

A white paper airplane is shown in flight, with a dotted line tracing its path as it curves downwards and then loops back up towards the text. The background is a light beige gradient with several white, stylized clouds scattered across the top half.

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Data Protection in the EU

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Overview

I. Short history of data protection in Europe

- ✓ The concept behind data protection
- ✓ Cornerstones of the development and the generations of data protection regulation

II. Back to the basics

- ✓ The importance of definitions in practice
- ✓ Comparison of the basic definitions (EU directive and three national regulation)

Short history of data protection in Europe

The threats of information society

✓ Orwell's negative utopia (written in 1948!):

„The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it, moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment.”

„You had to live - did live, from habit that became instinct - in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.”

„The black-moustachio'd face gazed down from every commanding corner. There was one on the house-front immediately opposite. BIG BROTHER IS WATCHING YOU”
(George Orwell: 1984)

Short history of data protection in Europe

The threats of information society

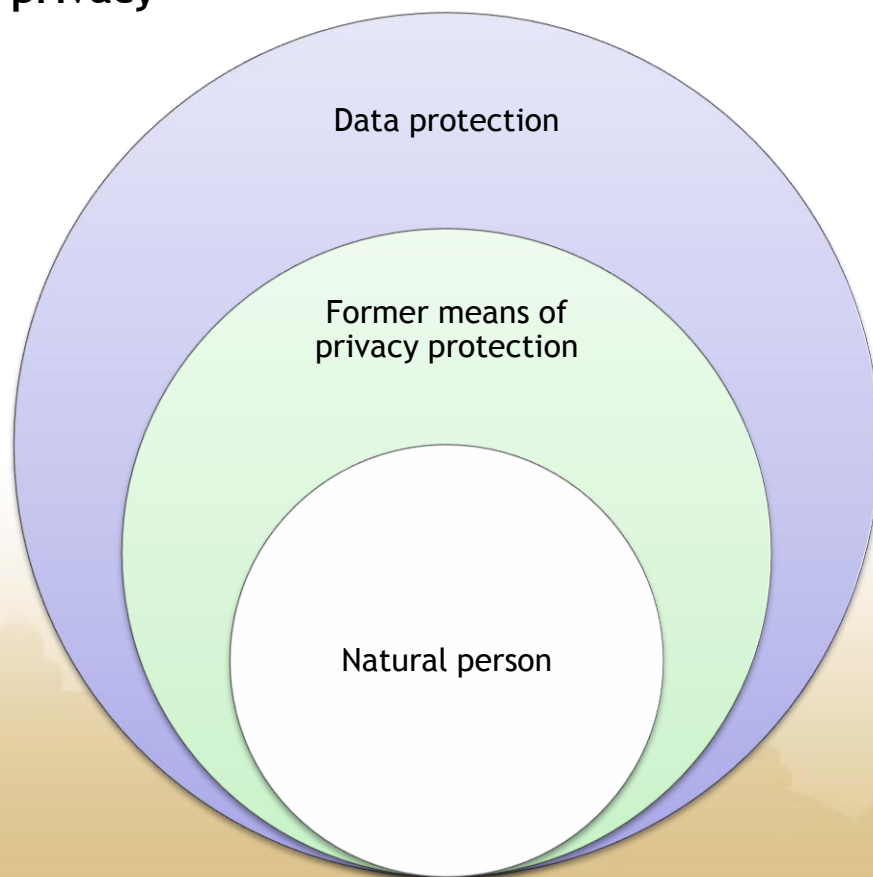
- ✓ In the 60'es technology dramatically increase the effectiveness of data processing, and makes it possible to survey people
- ✓ There is a clear intention by the states in whole Europe to establish and centralize electronic databases.

