

COMPARATIVE STUDY OF SLOVAK AND AUSTRIAN APPROACH TO GDPR

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Abstract: Article deal with the GDPR from the comparative perspective of two neighboring countries: Slovakia and Austria. Firstly, the article deals with the necessity to enact a national law in the Member States. Then the article deals with the specific provisions of the GDPR firstly providing specific duties to Member states and secondly giving certain leeway to Member states. On explanation of those two types of articles the comparison is provided.

Keywords: GDPR, Data Protection, European Union, Slovakia, Austria.

1 Introduction

Personal data are part of the fundamental rights and freedoms. "A decade after the promulgation of the directive, the EU entrenched its commitment to data privacy by ratifying Article 8 of the Charter of Fundamental Rights of the European Union, which came into effect with the 2009 Treaty of Lisbon. Article 8 is entitled Protection of Personal Data..."¹ and stipulates besides that everyone has the right to the protection of personal data concerning him or her. It is mostly significant in case data includes the racial and ethnic origin. "The Union uses its powers and interferes with the increasing range of fields of human activities and therefore touches directly the individuals in the Member States. The new public power appears that has to be fettered by bonds of fundamental rights."² "Current challenge for the fundamental and human rights is the digital world. It is obvious that the digital world has different challenges than the "real" world. The data protection reform fully covers the data protection in digital world and digital era."³

Since 25. May 2018 the new rules for data protection in EU applies. "Reform of personal data protection is fundamental to the creation of a digital single market, which is a priority of the Union and aims liberties associated with the EU single market to expand to the digital world"⁴ General data protection regulation (GDPR)⁵ can be called as a significant milestone in the data safety. "This uniform legislation at level of European Union replaces the current divergent national legislation of the Member States of the Union."⁶ GDPR attracted the attention of the whole world in the area of data protection for the reason that the rules apply to any controller which is dealing with personal data of EU citizens or residents. "Although the GDPR is an European Union Regulation, its territorial scope does not stop at European boundaries. Given a global economy with multinational groups and cross-border data transfer, international aspects have been taken into consideration upon creation of the GDPR."⁷ It means that the registered seat and the territory where are the data proceeded is not the significant factor for determining whether the controller should comply with GDPR rules or not.

GDPR changes also the view on the protected data. The answer to the question what should be protected based on the GDPR is changed comparing to previous directive. The scope of the protection was extended to any data which can be linked directly or indirectly with a specific person. There are two possible theories relating to determine whether it is already a data which is under protection of GDPR or not. Based on the absolute theory it would be any data which can be linked to a specific person no matter what time, sources it takes. The relative theory is based on the principle of adequacy which means that the sources invested into linking the data with a specific person should be adequate in time, finances, human sources. Also, the current stage of technology development is important to consider. I would prefer to use the relative theory which is also highlighted in recital 26 of GDPR.⁸

Significance of the GDPR is given also by the structure of the fines and the penalty system which comes into the question when there is no compliance with the regulation. The penalty system is like the competition law penalty system, where penalties are considered based on the annual turnover of the controlled subject.

As far we know generally regulation does not need any implementation and based on the general principles of the EU law the regulation has the direct effect which means that Member states apply the regulation with no need of further action of the Member states to implement. GDPR and the implementation seem more comprehensive issue. Firstly, there is a fact that all Member states have national legislation about the personal data protection as far the previous data protection legal framework was Directive⁹ where the national implementation is necessary. This issue can be solved easily as far the jurisprudence of the Court of Justice is settled here and states that the national law does not apply in case it is not in compliance with EU law, which is based on the well-known principle of supremacy of EU law¹⁰. The second issue with implementation is that the GDPR allows to the Member States several possible differences, derogations and exemptions leaving them on the Member states and their national laws. For example, the article 9 para 4 GDPR¹¹ leaves some space for the Member states to extend the conditions related to proceeding of the special categories of personal data (sensitive data). The third issue is that together with GDPR a Police Directive¹² was also enacted which must be implemented by Member states. Member states therefore implement also a national legislation related to GDPR to a) change the current national law based on the previous Directive b) implement the possible exemptions given by GDPR and c) implement the Directive.

The European Parliament in December 2017 provided an overview of the GDPR implementation in all EU Member states¹³. According to this material not all of the Member stated work on the implementation of GDPR on time.

