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Methodological guideline no. 2/2018

Lawfulness of processing

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According to § 81 par. 2 letters d) Act no. 18/2018 Coll. Office for the Protection of Personal Data of the Slovak Republic (hereinafter referred to as the "authority") issues this methodological guideline.

INTRODUCTION

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection natural persons in the processing of personal data and on the free movement of such data, which Directive 95/46/EC (General Data Protection Regulation) is repealed (hereinafter "Regulation") regulates the principles of personal data processing in Art. 5 par. 1. In Act no. 18/2018 Coll. on the protection of personal data and on the amendment of certain laws (hereinafter referred to as "Act No. 18/2018 Coll. z."), the principles of processing are reflected in the provisions of § 6 to § 12.

These basic principles basically reflect the existing legal regulation of personal protection data, while Regulation and Act no. 18/2018 Coll. they specify and establish individual principles more specific rules for operators. The principles are interwoven throughout the Regulation and by law no. 18/2018 Coll. and affect the interpretation of individual provisions as well as their administration application.

Legality can be described as one of the most important principles of personal protection data. This policy expresses and contains the condition that the processing of personal data is legal only if and only to the extent that at least one of the conditions according to Art. 6 para. 1 Regulations/§ 13 par. 1 of Act no. 18/2018 Coll.

The principle of legality also expresses the requirement for fair and lawful processing, which

means that the processing must not contradict (must be consistent) not only with itself

Regulation/law no. 18/2018 Coll., but it must be in accordance with the law of the Union, the law of the Member States state and good manners, so that the basic rights and freedoms of the affected persons are not violated, especially to the violation of their right to preserve human dignity, or to other unauthorized ones by interfering with her right to privacy. In connection with the above, legal regulation is necessary personal data protection should always be perceived as a general legal regulation - *lex generalis*.

Art. 5 par. 1 letter a) Regulations

Personal data must be processed lawfully, fairly and transparently relation to the person concerned ("lawfulness, justice and transparency").

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§ 6 of Act no. 18/2018 Coll.

Personal data can only be processed in a legal manner and in such a way that there is no violation fundamental rights of the person concerned.

1.1 What does the legal basis for personal data processing mean?

The operator must dispose of personal data for each purpose of processing adequate legal basis in accordance with Art. 6 par. 1 Regulations/§ 13 par. 1 of Act no. 18/2018

Z. z., which defines the conditions under which processing is legal. Legal basis

we understand from the point of view of personal data protection the reason that allows the operator carry out individual processing operations with the personal data of the persons concerned (e.g. legitimate interest of the operator to protect his property, Act no. 311/2001 Coll.

Labor Code as amended). Personal data may be processed by the operator for different purposes, and for each such purpose it must have a suitable/adequate legal basis.

On what basis do I perform the processing? On the basis of consent, contract, law, legitimate interest...?

The operator is obliged to determine the legal basis before starting the processing and may choose any of the legal bases if it meets the conditions defined for it. But he has to

consider the legal consequences of determining a specific legal basis, which means the operator he must take care to adapt its use to a specific processing activity and to his own own environment.

1.2 Lawfulness of data processing

The principle of legality is specified in particular in Art. 6 of the Regulations/§ 13 of the Act no. 18/2018 Coll. This provision exhaustively enumerates the conditions under which the processing takes place legal:

- a) consent of the person concerned to the processing of personal data,
- b) processing is necessary for the performance of the contract to which it is a party person, or within pre-contractual relations,
- c) processing is necessary to fulfill a legal obligation¹ of the operator,
- d) processing is necessary to protect the vital interests of the data subject or another natural person,
- e) processing is necessary to fulfill a task carried out in the public interest or at exercise of entrusted power,
- f) legitimate interest of the operator or a third party.

In the context of § 13 par. 1 letter c) Act no. 18/2018 Coll. the processing is legal if it is stipulated by a special law regulation or international treaty to which the Slovak Republic is bound.

