

TRANSPARENCY, AN ESSENTIAL ELEMENT OF THE RIGHT TO PERSONAL DATA PROTECTION

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Abstract

The importance of the right to personal data protection at European level, as a fundamental right, is recognized by the Art. 16 of the Treaty on the Functioning of the European Union and of the Art. 8 of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty. The Convention adopted by the Council of Europe in 1981 for the protection of individuals with regard to automatic processing of personal data, considered as the first legal instrument on the protection of personal data, establishes a number of specific guarantees concerning the rights which are recognized in this context to the individuals whose personal details are being processed. Thereafter, the provisions of this international instrument have been adopted and developed at national level and at EU level, with the passing of 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. Thus, the right to information, the right to access, the right to rectification, the right not to be subjected to an automatic individual decision, the right to object and the right to file a complaint to the national supervisory authorities became legally binding rights. The right to information translates into the correlative obligation of the controller to provide the subject with details related to the processing of his/her personal data, including the aspect of how to exercise other individual rights. All these rights contribute to the transparency required to perform the processing of personal data and thus to guarantee the right to privacy and the right to personal data protection. In order to ensure effective implementation of these rights in Romania was established, according to the European model, the National Supervisory Authority for Personal Data Processing, with the role of defender of the right to privacy of individuals who may be affected by improper processing of personal data. This paper will analyze on the one hand, the general legal regime of the rights of data subjects, and on the other hand, the way in which the supervisory authority contributes to ensuring transparency of the personal data processing, by virtue of the exercise of its statutory powers, related to control and public awareness competencies.

Key words: right to data protection, transparency, right to information, right of access, right to rectification, right to object, supervisory authority.

1. Introduction

One's ability of exchanging information in real time among people and entities while being at long distances is one of the advantages of using world wide technical

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means. On the other hand, we should not neglect the risks upon using such means regarding the exposure of people's privacy by accessing or divulging such information. Thus, the enforced legislation for protecting the right of privacy and personal data is a pillar of checks and balances among the interest for knowledge and need to keep one's privacy. In respect to the individuals' data being processed, it is imperative to acknowledge the specifics of such processing and, if applicable, to request rectification of the information. The monitoring of the legal regime of the individuals' rights is within the power of a data protection authority, such as is the Romanian National Supervisory Authority For Personal Data Processing.

2. Legal framework

The European Convention for the Protection of Human Rights and Fundamental Freedoms¹ focuses on the any natural person's right to privacy and family life, to his/her home and his/her correspondence. There are also some certain restrictions for the public authorities, settled in a exceptional manner, when they are provided for by law and state a necessary measure for protecting public and national security, country's wealthfare, public order and preventing criminal offences, protection of health, morals, rights and freedoms of others in a democratic society².

Within the Council of Europe, the field of data protection was highlighted by the adoption of the Convention nr. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data³, which was considered the first legal instrument within protection of personal data, on January 28th 1981, in Strasbourg. This convention states two fundamental principles: freedom of usage of these data and respecting individuals' rights to whom the data belong.

The Convention aims to protect natural persons' privacy against any public authorities' and legal persons' intrusions; the Convention provisions and its additional Protocols are part of each country's legislation upon ratification.

The European acknowledgement of the data protection field, as a fundament right, is also settled in art. 16 of the Treaty on the Functioning of the European Union (T.F.E.U.)⁴, as amended through the Treaty of Lisbon, acting since the 1st December 2009, stating that any individual has the right of personal data protection and such supervision is under the control of an independent authority.

The Charter of Fundamental Rights of the European Union⁵ that became legally equal as the Treaties, as stated in art. 6 para. (1) of the T.F.E.U., represents the basis of

¹ Adopted on te 4th November 1950, in Rome, by the Council of Europe

² As provided by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

³ Ratified by Law no. 682/2001 on the ratification of the Convention on the protection of individuals with regard to automatic processing of personal data, adopted in Strasbourg on the 28th January 1981 (Official Journal of Romania no. 830/21.12.2001)

⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Romanian version, Official Journal of EU C83/30.03.2010)

⁵ Charter of Fundamental Rights of the European Union (Romanian version, Official Journal of EU C 83/30.03.2010). As for the features of the Charter, see E.S. Tănăsescu, „Carta drepturilor

acknowledging the personal data right within the European Union. Thus, as provided by the art. 8 of the Charter⁶, the right to protection of personal data is settled as a distinct and autonomous right, and once the Treaty of Lisbon was adopted it became a fundamental right within the European Union. Personal data protection requests regulations and precise means of data processing, modalities for ensuring an adequate movement of data, and also the presence of an independent national supervisory authority.