(Democratic) answer to the threats: data protection regulation

- ✓ Data protection regulation is a new means of protecting privacy
- ✓ Data protection has joined to the group of former legal protection: protection of someone's image, (recorded) voice, and private secret
- ✓ Data protection regulation is much stronger than the former means: stricter provisions and easier procedure to prove (although less case law in the practice of courts)
- ✓ In case of natural person data protection regulation deprives former legal institutions

Short history of data protection in Europe

Data protection as a
new means of privacy



Short history of data protection in Europe

1st generation of data protection regulation

- ✓ React on, and regulates only the automated data processings
- ✓ The main purpose is to ensure the transparency of the state databases
 - Hessen, 1970
 - Sweden, 1973
 - Federal Republic of Germany (BRD), 1977

2nd generation of data protection regulation

- ✓ Regulates both automated and manual data processings
- ✓ Based on the concept of information self-determination, which was developed in 1983 by the German Constitutional Court (The „national-census decision”)
- ✓ The concept permeated almost the whole European data protection regulation (Austrian, Finnish, Dutch, Hungarian)
- ✓ Focus on general principles rather than on technology

Short history of data protection in Europe

The concept of information self-determination (as expressed by the Hungarian Constitutional Court)

- ✔ The data subject shall order the use and processing of the personal data;
- ✔ The collecting and use of personal data is only allowed with the consent of the data subject;
- ✔ The whole path of the data processing has to be followable and controllable for everyone, so persons shall have the right to know who, when, and for what reason and for what purposes uses their personal data;
- ✔ As an exception, the law can order the compulsory data transmission and can prescribe the details of the data processing, too;
- ✔ Such law limits the right of the information self-determination, and so it is subject to the general constitutional test of the restriction of fundamental rights;

Short history of data protection in Europe

The concept of information self-determination (as expressed by the Hungarian Constitutional Court)

- ⇒ Basically, data processing can be based on the data subject's consent or on a provision of an act.
- ⇒ There are many principles, guarantees and legal institutions deriving from the concept:
 - data processing shall have a (legal) purpose,
 - the information provision concerning the data processing
 - limited possibility of data(base) integration
 - the requirement of the informed consent
 - the rights of the data subjects

Short history of data protection in Europe

The criticism of the concept

- ✔ As a consequence of the concept enormous amount of new law was made to ensure the legality (legal base) of data processing: finally the status quo has become simply enacted
- ✔ Formal criteria became more important than the content
- ✔ The data protection became the „legal game of the upper middle class” (Mayer Schönberger); economic and social status is needed to live with the right of information self-determination
- ✔ Most people automatically (and without any awareness) gives consent

Short history of data protection in Europe

The criticism of the concept

- ⇒ It seems, that the concept of information self-determination is a legal fiction
 - In the Hungarian legal system more than 540 section which gives permission to data processings and another 1350 section to data transmission amongst the authorities
- ⇒ The most element of the concept is still valid and applicable
- ✓ Most of the data protection acts in Europe and the EC directive can be regarded as a 2nd generation regulation.

Short history of data protection in Europe

3rd generation of dp regulation

- ✓ Germany (again😊): Teledienstdatenschutzgesetz, 1997 (data protection in electronic communications)
- ✓ New principles emerges
 - Principle of data thrift
 - Data protection audit
- ✓ Tries to answer to the emerging questions of the data protection
- ✓ Focus again on technology: tries to form the technology and the procedure itself to serve privacy and data protection
- ✓ Sectoral data protection regulation's importance is emerging

- ✓ The principles of the different generations are not opposite to, but complete each other

Short history of data protection in Europe

About the European Regulation

- ✓ Convention for the protection of individuals with regard to automatic processing of personal data, Council of Europe, 28th January 1981.
- ✓ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- ✓ Implementation deadline: 1998

- ✓ The main purposes of the data protection directive
 - protection of individuals
 - ensure free movement of such data
- ✓ Which is „stronger”, if any?
 - Can a Member State adopt stricter rules than the directive?

Short history of data protection in Europe

- ✓ Recital (10) of the Directive „Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms. [...] For that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community”
- ✓ Lindquist case: although the Commission argued, that wider protection infringe the Directive, the ECJ didn't accept this argument. The Member States shall have higher level of protection as far as it is in accordance with the directive's objective of maintaining a balance between the free movement of personal data and the protection of private life.
- ✓ Hungary clearly provide higher level of protection

Back to the basics - definitions

Comparison of the ...

