

# THE ANALYSIS OF THE APPLICATION OF PERSONAL DATA PROTECTION NORMS BY COLLABORATIVE PLATFORMS\*

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## **ABSTRACT**

*This paper analyses the practical application of the legal norms enacted to ensure the protection of the right for personal data protection as defined in Article 8 of the Charter of Fundamental Rights of the European Union. This paper identifies the categories of personal data collected and processed by collaborative platforms and analyses the lawfulness of this processing considering the individual legal bases, with particular regard to consent, contract performance and legitimate interests pursued by platforms. This paper further discusses the use of cookies to obtain personal data by collaborative platforms and provides a comparison of selected collaborative platforms and their approaches to cookies regulation.*

**Keywords:** collaborative platforms, cookies, consent, contract performance, legitimate interest, personal data

## **1. INTRODUCTION AND METHODOLOGY**

The importance of the objective to ensure the application of the fundamental right for personal data protection on the Internet has been confirmed by the adoption of the General Data Protection Regulation (hereinafter only as ‘GDPR’), the in-

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tion of which was i. e. to influence how online platforms process personal data of their users. The basis for this development was the extensive amount of data, whether personal or other, collected and processed by platforms for different purposes, including for commercial purposes.<sup>1</sup>

The collection and processing of personal data also concerns the users of collaborative platforms. The affected users include all platform users, namely those that offer to provide different services, those that only search the offers of these service providers as well as those that actually choose and order the provision of a service. Information collected about these users, their activity on collaborative platforms and data about individual transactions realised through these platforms create large datasets that can be analysed and used for different purposes, including to strengthen the platform's market position.<sup>2</sup> The collection and processing of user's personal data inevitably triggers the application of the relevant personal data protection regulation, specifically GDPR, that establishes the conditions that must be met to ensure the lawfulness of such processing. The objective of this paper is to analyse whether these conditions are satisfied and how the relevant legislation is applied by collaborative platforms in practice.

This paper analyses the approach of the selected collaborative platforms to the issue of ensuring the required level of protection of their users' personal data and the compliance of the adopted measures with the applicable EU legislation. Specifically, the dominant representatives of collaborative platforms operating in different sectors of the economy, namely in the accommodation sector (Airbnb and Booking) and in the transport sector (Uber, Bolt and BlaBlaCar), are analysed on

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<sup>1</sup> As regards commercial use and utilization of personal data see also: 1) Treščáková, D., *On some aspects of protection of personal data in the European area*, n: Topical issues problems of modern law and economics in Europe and Asia, Moscow: Moskovskij gosudarstvennyj juridičeskij universitet imeni O. E. Kutafina, 2018, pp. 144-162; 2) Treščáková, D., *Právo elektronického obchodu, Širšie súvislosti*, Praha, Nakladatelství Leges, 2021, p. 229; 3) Treščáková, D.; Hučková, R., *Niektoré aspekty ochrany osobných údajov v rámci elektronického obchodovania*. Days of Law 2015, Brno, Masarykova univerzita, 2016, pp. 105-119

<sup>2</sup> As regards the market power of collaborative platforms and the relevant competition law aspects see also: 1) Capobianco, A.; Nyeso, A., *Challenges for Competition Law Enforcement and Policy in the Digital Economy*, Journal of European Competition Law & Practice, Vol. 9, No. 1, 2018, pp. 19 - 27; 2) Lougher, G.; Kalmanowicz, S., *EU Competition Law in the Sharing Economy*, Journal of European Competition Law & Practice, Vol. 7, No. 2, 2016, pp. 87 - 102; 3) Rudohradská, S., *The Position of Collaborative Platforms from the Perspective of Competition Law*, in: Evolution of Private Law – New Challenges, Katowice, Instytut Prawa Gospodarczego, 2020, p. 163-175; 4) Rudohradská S.; Treščáková, D., *Proposals for the digital markets act and digital services act – broader considerations in context of online platforms*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, pp. 487-500

the basis of their own internal rules and regulations regarding the personal data protection as presented and available to their users directly on these platforms.

## 2. CATEGORIES OF PERSONAL DATA PROCESSED BY COLLABORATIVE PLATFORMS

It is undisputed that collaborative platforms process large amounts of information regarding their users and their activities realised on these platforms to achieve different objectives. In the majority of cases the information collected will present personal data relating to an identified or identifiable natural person (hereinafter only as ‘data subject’), the processing of which must adhere to the applicable legislation.

In compliance with the definition of personal data as specified in Article 4 (1) (a) of GDPR, personal data may relate to an identified data subject, if, within a group of persons, he or she is “distinguished” from all other members of the group, or to an identifiable data subject when, although the person has not been identified yet, it is possible to do so.<sup>3</sup> As is stated by Pinkavova and Fořt, personal data “can be information that relates to a natural person in any way without this separate information being able to identify any natural person.”<sup>4</sup> Therefore even information that does not seem as personal data at first sight may be regarded as such if it has the potential to identify a specific natural person in connection with other information that the controller has at its disposal.