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Operators whose activities are covered by the regulation of the Regulation should not omitting that in the 4th part of Act no. 18/2018 Coll., which is binding for all entities adjusted special situations of legal processing, which are based on the authorizers the provisions of the Regulation, within which the Member States had the possibility to keep in force, or, on the contrary, introduce more specific provisions for the purpose of stating the right to protection personal data in accordance with the specifications specific to that legal order, or

already in the field of freedom of expression and right to information, processing of personal data of employees and so on. The provisions of § 78 of Act no. 18/2018 Coll. they do not represent separate legal bases processing, but adjust the conditions, or conditions under which the processing is lawful.

1.3 Three types of personal data

- general (ordinary) personal data (e.g. name, surname, social security number),
- special categories of personal data, which are exhaustively defined in Art. 9 par. 1

Regulations/§ 16 par. 1 of Act no. 18/2018 Coll. For a special category of personal data

according to the new legislation on the protection of personal data, the birth number is no longer considered, but enjoys the same legal protection, including the ban on publishing the social security number, s

with the exception of the case where the person concerned publishes the birth number himself and also the photo, unless it is prepared for the purpose of processing a special category of personal data, is not considered a special category data,

- personal data related to the recognition of guilt for criminal acts and misdemeanors.

In the case of processing a special category of personal data, it is necessary to state that their processing is generally prohibited unless one of the conditions in the meaning applies

Art. 9 par. 2 Regulations/§ 16 par. 2 of Act no. 18/2018 Coll., for which the processing is special category of personal data allowed, while the operator must not forget that for

the processing itself must also have an adequate legal basis in accordance with Art. 6 para. 1 Regulations/13 para. 1 of Act no. 18/2018 Coll.

In other words, in terms of the new legislation, it is necessary to fulfill the condition first

according to Art. 9 par. 2 Regulations/§ 16 par. 2 of Act no. 18/2018 Coll., which exempts processing from

of the prohibition referred to in art. 9 par. 1 Regulations/§ 16 par. 1 of Act no. 18/2018 Coll. and subsequently

fulfill the condition according to Art. 6 par. 1 Regulations/§ 13 par. 1 of Act no. 18/2018 Coll. (legality

processing in the context of having a suitable and adequate legal basis).

2. Consent

Consent to the processing of personal data must be given freely and must be

specific, informed, unequivocal and demonstrable.² The conditions for granting consent are detailed in Art. 7 Regulations/§ 14 of Act No. 18/2018 Coll. So that consent can be

Closer to this legal basis - WP 29 Working Group Guidance on Consent under the Regulation, available at: https://dataprotection.gov.sk/uouu/sites/default/files/usmernenia_k_suhlasu.pdf

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considered as a valid legal basis for processing should be specific and informed by indicating the wishes of the person concerned. When used properly, consent is a tool that provides the data subject with control over the processing of his data. If used incorrectly, control is apparent and consent constitutes an inappropriate legal basis for processing. In the meaning already mentioned legal consequences of choosing a legal basis is necessary in this state that the person concerned has the right to withdraw consent at any time and before providing it consent, the person concerned must be informed of this right.

The method of obtaining consent and proof of its granting is at the discretion of the operator; the office consistently monitors the line of rights of the persons concerned, i.e. the right to agree and disagree, as well as the right not to be discriminated against in connection with not giving consent.

In this context, we can also mention the term express consent, used for example in processing of a special category of personal data, or in case of consent to processing social security number (provided consent is an appropriate legal basis). From a legal point of view explicit consent means expressed consent. Any consent to processing must be free, specific, informed and unambiguous expression of the will of the person concerned, in which form declarations; or a clear confirming act (e.g. uploading a photo to web interface the person concerned), expresses consent to the processing of personal data, whatever but it cannot be considered as express consent. It can therefore be assumed that the key the difference between ordinary and express consent is the way consent is expressed.

Consent that can be inferred from the actions of the person concerned is not considered express consent persons. Express consent must be provided by a statement from the person concerned. Most often provided by a clear written statement of the person concerned, which he or she handwritten signs, and by which he agrees to the processing of personal data of a special category for a specific one purpose. However, this is not the only way of proving its acquisition, it can be in such a way as well providing explicit consent by filling out an electronic form, sending an e-mail with an electronic signature or a scan of the declaration together with the signature. The so-called also seems appropriate. two-step verification.

Example: The operator sends an e-mail to the person concerned that he intends to process health data records, and if the person concerned agrees, he should send a reply to the operator "I agree", and the operator will subsequently verify this fact by sending an SMS verification code to confirm consent.