- ✓ Data protection directive
- ✓ Hungarian data protection act (Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest)
- ✓ Czech data protection act (Act 101 of April 4, 2000, on the Protection of Personal Data and on Amendment to Some Acts)
- ✓ Slovakian data protection act (Act No. 428/2002 Coll. on Protection of Personal Data)

Back to the basics - definitions

Personal data

✓ EU Directive: shall mean

- any information relating to an identified or identifiable natural person ('data subject');
- an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity

✓ Hungary: shall mean

- any information relating to an identified or identifiable natural person ('data subject')
- *and any reference drawn, whether directly or indirectly, from such information.*
- *In the course of data processing, such information shall be treated as personal data as long as the data subject remains identifiable through it.*
- An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

Back to the basics - definitions

Personal data

- ✓ Czech Republic (personal data): shall mean
 - any information relating to an identified or identifiable data subject.
 - a data subject shall be considered identified or identifiable if it is possible to identify the data subject directly or indirectly in particular on the basis of a number, code or one or more factors specific to his/her physical, physiological, psychological, economic, cultural or social identity
- ✓ Czech Republic (anonymous data): shall mean
 - *such data that cannot be linked to an identified or identifiable data subject*
 - *in their original form or following processing thereof*

Back to the basics - definitions

Personal data

- ✓ Slovakia (personal data): shall mean
 - any information relating to an identified or identifiable natural person,
 - while such person is one who can be identified, directly or indirectly,
 - in particular by reference to a identifier of general application or by reference to one or more factors specific to his physical, physiological, psychic, mental, economic, cultural or social identity.
- ✓ Slovakia (anonymous datum): shall mean
 - *a personal datum adjusted in such manner that it cannot be matched with the concerned data subject*

Back to the basics - definitions

Personal data

- ✓ UK (personal data): data which relate to a living individual who can be identified:
 - from those data; or
 - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller
 - and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Back to the basics - definitions

Personal data

✓ Absolut and relative interpretation of personal data

- Absolut interpretation: the data is a personal data, if the link (relation) between the data subject and the data can be *somehow reconstructed*, even if it is possible only through more data controllers and more steps. (HU, CZ, SK)

⇒ This results, that wide range of data is regarded personal data

- Relative interpretation: the data is a personal data if the link (relation) between the data subject and the data can be established by a certain data controller. (UK)

⇒ This results, that the same data can be regarded as personal data at one data controller and anonymus data at another data controller.

- There is a difference in the EU concerning the definition and so concerning the scope of the data protection regulation

Back to the basics - definitions

Processing of personal data

✓ EU Directive: shall mean

- any operation or set of operations which is performed upon personal data,
- whether or not by automatic means,
- such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

Back to the basics - definitions

Processing of personal data

- ✓ Hungary (data management): shall mean
 - any operation or set of operations that is performed upon data,
 - whether or not by automatic means,
 - such as collection, recording, organization, storage, adaptation or alteration, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, deletion or destruction, and blocking them from further use. Photographing, sound and video recording, and the recording of physical attributes for identification purposes (such as fingerprints and palm prints, DNA samples and retinal images);

- ✓ Hungary (data processing): shall mean
 - the technical operations involved in data management,
 - irrespective of the method and instruments employed for such operations and
 - the venue where it takes place.

Back to the basics - definitions

Processing of personal data

✓ Czech Republic: shall mean

- any operation or set of operations that is *systematically* executed by a controller or a processor in relation to personal data
- by automatic or other means.
- Personal data processing shall mean, in particular, the collection of data, their storage on data carriers, disclosure, modification or alteration, retrieval, use, transfer, dissemination, publishing, preservation, exchange, sorting or combination, blocking and liquidation

✓ Slovakia: shall mean

- any operation or set of operations which is performed upon personal data
- such as obtaining, collection, recording, organization, adaptation or alteration, retrieval, consultation, alignment, combination, transfer, use, storage, destruction, transmission, provision, making available or making public

Back to the basics - definitions

Controller - Processor

✓ EU Directive (controller): shall mean

- the natural or legal person, public authority, agency or any other body which alone or jointly with others
- determines the purposes and means of the processing of personal data;
- where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law

✓ EU Directive (processor): shall mean

- a natural or legal person, public authority, agency or any other body which
- processes personal data on behalf of the controller

Back to the basics - definitions

Controller - Processor

- ✓ Hungary (controller): shall mean
 - a natural or legal person or unincorporated organization that
 - determines the purpose of the processing of data,
 - *makes decisions regarding data management (including the means) and*
 - *implements such decisions itself or engages a processor to implement them.*

- ✓ Hungary (processor): shall mean
 - a natural or legal person or unincorporated organization that
 - is engaged in the processing of personal data on behalf of a controller
 - including when ordered by virtue of legal regulation.