As regards the identification of personal data collected and processed by collaborative platforms, these can be distinguished into different categories on the basis of the analysis of the selected collaborative platforms’ internal regulations made publicly available by these platforms with the objective to conform to their transparency and the provision of information obligation established by Articles 12-14 of GDPR. On this basis, the following categories of personal data may be differentiated:

1. personal data provided to the collaborative platforms from users themselves,
2. personal data collected by collaborative platforms automatically,
3. personal data collected by collaborative platforms from third parties or other sources.

<sup>3</sup> Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 01248/07/EN WP 136, p. 12

<sup>4</sup> Pattynová, J.; Suchánková, L.; Černý, J. a kolektiv, *Obecné nařízení o ochraně osobních údajů (GDPR), Data a soukromí v digitálním světě. Komentář*, Praha, Leges, 2018, p. 51

The first category of personal data collected and processed by collaborative platforms includes data that is provided to platforms directly from their individual users, whether voluntarily or on the basis of the platforms' request, as platforms may perceive the provision of certain personal data as necessary to achieve their objectives. Platform users may provide their personal data to collaborative platforms in different ways. Firstly, personal data may be provided in the registration process when the user wants to establish its user profile on a platform, as user registration is usually a prerequisite for making use of services provided by that platform. Personal data provided in this way usually include information that enables the user's identification (name, surname, date of birth, address, gender, photo etc.) and user's contact information (email address, phone number). Secondly, personal data may be provided in connection with the reservation of a specific service provided through a collaborative platform. As collaborative platforms mediate the provision of different services and due to the fact that they intervene in the process of service provision to varying degrees, the personal data provided in this way usually include:

- a) data that enables closer identification of the user with the objective to verify their identity, e. g. Airbnb, Uber and Bolt require the provision of a personal ID card, passport, driving license or other form of user's identification,
- b) information regarding the type of business of the service provider, their professional capacity, knowledge and experience including information from their criminal record (required from the drivers of Uber and Bolt) in order to review the service providers' reliability,
- c) information relating to the assets shared by service providers (vehicle ID, its description as well as information regarding the insurance) to ensure their suitability for use,
- d) payment information (bank account number, information about the credit card) in order to verify the user's solvency and for payment execution, *e.g.* through the platform's own company (*e.g.* Airbnb Payments UK Ltd.)

Thirdly, users also produce information processed by collaborative platforms when they provide them with feedback to the services provided either by platforms themselves or by individual service providers active on these platforms (*e.g.* rating system of Uber or Bolt drivers, possibility to write reviews of the accommodation reserved through Airbnb or Booking etc.). Users also provide platforms with information that may be regarded as personal data when they communicate with customer services established by these platforms or when they participate on competitions, surveys or other promotional events organised by the platform. As is

clear from this enumeration, collaborative platforms process vast amount of data that is provided by the users themselves.

The second category of data distinguished from the platform's personal data policies consists of personal data that is collected and processed automatically, without any participation from the users. The sources of information in this regard are the collaborative platform's own websites and mobile applications that enable the user to interact with the platform and make use of its services. Information collected in this way relates to the services provided through collaborative platforms by individual service providers. These include e. g. date and time of service's use, type of a service provided, type of a service the user is interested in being provided, type of a service offered by different service providers, the amount paid for the services' provision, the method of payment, information on the way how a reservation was created, use of a promo code etc. This category of data also includes information regarding the user's hardware and software used to interact with platform's websites and mobile applications. Following information may be collected in this regard: device's IP address, web browser, operating system, language and other user preferences and in the case of mobile devices information on the type of a device used and its settings. This category of personal data also encompasses information that relates to the user's activity on collaborative platforms, such as the websites visited, the content displayed to the user, individual search inputs, date and time of the access, the length of the access, third party services used before the access to the platform, websites visited by the user before and after their access to the platform and any other user activities on the platform. Furthermore, platforms also automatically collect and process other data such as login information, information enabling the identification of a precise or approximate location of the user's device (through IP address or GPS), data from the assets shared or from the mutual communications between users on the platform.

The third category of personal data comprises of data provided to collaborative platforms from third parties or other sources that include companies that are materially connected and coordinate their activities with collaborative platforms, external companies that provide platforms different services as well as public databases, registrars, and other publicly available sources of information. The nature of services provided by external companies include e. g. payment services, insurance, marketing, social network (cookies, interconnection of user accounts across platforms), cybersecurity, dispute mediation, legal, administrative, or other services that require the processing of users' personal data. As regards the public databases, registrars, and other publicly available sources of information, these are used in order to verify users' existence and reliability and include e. g. the commercial register, the list of debtors on public health or social insurance etc.