In application practice, the Office often encounters incorrect use of consent, in particular in situations where a special law directly imposes on the person concerned the obligation to provide personal data to a legally defined entity. In such a case, the person concerned shall not be granted the right to decide on the processing of her personal data. Similarly, in the case of obtaining consent with processing personal data for the purpose of concluding and fulfilling the contract. Obtaining consent of the person concerned is in such cases redundant and confusing for the person concerned, as the operator has another relevant legal basis for the processing in question, the use of which will probably be invoked after the consent of the person concerned has been revoked.

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The Office is of the opinion that the mentioned procedure of the operators has, among other things, a consequence falsely informing affected persons about the right to withdraw consent in accordance with Art. 7 par. 3 Regulations/§ 14 par. 3 of Act No. 18/2018 Coll., as well as insufficient fulfillment of the legal requirement information obligation according to Art. 13 or 14 of the Regulations/§ 19 or 20 of Act No. 18/2018 Coll. We emphasize once again that it is the duty of the operator to establish the processing of personal data

data on an appropriate legal basis so that the processing meets the requirements of lawfulness.

3. Contract

The operator processes personal data without the consent of the person concerned, if the processing personal data is necessary for the performance of the contract in which the data subject acts as one of the contracting parties, or to take action before concluding the contract on the basis requests of the person concerned, i.e. within pre-contractual relations. Provision of Art. 6 par. 1 letter b) Regulations/§ 13 par. 1 letter b) Act no. 18/2018 Coll. it is necessary to interpret strictly, it does not have apply to situations where the processing is not really necessary for the performance of the contract. That means, for example, in the case of an employment contract, the necessity of processing is assessed personal data of the persons concerned, so that the contractual parties fulfill the obligations specified in the work contract.

4. Legal obligation

According to Art. 6 par. 1 letter c) of the Regulation, the processing is legal only if and only in that scope, if it is necessary to fulfill the legal obligation³ of the operator. Currently it is it is necessary to interpret the provision in question in terms of the opinion of the European Commission, which is of the opinion that this legal basis for processing personal data can be the operator use only if it is a legal obligation, not an authorization, or an option enshrined in the law. In special legal regulations, processing is defined by command form, as a legal obligation, expressed for example: the operator is obliged to process name, surname ..., the operator processes name, surname ..., health documentation contains

Example of a legal obligation: According to § 99 of Act no. 311/2001 Coll. Labour Code, the employer is obliged to keep records of working hours, overtime work, night work, the active part and the inactive part of the employee's work readiness so that it is recorded the beginning and end of the time period in which the employee performed work or was instructed to do so or an agreed working emergency. During the temporary assignment, the employer leads

records according to the first sentence at the place of work of the temporarily assigned employee.

Example of a legal obligation: According to § 20 par. 4 first sentence of Act no. 245/2008 Coll. about education and education (school law) and on the amendment of some laws, elementary school requires

In the context of § 13 par. 1 letter c) Act no. 18/2018 Coll., i.e. in the case of processing activities that do not fall under under the law of the European Union, processing is legal if it is stipulated by a special regulation or an international treaty, by which the Slovak Republic is bound.

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when registering a child for compulsory school attendance, personal data according to § 11 par. 6 letters

a) first to sixth point and letter b).

In the conditions of the legal order of the Slovak Republic, it is in special legal terms

regulations often define the processing of personal data as an option, not as legal

obligation. Operators whose processing is necessary to fulfill the legal

options or authorizations, they will have to find another suitable legal basis, especially perhaps in this one

context to talk about the fulfillment of a task carried out in the public interest or in the performance of a public service

powers according to Article 6 par. 1 letter e) Regulations⁴, or on the legitimate interest of the operator

in accordance with Art. 6 par. 1 letter f) Regulations. Since the legislator himself assumes that

the processing is lawful, the test of proportionality is when using the legal basis

of legitimate interest is a mandatory requirement, operators will pass more easily.

Example of a legal option: According to § 9 par. 1, first sentence, Act of the NR SR no. 182/1993 Coll. about

ownership of apartments and non-residential premises, the administrator or the association is authorized for purposes

house administration to process personal data of the owners of apartments and non-residential premises in the house v

scope of name, surname, date of birth, social security number, permanent or temporary address

address, apartment number, phone number, email address, account number and bank code.

