

March 2017

## *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 5 of 16*

### **Legitimate interest**

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

##### *Important changes*

- When performing their tasks, public authorities will not be able to process personal data on the basis of "legitimate interest".
- Processors who process personal data based on "legitimate interest" should pay due attention to assess if a data subject's fundamental rights and freedoms do not prevail over the legitimate interest pursued by the controller.

##### *Compliance Action Plan*

If the controller processes the personal data based on legitimate interest, they should ensure that:

- The processing is also lawful after the GDPR comes into effect (please refer to Lesson 3 – Lawfulness of processing and further processing) and that this legal ground is relevant for the circumstances;
- for purposes of demonstrability, they keep record of how they assessed the data subjects' rights and freedoms that will be affected by the processing;
- data subjects are notified that their personal data will be processed based on this legal ground.

## Regarding the specifics of “legitimate interest”

The GDPR regulates that the processing is lawful only when and to the extent that at least one of the stated conditions applies, whereby one of the conditions is that processing is necessary to serve 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 the protection of personal data, in particular where the data subject is a child<sup>1</sup>.

For the sake of comparison, the current Slovak legal regulation<sup>2</sup> (the “Slovak Act”) stipulates that the controller may also process personal data without the data subject’s consent if processing the personal data is necessary to protect the legal rights and interests of the controller or the third party, mainly personal data processed in the scope of property protection, financial or other interests of the controller and personal data processed for the security purposes of the controller via video cameras or similar systems; this will not apply if fundamental rights and freedoms of data subject protected by this Act are predominant in such personal data processing.

Also, the current Czech legal regulation (the “Czech Act”) stipulates that the controller may also process personal data without the data subject’s consent if it is necessary to protect the legal rights and interests of the controller, receiver or another data subject. Such processing must not infringe the data subject’s right to protection of their private and personal life<sup>3</sup>.

The controller’s protected interest (recognized by the legislation, not just by their own opinion) is proportionate to the protection of the right to privacy of the data subject (right to informational self-determination as a guaranteed fundamental right and freedom of the individual.<sup>4</sup> In case of a collision of these two interests/rights, it is necessary to assess if the controller’s right prevails in a particular situation (or of the receiver or a data subject) or if it is the data subject’s right to privacy that prevails. In other words, it is necessary to assess which interest has a higher value from the legal or social aspect. European courts and the Czech Constitutional Court decide this matter using a three-level proportionality test.<sup>5</sup>

Compared to the current legislation, the wording of the GDPR is broader and differs in the following:

- whereas the Act legitimizes the processing of personal data without the data subject’s consent for the purpose of the *protection of rights and interests protected by law* of the controller or a third party, the GDPR states that personal data may be processed without the data subject’s consent if it is necessary to serve the legitimate interests pursued by the controller or by a third party.

This means that the exception from the obligation to have the data subject’s consent regulated by the GDPR is broader than that regulated by the Act and can cover more processing operations.

Whereas under the current legislation the condition of processing personal data *for the protection of rights and interests protected by law* must be met (i.e. there must be the explicit intention to protect the controller’s or a third party’s rights and interests) the GDPR does not regulate such condition. On the contrary, pursuant to the GDPR, it is sufficient if

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

<sup>2</sup> Article 10(3) let. g) of Act no. 122/2013 Coll., the Data Protection Act as amended (Slovakia).

<sup>3</sup> Article 5 (2) let. e) of Act no. 101/2000 Coll., the Data Protection Act as amended (Czech Republic).

<sup>4</sup> Art. 10 (3) of the Charter of Fundamental Rights and Freedoms, Publish by the decision of the presidency of the Czech National Council no. 2/1993 Coll.; Art. 8 Charter of Fundamental Rights of the European Union; Art. 8 of Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>5</sup> I.e.: 1. if the limitation is regulated by the law 2. if the infringement is necessary and corresponds with the pursued legitimate interest. Refer to e.g. decision of the Constitutional Court of the Czech Republic file no. I.ÚS 321/06 dated 18 December 2006, decision of the plenum of the Constitutional Court of the CR file no. Pl. ÚS 4/94 dated 12 October 1994, and others. The usage of this test refers to e.g. the decision of the CJ EU dated 20 May 2003, in matters C-465/00, C-38/01 and C-139/01, *Österreichischer Rundfunk*; decision of the CJ EU dated 9 November 2010, in matters C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Hessen*.

personal data is processed for the legitimate interests of the controller or a third party, without the protective factor.

The new concept of legitimate interest will cover e.g. processing of personal data for marketing purposes or a one-off entry into a building, which purposes do not have an explicit protective character.

- As opposed to the current legal regulation, the GDPR regulates that the assessment of the balance of the legitimate interest pursued by the controller and rights and freedoms of data subjects who will be affected by the processing was carried out with a special consideration towards children<sup>6</sup>.

The GDPR aims for higher protection of children's rights and freedoms because they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. The GDPR obliges the controller to carefully document how and with what outcome the assessment of the balance of the controller's (or third party's) legitimate interest against a child's rights and freedoms was made.

For purposes of assessment, if a data subject's (not just children's) rights and freedoms do not override the legitimate interest of the controller, it is necessary to take into consideration the reasonable expectations of data subjects based on their relationship with the controller. The existence of the legitimate interest requires 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.

- Finally, the GDPR specifically states that public authorities will not be able to rely on the legitimate interest when carrying out their tasks. For this purpose, it will be necessary to consider the application of another legal ground<sup>7</sup>.

### *Legitimate interest*

The GDPR introduces the following examples of what types of processing could fall under the "legitimate interest" criteria:

- preventing fraud;
- direct marketing;
- if the controller is a part of a group of undertakings or institutions affiliated to a central body that may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data;
- preventing unauthorised access to electronic communications networks and malicious code distribution and stopping 'denial of service' attacks and damage to computer and electronic communication systems;
- indicating possible criminal acts or threats to public security by the controller and transmitting the relevant personal data on public security to a competent authority.

The purpose of processing, including the legitimate interest, should be duly notified to the data subject prior to the commencement of the processing (the notification obligation will be discussed in a separate lesson).

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<sup>6</sup> Please refer to Lesson 3.

<sup>7</sup> E.g. Article 6(1) let. c) or e) of the GDPR.

Further the GDPR explicitly states<sup>8</sup> that the associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to the legitimate interests pursued by controllers in specific contexts. The controllers should verify if such a Code of Conduct exists that would regulate the processing operations they carry out.

### *What now*

The controller should ensure that if they process personal data based on the legitimate interest pursued by them or a third party, data subjects' rights and freedoms do not override the legitimate interest, especially if the data subject is a child. Also, it is necessary to ensure that the controller is able to demonstrate how they assessed the balance of the legitimate interest against the data subjects' rights and freedoms.

### *Further information can be found here:*

Recitals 47 - 50

Articles 6(1) let. f), 13(1) let. d), 14(2) let b), 40(2) let. b)

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<sup>8</sup> Art. 40(2) let. b) of the GDPR.