### 3. THE LAWFULNESS OF PERSONAL DATA PROCESSING

The subject responsible for ensuring compliance with personal data protection rules is a controller that alone or jointly with others determines the purposes and means of personal data processing. In the context of collaborative economy, collaborative platforms will be considered as controllers as they determine the scope of person data collection and the objectives of their processing.

According to Article 5(2) of GDPR, the controller is responsible for, and must be able to demonstrate compliance with the principles of personal data processing that are defined by GDPR. One of the most important principles in this regard is the principle of lawful processing that requires that personal data are processed lawfully on the basis of at least one of the legal bases stipulated in Article 6(1) of GDPR. Controller is obligated to determine which legal base for personal data processing is applicable as regards all personal data processed and must “alone analyse and consider which legal base is best applicable to a specific processing operation in the context of personal data processing’s purpose.”<sup>5</sup> In the following text the selected legal bases for personal data processing will be closely analysed in the context of their application by collaborative platforms.

#### 3.1. Consent

Consent as a legal basis for personal data processing defined in Article 6(1)(a) of GDPR presents one of the most frequently applied legal basis in practice. The reason for this is most likely the legal uncertainty of controllers that prefer its application if the admissibility of other legal bases for personal data processing is unclear. However, the process of obtaining consent just ‘to be sure’ is not acceptable under the current legislation that distinguishes consent only as one of the admissible legal bases that should not be used as the first, but rather as the last solution that legitimates personal data processing by the controller in a specific case. The controller is, in this regard, obligated to duly consider the admissibility of other legal bases and only if they are not applicable, controller may request the provision of consent from the data subject for the processing of their personal data for one or more specific purposes.

Consent of the data subject is defined in Article 4(11) of GDPR as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” One of the most

<sup>5</sup> Valentová, T.; Birnstein, M.; Golais, J., *GDPR / Všeobecné nariadenie o ochrane osobných údajov, Zákon o ochrane osobných údajov, Praktický komentár*, Bratislava, Wolters Kluwer, 2018, p. 108

important conditions for the provision of a valid consent is the fact that the consent provided is active, namely that it represents the data subject's decision to agree with the use and processing of their personal data for a specific purpose. As Advocate General provided in its Opinion in the case C-673/17 Planet 49, "it is not sufficient in this respect if the user's declaration of consent is pre-formulated and if the user must actively object when he does not agree with the processing of data"<sup>6</sup> as it would not be clear in this case whether the user actually read information that was provided to them and therefore if consent was provided freely and with the understanding that it could be rejected. The above-stated definition of consent clearly established the need for "an unambiguous indication of the data subject's wishes and a clear affirmative action signifying agreement to the processing of personal data."<sup>7</sup>

The requirement of active consent is especially important in the context of the collection and processing of personal data by online platforms on the Internet, whose users are usually not aware of the scope of data collection and objectives pursued by their processing. The Recital 32 of GDPR states in this regard that the provision of consent "could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent."

The active consent condition and other requirements for the provision of a valid consent may be the reason why the reliance of collaborative platforms on consent provision is rather limited. Following the requirement to limit the purpose of personal data processing to one or more specific purposes, collaborative platforms refer in their internal personal data regulations to the provision of consent most frequently to legitimize personal data processing for marketing purposes. Specifically, this concerns:

- sending marketing communications per email (Booking)
- provision, personalization, evaluation of results and improvement of advertising (Airbnb)
- sending marketing materials and information necessary to ease the process of service provision or the reservation process (BlaBlaCar)
- suggesting and recommending goods and services relating the platform's services that the user may find interesting (BlaBlaCar)

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<sup>6</sup> Opinion of the Advocate General in the case C-673/17 Planet 49 [2019] C:2019:246, para. 61

<sup>7</sup> *Ibid.*, para. 70

- identifying users and sending advertisements through social networks (BlaBlaCar).

Other purposes for personal data processing include access to user's location (Booking, Bolt), access to user's contacts (Booking), verification of information provided to the platform by the user in the form of personal documentation (BlaBlaCar), provision of information to the user regarding the services provided, *e.g.* confirmation of reservation (BlaBlaCar), enabling the mutual communication of users regarding the services provided (BlaBlaCar) or connecting user's account with their account on social networks (Airbnb).

As regards consent provision, it is also necessary to analyse whether collaborative platforms adhere to their obligation to enable their users to withdraw their consent at any time and whether the process of consent withdrawal is indeed as easy as the process of its provision, as requires Article 7 of GDPR. The results of our analysis provide that only some platforms duly inform their users about their right to withdraw consent prior to its provision (Airbnb, Booking and Uber). As regards Booking and Uber, these platforms inform their users about their right to contact the responsible person within the platform's organization with their request for consent withdrawal. Airbnb, on the other hand, also provides the possibility to inform the platform about the user's consent withdrawal directly through changes in the user's account settings. Other analysed platforms only provide the general possibility to contact the responsible person within the platform's organisation (data protection officer) with any requests regarding personal data processing, not specifying that this includes consent withdrawal. However, as the applicable legislation only requires that consent withdrawal should be as easy as its provision, the last approach stated cannot be immediately considered as not in compliance with the requirements stipulated in Article 7 of GDPR.

