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Application of Legal Instruments of Protection in the Field of Personal Data – Human Rights between Challenges and Limits

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ABSTRACT: This paper proposes the analysis of a situation that may arise in the matter of personal data, when we talk about the protection of such data, as well as about the applicable legislation, referring to those legal instruments for the protection of personal data. Since the implementation of the legal texts also implies the confrontation with the reality or with the factual situation, the working hypothesis we propose is that of the limitations that appear regarding the exercise of what we generically call "human rights". These limitations and the way in which the legislation has the capacity to deal in particular with respect for human rights, are challenges that we will analyze in our paper. As a working method, we chose qualitative analysis, observation and comparison, using various types of normative acts applicable in European countries. As a subject of analysis, I preferred the legislation within the European Union, as well as the Romanian legislation.

KEYWORDS: human rights, personal data, sensitive data, regulation, directive, legal instruments

1. Introductory aspects regarding the legal instruments of personal data protection

The right to privacy is a fundamental right, which was regulated for the first time in the Universal Declaration of Human Rights (UN General Assembly 1948, Art. 12). Although not binding, the Declaration is a reference document, which was the basis for the adoption of treaties and laws on the protection of fundamental rights and freedoms (Stelejan-Guțan 2018, 7).

Going further, throughout history, the European Convention on Human Rights was adopted by the Council of Europe (1950). Within this normative act, at art. 8 regulates the right to private and family life, developing to a certain extent the provisions of the Declaration. Starting from the jurisprudence of the European Court, "the right to privacy is the right to privacy". The notion of private life includes elements that relate to a person's identity, such as his name, photograph, physical and moral integrity (Stelejan-Guțan 2018, 166-167). The European Court has defined the scope of art. 8 in a broad sense, by inserting some rights that are not expressly provided in the law (Erimia 2016, 456). This makes the processing of personal data an interference within the meaning of art. 8 of the Convention.

2. How to regulate and understand the phrase "protection of personal data"

2.1. General Data Protection Regulation at EU level

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In 1981, Convention no. 108 for the protection of individuals with regard to automatic processing of personal data, this document being recognized as the first international legal instrument, with binding force in the field of personal data protection, which was also ratified by Romania (in 2001).

The drafting of the Charter of Fundamental Rights of the European Union is the implementation of a modern vision of human rights, adapted to social, technological and cultural progress. It contains concepts of fundamental rights such as the protection of personal data, a concept that we also find in the European Convention on Human Rights in the form of the right to respect for private and family life, home and correspondence (Chilea 2018, 7).

Convention no. 108 for the protection of individuals with regard to automatic processing of personal data of the Council of Europe was ratified on 28 January 1981 and is one of the first legally binding international instruments that explicitly deals with the protection of personal data. The importance of this convention is a major one in the field of personal data protection, the day of January 28 becoming special, so that on this date is celebrated the European Day of Data Protection.

Convention no. 108 applies to both data processing in the public and private sectors, being designed as a tool for the protection of individuals against public abuse of collection and processing of personal data, while providing a mechanism for monitoring the rights of persons to life. private. It also seeks to regulate the cross-border flow of personal data (Craig and Grainne 2017, 427). Article 2 of the Convention defines personal data as those data relating to an identified or identifiable individual, and data processing represents any operations or set of operations performed on personal data, such as collection, storage, storage, modification, storage, dissemination, making available, deleting, destroying or performing logical or arithmetic operations with such data.

Chapter 2 of Convention no. 108 sets out a number of principles that must be observed in the protection of personal data, such as:

- obligations of the signatory parties: each member will take the necessary measures in national law to implement the provisions of the Convention and to ensure compliance with them
- each state party to the Convention must also allow the Convention Committee to evaluate the effectiveness of the legal measures it has taken to implement the provisions of the Convention and to participate actively in the evaluation process.

