

REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND THE FREE MOVEMENT OF THESE DATA

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Abstract

The entry into force on 25 May 2018 of Regulation (EU) 2016/679² of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the so-called RGPD Regulation, is an important moment in protecting the citizens of the European Union from the point of view of the use of personal data. The present paper aims at presenting the fundamental principles underpinning the European Parliament's and Council's re-regulation, the persons to whom these regulations apply, the obligations that public authorities or bodies have to fulfill, as well as the rights of the citizens of the European Union in this context.

Keywords: RGPD Regulation, Personal Data Protection, Personal Data Operator, Data Protection Officer.

JEL Classification: K23, K38

1. Introduction

On 27.04.2016 it was published in the Official Journal of the European Union no. 119/1 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of individuals 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), which entered into force on 25.05.2018. The reason for the emergence of this regulation was the different way in which EU Member States have understood to apply and enforce the provisions of Directive 95/46/EC³ in national legislation. Differences have thus been created between the levels of protection of individuals' rights and freedoms, in particular the right to the protection of personal data, as regards the processing of personal data in the Member States, which is likely to hinder the free movement of data throughout the Union. These differences may constitute an obstacle to the conduct of economic activities at Union level, distort competition and prevent the authorities from fulfilling their responsibilities under Union law.

Rapid technological developments and globalization have created new challenges for the protection of personal data. The magnitude of the collection and exchange of personal data has increased significantly. The technology allows both private companies and public authorities to use personal data at an unprecedented level in their activities. More and more, individuals make public personal information worldwide. Technology has transformed both the economy and social life and should further facilitate the free movement of personal data within the Union and the transfer to third countries and international organizations, while ensuring a high level of protection of personal data.

These developments call for a stronger and more coherent data protection framework in the Union, accompanied by a rigorous application of the rules, taking into account the importance of creating a climate of confidence that will enable the digital economy to develop in the internal market. Individuals should have control over their own personal data, and legal and practical security for individuals, economic operators and public authorities should be strengthened.

In view of the extraordinary development of online commerce, and given that personal information such as name, address, CNP, telephone number, email address, payment method, etc. are

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² Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC published in the Official Journal of the European Union no. 119/1 of 26.04.2016.

³ Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Union no. 281/31 of 25.10.1995.

required to carry out these activities, citizens must benefit of legal protection of personal data provided. The widespread public perception is that there are significant risks to the protection of individuals. In order to ensure a consistent and high level of protection of natural persons and to remove obstacles to the movement of personal data within the Union, the level of protection of the rights and freedoms of individuals with regard to the processing of such data should or equivalent in all Member States, an objective that Directive 95/46 EC has failed to achieve, the transposition of the regulation being left to the discretion of each Member State, depending on its own possibilities and specifications.

The purpose of the EU Regulation 2016/679 is to ensure a uniform level of protection for individuals throughout the Union and to remove differences that hinder the free movement of data within the internal market. The provisions of the Regulation aim to provide legal certainty and transparency for economic operators, including micro and small and medium-sized enterprises, and to provide individuals in all Member States with the same level of rights, obligations and responsibilities legally imposed for operators and their empowered persons to ensure a consistent monitoring of the processing of personal data, equivalent sanctions in all Member States, and effective cooperation of the supervisory authorities of different Member States.

2. The main provisions of Regulation (EU) 2016/679

EU Regulation 2016/679 sets out the scope both in terms of the active subject, ie the beneficiaries and the passive subject, ie the persons empowered to collect the personal data, the nature of the data that can be collected, the sanctions applicable in the failure to comply with legal obligations.

Regarding the active subject of the legal relations established under Regulation 2016/679, according to art. 1 par. 2 in conjunction with art. 4 point 1 of the RGPD Regulation, the new regulation seeks to ensure the protection of the fundamental rights and freedoms of individuals and, in particular, their right to the protection of personal data, ie any information about an identified or identifiable individual, such as name, identification number, location data, one or more specific elements that are physically, physiologically, genetically, psychologically, economically, culturally or socially identifiable. As a result, the RGPD Regulation does not apply to the processing of personal data relating to legal persons. The RGPD also does not apply to personal data relating to deceased persons. Regarding the passive matter established by the provisions of the RGPD Regulation, art. provides that they are empowered to process the personal data of European Union citizens, ie natural or legal persons, public authorities, agencies or other bodies, alone or together with other operators. An operator may have his domicile, residence or headquarters in or outside the Union. This Regulation shall apply to the processing of personal data of persons who are in the Union in the course of the activities of an office of an operator or of a person empowered by an operator within the Union, whether or not the processing takes place within the Union. It also falls under the scope of the Regulation and the processing of personal data of data subjects who are located in the Union by an operator or a person empowered by an operator not established in the Union if processing activities have as their object the provision of goods or services to such persons within the Union, whether or not a payment is requested by the data subject, or whether it is intended to monitor their behavior if they occur within the European Union. The regulation, according to art. 3 par. 3 also applies to the processing of personal data by an operator who is not established in the Union but in a place where national law is applied under public international law.

