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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 law through Act no. 122/2013 Coll. and part of Czech law through Act no. 101/2000 Coll., the Data Protection Act. The GDPR will come into effect on 25 May 2018, 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 the 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.*

*If you wish to receive the School of Data Privacy series directly to your e-mail box, please subscribe at [office@bapol.cz](mailto:office@bapol.cz), or by calling the phone number +420 251 009 111.*

### *Lesson 3 of 16*

#### **Lawfulness of processing and further processing**

##### **Below you will learn:**

##### *Important changes*

- The GDPR changes the legal grounds for processing personal data
- In certain cases, processing for a different purpose than the purpose for which the personal data was originally collected will be permitted
- New criteria have been introduced for the compatibility test for the purposes of processing

##### *Compliance Action Plan*

- Checking the legal grounds for processing personal data and ensuring that they will be relevant after the GDPR comes into effect
- Ensuring the ability to demonstrate a compatibility test if personal data is processed for reasons other than the original purpose

## Regarding the lawfulness of processing

As we mentioned in Lesson 2, one of the principles relating to processing personal data is the lawfulness of processing<sup>1</sup>. The term "lawfulness" is fairly broad and without further clarification it would be vague and legally uncertain. The GDPR further regulates it in clause 6.

The principle of lawfulness means that if no exception regulated by the GDPR applies to the processing, the controller is always obligated to obtain the data subject's consent with the processing of his/her personal data. Besides the data subject's consent, which is the basic legal ground for the processing and will be discussed in a separate lesson, processing will be lawful only if and to the extent that at least one of the following applies ("legal grounds for processing")<sup>2</sup>: if the processing is necessary:

- a) for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract<sup>3</sup>;
- b) for compliance with a legal obligation to which the controller is subject<sup>4</sup>;
- c) in order to protect the vital interests of the data subject or of another natural person<sup>5</sup>;
- d) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller<sup>6</sup>;
- e) for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject requiring personal data protection, in particular where the data subject is a child<sup>7</sup>.

Besides the data subject's consent, the most relevant issue for businesses will be the legal grounds for processing outlined in point a), b) and e) above.

The GDPR allows States to add additional specific requirements and implement measures for processing care of the reasons outlined in points b) and d) above. The same is allowed in other special situations where the processing takes place<sup>8</sup>.

The legal grounds for processing as of the effective date of the GDPR will include:

- in relation to Article 85 of the GDPR, processing of personal data necessary for academic, artistic, literary or journalistic purposes, if it arises from the controller's business activities, except if such processing would violate the data subject's right to protection of his/her personality and privacy or if such processing without the data subject's consent is prohibited by a special Act or an international treaty;

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<sup>1</sup> Art. 5(1) of the GDPR: *Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*

<sup>2</sup> The lawfulness of processing sensitive data will be the subject of a separate lesson.

<sup>3</sup> E.g. a consumer orders goods through an on-line shop, the seller needs to process his/her name, surname, address or another contact details for the purpose of delivery.

<sup>4</sup> The basis for the processing must be laid down by Union law or Member State law to which the controller is subject. Such law can regulate concrete circumstances of processing such as the general conditions governing the lawfulness of processing by the controller, the types of data which are subject to the processing, the data subjects concerned, the entities to, and the purposes for which, the personal data may be disclosed, the purpose limitation, storage periods, and processing operations and procedures, including measures to ensure lawful and fair processing.

<sup>5</sup> Processing of personal data based on the vital interest of another natural person should take place only where the processing cannot be manifestly based on another legal basis.

<sup>6</sup> As in footnote no. 4.

<sup>7</sup> The existence of a legitimate interest needs careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could, in particular, override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing.

<sup>8</sup> As stated in Chapter IX of the GDPR.

- in relation to Article 88 of the GDPR, providing access to, providing or publishing of personal data in the extent of academic title, name, surname, work/service position or function, department, place of work, telephone number, fax number or work e-mail address and the employer's identification details provided that the controller is the data subject's employer;
- in relation to Article 87 of the GDPR, processing of a national identification number regulated by a special Act for the purpose of determining a natural person only if its use is necessary for reaching the respective purpose of processing and if the data subject gave his/her written or otherwise demonstrable consent for processing thereof;
- in relation to Article 89 of the GDPR, processing for the purposes of archiving in the public interest, scientific or historical research or for statistical purposes;
- in relation to Article 49(5) of the GDPR, the entitlement of transferring a special category of personal data and the national identification number to a third party located in a third country which does not ensure an adequate level of personal data protection only with the prior explicit consent of the data subject, unless a special Act provides otherwise;
- in relation to Article 9(4) of the GDPR, processing of genetic data, biometric data and data related to health, if it is necessary for compliance with a legal obligation to which the controller is subject.

