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Outsourcing und Data Protection

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NKF

Subject Matter

- **Outsourcing: depending on area different meaning and requirements**
- **However always personal data are involved:**
 - Outsourcing of business divisions or tasks
 - Mandating external services
 - Transfer of data processing within the group or to a third party
- **Legal Basis:**
 - Art. 10a and 6 DPA
 - Cantonal Data Protection Laws: IT-Outsourcing of cantonal and communal administrations
- **Responsibility always remains with outsourcer/controller**

Applicability of Swiss Data Protection Act?

- **Offshoring, Farshoring or Nearshoring?**
- **When does the Swiss DPA apply?**
 - Principle of territoriality: data processing in Switzerland and access from abroad to server in Switzerland
 - However onwards transfer of personal data originating from Switzerland from a country abroad not subject to DPA
 - DPA does not apply, if personal data are directly acquired abroad (e.g. via Webserver)
- **Caution: secrecy obligations (e.g. bank secrecy, professional secrecy obligations, etc.) or Blocking Statutes can generally prohibit the export**
- **No crossborder disclosure if personal data is anonymized or encrypted**

Art. 10a DPA

■ Article 10a DSG: Data Processing by Third Parties

- ¹The processing of personal data may be assigned to third parties by agreement or by law if:
- a. the data is processed only in the manner permitted for the instructing party itself; and
 - b. it is not prohibited by a statutory or contractual duty of confidentiality
- ² The instructing party must in particular ensure that the third party guarantees data security.
- ³ Third parties may claim the same justification as the instructing party.

Requirements of Art. 10a DPA

- **Principal (Outsourcer)**
- **Mandate for data processing**
- **Third party**
- **Written agreement**
- **Subordinate relationship**
- **Processing in the same scope as the principal**
- **No adverse legal or contractual confidentiality obligations**
- **Data security**

Provisions in Outsourcing Contract

■ Required data protection clauses:

- Reference to DPA provisions
- Warranty of provider to comply with DPA provisions
- Warranty of fulfilment of data protection claims of data subjects
- Consent of controller for subcontracting by processor
- Purpose definition for data processing by processor
- Obligation of processor to subject its employees, auxiliary personnel, freelancers etc, to the comply with DPA provisions
- Obligation of processor to comply with data security obligations

Outsourcing Privilege

■ Benefits of Outsourcing Privilege:

- Processor is not third party in the meaning of DPA
- No registration requirement according to Art. 11a Abs. 3 lit. b DPA
- No justification reasons necessary according to Art. 12 Abs. 2 lit. c DPA
- No limitations of justification reasons according to Art. 9 Abs. 3 DPA
- No obligations to inform data recipients according to Art. 7a DPA
- No application of transparency principle (Art. 4 Abs. 4 DPA) and duty of information (Art. 7a DPA)

Special Questions Art. 10a DPA I

- **Data Flows within the Holding:**

- Usually: transfer of data processing from one group company to another (inter-company agreements)
- Question: data processing for own purposes and not for the outsourcing group company?

- **Access of several group companies to data – use however only for own purposes (Shared Service Center)**

- **Mutual ownership of data collections – use however for own purposes**

Special Questions Art. 10a DPA II

■ Audit Right:

- Controller is responsible for control (Oberaufsicht)
- Proviso for supervision of necessary rights:
 - Access for internal and external auditors
 - Right to inspect infrastructure
 - Right over type of data processing
- Scope of audit right: any time or only quarterly, with or without prior notification etc.
- In practice: major issue in the regulated sectors as a requirement by the authorities

Crossborder Data Processing

- **Additionally fulfilment of requirements of Art. 6 DPA**
- **Usually requirements of Art. 10a and 6 DPA fulfilled with standard contracts**
- **Adequate protection:**
 - Swiss Transborder Data Flow Agreement
 - EU-Model clauses
 - Privacy Shield CH

Common Problems when Outsourcing

- **Location of Cloud?**
- **Mandating of Subproviders**
- **Outsourcing of personal data protected by law: Auxiliary personnel topic**
- **Handing back of Personal Data:**
 - Which format?
 - Deal contractually with handing back formalities
 - Insolvency of provider / Cloud provider: no claim for handing over of personal data

Implications of revised DPA on Outsourcing?

- **Draft Swiss DPA contains some new provisions:**

- Introduction of the terms controller and processor and respective duties
- Duty of information extended as regards identity and contact details of controller
- Controller has duty to obtain approval for engaging subprocessors
- Controller has duty to obtain approval for EU model clauses

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