The processing of personal data may also be carried out by a proxy acting on behalf of an operator⁴. In this case, the empowered person must provide the operator with sufficient guarantees for the implementation of appropriate technical and organizational measures so that the processing complies with the legal requirements and ensures the protection of the rights of the data subject.

Processing by a person empowered by an operator is governed by a contract or other legal act in writing, including in electronic form, under Union law or national law binding on the person

⁴ <http://www.dataprotection.ro/?page=IntrebariFrecvente>, consulted on September 15, 2018.

empowered by the operator in relation to the operator; and which determines the object and duration of the processing, the nature and purpose of the processing, the type of personal data and the categories of persons concerned and the obligations and rights of the controller.

Regarding the nature of the activities⁵ that operators can carry out under the Regulation, art. 2 par. 1 refers to the processing of personal data wholly or partly by automated means, as well as the processing by other means than automated processing of personal data which are part of a data recording system or which are intended to be part from a data recording system. The data processing activity is, according to art. 4 (1) of the Regulation, a transaction or set of operations performed on personal data or on personal data sets, with or without the use of automated means, such as collecting, recording, organizing, structuring, storing, adapting or modification, extraction, consultation, use, disclosure, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction of such personal data.

However, not all personal data processing activities fall within the scope of Regulation 2016/679. Thus, according to art. 2 par. 2, the Regulation does not apply to the processing of personal data in an activity that does not fall under European Union law if the data processing activity is carried out by a natural person in an exclusively personal or domestic activity or if the activity is carried out by the Member States under Chapter 2 of Title V of the EU Treaty, namely the policies on border control, asylum and immigration. Also, the provisions of Regulation 2016/679 are not applicable if the processing of personal data is carried out by the competent authorities for the purpose of preventing, investigating, detecting or prosecuting offenses or of executing criminal sanctions, including protection against threats to the address of public safety and their prevention.

The Regulation does not apply to the protection of fundamental rights and freedoms or the free movement of personal data relating to activities not falling within the scope of Union law, such as national security or foreign and security policy activities the Union.

Where personal data are processed by the institutions, bodies, offices and agencies of the European Union, the provisions of Regulation (EC) no. 45/2001⁶.

Also, when the processing of personal data is an information society service, the special provisions, namely those of Directive 2000/31/EC on electronic commerce, remain applicable.⁷

Regarding the type of personal data that can be processed, the RGPD Regulation specifies which data can be processed, and what data it does or under what conditions. As we have already shown, art. 4 par. 1 of the Regulation gives a definition of "personal data", ie any information about an identified or identifiable natural person, such as a name, an identification number, location data, an online identifier, or specific items of its own physical, physiological, genetic, psychic, economic, cultural or social identity. If the first elements of identification, namely name, domicile or identification number are logically mentioned, the text of the Regulation also refers to other more personal data, namely genetic, physiological, psychic information⁸, etc.

Genetic data is that personal information relating to the inherited or acquired genetic characteristics of a natural person that provides unique information on the physiology or health of that person and which results, in particular, from an analysis of a sample of biological material harvested from the person Cause. Biometric data is personal information resulting from specific processing techniques relating to the physical, physiological or behavioral characteristics of a natural person that allow or confirm the unique identification of that person, such as facial images or dactyloscopic data (fingerprints). Health data is personal information relating to the physical or mental health of a natural person, including the provision of healthcare, which discloses information about his or her health. In view of the very easy way of obtaining this personal data by the person

⁵ <https://www.politiaromana.ro/ro/legislatie/protectia-datelor-cu-caracter-personal>, consulted on September 15, 2018.

⁶ Council Regulation (EC) no. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, published in the Official Journal of the European Union no. 008 of 12.01.2001.