The Convention clearly sets out aspects regarding the legitimacy of the processing of personal data and their quality. Thus, the processing of data must be proportionate to the legitimate interest pursued, with a view to ensuring a balance between the purpose pursued, public or private, and the rights or freedoms affected.

Personal data must be collected, processed only in a legal, transparent manner, based on a free, unequivocal consent of the data subject or an interest established by law. The convention establishes in art. 6 a set of special categories of personal data, such as:

- genetic data
- personal data relating to offenses, criminal proceedings and related convictions and security measures
- biometric data that identifies a person
- personal data regarding ethnic or racial origin, political opinions, religion, health or sex life, membership in an organization.

The processing of such data is prohibited, except in cases and under the security conditions provided by law.

This Convention enshrines a number of the data subject's rights, such as: the right to be informed about the storage of his or her personal data, to oppose their processing or to request their correction or deletion. One of the obligations imposed by the Convention on signatory states is to set up a national data protection supervisory authority.

On 24 October 1995, the European Parliament and the Council of the European Union adopted Directive no. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in order to ensure the protection of the fundamental rights and freedoms of individuals and in particular the right to privacy with regard to the processing of personal data personal character.

On 27 April 2016, the same institutions drafted Regulation (EU) no. 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive no. 95/46/EC, with application starting with 25.05.2018.

Also on 27 April 2016, the European Parliament and the Council of the European Union adopted Directive (EU) no. 2016/680 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating or prosecuting offenses or the execution of sentences and on the free movement of such data and repealing Framework Decision no. 2008/977/JHA of the Council.

Currently, the main legal instruments in the field of personal data protection are within the European Union (Chilea 2013, 134):

- Regulation (EU) no. 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- Directive (EU) no. 2016/680 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of the prevention, detection, investigation or prosecution of criminal offenses or the execution of sentences and on the free movement of such data
- Regulation (EU) no. Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data and repealing Regulation (EC)) no. 45/2001 and Decision no. 1247/2002 / EC.

EU Regulation no. 2016/679 finds its sources in the Charter of Fundamental Rights of the European Union, art. 8 (1) and the Treaty on the Functioning of the European Union, art. 16 (1) which stipulate that every person has the right to the protection of his personal data (Brașoveanu 2012,136).

The purpose of the Regulation is to contribute to the achievement of a state of freedom, security and justice within the European Union, given at all times that the right to the protection of personal data is not an absolute right, but must be considered in close connection with the in society and in balance with other rights, respecting the principle of proportionality.

Although EU Directive no. 45//46/EC has been a basic tool in the protection of personal data, the need to adopt a new regulation to replace it has arisen due to the exponential growth of the economic and social activity of the members of the Union and the increased risks of personal data generated by the explosion. online activity.

According to art. 1 (1) of the Regulation, it establishes rules for the protection of individuals with regard to the processing of personal data and rules on the free movement of personal data (Erimia and Gheorghiță 2009).

Chapter II sets out the principles governing the lawful processing of personal data, such as the principle of legality, fairness and transparency in relation to the data subject, accuracy, data security, limitation of the data retention period.

An important aspect provided for in the Regulation is that of the data subject's consent to the processing of his or her personal data. It must be clear, free and always retractable.

In the case of the processing of personal data of a child, this is legal only if the minor who gave his consent has reached the age of 16 or if the consent is given or approved by the holder of parental responsibility of the child.

Chapter III of the Regulation contains the rights of the data subject, such as:

- the right to information on the processing of his personal data and on the actions taken following his request
- the right of access to his personal data processed by an operator
- the right to rectification
- the right to delete data
- the right to restrict processing
- the right to data portability
- the right to opposition
- the right to automated individual decision-making.

Development and adoption of Directive (EU) no. 2016/680 is due to the lack of a specific instrument for the protection of personal data processed in activities that were not regulated by European Community law, such as activities in the field of international judicial cooperation in criminal matters.

At the same time, it was taken into account that technological evolution allows large-scale processing and transmission of personal data for the purpose of prevention, investigation, identification of crimes or execution of punishments.

