Dear Madam, dear Sir,

I would like to take the opportunity and make some remarks to the Guidelines 07/2020 on the concepts of controller and processor in the GDPR (hereinafter the "Guidelines" as regards the definition or the concept of the processor as per article 4 no. 8 GDPR.

As defined in the GDPR, a processor is a separate legal entity (separate from the controller), which processes personal data on behalf of a controller (or several controllers).

In the Guidelines 07/2020 (para. 78) published for consultation you conclude, as did the article 29 working party in its "Opinion 1/2010 on the concepts of "controller" and "processor" (WP 169, page 25)", that *"acting "on behalf of" means serving someone else's interest and recalls the legal concept of "delegation""*. In para. 81 of the Guidelines state that *"a service provider may still be acting as a processor even if the processing of personal data is not the main or primary object of the service, provided that the customer of the service still determines the purposes and means of the processing in practice"*. Thus, in your opinion, the controller should carefully assess whether or not to entrust a service provider with rendering certain services that comprise or entail the processing of (controller's) personal data.

I would like to make certain remarks regarding this concept, described in the second example in para. 81 of the Guidelines, which in my opinion cannot be generally applied.

Firstly, the concept of delegation requires that the delegating party, i.e. the controller, has explicitly engaged the processor to process personal data. This in my opinion makes it necessary that the engagement under civil law is foresees that the controller wants the processor to process personal data and is the core element of the contract. As the contract or instrument as per article 28 GDPR must satisfy certain criteria an implicit engagement for data processing might lack transparency.

Secondly, acting on someone else's behalf requires an *animus rem alteri gerendi*. Thus, the (potential) processor must have the will to process personal data to the benefit of the controller. If this element is missing, there cannot be any data processing as per article 28 GDPR.

Thirdly, the "mere" possibility that personal data can be accessed when rendering services must, in my opinion, not be considered to result in data processing on someone else's behalf. This interpretation would qualify all and any cleaning personnel as processors as they *could* access personal data. Thus, in my opinion it is doubtful whether the idea conveyed in example two in para. 81 of the Guidelines is accurate or needs a more differentiated approach. F.e. where an IT service provider is hired for maintenance services, the processing of personal data might occurs insofar as personal data may be disclosed to the IT services provider in course of performing the maintenance services (either through system access or through remote support using screen sharing or similar means).

In my understanding a processor as per article 7 no. 8 GDPR must be explicitly entrusted by the controller to process personal data on its behalf. An entity processing personal data to the benefit of someone else, assuming a *animus rem alteri gerendi*, can only qualify as data processor when and insofar such (potential) processor clearly informs the controller of data processing on its behalf.

In my opinion, in cases like in the second example in para. 81 of the Guidelines the real question at hand is the purpose and the legal basis for disclosure of personal data to the service provider. This question must not be solved "the easy way" by "fleeing" into a data processing agreement. Such approach might also result into a shortfall on realizing the concept of privacy by design and privacy by default: where it cannot be ruled out, that in course of the provision of services the service provider has or may have access to personal data, the prioritized duty of the controller must be to check whether the services can be provided without the service provider having access to personal data.

In summary of my considerations I may state as follows:

- "Delegation" requires an explicit act by the controller
    - Such will or act of the controller must manifest in the provisions of the contract under civil law, concluded between the controller and the (potential) processor.
    - Also the criteria as per article 28 (3) GDPR must be satisfied.
- "Acting on someone else's behalf" requires an *animus rem alteri gerendi* as regards the processing of personal data.
    - Cleaning service or facility management providers or also IT service providers (engaged for maintenance services) may not have such *animus rem alteri gerendi*.
- The "mere" possibility of disclosure of personal data to a service provider (as a sole element) cannot constitute data processing as per article 28 GDPR. Thus, the following approach appears to be more feasible:
    - The controller should evaluate whether disclosure of personal data to the service provider is required (privacy by design / privacy by default).
    - If disclosure is required for the service provider to render the services AND the processing of personal data is a core element of the services to be provided, this constitutes data processing as per article 28 GDPR.
    - If disclosure is required for the service provider to render the services AND the processing of personal data is NOT a core element of the services to be provided, this is not a case of data processing as per article 28 GDPR. In this case, the controller should enter into an NDA with the service provider. Also, controller requires an adequate legal basis for disclosure and service provider needs a legal basis for its own processing (viewing!).
    - If neither of the cases above applies, the disclosure would constitute a data breach.

Please consider these thoughts in course of the further proceedings. I would happy to receive feedback and regret that due to a lack of time I could not elaborate in more detail.

Thank you very much.

Best regards

Reinhard Hübelbauer