### **3.2. Contract performance**

The processing of personal data is considered lawful under Article 6(1)(b) of GDPR if it 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 contract. In this regard we can distinguish two cases of this legal basis application, namely the processing of personal data in pre-contractual relations if steps ought to be taken at the request of the data subject and processing in relation to the fulfilment of the already concluded contract.

On this legal basis the controller is allowed to process only personal data "necessary for the performance of a contract (*i.e.* the fulfilment of contractual obliga-



tions) within the time period necessary to achieve the contract's purpose [where] the necessity of processing is analysed in relation to the subject matter of the contract."<sup>8</sup> As regards personal data, processing of which will fall under this legal basis, the controller will be entitled to process primarily personal data necessary for the identification of the data subject as one of the contractual parties as well as personal data that directly relate to contract performance (e.g. shipping address, payment data), especially if they are considered as essential elements of the contract by the applicable legislation.

In the context of collaborative platforms, internal regulations of all of the analysed platforms directly refer to the contract performance as a legal basis for personal data processing in relation to the provision of platform services to individual users. These platform services differentiate in nature, but include in general:

- a) operation of the platform, its improvement and further development (Airbnb),
- b) reservation of services through the platform, including reservation and delivery of the necessary confirmations and other documents to users (Booking, BlaBlaCar),
- c) provision of customer services by the platform (Booking, BlaBlaCar),
- d) enabling mutual communication between users on the platform (BlaBlaCar),
- e) provision of payment services (Airbnb through its subsidiary – Airbnb Payments UK Ltd.)

Contract performance as a legal basis for processing of personal data of collaborative platforms' users according to their internal regulations is, therefore, strictly limited to the provision of selected services provided by these platforms to their users, the objective of which is to, primarily, mediate contact between the relevant service provider or the platform and the person searching for the provision of these services.

### 3.3. Legitimate interests

The processing of personal data by collaborative platforms may also be considered lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third part, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection

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<sup>8</sup> Hudcová, I.; Cyprichová, A.; Makatura, I. a kolektív, *Nariadenie o ochrane fyzických osôb pri spracúvaní osobných údajov / GDPR. Veľký komentár*, Bratislava, Eurokódex, 2020, ISBN: 978-80-8155-094-2, p. 152

of personal data, in particular where the data subject is a child (Article 6(1)(f) of GDPR).

This legal basis for personal data processing differentiates from other legal bases as its application is conditional on the execution of the so-called balancing test that examines the following aspects (a) legitimacy of the controller's or third party's legitimate interest, (b) necessity of personal data processing to achieve the objective pursued and (c) proportionality of processing. This assessment is not "a straightforward balancing test consisting merely of weighing two easily quantifiable and comparable 'weights' against each other. Rather, the test requires full consideration of a number of factors, so as to ensure that the interests and fundamental rights of data subjects are duly taken into account."<sup>9</sup>

GDPR provides specific examples of legitimate interests that may be pursued by controllers or third parties. These include:

- the processing of personal data strictly necessary for the purposes of preventing fraud<sup>10</sup>
- the processing of personal data for direct marketing purposes<sup>11</sup>
- legitimate interests of controllers that are part of a group of undertakings or institutions affiliated to a central body in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data<sup>12</sup>
- the processing of personal data to the extent strictly necessary and proportionate for the purposes of ensuring network and information security<sup>13</sup>
- indicating possible criminal acts or threats to public security by the controller and transmitting the relevant personal data in individual cases or in several cases relating to the same criminal act or threats to public security to a competent authority<sup>14</sup>

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<sup>9</sup> Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, 844/14/EN, WP 217, p. 3

<sup>10</sup> Recital, para. 47, 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), OJ L 119, 4 May 2016, p. 1-88

<sup>11</sup> *Ibid.*, Recital, para. 47

<sup>12</sup> *Ibid.*, Recital, para. 48

<sup>13</sup> *Ibid.*, Recital, para. 49

<sup>14</sup> *Ibid.*, Recital, para. 50

- transfers which can be qualified as not repetitive and that only concern a limited number of data subjects.<sup>15</sup>

The examples of legitimate interests defined above are also applied by the collaborative platforms in their internal regulations regarding personal data processing. The most generally defined purpose pursued by all collaborative platforms in this regard is the realisation of their business activities. To illustrate, collaborative platforms use legitimate interest as a legal basis for personal data processing of their data subjects to achieve the following objectives:

- to improve the functioning of the platform and related user experience (by platform testing and resolving detected issues, analysing user activity on the platform *e.g.* from search history, reservations, profile information, user preferences, content published by the user etc.) with the objective to understand how the platform is used and to personalize and adjust the user experience,
- to improve and adjust goods and services provided through the platform including related services (payment, insurance etc.)
- to enable mutual communication between platform users,
- to create and administer user accounts,
- to analyse platform's performance (traffic on the platform, number of services reserved etc.)
- to inform users about platform changes and actualisations of conditions for their use.