Within the second level EU legislation, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁷, adopted by the European Parliament and the Council, on the 24th October 1995, is the first EU law setting basic rules and principles regarding personal data processing. According to this act, individuals must be informed on the entities that hold and process personal data, the purpose of the collection and the means to resort to the right of access and intervention to data, and the right to object in case of an illegal processing.

At national level, Romanian case, although it does not bear the statute of a constitutional right, personal data protection is a part of the fundamental right to intimacy, personal and private life, as it is provided by the art. 26th of the Romanian Constitution⁹.

At national level, the Directive 95/46/EC was transposed by the Law no. 677/2001 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data¹⁰ which settled, mainly, the general and special rules for collecting, storing and use of personal data, conditions for transfer of the data abroad, and the rights of the data subjects, as well.

The legal framework for enforcing efficiency of the EU approach is based on the Law no. 102/2005 regarding the setting up, organization and functioning of the National Supervisory Authority for Personal Data Processing¹¹. The law established a national independent and autonomous authority for personal data protection¹², set up its powers for supervising and control, including the one related to informing the data controllers on their obligations and the individuals upon their rights¹³.

fundamentale a UE: avantajele și efectele ei pentru cetățenii europeni", in "Revista Română de Drept Comunitar", no. 4/2010.

⁶ "1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

⁷ Published in Official Journal of EU. L 281/23.11.1995.

⁸ Art. 26:

"(1) The public authorities shall respect and protect the intimate, family and private life.

(2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.

⁹ I. Muraru, E. S. Tănăsescu, "Constituția României. Comentariu pe articole", C. H. Beck, Bucharest, 2008.

¹⁰ Published in Official Journal of Romania, no. 790/12.12.2001.

¹¹ Published in Official Journal of Romania, no. 391/9.05.2005.

¹² Before the adoption of the Law no. 102/2005, the Romanian Ombudsman was filling in the specific attributions of such an authority, according to art. 21 of the Law no. 677/2001.

¹³ Art. 10, letter b) and c) of Law no. 102/2005

Among the national laws focusing on the importance of the right to privacy, the Civil Code ¹⁴ has its own legal section centered upon private life and people's dignity¹⁵, qualified as rights of personality¹⁶. Therefore, each and every individual has the right to privacy, none can be subjected to intrusions in his/her privacy, private or family, residence, secrecy of any means of communication, without his/her consent¹⁷.

3. General regime of the data subjects' rights

Within the generic right to personal data protection, specific rights have been established, taking into account that any data filling systems are destined for the usage of people's interest, thus respecting their fundamental rights and freedoms.

Therefore, the following rights were provisioned:

- the right to information;
- the right to access the data;
- the right of intervention upon the data;
- the right to object;
- the right not to be subject to an individual decision;
- the right to complain to the data protection authorities.

The observance of these rights became more stringent today as the need for defending the identity is displayed more often, taking into account that the use of personal data expanded and the means for data collecting and processing widened and technically streamlined.

The obligation of respecting the rights is incumbent upon every data controller regardless of their field of activity, and the violation of these rights may lead to contravention sanctions issued by the National Supervisory Authority for Personal Data Processing as provided by the Law no. 677/2001.

Right to information, as provisioned by the art. 12 of the Law no. 677/2001, settles the power of the data subject to acknowledge the elements required by the processing of his/her personal data. The observance of this right to information is to ensure the data processing transparency for the data subject who can thus give his/her express and unequivocal consent to have personal data processed, being previously informed of his/her rights in relation to the data controller.