Back to the basics - definitions

Controller - Processor

- ✓ Czech Republic (controller): shall mean
 - any entity that determines the purpose and means of personal data processing,
 - *carries out such processing and*
 - *is responsible for such processing.*
 - The controller may empower or charge a processor to process personal data, unless a special Act provides otherwise.

- ✓ Czech Republic (processor): shall mean
 - any entity processing personal data
 - on the basis of a special Act or
 - authorisation by a controller.

Back to the basics - definitions

Controller - Processor

✓ Slovakia (controller): shall mean

- a state administration authority, territorial self-government authority, other public authority body or legal or natural person, which alone or jointly with others
- determines the purposes and means of the processing of personal data.
- Where the purposes and means of the processing of personal data are regulated by a special Act, the controller shall be the authority determined thereby for fulfilment of the purpose of the processing or the authority, which fulfils the requirements stipulated by law.

✓ Slovakia (processor): shall mean

- a state administration authority, territorial self-government authority, other public authority body or other legal or natural person
- processing personal data on behalf of the controller or controller's representative.

Back to the basics - definitions

Controller - Processor

- ✓ Slovakia (entitled person): shall mean
 - any natural person
 - disposing of personal data
 - within the framework of his employment relationship, civil service employment relationship, civil service relationship, membership, based on authorization, election or appointment or within the framework of performance of a public office,
 - who may process personal data only upon instruction of the controller, controller's representative or processor, unless otherwise stipulated by this Act or by a special Act

Back to the basics - definitions

Summary of data processing, data management, controller, processor

Directive	Hungarian Act	Czech Act	Slovakian Act
<i>Processing of personal data</i>	<i>Data management</i>	<i>Processing of personal data</i>	<i>Processing of personal data</i>
-	<i>Data processing</i>	-	-
<i>Controller</i>	<i>Controller</i>	<i>Controller</i>	<i>Controller</i>
<i>Processor</i>	<i>Processor</i>	<i>Processor</i>	<i>Processor</i>
-	-	-	<i>Entitled person</i>

Back to the basics - definitions

Hungarian regulation concerning data controller and processor

- ✔ A processor may not make any decision on the merits of data management and shall process any and all data entrusted to him solely as instructed by the controller; the processor shall not engage in data processing for his own purposes and shall store and safeguard personal data according to the instructions of the controller.
- ✔ Liability
 - the controller shall be held liable for the legitimacy of instructions pertaining to data management operations
 - the data processor shall be held liable within his sphere of competence and within the scope specified by the data manager for the processing, alteration, erasure and disclosure by transmission of personal data.
- ✔ The data processor shall not be permitted to subcontract any part of his operations to another data processor!

Back to the basics - definitions

Consent

✓ EU Directive: shall mean

- any freely given specific and informed indication of his wishes
- by which the data subject signifies his agreement
- to personal data relating to him being processed.

✓ Hungary: shall mean

- any freely given specific and informed indication of his wishes
- by which the data subject signifies his agreement
- to personal data relating to him being processed
- *without limitation or with regard to specific operations.*

Back to the basics - definitions

Consent

- ✓ Czech Republic: shall mean
 - a free and informed manifestation of will
 - of the data subject
 - the content of which is his assent to personal data processing.
- ✓ Slovakia: shall mean
 - any freely given specific and informed indication of his wishes
 - by which the data subject knowingly signifies his agreement
 - to personal data related to him being processed.