Another objective pursued by all collaborative platforms is their legitimate interest on ensuring collaborative platform's security and trustworthiness. In this regard, personal data of platform's users are processed for the following partial objectives:

- to control the compliance with the conditions for the platform's use and to identify infringements; To illustrate, Uber analyses information from the drivers' vehicles to identify dangerous behaviour (speeding, quick acceleration or braking) and to raise awareness about safer driving.<sup>16</sup>
- to prevent and identify fraud which can include fraudulent offers of service providers, fraudulent interest of potential service recipients, fraudulent payments etc. Some platforms create blacklists of users that seriously and/or repeatedly infringed the platform's conditions of use and ban these users from the platform.

<sup>15</sup> *Ibid.*, Recital, para. 113

<sup>16</sup> Uber Privacy Notice, 2021, available at: [<https://www.uber.com/legal/sk/document/?name=privacy-notice&country=slovakia&lang=en-gb>], Accessed 10 March 2022

- to prevent and detect cases of attacks on platform's security and to provide security incident management including the assessment of risks,
- to help with the investigation and prosecution of criminal offences, including tax frauds (*e.g.* Airbnb).<sup>17</sup>

Another example of a referral to a legitimate interest as a legal basis for personal data processing by collaborative platforms that is most frequently mentioned in their internal regulations is direct marketing. Under this objective the collaborative platforms:

- use contact information of their users, especially their email addresses for regular sending of marketing communications (advertisements, promo activities, competitions etc.) to promote goods and services provided by the platform,
- to create individualised offers and to personalize content that is displayed to the individual user,
- to promote their own services through social media, *e. g.* by connecting user account on the platform with their account on social networks (*e.g.* BlaBlaCar),<sup>18</sup>
- to send requests to users to attend market research realised by the platform,
- to analyse, evaluate and optimize their own advertisement campaigns.

Other objectives pursued on the basis of the collaborative platform's legitimate interest include enabling of mutual communication between the platform and its users, provision of customer services, research and development, dispute resolution and answering of legal requests. As regards the communication between the platform and its users, this may be necessary *e.g.* to notify platforms users about changes on the platform or of its terms of service, to send notifications regarding user's platform account, to send invoices for services provided or to process other user requests or questions. This is closely connected with the communication of the user with the platform through customer services provided by that platform. To illustrate, Booking<sup>19</sup> connects the phone number of the user to their reservation and monitors the content of the phone calls to control the quality of services provided and to educate their customers service employees. The legitimate interest on research and development is also declared by some collaborative platforms,

<sup>17</sup> Airbnb Privacy Policy, available at: [[https://www.airbnb.co.uk/help/article/2855/airbnb-privacy?\\_set\\_bev\\_on\\_new\\_domain=1646917422\\_OWRkMGYyMjNhZTUx](https://www.airbnb.co.uk/help/article/2855/airbnb-privacy?_set_bev_on_new_domain=1646917422_OWRkMGYyMjNhZTUx)] Accessed 10 March 2022

<sup>18</sup> BlaBlaCar Privacy Policy, 2022, available at: [<https://blog.blablacar.sk/about-us/privacy-policy>], Accessed 10 March 2022

<sup>19</sup> Booking Privacy Policy, available at: [<https://www.booking.com/content/privacy.sk.html>], Accessed 10 March 2022

including Uber<sup>20</sup>. Some collaborative platforms also define as their legitimate interest the investigation and resolution of disputes regarding the services provided through the platform.

The above provided examples of objectives pursued by processing personal data of collaborative platform users on the basis of the legitimate interest demonstrate the diversity of processing operations realised by collaborative platforms to achieve these usually very generally defined purposes. In this regard, it is not possible to unambiguously determine whether platform interests are overridden by the interests or fundamental rights and freedoms of the data subject or not. However, as the balancing test is firstly realised by the collaborative platform itself, the legitimacy of personal data processing on this basis cannot be excluded without further analysis. The individual platform users themselves will be required to contact the platform in case of doubts and to object the processing of their personal data. Such actions would trigger new process of assessment that could lead to either confirmation or refutation of the applicability of the legitimate interest as the legal basis for data subject's personal data processing. This would be especially important if the user's objection was directed towards direct marketing including profiling, as in this case the controller is no longer authorized to process personal data for these purposes and must end such processing immediately.