¹ Post, R.: Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere (April 15, 2017). Duke Law Journal, Forthcoming; Yale Law School, Public Law Research Paper No. 598

² Hamulák, O.: Idolatry of Rights and Freedoms, In: Protection Rights in the EU, Controversies and Challenges of the Charter of Fundamental Rights, Springer – Verlag Berlin Heidelberg, 2014, p.: 197

³ Ježová, D.: Fundamental rights in the European Union – perspective of the digital era, In: Human Rights in EU external relations: Between law and politics, Bratislava: Comenius University, 2017, p. 86

⁴ Ježová, D.: Data Protection in Virtual World, In: Právní rozpravy 2017, Hradec Králové: Magnanimitas, 2017, p. 63, ISBN: 978-80-87952-18-4

⁵ Regulation (EU) 2016/679 of the European parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L 119/1

⁶ Ježová, D.: EU digital single market – are we there yet?, In: AD ALTA: journal of interdisciplinary research, year 7, No. 2 (2017), p. 100

⁷ Voigt, P., Bussche, A.: The EU General Data Protection Regulation (GDPR) A Practical Guide, Springer – Verlag Berlin Heidelberg, 2017, p. 22

⁸ Recital 26 GDPR: To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments.

⁹ 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

¹⁰ Case Costa v. ENEL 6/64, Simmenthal case 106/77, etc.

¹¹ Art. 9 para 4 GDPR: Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

¹² Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA

¹³ See below: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=9350> (accessed 24.06.2018)

2 Slovakia and GDPR

Slovakia was one of the Member states countries which enacted the national legislation on time and before 25. May 2018. Slovakia enacted on 29. November 2017 Act No. 18/2018 Coll. on Personal Data Protection which repeals the previous act No. 122/2013. The Act was declared on 30. January 2018 and came into effect on 25. May 2018. Here we can conclude that Slovak republic was ready for the GDPR and Slovak citizen and controllers could prepare for GDPR for almost four months. Slovak republic gave sufficient time and therefore also the legal certainty for the national controllers to implement and comply with GDPR.

Looking deeper into the Slovakian Act we will discover that Slovakian Act includes the GDPR and the Police Directive together. Slovakia chose to enact a completely new legislative Act and reveal the previous legislation. The Act is divided into six parts and 112 articles. The first part of the Act is about the general provisions. This part is the almost the same as the GDPR. We can find here the definition same as in GDPR, the scope of the Act, and the guarantee of the free movement of personal data. Slovak republic guarantees that it will not forbid the transfer of personal data within EU Member states based on the fundamental right protection of natural persons.

The second part of the Act are the general provision for personal data protection of natural persons by processing of data. Here the principles can be found¹⁴ (same as in Article 5 GDPR), the provision about the lawfulness of processing, provision about the consent of the data subject, processing of the special categories of personal data, provision about the rights of the data subject, rights and duties of the controller and processor, security of personal data, assessment of the impact on personal data protection and previous consultation, data protection officer, transfer of the personal data to third countries or to the international organizations.

The third part includes the special provisions of the protection of personal data by processing by several authorities, which applies for the criminal procedures. This part is the implementation of the Police directive. We can find here principles, rights of data subject, rights and duties of the authorities and processors, transfer of the personal data to third countries or to the international organizations.

The fourth part is about the specific situations of the lawfulness data processing, where we can find legal provisions about processing personal data without the consent of the data subject for academic purposes, artistic purposes and literary purpose, unless the processing breaches the right for privacy. We can also find here the lawfulness of processing personal data without the consent for informative purposes of the public by media, by employee. The rules for processing the data of the deceased person, confidentiality rules.

The fifth part stipulates the rules about the Office for Personal Data Protection. It states the rights of the office, codes of conduct, certificate which can be obtained from the certification authority, rules for providing the control by office, and the procedural rules for the proceeding on personal data protection, administrative offences and fines.

The sixth part are the common, transition and final provisions.

Supervising authority in Slovakia based on the GDPR is the Office for Personal Data Protection (Úrad na ochranu osobných údajov)¹⁵. Controlling authority enacted also the methodical guidelines regarding the applicability of the Slovak Act in practice address mostly to controllers. One of the methodic

guidelines¹⁶ deals with the issue when do we apply the Slovakian Act and when is the GDPR applied. Based on the guidelines we differ between a controller who provides the activity which falls within the EU law and in this case GDPR should be applied and the Act is applied only in limited way and only several provisions of part one, part four, five and six should apply on the controller. On the other hand, when there are activities of the controller which do not fall within EU law the Slovak Act should apply primary on that activities. This is based on the recital 16 of GDPR¹⁷ where it is stated that GDPR does not apply to ex. protection of fundamental rights and freedoms.

