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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 or office@bapol.cz, or by calling the phone number +421 220 251 311 and +420 251 009 111.

Lesson 13 of 16

Supervision over processing personal data

Below you will learn:

Important changes

- In certain cases, controllers and processors may be subject to supervision of not only the supervisory authority of the state in which they are established, but of the supervisory authority of another Union member state, which will have the status of a lead authority;
- A new European Union body will be established – the European Data Protection Board.

Compliance Action Plan

Controllers and processors should:

- become familiar with the extensive powers of the supervisory bodies;
- if they carry out cross border processing, becoming familiar with the functioning and cooperation of the lead supervisory authority and local supervisory authorities is recommended.

Supervision over processing personal data

Supervising the processing personal data is another extensive chapter of the GDPR. According to Recital 117 of the GDPR, the establishment of supervisory authorities in Member States is an essential component of the protection of natural persons with regard to the processing of their personal data. The supervisory authorities' role is to monitor and eventually to authoritatively ensure compliance with the GDPR for purposes of protecting the rights and fundamental freedoms of the data subject whose personal data is processed.

In the area of supervision over processing personal data the GDPR introduces several new concepts and even a new EU institution, in which all Member States will be represented. It will be of essence for controllers and processors to become familiar with which supervisory bodies they will be subject to in the extent of which processing operations, and what obligations they will have towards these authorities.

Local supervisory authorities

First of all, controllers and processors will be subject to the supervisory authority of the state in which the controller is established (for ease of reference we will refer to such DPA as the "local supervisory authority", although the GDPR does not use this term). In Slovak conditions this would be the Data Protection Office of the SR¹, in Czech conditions the Data Protection Office of the CR².

The local supervisory authority is competent to supervise processing:

- in the context of the activities of a controller or processor established on its own Member State territory.

The local supervisory authority will not be automatically competent to carry out supervision over cross border processing of personal data within two or more member states (for such processing please refer to the "*Lead supervisory authority*" below), but only over processing operations carried out within one state (also when it is carried out by a controller or processor who otherwise conducts cross border processing);

- carried out by public authorities or private bodies acting in the public interest.

Typically these are processing operations of State administrative bodies and self-administration bodies. Supervisory authorities are, however, not competent to supervise processing operations of courts acting in their judicial capacity;

- affecting data subjects on its territory.

The local supervisory authority will always be competent if rights of data subjects located in its own territory are in question, i.e. regardless whether it is a local or cross border processing (this is an exception from the rule explained in the first bullet point above). The local supervisory authority is always competent to handle a complaint lodged with it or a possible infringement of the GDPR if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State;

- carried out by a controller or processor not established in the Union when targeting data subjects residing on its territory.

This type of a supervisory power relates to the extended applicability of the GDPR (please refer to Lesson 1). This means that the local supervisory body will have competence over e.g. a Chinese controller which is not established in the EU, but which offers goods or services in a Member State.

¹ Website: <https://dataprotection.gov.sk/uouu/> .

² Website: <https://www.uouu.cz/> .

Lead supervisory authority

If the controller or the processor process personal data on a cross border basis (whether through one or more establishments in the Union), it will also fall under the lead supervisory authority which is competent as the main supervisory authority for cross border processing. Processing operations which do not contain a cross border element will continue to fall under the local supervisory authorities; however, in case of cross border processing, the lead supervisory authority will be competent.

All (also other than lead) supervisory authorities will be competent to handle a complaint lodged with it or a possible infringement of the GDPR if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State. Also in case of cross border processing, any supervisory authority may act under said conditions. However, the supervisory authority must first notify the lead supervisory authority, which decides if it will deal with the case or not.

If the lead supervisory authority decides that it will not deal with the matter, the local supervisory authority will be competent. If the lead supervisory authority decides that it will deal with the matter, the supervisory authority who notified the lead supervisory authority can deliver a draft decision to the lead supervisory authority, which will subsequently follow the cooperation procedure.

Cooperation between the lead supervisory authority and the other supervisory authorities concerned

- *Cooperation and exchange of information:* the lead supervisory authority cooperates with the other supervisory authorities concerned in an endeavour to reach consensus. The lead supervisory authority and the supervisory authorities concerned exchange all relevant information with each other.
- *Submitting a draft decision to other supervisory authorities of opinion:* the lead supervisory authority without delay communicates the relevant information on the matter to the other supervisory authorities concerned. Without delay it submits a draft decision to the other supervisory authorities concerned for their opinion and take due account of their views.
 - *Submitting the matter to the Board:* where any of the other supervisory authorities concerned within a period of four weeks expresses a relevant and reasoned objection to the draft decision, the lead supervisory authority, if it does not follow such objection or is of the opinion that it is not relevant or reasoned, submits the matter to the European Data Protection Board (the "Board").
 - *Submitting a revised draft of the decision for opinion to other supervisory authorities concerned:* where the lead supervisory authority intends to follow the relevant and reasoned objection made, it submits to the other supervisory authorities concerned a revised draft decision for their opinion.
- *Adopting a decision:* the lead supervisory authority adopts and notifies the decision to the main establishment or single establishment of the controller or processor, as the case may be, and informs the other supervisory authorities concerned and the Board of the decision in question, including a summary of the relevant facts and grounds. The supervisory authority with which a complaint has been lodged informs the complainant of the decision. Where a complaint is dismissed or rejected, the supervisory authority with which the complaint was lodged adopts the decision and notifies it to the complainant and informs the controller thereof.
- *Ensuring compliance:* the lead supervisory authority ensures that the controller or processor take the necessary measures to ensure compliance with the decision as regards processing activities in the context of *all* its establishments in the Union. The controller or

processor notifies the measures taken for complying with the decision to the lead supervisory authority, which informs the other supervisory authorities concerned.

The rules for determining the lead supervisory board of the controllers or processors, including a broader discussion on the topic with practical examples, is contained in the document drafted by WP 29.³

European Data Protection Board

The GDPR regulates a new independent body of the Union with its own legal personality – the European Data Protection Board (the “Board”). The board is a body of the European Union and is created from the representatives of supervisory authorities of all Member States and the European Data Protection Supervisor.

Although the controllers and the processors will not be directly subject to the supervision of the Board, the Board may have impact on the processing of personal data. The Board has a list of duties, among which it ensures a consistent application of the GDPR. For this purpose and in the context of the mechanism of consistency, it cooperates with supervisory bodies of the Member States when adopting decisions.

What now

For controllers and processors which process personal data only within one jurisdiction, only the supervisory authority in that particular member state will be relevant. However, if you process personal data on a cross border basis, it will be essential to realize that these processing operations may be subject to the supervision of the lead supervisory authority. Controllers and processors should be prepared to communicate with other than their local supervisory authority.

Further information can be found here:

Recitals 117 – 140

Chapters VI and VII

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³ Guidelines for identifying a controller or processor’s lead supervisory authority; adopted by the Article 29 Data Protection Working Party on 13 December 2016, revised on 5 April 2017, WP 244 rev. 01.