Thus, according to art. 1(1) Directive (EU) no. 2016/680 lays down rules on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, investigating, identifying offenses or enforcing penalties, including for the purpose of preventing threats to public security.

Chapter II of the Directive sets out the principles to be taken into account by the competent data protection authorities, including:

- principles regarding the processing of personal data (legality, correctness, accuracy, etc.)
- observance of data storage time
- reviewing the need for data retention
- differentiations regarding different categories of people
- checking the quality / validity of the data
- processing of special categories of data.

2.2. GDPR in Romania

In Romania, currently, the protection of personal data is achieved through a set of legal instruments in accordance with European legislation in the field, taking into account art. 26 al. (1) of the Romanian Constitution: “Public authorities respect and protect intimate, family and private life”. Until the entry into force of Law no. 363/20018 and Law no. 190/2018, the protection of personal data was based on Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and the free movement of such data and Law no. 238 of 10 June 2009 on the regulation of the processing of personal data by the structures / units of the Ministry of Administration and Interior in prevention activities, investigation and fight against crime, as well as maintaining and ensuring public order.

EU Regulation no. 2016/679, in force since 25.05.2018, is applicable on the territory of all EU member states. Considering its provisions regarding the fact that in certain situations complementary provisions are necessary at national level, the Romanian legislative apparatus adopted Law no. 190/2018 on measures to implement EU Regulation no. 2016/679, which entered into force on 31.07.2018.

The regulation has general applicability in Romania, except for the activities:

- which is not covered by Union law
- carried out by Member States falling under Chapter 2 of Title V of the Treaty on the Functioning of the European Union
- exclusively personal or domestic carried out by individuals
- activities carried out by competent authorities for the purpose of preventing, investigating, detecting or enforcing criminal sanctions, including protecting against and preventing threats to public safety (an area covered by Directive (EU) No 2016/680).

For the transposition into Romanian legislation of Directive (EU) no. 2016/680, Law no. 363/2018 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating, prosecuting and combating crime or the execution of penalties, educational and security measures, and on the free movement of such data. [Șandru, Alexe 2018, 8].

At the same time, by Law no. 102/2005 regarding the establishment, organization and functioning of the National Authority for the Supervision of Personal Data Processing, the control and supervision body for the observance of human rights in the field of personal data protection was created in Romania.

Another tool used in the protection of personal data is Instructions no. 27 of February 3, 2010 on organizational and technical measures to ensure the security of personal data processing performed by the structures / units of the Ministry of Administration and Interior (Mitra-Radu 2013, 151).

Violation of legal provisions regarding the processing or protection of personal data can lead to several types of sanctions (Mitra 2014, 98).

3. Legal instruments for the protection of personal data

3.1. The notion of "biometric data"

Biometric data is a special set of personal data, with a limited space in European and national legislation. Although technological progress in the field of information systems urges the increasing use of this type of data in the process of identifying persons, in Romania, the National Authority for Supervision of Personal Data Processing, but also the courts have been reluctant to processing of biometric data, constantly recommending a serious analysis of the proportionality of the use of these special data, following to ensure a balance between the purpose pursued and respect for human rights.

By art. 4, lit. m) of Law no. 363/2018, the Romanian legislator defined biometric data as “personal data resulting from specific processing techniques, referring to the physical, physiological or behavioral characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data ”.

Worldwide, biometric authentication is increasingly used. Technologies based on fingerprint are used, but also on facial recognition, iris recognition and even the specific features of an individual's gait.

Although the benefits of using this technology are obvious, ensuring speed in access or reduced risk of failure to authenticate, there are many criticisms regarding the security of this data (risk of identity theft) or ideas that would invade a person's privacy, may reveal sensitive data of the person (Stăiculescu and Trandafirescu 2003, 14).

There are countries where video surveillance for the official purpose of preventing and combating crime or terrorism is widely used. However, it is not known the border at which the legal role of ensuring the security of persons stops, and where the desire of governments to control the population starts.