Example of a legal option: According to § 13 par. 4 of Act no. 311/2001 Coll. Labour Code,

the employer may not without serious reasons based on the special nature of the activities

the employer to violate the employee's privacy at the workplace and in common areas

employer by monitoring him, recording telephone calls

carried out by the employer's technical work equipment and controls

e-mail sent from a work e-mail address and delivered to this address without

to notify him in advance. In this case, the control fee cannot be introduced

to consider the mechanism as a legal obligation of the operator, its introduction is an authorization

the employer.

5. Vital interest

The processing of personal data is considered lawful, even if it is necessary for the purposes

protection of an interest that is essential for the life of the person concerned and compared to the previous legal one

adjustment of the protection of personal data of another natural person. With reference to the relevant recital 46

Regulations, processing personal data on the basis of vital interest should

carried out only in exceptional cases, in principle only if such processing

cannot be based on another legal basis. An example is the use of this legal

basis in the case of processing personal data of victims or participants in a traffic accident, when

consent to processing cannot be obtained objectively. Obligation to obtain additional consent

then, as the person concerned or another natural person is able to provide it, it falls away. Into account

comes the use of this legal basis even if the processing is necessary for

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See further in the methodological guidelines - p. 6

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humanitarian purposes, including monitoring epidemics and their spread, or in humanitarian

emergency situations.

6. Public interest

Processing is also legal if it is necessary to fulfill the task carried out in

public interest or in the exercise of public authority entrusted to the operator. Public interest

is an interest that is generally beneficial, that is, it should serve the benefit of the majority of citizens.

As in the case of personal data processing, if it is necessary for fulfillment

legal obligation of the operator, according to Art. 6 par. 3 Regulations as a basis for processing

must be determined:

a) in Union law or

b) in the law of the Member State applicable to the operator.

We do not have a legally defined concept of Union law or Member State law, but a recital

41 of the Regulation states that if this Regulation refers to a legal basis or

legislative measure, this does not necessarily require a legislative act to be adopted

by the parliament, without prejudice to the requirements arising from the constitutional

of the order of the member state. Based on the provisions of Art. 13 par. 1 of the Slovak Constitution

of the Republic, according to which obligations may be imposed by law or on the basis of law, v

within its limits and while preserving fundamental rights and freedoms, by an international treaty according to Art.

7 par. 4, which directly establishes the rights and obligations of natural persons or legal entities, or

by government order according to Art. 120 par. 2, the basis for processing should be established

in any of the mentioned legal standards. The law in question also determines the purpose of processing, which

it must be sufficiently clear and precise so that the processing of personal data is for the data subject

predictable.

In the case of the legal basis according to Art. 6 par. 1 letter c) Regulations is processing

of personal data explicitly enshrined as a legal obligation of the operator. If it goes

on the legal basis public interest, the operator is given to implement a certain role in

public interest, while it is clear that the fulfillment of this task cannot be done without processing

personal data.

Example: Monitoring of areas accessible to the public by the municipality. Municipality according to law

no. 369/1990 Coll. on municipal establishment, as amended, in the exercise of self-government

ensures public order in the village. It is obvious that the fulfillment of this task cannot be done without

processing of personal data, even if the provision of the law does not formally regulate it directly processing of personal data. It is decisive that the purpose for which the operator processes personal data is in accordance with his tasks imposed on him by a specific generally binding legal prescription. The municipality can therefore use it as a legal measure when monitoring areas accessible to the public basis for processing public interest in ensuring public order in accordance with Art. 6 par.

1 letter e) Regulations.

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If the operator chooses this legal basis, he is not obliged to perform the test proportionality, as in the case of a legitimate interest. However, the person concerned has the right to object to the processing. When choosing this legal basis, the operator must know office, in accordance with the principle of responsibility, to prove the importance of the public monitored by him interest or what role was entrusted to him in the exercise of public authority, as well as the fact that the legal basis for processing is established in the law of the Union or the law of a Member State. Necessity processing of personal data in the public interest or in the exercise of public authority the operator is assessed by the office in accordance with the basic principles of processing.