The right of information is correlated with the data controller's legal obligation of providing the notice of the data processing terms, either while data collecting (in case of direct collection) or later on, before the first disclosure to a third party (in case of collection of data from other sources or indirect data collection).

Therefore, as provisioned by the Law no.677/2001, art 12, para (1), the data controller has the obligation to provide the data subjects the following information:

¹⁴ Adopted by Law no. 287/2009, republished in Official Journal of Romania, no. 505/15.07.2011.

¹⁵ See Chapter II "Respect of the human being and his/her intrinsic rights", part of the "Title II, The Individual" of the "Book I – On Persons".

¹⁶ On these category of rights, see C. Jugastru, „Reflecții asupra noțiunii și evoluției drepturilor personalității”, An. Inst. de Ist. „G. Bariț”, Cluj-Napoca, Series Humanistica, tom. V, 2007.

¹⁷ See art. 77 of the Civil Code: "Any personal data processing by automatic or manual means may be carried out only in cases and under the terms provided by the special law".

- the identity of the data controller and, if required, of the data controller's representative;
- the purpose of the data processing;
- additional information, such as: the recipients, or the categories of recipients of the data; whether the requested information is compulsory, and the consequences of the refusal to provide it; the existence of the data subject's rights, stated by this law, notably the right of access, intervention and objection as well as the terms in which they may be exerted;
- any other information which may be expressly requested by the National Supervisory Authority for Personal Data Processing, considering the processing's specific situation.

In respect of the above, the data protection authority expressly requested the data controllers who take part to the systems of credit bureaus to inform the debtors on the supplementary issues regarding the data processing within these databases¹⁸.

In case the data is not directly obtained from the data subject, in accordance to the Law 677/2001, art. 12, para (2), the data controller is obliged at the moment of collecting data or at least before the first disclosure takes place, if he/she has the intention to disclose the data to a third party, to provide the data subject with the following minimum information, unless the data subject already possesses that information:

- a) the identity of the data controller and, if required, of the data controller's representative;
- b) the purpose of the data processing;
- c) additional information, such as: the recipients, or the categories of recipients of the data; whether the requested information is compulsory, and the consequences of the refusal to provide them; the existence of the data subject's rights, stated by this law, notably the right of access, intervention and objection as well as the terms in which they may be exerted;
- d) any other information which may be expressly requested by the supervisory authority, considering the processing's specific situation.

The data controller can prove he/she complied with this obligation in different ways: written procedure (additional contract clauses or registration forms), head-quarter displaying (recommended for public authorities and institutions, especially), online, on the website where the collection or the disclosure of the data takes place, and verbally, in exceptional cases. In respect to the oral information, the National

¹⁸ Art. 9, para (1), Decision no. 105/2007 regarding the processing of personal data performed in a credit bureau type filling system (published in the Official Journal of Romania no. 891/27.12.2007): "Participants have the obligation to provide, clearly and accurately, the information mentioned in art. 12 para. (1) of Law no. 677/2001 to data subject at the time of sending the notice provided in article 8, including information on:

- a) personal data transmitted;
- b) identity of the credit bureau/s to which the data are transmitted;
- c) categories of participants to the credit bureau to which the data are transmitted;
- d) period/s of data storage within the credit bureau type filling systems;
- e) concrete modalities for the exercise of the right of access, intervention, opposition in relation to the participant and the credit bureau/s."

Supervisory Authority for Personal Data Processing stated that this is only allowed when difficulties are present while informing the data subject/s in any of the other ways, taking into account the specific circumstances of the processing¹⁹.

The Authority regulated the concrete means of informing the data subject/s in case of the credit bureau type filing systems²⁰, the use of video surveillance systems²¹ or the collection of the Personal Identification Number (CNP)²².

Exceptions from informing the data subject, as provisioned by the art. 12 para (3) and (4) of Law no. 677/2001, are strictly applicable when personal data are indirectly collected, in the following cases:

- the processing of data is carried out exclusively for journalistic, literary or artistic purposes, if their enforcement might reveal the source of information;
- the processing of data is carried out for statistical, historical or scientific research;
- any other situations if providing such information proves to be impossible or would involve a disproportional effort towards the legitimate interest that might be damaged;
- the situations in which recording or disclosure of the data is expressly stated by law.