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), published in the Official Journal of the European Union no. 178 of 08.06.2000.

⁸ www.anpc.gov.ro/anpcftp/interes.../procedura_date_caracter_personal_150320.pdf, consulted on September 15, 2018.

concerned, I consider these categories of information to be 'high-risk', protecting them by imposing on those who request them processing, additional guarantees of good practice.

The Regulation regulates certain special categories of personal data whose processing is either prohibited or possible only in compliance with the conditions provided by the Regulation. Thus, under art. 9 of Regulation 2016/679 prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious confession or philosophical beliefs or membership of trade unions and the processing of genetic data, biometric data for the unique identification of a natural person, data on the health or data on the sexual life or sexual orientation of a natural person.

The processing of such personal data is possible in the cases expressly provided by the Regulation in paragraph 2 of Article 9, namely:

- the data subject has given his explicit consent to the processing of such personal data for one or more specific purposes, unless Union law or national law provides that the prohibition can not be lifted by consent the person concerned;

- processing is necessary for the purpose of fulfilling the obligations and exercising specific rights of the operator or person concerned in the field of employment and social security and social protection, to the extent that this is authorized by Union or national law, or by a collective labor agreement concluded under national law providing for adequate safeguards for the fundamental rights and interests of the data subject;

- processing is necessary to protect the vital interests of the data subject or another natural person when the data subject is physically or legally incapable of giving his consent;

- the processing is carried out in the course of their legitimate activities and with adequate safeguards by a foundation, association or other non-profit-making organization and political, philosophical, religious or trade union organization, provided that the processing relates only to members or former members of that body or persons with whom he has permanent contact with his or her purposes and that personal data are not disclosed to third parties without the consent of the data subjects;

- processing refers to personal data which are made public by the data subject in a manifestly;

- processing is necessary for the establishment, exercise or defense of a right in court or whenever courts act in the exercise of their judicial function;

- processing is necessary for reasons of overriding public interest under Union or national law;

- processing is necessary for purposes relating to preventive or occupational medicine, the assessment of the employee's work capacity, the establishment of a medical diagnosis, the provision of medical or social assistance or medical treatment or the management of health systems or services; social assistance;

- processing is necessary for reasons of public interest in the field of public health, such as the protection against serious cross-border threats to health or the provision of high standards of quality and safety of healthcare and of medicinal products or medical devices;

- processing is necessary for purposes of archiving in the public interest, for purposes of scientific or historical research or for statistical purposes.

Although the provisions of Regulation 2016/679 are mandatory and directly applicable in national legislation, Member States may maintain or introduce additional conditions, including restrictions, concerning the processing of genetic data, biometric data or health data.

Where personal data concern criminal convictions or related security measures, such data shall be processed only under the control of a State authority or where processing is authorized by Union or national law providing for adequate safeguards for the rights and freedoms of data subjects.

The processing of personal data must be carried out in compliance with the principles laid down in Art. 5 of the Regulation. As a result, data must be processed legally, fairly and transparently against the data subject; the data must be collected for determined, explicit and legitimate purposes and can not be further processed in a way incompatible with those purposes; the data are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed; the data are accurate and are kept in a form that permits identification of the data subjects for a period not exceeding the time required for the purposes for which the data are processed. The data subjects

must also be guaranteed that the data are processed in a way that ensures the adequate security of personal data, including protection against unauthorized or unlawful processing and against loss, destruction or accidental damage.

Regarding the rights of data subjects to process their personal data, EU Regulation 2016/679 provides for the rights of persons whose personal data are collected and processed. These rights are: the right of access, the right to rectification, the right of removal, the right of restriction, the right to data portability and the right to object.

The right of access allows the data subject, according to art. 15, obtain from the operator a confirmation that personal data relating to it are processed or not. If such data is processed, the data subject must have access to the data, communicating his or her purposes for processing, the categories of personal data concerned; recipients to whom personal data has been or is to be disclosed; the period for which personal data is expected to be stored, if possible; the possibility to require the operator to rectify or erase personal data or to restrict their processing, as well as the possibility and the right to object to the processing of his or her personal data.

The data subject's access to his/her processed data is made by releasing a copy of the personal data being processed by the operator.

The right to rectification allows the data subject, according to art. 16, obtain from the operator the rectification, without undue delay, of inaccurate personal data relating to him and the completion of personal data which is incomplete.