#### **4. COOKIES AS A TOOL TO COLLECT PERSONAL DATA AND DIFFERENT POLICIES OF COLLABORATIVE PLATFORMS**

Collaborative platforms employ different tools that collect and process personal data of their users. One of these tools used by all of the analysed collaborative platforms are cookies. Cookies can be characterized, in general, as small data or text files placed in the end user's terminal equipment by a website's server with the objective to store and transmit requested information back to this server. Barth defines cookies in their technical sense as referring to the state of information that passes between an origin server and user agent and is stored by the user agent.<sup>21</sup>

Different types of cookies employed by collaborative platforms can be distinguished. From the legal perspective, it is necessary to differentiate between the so-called 'first-party' and 'third-party' cookies. Whereas the former presents cookies employed on the end-user's terminal equipment by a website they actually visited, the latter type of cookies are „set by websites that belong to a domain that is dis-

<sup>20</sup> Uber Privacy Policy, 2021, available at: [<https://www.uber.com/legal/sk/document/?name=privacy-notice&country=slovakia&lang=en-gb>], Accessed 10 March 2022

<sup>21</sup> Barth, A., *Request for Comments 6265: HTTP State Management Mechanism*, 2011, available at: [<https://tools.ietf.org/html/rfc6265>], Accessed 10 March 2022

tinct from the domain of the website visited by the user as displayed in the browser address bar, regardless of any consideration whether that entity is a distinct data controller or not.<sup>22</sup> As regards first party cookies, these are usually essential for the proper functioning of the website, as without them in effect, the content of many websites is not accessible to the website's visitors. First-party cookies are also beneficial to end-users, as they identify them as individuals, allowing for example automatic login or customization of the website's content. Third-party cookies, on the other hand, are employed by websites other than those that the end-user actually visited and are therefore often rejected by many end-users. Rejection of third-party cookies should not, in theory, have any effect on the functioning of the website visited, but this is not always the case (*e.g.* Facebook does not allow its users to login into their Facebook account if they reject third-party cookies in the browser settings).

Another category of cookies that can be distinguished include the so-called session cookies that are active only during the time of the end-user's visit on the website and the so-called persistent cookies that are stored in the end-user's terminal equipment with the objective to collect and monitor user's activities even after their visit of the website.

Purposes pursued by the employment of cookies include:

- a) enabling the use of all of the visited website's functionalities (necessary, functional cookies),
- b) preservation of information on user's preferences as regards the website visited (language, country etc.) (necessary, functional cookies),
- c) verification of the user's identity as regards the login into their personal accounts or realisation of commercial transactions online without the need to repeatedly enter login information (necessary, functional cookies),
- d) analysis of the effectiveness and user's interaction with the website, specifically as regards the websites visited, functionalities used, content displayed, length of a visit etc. (analytical cookies),
- e) analysis of the effectiveness of advertisements displayed on the website and direct online marketing based on previous behaviour of the end-user (marketing cookies).

The applicable legislation regulating cookies is the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the process-

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<sup>22</sup> Article 29 Data Protection Working Party, (2012) Opinion 04/2012 on Cookie Consent Exemption adopted on 7 June 2012 by the Article 29 Data Protection Working Party, 00879/12/EN

ing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) that regulates the processing of traffic data (Article 6). Traffic data must be processed on the basis of the user's consent with the right to withdraw consent provided by the user at any time. Moreover, the Recital (25) of the Directive 2002/58/EC further specifies: "Users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment. This is particularly important where users other than the original user have access to the terminal equipment and thereby to any data containing privacy-sensitive information stored on such equipment. (...) The methods for giving information, offering a right to refuse or requesting consent should be made as user-friendly as possible."<sup>23</sup> The use of cookies with the objective to collect and process information is, therefore, not prohibited in general, but must be compliant with the applicable legislation regulating the provision of a valid consent. In this regard, the relevant provisions of GDPR are referred to (Article 2(f) of the Directive 2002/58/EC).

GDPR recognizes the ability of cookies to collect and process information that can be considered as personal data directly in its definition of personal data that includes *inter alia* any information relating to an identifiable natural person, meaning a person that can be identified, directly or indirectly, in particular by reference to different identifiers, including the so-called online identifiers (Article 4(1) of GDPR). Recital (30) further interprets the term 'online identifiers' as identifiers provided by natural person's "devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers (...) [that] may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them."<sup>24</sup> However, cookies may not always be able to identify the natural person, as information collected in this regard will not always lead to the identification of one specific natural person. It is, therefore, necessary to distinguish these cases in practice and to apply the relevant legislation accordingly. The ability of cookies to be considered as personal data has further been

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<sup>23</sup> Recital para. 25, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31 July 2002, pp. 37-47

<sup>24</sup> Recital para. 30, 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), OJ L 119, 4 May 2016, pp. 1-88

confirmed in the CJEU's case law, specifically in its decisions in the case C-210/16 *Wirtschaftsakademie Schleswig-Holstein*<sup>25</sup> and in the case C-673/17 *Planet 49*.<sup>26</sup>

As has been examined above in connection with personal data collected by collaborative platforms in general, if personal data is collected by cookies, a legal basis for such collection and processing must also be determined. Directive 2002/58/EC refers in this regard to consent as the applicable legal basis to be considered.