At the European level, EU Regulation no. 2016/679 regulates by art. 9 processing of special categories of personal data, in which biometric data are included. The processing of such data is permitted only under certain conditions, including:

- the data subject has given his or her consent for this data to be processed for one or more precise purposes
- the processing is necessary for the purpose of fulfilling the obligations and exercising specific rights of the operator or of the data subject in the field of employment and social security and social protection
- the processing is necessary to protect the vital interests of the data subject or of another natural person, when the data subject is physically or legally incapable of giving his or her consent
- the processing is necessary for the ascertainment, exercise or defense of a right in court or whenever the courts act in the exercise of their judicial function
- the processing is necessary for reasons of major public interest
- the processing is required for purposes related to preventive or occupational medicine
- the processing is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare and medicines or medical devices
- the processing is necessary for archiving purposes in the public interest, for scientific or historical research purposes or for statistical purposes.

In Romania, the national legislative framework takes over the provisions of the Regulation on the processing of genetic data, biometric data or health data, inserting them in Chapter II, art. 3 of the law no. 190/2018, but in art. 10 of the law no. 363/2018.

Thus, the processing of such data "for the purpose of an automated decision-making process or for the creation of profiles, is permitted with the explicit consent of the data subject or if the processing is performed under express legal provisions", and the processing of health data performed to ensure health may not be subsequently performed for other purposes by third parties.

In accordance with art. 10 of the law no. 363/2018, the processing of biometric data for the unique identification of a natural person can be performed only if it is strictly necessary in a given case, if the rights and freedoms of the data subject are protected and secured and if one of the following conditions is met:

- the processing is expressly provided by law
- processing is necessary to prevent an imminent danger at least to the life, bodily integrity or health of the data subject or of another natural person
- the processing refers to personal data that are manifestly made public by the data subject.

3.2. Extension of free access to information

Continuing to remain in the field of Romanian law, it should be mentioned that in the public sector in the field of personal data protection are applicable two important legal instruments, namely: Law no. 544/2001 on free access to information of public interest and EU Regulation no. 2016/679.

Thus, at art. 2, lit. b) of law no. 544/2001, the legislator defined the information of public interest as “any information regarding the activities or resulting from the activities of a

public authority or public institution, regardless of the support or the form or manner of expression of information".

Art. 6 of the same law stipulates that:

(1) Everyone has the right to request and obtain from public authorities and institutions, under the conditions of this law, information of public interest.

(2) Public authorities and institutions are obliged to provide persons, at their request, with information of public interest requested in writing or orally.

Also, through art. 12 of the law no. 544/2001, an attempt was made to clarify the situations in which the free access to public information is restricted, one of them being the one provided at let. (d) the situation in which the information requested contains personal data. At the same time, art. 4, paragraph 1 of Regulation (EU) no. 2016/679, as well as art. 4 lit. (a) of law no. 363/2018 defines personal data "any information regarding an identified or identifiable natural person, hereinafter referred to as the data subject; an identifiable natural person is a person who can be identified, directly or indirectly, in particular by reference to an identifying element, such as a name, an identification number, location data, an online identifier, or one or more many elements specific to his physical, physiological, genetic, mental, economic, cultural or social identity ".

Following the increasing media coverage of human rights, including the two rights, the protection of personal data and the right to free access to public information, the population has seen a gradual increase in requests to public authorities to access information considered public. Some of these requests are aimed at obtaining photocopies of documents containing both public information and personal data.

All art. 4 of Law no. 363/2018, but at letter e) the term pseudonymization is defined as "the processing of personal data in such a way that they can no longer be attributed to a specific data subject without the use of additional information, insofar as this additional information is stored separately and the object of technical and organizational measures intended to guarantee the non-attribution of an identified or identifiable natural person".

Given that the law does not expressly regulate the situation where personal data are contained in the same document with information of public interest, in order to respect each of the two rights, the requested information will be forwarded to the petitioner, but using pseudonymization, that is deleting any information relating to an identified or identifiable person.