It will always remain the obligation of the States to ensure personal data protection complies with the right to freedom of expression and information in these special cases.

States are also obliged to notify the Commission before the GDPR enters into force about detailed rules, nuances and exceptions to the processing of personal data for journalistic purposes and for purposes of academic, artistic or literary expression, for processing in the context of employment and in the context of the statutory duty of confidentiality.

### *Obsolete legal grounds*

In comparison to the valid legislation<sup>9</sup> ("the Act") when the GDPR takes effect the following legal grounds will be abolished:

- legal ground pursuant to Art. 10(3) let. d) of the Act "direct marketing in postal traffic"; while adhering to the conditions regulated by the GDPR, especially the proportionality principle with regard to reasonable expectations of data subjects and with regard to the existence of the controller's legitimate interest, direct marketing will be able to be regarded as a legitimate interest (ie the legal ground sub e) above);
- legal ground pursuant to Art. 10(3) let. e) of the Act "further processing of published personal data"; this legal ground is in conflict with the lawfulness, fairness and transparency principle, the principle of purpose limitation and purpose compatibility; when processing published personal data, the controller will have to comply with a relevant legal ground; and
- legal ground pursuant to Art. 15(4) of the Act "one-time entry" and legal ground pursuant to Art. 15(7) of the Act "monitoring of publicly accessible premises"; the controller will have to comply with a relevant legal ground, e.g. a legal obligation pursuant to point b) above or a legitimate interest pursuant to point e) above.

### **Regarding the lawfulness of further processing**

As we mentioned in Lesson 2, another principle relating to personal data processing is the limitation of purpose. It binds controllers to collect personal data for specified, explicit and

<sup>9</sup> Act no. 122/2013 Coll., the Data Protection Act as amended (Slovakia).

legitimate purposes and prohibits them to further process it in a manner that is incompatible with those purposes.<sup>10</sup> However, in Article 6 sec. 4 the GDPR permits that personal data, collected for a specific purpose, may be under specific conditions processed for a purpose different than the original one ("further processing"). It is processing for a different purpose but compatible with the original one, on the basis of the same legal ground (ie the purpose is different, the legal ground remains).

By this provision the GDPR literally brings light to a grey zone which existed in the issue of further processing under the previous legal regulation. The GDPR explicitly regulates that further processing for privileged purposes (ie archiving in the public interest, scientific or historical research or statistical purposes) is not incompatible with the original purpose if the controller ensures appropriate safeguards for the rights and freedoms of the data subject.<sup>11</sup> Besides that the GDPR also lays down the factors controllers must take into account when accessing whether the new purpose is compatible with the purpose for which it was originally collected.

In other words, if the controller considers whether they may process personal data for a different purpose than for which it was originally collected, they are obliged to carry out a compatibility test with the purposes of processing. The compatibility test is carried out with regard to specific conditions such as:

- any link between the purposes for which the personal data was collected and the purposes of the intended further processing;
- the context in which the personal data was collected (in particular regarding the relationship between data subjects and the controller);
- the nature of the personal data (in particular whether special categories of personal data are processed, or whether personal data related to criminal convictions and offences are processed);
- the possible consequences of the intended further processing for data subjects;
- the existence of appropriate safeguards (e.g. encryption or pseudonymisation).

The GDPR introduces the above criteria with the phrase "inter alia", which means that other suitable criteria may be taken into account for the purpose of the compatibility test. However, if the processing for the original purpose is based on the data subject's consent or based on special legislation (regulating e.g. public interest, national or public security, etc.) the controller should be allowed to further process the personal data irrespective of the compatibility of purposes.

The conditions for admissibility of further processing relate only to the original controller. Should the processing operation result in providing personal data to another controller, they would also have to comply with a separate legal ground for processing. Also, the controller is obligated to inform data subjects in advance of any instances of further processing.

### *What now*

In relation to the new legal regulation outlined above it is vital that prior to the GDPR taking effect businesses and institutions check that they process personal data based on the legal grounds regulated by the GDPR.

It will also be necessary to conduct a compatibility check under the relevant criteria to ensure the lawfulness of further processing.

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<sup>10</sup> Art. 5(1) let. b) of the GDPR: *Personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.*

<sup>11</sup> For this purpose the controller should implement technical and organisational measures which can include data minimisation, pseudonymisation or anonymisation.

*Further information can be found here*

Recitals 40, 41, 44 - 47, 50, 153, 155

Articles 5 sec. 1 let. a) and b), 6, 23 sec. 1, Chapter IX (Articles 85-91)

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