Especially important condition in relation to the use of cookies by collaborative platforms is to ensure the active provision of a consent. This condition is represented by the co-called opt-in principle that requires active conduct of the user to provide consent with personal data processing for a specific purpose. The previously accepted opt-out principle considered consent provided in a passive manner as sufficient, a practice that no longer adheres to the applicable legislation. Passive consent with the use of cookies was previously based on the absence of user's objections with the employment of cookies. Therefore, if a user visited a website and did not actively object to the use of cookies, this was interpreted by website operators as the provision of a consent. However, due to the precision of provisions regarding consent, this practice is no longer acceptable. The analysis of notifications displayed to the user when they visit websites of the analysed collaborative platforms have demonstrated that all of these platforms recognize and apply the opt-in principle, as they provide the user with the possibility to consent with the use of cookies by clicking the accept button directly in the notification banner (Airbnb, Booking, Uber, Bolt, BlaBlaCar) or separately through cookie settings available in their platform account (Airbnb, BlaBlaCar).

Another requirement for the provision of a valid consent that is especially relevant as regards the use of cookies is the right to withdraw consent provided by the user and the need for such withdrawal to be as easy as was the provision of consent. In practice, consent with the use of cookies can usually be provided in a notification panel displayed at the time of the user's first visit to the website. However, after consent is provided, this notification panel is no longer visible on the website in question. In order for the user to be able to withdraw their consent, the website should include information on how such withdrawal may be executed. Our analysis has shown that only some of the analysed collaborative platforms inform their users about their right to withdraw consent directly in connection with the personal data processing realised through the use of cookies (e.g. Airbnb that in-

<sup>25</sup> Judgement of the Court in the case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein* [2018] ECLI:EU:C:2018:388

<sup>26</sup> Judgement of the Court in the case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Planet49* [2019] ECLI:EU:C:2019:801



forms their users about this right directly in its notification banner as well as in its Cookie Policy), whereas other collaborative platforms contain such information only in their general policies regarding personal data processing.

The employment of cookies for different purposes can be identified in relation to all of the analysed collaborative platforms that make use of cookies both on their websites as well as in their mobile applications. In our analysis we have focused primarily on the use of cookies on collaborative platforms' websites due to the ability to verify numerous aspects related to the use of cookies through browser settings, especially as regards the issue of whether cookies were employed even before the relevant end-user provided their consent.

As has been specified above, the primary condition for the lawful employment of cookies on collaborative platforms' websites is the provision of the end-user's consent with their application. Consent of the end-user is primarily provided to the platform at the time of the end-user's first visit of the website through a notification panel displayed on the website. The general presumption in this regard is that no personal data should be collected and processed before a valid consent is provided. Therefore, no cookies that collect such personal data should be employed (this does not concern cookies that do not collect personal data but are necessary to ensure the website's functioning). The results of our analysis have shown that in conflict with this presumption all of the analysed collaborative platforms employed cookies even before any consent with their use was provided. This conclusion was verified by accessing collaborative platforms' websites in the Incognito mode through browser settings that enable the user to see what cookies are used on the visited website with prior deletion of all cookies from the browser. All of the analysed collaborative platforms employed cookies even prior to consent provision, e. g. Booking employed 33 cookies, Airbnb and Bolt 27 cookies, Uber 16 cookies and BlaBlaCar 13 cookie files. However, as it is not possible to distinguish which cookies employed before consent provision collected and processed personal data and which did not, it cannot be unambiguously stated that use of these cookies by collaborative platforms was unlawful. However, due to the high number of cookie files used this conclusion also cannot be rejected.

In addition to the collaborative platforms' notification banners, all of these platforms have created their own internal rules for the use of cookies included in their cookie policies.<sup>27</sup> The purpose of these rules is to inform collaborative platform'

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<sup>27</sup> These internal rules include:

-Airbnb Cookie Policy, available at: [[https://www.airbnb.ie/help/article/2866/airbnb-cookie-policy?locale=en&\\_set\\_bev\\_on\\_new\\_domain=1647003350\\_NmRmNmEwY2YxOWJi](https://www.airbnb.ie/help/article/2866/airbnb-cookie-policy?locale=en&_set_bev_on_new_domain=1647003350_NmRmNmEwY2YxOWJi)], Accessed 14 March 2022

users about the individual aspects of the cookies' employment. These regulations should, in our opinion, include the following information:

- description of cookies and their general purpose
- classification of cookies distinguishing first- and third-party cookies and session and persistent cookies
- purposes pursued by cookies
- data collected by cookies
- time of cookies' employment
- the possibility to change settings including the right to withdraw consent
- the use of cookies by third parties
- the possibility to contact the platform if the user has any questions

The provision of this information will ensure the fulfilment of another obligation of collaborative platforms relating to the provision of a valid consent, specifically the obligation to ensure that the consent provided by the user is informed. This obligation was interpreted by the CJEU in its decision in the case C-673/17 Planet 49, where the Court stated that information that the service provider (in this case the relevant collaborative platform) must provide to the website user includes *inter alia* information about the duration of the operation of cookies and information regarding the question whether third parties may have access to those cookies or not.<sup>28</sup> In the following Table 1 we provide a summary of information regarding the use of cookies included in the cookies policies of the analysed collaborative platforms. For comparison, the Table 2 further specifies information that is provided to end-users directly in the platforms' notification banners displayed at the time when they visit the website for the first time.