3.3. Human rights between challenges and limits

Regarding human rights (Rotaru 2019, 201-215), as we have shown before, Romanian and European legislation comes with some limitations, but also with challenges that cannot be ignored, but only need to be known and respected.

The regulation I referred to during this study makes some changes to human rights, such as:

Regarding the scope of the Regulation, the provisions of art. 3 does not limit its territorial application to operators under the jurisdiction of an EU Member State, but also extends to the location of the data subject.

The regulation strengthens the control over its own data, adopting the following provisions. The principle of transparency is added in art. 5, detailed in art. 12-14. Thus, the Regulation extends the information due to data subjects. The information must be provided in clear and easy-to-understand language, adapted to the level of the data subjects (for exemple: minors, specialists).

The Regulation maintains the rights of data subjects introduced by the Directive (access, rectification, deletion, blocking and opposition) in a clearer form. If in the Directive and in Law no. 677/2001 the first four rights mentioned above were included in the same

provision, the Regulation creates a provision for each, at art. 15-20. For example, the right of access extends the level of information that can be requested by the data subject, and the right of deletion specifies the cases in which the deletion must be performed by the operator. The Regulation introduces the right to data portability, according to which personal data may be withdrawn from an application or service without hindrance from the operator and transmitted to another operator. The regulation removes the prerogative of operators to charge a fee for facilitating these rights, ensures the possibility of exercising these rights in any form and introduces a 30-day response period.

The conditions of consent are detailed in art. 7-8. To be valid, it must be voluntary, specific, informed and clear, manifested by the data subject through an unequivocal statement/action. Thus, the default consent is not valid. It must be clearly separated from other provisions. For the volunteer, consent can be withdrawn at any time and as easily as giving it. For the processing of data of minors under 16 years of age, consent must be given by the minor's legal representative. Member States may specify a lower age, but not less than 13 years.

The Regulation maintains the legal bases for the processing of personal data (art. 6) and adds new grounds for the processing of sensitive data (art. 9). Member States may introduce specific conditions for the processing of genetic, biometric and medical data.

The concept of "personal data" includes any information relating to an identified or identifiable person, information about a person whose identity is obvious, or established by obtaining additional information. Identification obviously involves elements that distinguish the person from any other, e.g. name, email address. A person is identifiable, for example, according to the ECJ, by online identification elements (eg IP address). Thus, the legislation does not apply to anonymous data, data that cannot be associated with a person.

The concept of "sensitive data" poses a risk to data subjects. Thus, processing is only allowed together with specific guarantees. The directive distinguishes the following: racial / ethnic origin, political opinions, religious / philosophical beliefs, health data, sex life, trade union membership. To these, the Regulation adds genetic and biometric data.

4. Conclusions

The subject under analysis in this paper addressed the legal instruments through which the protection of personal data can be achieved, but also the challenges faced by human rights when the legislator himself imposes certain limits, over those imposed by the right holder. It is known that the right of each individual is limited, at a given time, if, by exercising that right, the right of another person is infringed in any way. Here comes the challenge that we followed, analyzed and presented the result of the information we gathered.

In relation to these ideas, we followed to what extent it is possible to apply these legal instruments, what legal consequences the application of these instruments produces and how human rights and data on people in general can be protected.

Also as part of the conclusion of our research, we mention the fact that, regarding the conditions of validity of the consent expressed by a person, operators in some states could rely on the implicit consent as a legal basis for processing, without ensuring that the person truly consented. Specifically, we have here the Opinion 15/2011 on the definition of consent, adopted on 13 July 2011 and the concrete situation in which a common definition was proposed, by which consent must be obtained expressly and not implicitly, but, according to the Commission, the advisory nature of the opinion did not lead to a change in the more permissive legislation.

These elements of legal finesse have led some European countries (Spain, Greece) to include in their legislation special mentions, such as consent which should not be ambiguous or explicit.

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