3 Austria and GDPR

Austria same as Slovak republic belongs to one of the Member states which were able to enact the national legislation before the provided deadline by EU. Austria had even the second place in "the race" of adopting the national legislature, while the first place belongs to Germany. Austria enacted the national law on 31 July 2017, which is about ten months before the given deadline and for four months sooner than Slovakia did. Austrian national Act is called Federal Act concerning the Protection of Personal Data (DSG 2000).

Austrian did not enact a new legislative Act but chose to amend the current legislative Act from the year 1999. Austrian Act consist of five parts and 70 articles. The first articles deal with the general provision such as general right of the data protection, scope of the Act. The first part is all about the implementation of the Regulation and deals with the issues included in GDPR such as right of data subject, special categories of data, special attention is given to processing of images of data subject, deal with the supervisory authority, with the sanction mechanism. Third part of the Act is the implementation of the Directive and includes rules for processing of personal data for purposes of the security police, including the protection of public security by the police, the protection of military facilities by the armed forces, the resolution and prosecution of criminal offences, the enforcement of sentences and the enforcement of precautionary measures involving the deprivation of liberty. The fourth part is dealing with the special penal provisions such as administrative penalties and processing with the intention to make a profit or to cause harm. The last fifth part are the final provisions.

Under Austrian privacy law, the fundamental right to data privacy will still apply in Austria not only to natural persons, but also to legal persons. By contrast, the GDPR and most EU national privacy laws only apply to personal information pertaining to natural persons. The Austrian Act includes also specific regulations on the permissibility of processing personal information contained in photographic or video materials. It regulates the use of CCTV on public and private property, as well as the use of video recording for the purpose of monitoring employees.

Austrian supervisory authority is Austrian Data Protection Authority (Datenschutzbehörde)¹⁸. Austrian authority also enacted methodical guideline. Austria has created also a Data Protection Council which shall comment on questions of fundamental importance for data protection, promote the uniform further development of data protection, and advise the Federal Government on legal policy in the case of projects relevant to data protection.

¹⁴ Principle of lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality and accountability.

¹⁵ Official web page: <https://dataprotection.gov.sk>

¹⁶ Methodical guidelines available on: https://dataprotection.gov.sk/uouu/sites/default/files/kedy_zakon_kedy_nariadenie.pdf (accessed 24.06.2018)

¹⁷ Recital 16 GDPR: This Regulation does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. This Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union

¹⁸ Official webpage: <https://www.dsb.gv.at/> (access on 30.06.2018)

4 Slovakia and Austria - duties and margins according to GDPR

In this article the goal was to compare two countries Slovakia and Austria and their approach to GDPR, which will be demonstrated on the GDPR provisions giving at the exemptions and derogations to national legislations.

First group of the provisions of GDPR provides duties to the Member states such as article 36, article 40, article 42, article 54, article 58, article 84 and article 85. The comparison will be done whether both countries complied with the provided duties.

Article 36¹⁹ stipulates the duty of the Member states to include the supervisory authority into the legislative procedure at least by consulting it. Slovak republic did comply with this requirement as far Office for Personal Data Protection included in the legislation process of the new Act of Parliament No. 18/2018 Coll. Austria also complied.

Based on article 42²⁰ the Member states shall encourage the establishing of certification mechanism and of data protection seals and marks. Slovak republic did comply with this article very well and we can find the provisions about the certification already in general articles § 31 where the controllers and processors are encouraged to have certificates to prove their compliance with the technical and organization measures taken for the data protection. More specific provisions we can find in the § 86 where is specified that the certificates are issued by the Office for Personal Data Protection or the certification authority. The certificate demonstrates that the controller or processor is in compliance with the data protection rules and providing sufficient securities. The certificate is valid for three years. Slovak law stipulates in detail the process for obtaining the certificate. Obtaining the certificate is not obligatory, but voluntary. On the other side when the controller already obtained the certification he has a new duty and that is to maintain the standard of protection during the whole validity of the certification and to inform the office about any change. On the official webpage the Office for Personal Data Protection should publish the list of issued certificates. Until today I did not find any certificates on the official webpage. In Austrian Act there are no provisions about the certification at all.