The right to delete the data (the "right to be forgotten") allows the data subject, according to art. 17, obtain from the controller the deletion of personal data concerning him/her if: personal data are no longer necessary for the purposes for which they were collected or processed, the data subject withdraws the consent on the basis of which the processing takes place if the person the data subject is opposed to processing if personal data have been collected or processed illegally or if personal data has to be erased in order to comply with a legal obligation incumbent upon the operator under Union or national law under which the operator is located.

If the operator has made publicly available personal data and, after exercising the right to be forgotten, is obliged to shred them, he will have to take reasonable steps to inform the operators who process the personal data that the data subject has requested data deletion and any links to that data or any copies or reproductions of such personal data. However, exercising the right to delete data is discarded if processing is necessary: for the exercise of the right to free expression and information; for reasons of public interest in public health; for purposes of archiving in the public interest, for purposes of scientific or historical research or for statistical purposes, for the establishment, exercise or defense of a right in court.

The right to restrict the processing allows the person concerned, according to art. 18, require the operator to restrict the processing of personal data insofar as the data subject challenges the accuracy of the data; processing is illegal and the data subject opposes the deletion of personal data, but instead calls for restrictions on their use; the data subject opposed the processing for the period of time to verify that the legitimate rights of the operator prevail over the data subject's.

In all cases where personal data has been disclosed to the data subject, the operator has the obligation to communicate any rectification or deletion of personal data or to restrict the processing performed

The right to data portability allows the data subject, according to art. 20, to transmit its personal data collected and processed by an operator, another operator, if the processing is done by automatic means or if it was done on the basis of consent or a contract.

The right to opposition allows the person concerned, according to art. 21, to oppose, for reasons related to their particular situation, the processing of their personal data, including the creation of profiles based on those provisions. An operator shall no longer process personal data unless it proves that he has legitimate and compelling reasons that justify the processing and which prevails over the interests, rights and freedoms of the data subject or that the purpose is to establish, exercise or defend a right in court.

If personal data is processed for purposes of scientific or historical research or for statistical purposes, the data subject may, for reasons connected with his/her particular situation, have the right to object to the processing of personal data concerning him/her, unless processing is necessary for the performance of a task on grounds of public interest.

The right to an effective judicial remedy against a supervisory authority against an operator or a person empowered by the controller allows the data subject, 78 and 79, to appeal against a legally binding decision in the courts of the Member State in which the supervisory authority, the operator or the person empowered by the controller is established.

The right to compensation allows the data subject who has suffered material or non-pecuniary damage as a result of a violation of this regulation to obtain compensation from the operator or the person empowered by the operator for the damage suffered by bringing an action in court, according to art. 82.

Where the damage has been caused by more operators and an operator or person empowered by the operator has paid all the compensation for the damage occasioned, the operator or the person empowered by the operator has the right to request from the other operators or the other persons empowered by the operator involved in the same processing operation recovering that part of the indemnity corresponding to their liability for damage.

Sanctions. Regulation 2016/679 sets severe administrative sanctions ranging between € 10,000,000 and € 20,000,000 or, in the case of businesses, between 2% and 4% of the total annual global turnover for the previous financial year.

3. Conclusions

By 25 May 2020 and every four years thereafter, the Commission shall submit to the European Parliament and the Council a report on the evaluation and review of this Regulation, in particular by looking at the transfer of personal data to third countries or international organizations, and cooperation between Member States for the correct and effective application of the provisions of EU Regulation 2018/679.

At national level, Law no. 190/2018⁹ on measures to implement Regulation (EU) 2016/679 of the European Parliament and of the Council. The competent institution in this field is the National Supervisory Authority for Personal Data Processing, an autonomous central public authority with a general competence in the field of personal data protection, an institution whose objective is the protection of fundamental rights to privacy and the protection of personal data.

Bibliography

1. Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC published in the Official Journal of the European Union no. 119/1 of 26.04.2016
2. Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Union no. 281/31 of 25.10.1995.
3. Council Regulation (EC) no. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, published in the Official Journal of the European Union no. 008 of 12.01.2001.
4. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), published in the Official Journal of the European Union no. 178 of 08.06.2000.

⁹ Law no. 190/2018 on measures implementing Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing of Directive 95/46/EC (General Data Protection Regulation) published in the Official Gazette no. 651 of July 26, 2018.