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*Balcar, Polanský & Spol. s.r.o.'s*

## 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.sk](mailto:office@bapol.sk) or [office@bapol.cz](mailto:office@bapol.cz), or by calling the phone number +421 220 251 311 and +420 251 009 111.*

### *Lesson 4 of 16*

#### **Consent with processing personal data**

#### **Processing the personal data of children**

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

##### *Important changes*

- The GDPR brings new requirements for giving consent with processing personal data
- There are specific requirements regarding processing the personal data of persons in relation to scientific research and children's<sup>1</sup> data

##### *Compliance Action Plan*

- Businesses and institutions should ensure that they process personal data based on relevant and existing legal grounds
- If personal data is processed based on consent, it is necessary to ensure that:
  - consent is given by the data subject actively, not by silence, inactivity or pre-ticked boxes;
  - consent is distinguishable from other agreements, it is specific and clear;

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<sup>1</sup> The GDPR uses the term "child"; a Czech and Slovak equivalent can also be a "minor".

- data subjects are informed of the possibility to withdraw the consent at any time and it must be as easy to withdraw consent as to give it;
- the provision of services must not be conditional on consent to the processing of personal data that is not necessary to perform the contract;
- separate consents are given for distinct processing operations;
- consent is not given in a situation of clear imbalance between the controller and the data subject (e.g. where the controller is a public authority).

### **Regulation of consent in the processing personal data**

As we mentioned in Lesson 3, if no exception regulated by the GDPR applies to the processing of personal data, the controller must always obtain the data subject's consent with processing his/her personal data. The GDPR defines the consent as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her<sup>2</sup>.

Pursuant to current Slovak legislation<sup>3</sup>, consent is defined as any freely given, *express* and intelligible manifestation of will, so the new legislation differs from the current one *inter alia* in that the GDPR does not require express consent. That means that the consent can be implied (e.g. given by a certain action, but not omission), but it must be given freely, it must be specific, clear and based on intelligible information given to the data subject. In comparison, the current Czech legislation<sup>4</sup> defines consent only as any freely given and deliberate manifestation of will, the content of which is the data subject's consent to the processing of personal data. The new legislation thus states expressly that the consent can be implied (under conditions described above). The processing of sensitive personal data will, however, require express consent (unless an exception exists).

#### *Requirements for consent*

The GDPR regulates that the controller must be able to demonstrate that the data subject gave his/her consent with processing their personal data. In other words, the burden of proof to demonstrate that the consent was given and that it was given validly is on the controller. The GDPR regulates in article 7 the formal and material conditions for the validity of the consent as follows:

- *Free manifestation of will, certainty, informedness, unambiguity*: the consent requires an unambiguous manifestation of will, which is a free, specific, informed and unambiguous expression of the data subject that he/she agrees with the processing of the personal data related to him/her.

In order to ensure that consent is freely given, the controller should not rely on it if there is a clear imbalance between his and the data subject's position, in particular where the controller is a public authority and it is therefore unlikely that consent was given freely.

Consent is not to be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

For consent to be informed, the data subject should be aware of the fact and the extent to which consent is given, and at least of the identity of the controller and the purposes of the processing for which the personal data are intended.

- *Quoting separate purposes*: the consent must relate to all processing operations carried out for the respective purpose or purposes, and if the processing is carried out for more

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<sup>2</sup> Article 4 (11) of the GDPR.

<sup>3</sup> Article 4 (3) let. d) of the Slovak Act no. 122/2013 Coll., the Data Protection Act, as amended.

<sup>4</sup> Article 4 let. n) of the Czech Act no. 101/2000 Coll., the Data Protection Act, as amended.

purposes, the consent should be given for, or should quote the respective purposes separately so that the data subject has an actual option to refuse granting consent for any of the purposes.

Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case.

In practice, “bundled” consents that combine several unrelated purposes will not be permissible.

- *Distinguishability, clarity, plain language:* if consent is given in the context of a written declaration, which also concerns other matters, the request for consent must be presented in a manner which is easily distinguishable from other matters, and it must be worded clearly and in plain language; an infringement of this provision may result in the consent being invalid.

In practice this will mean that the part of the document containing the request for consent will have to be independent from e.g. other agreements, wording of orders, declarations, etc.

- *Intelligibility, accessibility:* the consent should be presented in an intelligible and easily accessible form, clearly and simply.

This request may be particularly difficult to achieve, especially with regard to the extent of information the controller is obliged to provide to the data subject (the notification obligation will be discussed in a separate lesson).