Back to the basics - definitions

Interpretation issues of the 'consent'

- ✓ Definitions clearly refers to the concept of information self determination
- ✓ Validity of the consent should be based on a wide range of information provision
- ✓ The information provision usually does not happen
 - ⇒ Most of the data processing which based on consent are illegal?
 - ⇒ It may hard to prove whether the consent was informed (burden of proof is an important question)

Back to the basics - legal base of processing

Legal base of data processing

- ✓ EU Directive: personal data may be processed only if:
 - the data subject has unambiguously given his consent; or
 - processing is necessary 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; or
 - processing is necessary for compliance with a legal obligation to which the controller is subject; or
 - processing is necessary in order to protect the vital interests of the data subject; or
 - processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
 - processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject

Back to the basics - legal base of processing

Legal base of data processing

- ✓ Hungary: Personal data may be processed if
 - the data subject has given his consent, or
 - decreed by law or by a local authority based on authorization conferred by law concerning specific data defined therein.

- ✓ Drawing up and participated in a contract is regarded as a consent
- ✓ Data processing is allowed to the extent necessary to protect the vital interests of the data subject
- ✓ If a fulfillment of a provision of an act clearly needs and assumes data processing, than it can be regarded as an authorization by law

Back to the basics - legal base of processing

Legal base of data processing

✓ Czech Republic

- The controller may process personal data only with the consent of data subject. Without such consent, the controller may process the data:
- if he is carrying out processing which is essential to comply with legal obligation of the controller;
- if the processing is essential for fulfilment of a contract to which the data subject is a contracting party or for negotiations on conclusion or alteration of a contract negotiated on the proposal of the data subject;
- if it is essential for the protection of vitally important interests of the data subject. (In this case, the consent of data subject must be obtained without undue delay, otherwise the controller must terminate the processing and liquidate the data.

Back to the basics - legal base of processing

Legal base of data processing

✓ Czech Republic

- in relation to personal data that were lawfully published in accordance with special legislation (right to the protection of private and personal life should be not prejudiced);
- if it is essential for the protection of rights and legitimate interests of the controller, recipient or other person concerned. (right to the protection of private and personal life should be not prejudiced);
- if he provides personal data on a publicly active person, official or employee of public administration that reveals information on their public or administrative activity, their functional or working position, or
- if the processing relates exclusively to archival purposes pursuant to a special Act.

Back to the basics - legal base of processing

Legal base of data processing

- ✓ Slovakia: Personal data may only be processed
 - upon consent of the data subject, unless otherwise stipulated by this Act
- ✓ Personal data may be processed without consent if
 - the processing of personal data is necessary for the purpose of artistic or literary expression, for the purpose of informing the public by means of the mass media
 - the processing of personal data is necessary for the performance of a contract to which the data subject is party or in order to establish relations or take steps at the request of the data subject prior to entering into a contract; or
 - processing of personal data is necessary for protection of life, health or property of the data subject or of another natural person without legal capacity or physically unable to give a consent and a consent of his legal representative cannot be obtained

Back to the basics - legal base of processing

Legal base of data processing

- ✓ Slovakia: Personal data may only be processed
 - upon consent of the data subject, unless otherwise stipulated by this Act
- ✓ Personal data may be processed without consent if
 - the subject of the processing is constituted solely by the title, name, surname and address of the data subject without a possibility of adding his other personal data and they are to be used solely for the controller's needs concerning the mail correspondence with the data
 - subject and the keeping of records of such data; if the scope of the controller's activities is direct marketing,
 - the processed personal data have already been made public; in such cases personal data must be duly denoted; or
 - processing of personal data is necessary for fulfilment of an important task carried out in the public interest
 - processing of personal data is necessary for protection of statutory rights and legitimate interests of the controller or the third party

Back to the basics - legal base of processing

Legal base of data processing

✓ Consequences

- No legal base is enacted which enables data controller to balance between interests
- Hungarian data protection is much stricter and formal than the directive and the Czech and Slovakian regulation
- Hungarian regulation is stricter, than the EU directive

Summary

I. Short history of data protection in Europe

- ✓ The challenges concerning the 2nd generation regulation has to be solved
 - New principles
 - Data protection audit
 - Appointment of internal data protection officers at big institutions

II. Back to the basics

- ✓ Despite the EU directive even the very basic questions are not (well) harmonized, which has a significant effect in practice

Thank you for your attention!

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