7. Legitimate interest

The processing of personal data is legal even if it is necessary for the purpose the legitimate interests of the operator or a third party, except when above these interests prevail over the interests or rights of the concerned person requiring personal protection data, especially if the person concerned is a child. With this legal basis it is required carrying out a proportionality test, before the very start of personal data processing data, and which assumes cumulative fulfillment within its three-step test conditions, namely following the legitimate interest of the operator or a third party, secondly, the necessity of processing personal data for the realization of the monitored legitimate interest and, thirdly, the condition that the fundamental rights and freedoms of the person to whom the data protection concerns the interests of the operator or a third party⁵.

The three steps of the proportionality test:

1. Identify the legitimate interest
2. Perform the necessity test
3. Perform a comparison test

The result of the proportionality test will show whether the legitimate interest of the operator exceeds the rights and freedoms of the persons concerned, and whether it is possible to proceed from it as from legal basis for processing. The legitimate interest of the operator may be for example, direct marketing and other forms of marketing or advertising, property protection by monitoring the premises with a camera system, keeping records of visitors when entering buildings and more.

The legal basis of legitimate interest does not apply to processing by public authorities power in the performance of their tasks set for them by law, as its use by public authorities would of power extended the legal basis established for them. For the processing of personal data carried out by public authorities in the performance of their tasks, the legal basis according to Article 6 comes into consideration para. 1 letter c) Regulations/§ 13 par. 1 letter c) Act no. 18/2018 Coll. or legal basis according to article 6 par. 1 letter e) Regulations/§ 13 par. 1 letter e) of Act no. 18/2018 Coll. But that

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In more detail, the judgment of the Supreme Court of the EU in case C-13/16, May 4, 2017, point 28

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does not exclude the possibility of a public authority applying the legal basis of legitimate interest to processing that it does not carry out in the performance of its tasks, for example in the case of a municipality that monitors the premises of the town hall building for the purpose of property protection, the publishing school photos of students inside the school (on the bulletin board) and the like.

8. Compatibility test

In Art. 6 par. 4 of the Regulation⁶ is regulated that if processing for purposes other than the purposes, on which personal data were obtained, is not based on the consent of the person concerned or on the right

of the Union or the law of a Member State, which represents a necessary and adequate measure in of a democratic society for the protection of the objectives specified in Article 23 par. 1, the operator at ascertaining whether the processing for another purpose is compatible with the purpose for which the personal data were originally obtained, shall take into account, among other things:

- a) any connection between the purpose for which the personal data was originally obtained and the purpose intended further processing of personal data,
- b) the circumstances under which the personal data were obtained, especially the circumstances relating to the relationship between by the affected person and the operator,
- c) the nature of personal data, especially whether special categories of personal data are processed or personal information relating to a guilty plea to a criminal offense or offence,
- d) possible consequences of the intended further processing of personal data for the data subject person
- e) the existence of adequate safeguards, which may include encryption or pseudonymisation.

Provision of Art. 6 par. 4 of the Regulations is an exception to the principle of purpose limitation within the processing operations of the same operator. The provision in question is not a separate legal basis, that means that the operator must/has

adequate legal basis in accordance with Art. 6 par. 1 Regulations, for example, processes personal data based on a contract with the person concerned. Legal basis for further processing, if the result of the compatibility test is positive, the contract will continue. The operator will process personal data for the original as well as for a new, compatible purpose.

The subject of the compatibility test, or compatibility is a finding of whether the operator the determined new processing purpose is compatible with the original processing purpose for which they were personal data obtained. Only on the basis of a positive result of the compatibility test can the operator to proceed with the processing of personal data for a purpose other than the original one, for

who obtained the personal data.

Example: In the case of an operator who has a legal claim against the debtor, for

the processing of personal data of the person concerned for the purpose of exercising a legal claim remains

the original legal basis on which he processed personal data for the original purpose (for example

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In Act no. 18/2018 Coll. is the compatibility test reflected in the provisions of § 13 par. 3

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contract) preserved, and thus there is only a change of purpose/partial modification in accordance with Art. 6

para. 4 Regulations/§ 13 par. 3 of Act No. 18/2018 Coll., after performing a compatibility test.

In Bratislava, on August 2, 2018

In Bratislava on January 22, 2019

Soňa Pótheová

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