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School of Data Privacy

Regulation (EU) 2016/679 of the EP and of the Council of 27 April 2016, the General Data Protection Regulation (the "GDPR") replaces Directive 95/46/EC (the "Directive"), which currently forms part of Slovak/Czech law through Act no. 122/2013 Coll./ 101/2000 Coll., the Data Protection Act. The GDPR will come into effect from 25 May 2018, as of when it will be directly applicable throughout the EU. It will apply to those who process personal data, as well as to natural persons whose personal data is subject of processing.

To help you navigate the maze of obligations introduced by the GDPR, we have created a regular weekly news series on this topic, which is without a doubt the most important legislative change in European history in the field of data protection to date.

If you wish to receive the School of Data Privacy series directly to your e-mail box, please subscribe at office@bapol.sk, or by calling the phone number +421 220 251 311.

Lesson 1 of 16

Material and territorial scope of the GDPR

Below you will learn:

Important changes

- The GDPR will have a significantly broader impact on those who process personal data.
- The GDPR will also apply to businesses/institutions which are not established in the EU;
 - if they process the personal data of data subjects located in the Union in relation to offering goods or services to them, irrespective of whether a payment is required, or
 - in relation to the monitoring of their behaviour if it takes place within the Union (e.g. through technical equipment such as *cookies*).

Compliance Action Plan

- Businesses/institutions should assess whether the GDPR will apply to them.
- If yes, we will provide information on a weekly basis about how to ensure compliance and minimize the risk of high sanctions.
- If not, we recommend implementing continuous monitoring processes to ensure this status into the future.

Material scope

The GDPR applies to the processing of personal data:

- carried out wholly or partly by automated means (mostly through IT means) and to;
- processing other than by automated means (e.g. entries in paper form) of personal data which:
 - form part of a filing system, or
 - are intended to form part of a filing system.

The GDPR does not apply to some types of processing, e.g. for personal or household purposes, internal security of Member States, etc.

Most of processing operations in the public and especially in the commercial sphere will be subject to the GDPR.

Territorial scope

Controllers and processors "established" in the EU

First of all, the GDPR will apply to persons and businesses that are "established" in the EU, if they process personal data in the context of their activities. It is a broadly defined rule which aims to ensure that the GDPR applies to controllers¹ and processors² processing personal data, if they are established in the EU, regardless of whether the processing takes place in the Union or not.

It is important to note that the GDPR extended its scope in connection to processors established in the Union. Pursuant to the previous legislation, if the controller was not established in the EU but appoints a processor established in the EU to process personal data on their behalf, such processing does not fall within the scope of the Directive.

A new crucial circumstance is that the concept of "establishment" of a business in the EU was defined more clearly by recent decisions of the EU Court of Justice ("CJEU"). Quite revolutionary in this regard is especially the CJEU's decision in *Weltimmo v. NAIH* from 2015 (C-230/14), which has an enormous impact on persons doing business through the internet in several EU States. The company Weltimmo had its registered office in Slovakia and provided services through the internet on a cross-border basis to Hungarian citizens. The CJEU decided that the Slovak company, despite not having a branch or other form of entrepreneurship in Hungary, is subject to the decisions of the Hungarian authority supervising the protection of personal data. The CJEU articulated that if a company offers services in the official language of a particular State (in this case in Hungary) and has a representative in the said country, in such case it underlies the supervision power of authorities in this country regardless of the fact that it is not registered in the local commercial or other register. In the CJEU's opinion, the existence of a subsidiary of a company in a particular state is not a necessary criterion for assessing whether a company is established in such country or not. On the contrary, establishment may arise where the company carries out real and effective activity, however minimal, through e.g. a web page in the local language, a representative operating in the respective territory and possibly a post box or a bank account, such as in the case of Weltimmo.

Businesses not established in the EU

The extension of the territorial scope of the GDPR to companies not established in EU Member States, but processing the personal data of persons located in the Union, is one of the most

¹ who alone or jointly with others determines the purposes and means of the processing of personal data.

² who processes personal data on behalf of the controller.

important changes introduced by the GDPR. If a company or an institution with its registered office outside of the Union meets one of the conditions set out by the GDPR, the Regulation will automatically apply to its processing activities. Such person will be obliged to comply with the principles of processing and to implement measures for ensuring the safety of personal data as outlined by the GDPR. They will be subject to the supervision powers of bodies determined by the GDPR and bear any potential sanctions such bodies impose.

The GDPR will apply to controllers and processors not established in the Union if they process the personal data of data subjects located in the Union, and if the processing activities are related to:

- the offering goods or services to these data subjects, irrespective of whether a payment is required, or
- the monitoring of their behaviour as far as their behaviour takes place within the Union.

What exactly is meant by "data subjects who are in the Union" is not quite clear yet. However, we can assume that it will be a broad concept and there will be a tendency to interpret it in a way to include as many data subjects as possible under the "umbrella" of the protection provided by the GDPR. Decisive criteria for the interpretation of this term might be the data subject's place of physical presence or place of residence.

For the first time, the scope of the Regulation is based on whether a company monitors the behaviour of persons on the territory of the Union. Monitoring will probably be most frequently carried out through the internet by means of small text files sent by the collector of the data to the data subject's equipment (smartphone, computer etc.), so called *cookies*.

Under the previous legal regulation pursuant to the Directive the supervisory bodies strived to establish their supervision power over non-EU businesses processing the personal data of EU citizens through the fact that businesses used technical equipment located in the EU for the processing of personal data, whereby this technical equipment was *cookies*. Pursuant to the GDPR, these efforts will not be necessary anymore due to an unambiguous provision on the applicability of the GDPR if the company monitors the behaviour of data subjects who are in the Union. Further processing will become relevant as well, especially profiling, which is defined as any form of automated processing of personal data consisting of the use of personal data to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.

When assessing if a non-EU company is considered as established in the Union, the criteria mentioned above articulated by the CJEU in its decision *Weltimmo v. NAIH* will be decisive. That means that the mere fact that a certain web page can be viewed from an EU country will not be sufficient for the conclusion about the existence of the establishment in the EU. For this conclusion the activities of the business should be provably aimed at data subjects located in the EU. If web pages are designed also in (at least) one of the local EU languages, contain pricing in one or more local currencies (e.g. GBP, EUR, CZK), contain contact details such as telephone numbers with European country codes, such circumstances would be relevant for the conclusion that the establishment of the business in the Union exists.

The extent to which European authorities will supervise the processing of personal data by companies outside of the EU has not been tested so far. The actual enforceability of their decisions aimed at companies outside the EU (e.g. the decision of the Slovak Data Protection Authority to imposing a fine on a Chinese company) is still questionable. However, the concept of protection of data subjects in the Union in relation to companies outside the EU is revolutionary. The rationale behind its introduction was the conviction that data subjects in the EU should not be deprived of due protection in relation to the processing of their personal data just because a company is headquartered elsewhere.

What now

First of all, businesses and institutions should find out whether the GDPR will apply to them with regard to the extended territorial scope. Non-EU businesses should exercise caution when assessing whether they are considered as "established" in the EU.

If the activities of a business or an institution fall under the scope of the new Regulation, it will be crucial to get to know the numerous obligations set out by the GDPR and to train staff that will on behalf of the business or the institution handle personal data. The obligations of controllers and processors, data subject's rights and basic principles for processing personal data will be the subject of the next lessons of the School of Data Privacy.

Further information can be found here

Material scope: Recitals 6-18 of the GDPR; article 2 of the GDPR

Territorial scope: Recitals 22-24 of the GDPR; article 3 of the GDPR

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