Another article giving a duty for action to the Member states is article 54²¹ according which every Member state needs to establish a supervisory authority and rules and procedures and other conditions and prerequisites of the authority. With this regard the recitals 117 and 121 are useful stating that establishing the supervisory authority is an essential component of the protection and stating that member states should even be able to establish more than one supervisory authority. Again, it was checked whether Slovak republic and Austria did comply with this duty. The answer for Slovak republic is positive. On the other hand, Slovak republic has established on one supervisory authority not more are stated in recital of GDPR. We

can find the whole part five of the Slovak act as a part dealing with the supervisory authority, establishing the organization of the authority, the authority consists of the chairman and vice-chairman. The law stipulates the role and the competencies of the authority. The law stipulates the procedural rules for the inspection of the authority, and the special procedure of the protection of personal data, which aim is to investigate the violation of the rights of data subject in the processing of their personal data or the violation of this law or a special regulation in the sphere of personal data protection and, if it is found, to remedy the deficiencies and, if justified, to impose corrective measures or a fine for breach. The proceeding can be started even *ex officio*, which means no specific application is needed. The time limit 90 days is provided to finish the procedure and to let the authority decide. In case the breach is proved the authority has the competence to order the measures for correction, to cancel the certificate or to order a fine. The answer for Austria is positive also. Austrian Act deal with bodies in the whole part two of the Act. Austria also fulfilled the expectations of EU mentioned in the recital and established more than one supervisory body. Based on Austrian law there are two bodies – Data protection Council and Data Protection Authority. In the law we can find very specific provisions about the establishment of those bodies, composition, power and jurisdiction, procedural rules for the control mechanism.

The sanction system of the GDPR is frequently discussed as far the sanctions are much higher than it used to be according to previous directive. Article 84²² GDPR stipulates another duty to Member states connected with the sanction mechanism and ordering them to lay down the penalties applicable to infringements which shall be effective, proportionate and dissuasive. Slovak republic is again in compliance with this duty and in § 104 and next the sanction mechanism is laid down. The sanction mechanism stipulates that the maximum fine is 20 million Euro or 4% of the gross worldwide turnover for the processor or controller in case of and the lower inn case of serious breaches such as breaching one of the principles of data protection, breaching some of the rights of the data subject, breaching the duties when transferring the data to third country, or breaching the duty of lawful processing of personal data. “Lower” sanction is up to 10 million Euro or 2% of the gross worldwide turnover in case of breaching particular duties of the Act. Austria also complied when included the part four into the national law which stipulates the special penal provisions. Austrian law is referring to the regulation and stipulates only the special provisions based on the examined article.

Another group of GDPR provisions are the provision where the action of the Member states is voluntary and the GDPR gives the Member states options to apply some exceptions if they are willing to. Those provisions are not proving any duties but giving the Member states leeway within the scope of GDPR. Those provision are mostly searched by the processors and controllers and they are specially interested to learn about them. In this article two chosen provisions were examined.

Article 6²³ allows Member states to maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1. Recital 45 clarifies that the obligation to carry out these types of processing should have a basis in Union or Member state law. Moreover, the obligation in question should be clear and precise and its application should be foreseeable to persons subject to it (Recital 41). In these respects, member states can more precisely determine specific

¹⁹ Article 36 para 4 GDPR: Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.

²⁰ Article 42 GDPR: The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account

²¹ Art. 54 GDPR: Each Member State shall provide by law for all of the following: (a) the establishment of each supervisory authority; (b) the qualifications and eligibility conditions required to be appointed as member of each supervisory authority; (c) the rules and procedures for the appointment of the member or members of each supervisory authority; (d) the duration of the term of the member or members of each supervisory authority of no less than four years, except for the first appointment after 24 May 2016, part of which may take place for a shorter period where that is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure; (e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment; (f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.

²² Art. 84 GDPR: Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive

²³ Art. 6 GDPR: Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

requirements for the processing and other measures to ensure lawful and fair processing. In Slovakian Act § 13 deals with the lawfulness of processing data and the usage of the mentioned article is very broad stipulating that legal basis for the processing of personal data pursuant to paragraph 1 (c) and (e) shall be provided in the Act, in a special regulation or in an international treaty to which the Slovak Republic is bound; a separate law must specify the purpose of the processing of personal data, the category of persons concerned and the list of processed personal data or the extent of the processed personal data. Slovakian act did not stipulate any specific rules yet and kept the more precisely usage in very broad way referring on other legislative act of Slovak republic. Austria has those provisions in § 7 and 8 of the Austrian Act DSGVO.