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-Booking Cookie Statement, available at: [<https://www.booking.com/content/privacy.html>], Accessed 14 March 2022

-Uber Cookie Policy (Global), available at: [<https://www.uber.com/legal/en/document/?name=cookie-notice&country=slovakia&lang=sk>], Accessed 14 March 2022

-Bolt Cookie Declaration, available at: [<https://bolt.eu/sk/cookie-declaration/>], Accessed 14 March 2022

-BlaBlaCar Cookie Policy, available at: [<https://blog.blablacar.co.uk/about-us/cookies-policy>], Accessed 14 March 2022

<sup>28</sup> Judgement of the Court in the case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Planet49* [2019] ECLI:EU:C:2019:801, para. 81

**Table 1.** Information included in collaborative platforms' Cookies Policies

Information / Platform	Booking	Airbnb	Uber	Bolt	BlaBlaCar
general description of cookies	x	x	x		x
cookies classification	x	x	x	x	x
classification of <i>first party cookies</i> and <i>third party cookies</i>	x				x
classification of <i>session cookies</i> and <i>persistent cookies</i>	x	x			
classification of cookies on the basis of the objectives pursued (analytics, marketing etc.)	x	x	x	x	x
general description of objectives pursued without cookies classification		x			
specification of data collected	x				
identification of individual cookies employed	x			x	
specification of the time for cookies storage	x			x	
information on the possibility to change browser settings	x	x	x		x
possibility to withdraw consent		x			
possibility to contact the platform	x		x		x
information about cookies used by third parties	x	x	x		x

Source: Authors

**Table 2.** Information included in collaborative platforms' notification banners

Information / Platform	Booking	Airbnb	Uber	Bolt	BlaBlaCar
cookies are used to collect personal data		x			
identification of cookies' purposes of use	x	x	x	x	x
direct link to cookies policies	x	x	x	x	x
possibility to withdraw consent		x			
possibility to adjust cookie settings by choosing selected types of cookies	x	x	x	x	x
information on cookies being used by third parties	x				x

Source: Authors

Information provided in the Table 1 demonstrates the fact that collaborative platforms usually include information regarding the description of cookies and their general purpose in their cookie policies. All of the collaborative platforms also differentiate between cookies on the basis of the purpose pursued by their use, specif-

ically recognizing necessary cookies, analytics cookies, marketing and advertising cookies. All of the collaborative platforms also allow their users to customize the provision of their consent for all or for some of these categories of cookies (with the exception of strictly necessary cookies that cannot be rejected or deselected from the options provided on all of the analysed collaborative platforms) directly through the selection in their notification banners.

However, not all recommended information regarding the use of cookies can be found in the analysed cookies policies. To illustrate, only two collaborative platforms – Booking and Bolt – specify in their policies the individual cookie files employed and the time of their employment and storage on the end-user's device and only one platform – Booking – provides information on the individual user data collected by cookies. The lack of this information may be due to the fact that all of the analysed collaborative platforms have created their own policies on personal data processing that specify in general what user data is collected and processed and the time for its processing. Despite of this we would recommend that this information should also be included separately in the collaborative platforms' cookies policies to simplify users' access to this information without the need to analyse the lengthy provisions of collaborative platforms' internal rules on personal data processing.

## 5. CONCLUSION

The analysis of the application of personal data protection norms by selected collaborative platforms provided interesting insights into how the relevant legislation is applied in practice. As regards the identification of the scope of personal data collected and processed by collaborative platforms, we may conclude that the presumed vast amount of user information at the platform's disposal was indeed confirmed. Moreover, the previous reliance on consent provision for the legitimization of personal data processing was substituted by one of the other legal bases enabling personal data processing, namely legitimate interests of the controller that are heavily applied and relied on by the analysed collaborative platforms in their internal regulations. In relation to the use of cookies as tools for personal data collection, we may conclude that the previous practice allowing for a passive consent provision is no longer applied by the analysed collaborative platforms that enable their users to actively consent with the use of cookies, allowing them to also select which categories of cookies (with the exception of strictly-necessary cookies) may be implemented. Our analysis has also identified some issues in this regard, namely the employment of some cookies before consent provision (identified in relation to all of the analysed collaborative platforms), uncertainty regarding the

process of consent withdrawal and the absence of information provided to users regarding cookies employment.

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