2.
4. If a processor processes personal data other than as instructed by the controller, the processor shall be considered to be a controller in respect of that processing and shall be subject to the rules on joint controllers laid down in Article 24.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the responsibilities, duties and tasks in relation to a processor in line with paragraph 1, and conditions which allow facilitating the processing of personal data within a group of undertakings, in particular for the purposes of control and reporting.

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<sup>43</sup> Controller - processor relations can also be found within a group of undertakings. Those relations are usually not determined by contracts or legally binding instruments, but based on internal instructions only.

<sup>44</sup> Clarification. It is not clear to which results Para 2(g) refers to.

<sup>45</sup> Reduction of an administrative burden in conformity with the principle of accountability.

*Article 27*

***Processing under the authority of the controller and processor***

The processor and any person acting under the authority of the controller or of the processor who has access to personal data shall not process them except on instructions from the controller, unless required to do so by Union or Member State law.