The art. 9 para 4²⁴ GDPR allows national authorities to maintain or introduce further conditions related to special categories of data, including limitations, with regard to the processing of genetic data, biometric data or data concerning health. Based on the recital 53, this should not hamper the free flow of personal data within the Union when those conditions apply to cross-border processing of such data. Recital 51 and 102 are relevant when reading this article, stating that some of the personal data are part of the fundamental rights and freedoms which should be considered as special categories of data. "A set of new rules is laid out in the Regulation for processing personal data under the scientific research exemption. For instance, further use of genetic data for scientific research purposes, without obtaining additional consent will be allowed, if the specific conditions are met."²⁵ Slovak republic already extended the extension from the general prohibition of processing special categories of personal data adding one new legal reason allowing to process the special category of personal data which is connected to some already existing Slovakian law and includes the necessity of processing them for the purpose of social insurance, social welfare insurance of officers and soldiers, the provision of state social benefits, the promotion of social inclusion a natural person with severe disabilities into society, provision of social services, the implementation of measures of social protection of children and social guardianship or for the purpose of providing assistance in material need, or processing is necessary for the purpose of performing duties or the rights of the operator responsible for processing in the field of labor law and in the area of employment, if the operator follows the relevant regulations or an international treaty binding the Slovak Republic. Austrian approach to the given task is slightly different and the Act specifies the different approach. Article 7 of Austrian Act deals also with lawfulness of processing special categories of data for archiving purposes stipulating that if special categories of personal data are to be collected, an important public interest in the research project must exist; furthermore, it must be ensured that the personal data are processed at the premises of the controller ordering the research project only by persons who are subject to a statutory obligation of confidentiality regarding the subject matter of the research project or whose reliability in this respect is credible. The Data Protection Authority shall issue the permit subject to terms and conditions, insofar as this is necessary to safeguard the data subjects' interests which deserve protection. A request be accompanied by a statement signed by the person authorized to exercise rights in respect of the data files from which the personal data are to be collected, stating that this person is making the data files available for the research project. Even in cases where the processing of personal data for scientific research purposes or statistical purposes is permitted in a form which allows the identification of data subjects, the data shall be coded without delay so that the data subjects are no longer identifiable.

²⁴ Article 6 GDPR: Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

²⁵ Shabani, M., Borry, P.: Rules for processing genetic data for research purposes in view of the new EU General Data Protection Regulation, In: European Journal of Human Genetics (2017)

5 Conclusion

The aim of this article was to introduce approach to GDPR taken by two different countries Slovakia and Austria. Comparing those two countries is much more difficult than comparing Slovakia and Czech Republic which are historically very close countries mostly with very similar approach. Nevertheless, Austria is a federal republic where the organization of the legal system is different than in Slovak republic which is landlocked country. On the other hand, historically Slovakia and Austria had common history in the times of Austro – Hungarian Empire where general legal principles were established²⁶. Therefore, comparative study of those two countries are mostly challenging.

Based on the examination of the approach of those two countries we can conclude that the approach is very similar but not the same. Slovakia enacted completely new Act of Parliament and Austria preferred to keep the current Act and the changes were made by the amendment of the existing legislative Act. Both countries used the same approach where implementing the Regulation and Directive as far both of them implemented those two EU laws in one legislative national piece. Slovakian approach was to enact complete legal rules which included mostly all provisions from GDPR and the directive on the other hand Austrian approach was to enact only the necessary provisions into the national law where for the rest the GDPR applies directly. Austrian approach was more minimalistic which can be observed in the length of the national Act of Parliaments where Austrian Act consist of 71 articles and Slovakian Act consist of 112 articles.

Generally speaking both of them complied with the duties given by GDPR to the Member states with slight irregularities. As mentioned above Slovak republic has established only one supervisory authority which is not a direct breach of the GDPR but based on the recital EU encourages Member states to have more supervisory authorities on the other hand Austria established two of them. In Austrian Act any legal provisions about the certification cannot be found on the other hand Slovakia has enacted detailed provision about the certification.

Lastly, Austrian was the second fastest country in EU which implemented the relevant national legislation. Slovakia did also the implementation on time and belongs to EU countries which prepared the national legislative before GDPR came into force.

To conclude, both of the countries mostly complied with the GDPR rules and took the responsible approach to implementation of GDPR to their national laws. The approach of implementation is different in the mentioned areas.

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