- *Option to withdraw:* it must be as easy to withdraw consent as to give consent. Data subjects must be informed of the possibility to withdraw their consent prior to giving it.

In practice, businesses and institutions will be requested that they make the option to withdraw the consent accessible in the same way as it was given (e.g. through a web page, e-mail, privacy settings, etc.). The GDPR regulates that the withdrawal of consent will not affect the lawfulness of processing based on consent before its withdrawal (i.e. prohibition of retroactivity), and the data subjects should be made aware of this fact prior to the consent.

- *Prohibition of inappropriate conditioning:* performance of a contract must not be made conditional on consent to the processing of personal data that is not necessary to perform the contract.

When assessing whether consent is freely given, utmost account will be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent (e.g. performance of a purchase contract concluded on-line should not be made conditional to consent with the processing of personal data for marketing purposes). Otherwise there would be reasonable doubt to what extent the consent was given freely, and thus it's valid.

Consent is presumed not to be freely given if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.

Recital 32 of the GDPR reads that consent may be given e.g. by a written statement, including by electronic means, or by an oral statement. Consent does not have to be express, but can include ticking a box when visiting an internet website (*opt-in*), choosing technical settings for information society services (e.g. by adjusting privacy settings on social media sites) or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent.

### *Consent for scientific research purposes*

The GDPR admits that if personal data is to be processed for purposes of scientific research, it is often not possible to fully identify the purpose of personal data processing at the time of data collection. Therefore, data subjects should be allowed to give their consent to certain areas of scientific research when in keeping with recognised ethical standards for scientific research. Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose.

Consent with participating in scientific research within clinical studies will be regulated by a special Regulation<sup>5</sup>.

### **Regarding the processing of children's personal data**

In several occasions the GDPR regulates the specific conditions for processing children's personal data. In particular, recital 38 reads that children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.

### *Processing a child's personal data based on consent*

The GDPR regulates the specific features of processing children's personal data based on consent as follows:

- if the controller processes personal data of a data subject based on his/her consent, in relation to the offer of information society services (e.g. social media) directly to a child, the processing of the personal data of a child is lawful where the child is at least 16 years old<sup>6</sup>;
- where the child is below the age of 16 years, such processing is lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child;
- the controller must make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

These conditions relate to personal data collected through the internet, i.e. they do not relate to offline data. Also, they do not relate to processing personal data on a legal ground other than the consent. The above provisions will not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

The consent of the holder of parental responsibility will not be necessary in the context of preventive or counselling services offered directly to a child (such as help lines aimed at children).<sup>7</sup>

### *Other particularities related to processing of children's personal data*

Children merit specific protection with regard to their personal data. Such protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child.

With regard to the above, any information and communication, where processing is addressed to a child, should be in such clear and plain language that the child can easily understand. The right to erasure and the "right to be forgotten" has a special meaning where consent was given during

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<sup>5</sup> Regulation (EU) No. 536/2014 of the EP and of the Council from 16 April 2014 on clinical trials on medicinal products for human use.

<sup>6</sup> Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

<sup>7</sup> Recital 38, the last sentence, of the GDPR.

childhood where the data subject was not fully aware of all risks connected to the processing and later he/she desires to erase such data, especially on the internet.<sup>8</sup>

If the controller processes the personal data based on legitimate interest grounds<sup>9</sup>, they must be able to demonstrate that they have responsibly and objectively assessed that the interests or fundamental rights and freedoms of the child whose personal data is processed do not override the legitimate interest pursued by the controller.

Pursuant to Article 40 (2) g) of the GDPR, associations and other bodies representing categories of controllers or processors may prepare codes of conduct for the purpose of specifying the application of this Regulation with regard to the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained.

Furthermore, each supervisory authority must, on its territory, promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing, whereby activities addressed specifically to children will receive specific attention.

### *What now*

Controllers should ensure that they process personal data on relevant and legal grounds regulated by the GDPR. If personal data is processed based on consent, the formal and material conditions for consent, as well as the circumstances of its granting, should comply with the new legislation. When processing personal data in relation to scientific research or in relation to children, additional conditions must be met.

### *Further information can be found here*

Consent with processing personal data:

Recitals 32, 33, 40, 42, 43

Articles 6 sec. 1; 7

Processing children's personal data:

Recitals 38, 58, 65, 71

Articles 6, sec. 1; 8; 40 sec. 2; 57 sec. 1 let. b)

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<sup>8</sup> Recital 65 of the GDPR.

<sup>9</sup> Article 6 (1) let. f) of the GDPR.