In case the processing of data is carried out exclusively for journalistic, literary or artistic purposes, statistical, historical or scientific research it is justifiable the application of some exceptions from informing the data subject, considering the specificity of such processing, under the terms provided by art. 12, para. (3) and (4) of Law no. 677/2001.

The right to information of the data subject is not to be mistaken with the right to get information of public interest, which is differently regulated by the Law no. 544/2001 on free access to public interest information²³ concerning a broad area of information based on the activity of the public authorities and institutions, but with the express exception of the information of personal data²⁴.

Another right for the transparency enforcement within the field of personal data processing is the *right of access to data*, provisioned in art. 13 of the Law no. 677/2001; based on this right, the data subject may obtain from the data controller, besides the confirmation of personal data processing, other information, similar with the ones resulting from the right of information; moreover, the data controller is obliged to inform the petitioner about the possibility of consulting the Register of personal data processing, of submitting a complaint to the supervisory authority, as well as to dispute the data controller's decisions in court.

¹⁹ 2006 Annual Report, available at http://www.dataprotection.ro/?page=Rapoarte_anuale&lang=ro (p. 33).

²⁰ Art. 9 of the Decision no. 105/2007, see above.

²¹ Art. 11 and 12 of Decision no. 52/2012 on the processing of personal data using video surveillance means, published in the Official Journal of Romania no. 389/11.06.2012.

²² Art. 5 of Decision nr. 132/2011 on the conditions of personal identification number processing and other personal data functioning for general identification, published in the Official Journal of Romania no. 929/28.12.2011.

²³ Published in the Official Journal of Romania no. 663/23.10.2001

²⁴ Art. 12 para. (1) lit. d), Law no. 544/2001.

Acknowledging these two rights, the data subject can request, if the case may be, rectification, deletion or even blocking of the data processing by the data controller, resorting to *the right of intervention and right to object* (art. 14 and 15, Law no. 677/2001)²⁵.

Also, in case of using exclusively automatic personal data processing for the adoption of an individual decision, in order to assess one's credibility, solvability or other behavioral aspects (such as the profiling techniques in marketing), the data subject has the right to re-evaluation of these individual decisions or to present arguments in his/her legitimate interest (art. 17, Law nr. 677/2001 - *the right not to be subject to an individual decision*).

An exception with a sectorial applicability from enforcing these subjective rights, is provisioned in art. 16, Law no.677/2001, considering the specific legal regime of the data processing carried out within the activities of preventing, investigating and repressing criminal offences and maintaining public order, as well as other activities in the field of criminal law.

This provisioned exception is two fold conditioned, firstly by the prejudice likely to be produced on the efficiency of the action or the objective followed in order to fulfill the legal obligations of the public authority and the period of time necessary for the achievement of the goal intended. After the case ceases, the public authorities have the obligation to ensure the information and the other rights of the data subject, to keep a record of such cases and to periodically inform the National Supervisory Authority for Personal Data Processing.

Pleading for the necessity of providing an equitable level of protection for the natural persons throughout the European Union and reducing the difference preventing the free movement of such data, the European Commission considered drafting a regulation – act with a direct binding legal force for every Member State, which shall substitute the actual Directive no. 95/46/EC. Thus, the draft of the Regulation 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 (General Data Protection Regulation)²⁶ establishes the right of information of the data subject/s. Art. 14 of the draft states the information categories available for the natural persons, both when the data were directly or indirectly collected. If the personal data is not collected from the data subject/s there has been a proposal for the data controller to make available for the data subject the source of the personal data, as well.

4. The role of the supervisory authority in providing transparency of data processing

Established by the Law no. 102/2005, the National Supervisory Authority for Personal Data Processing aims at defending the individuals' fundamental rights and

²⁵ See G. Zanfir, *Dreptul la protecția datelor cu caracter personal*, in "Revista de Științe Juridice", no. 2/2010.

²⁶ Published by the European Commission on 25th January 2012, available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

liberties, in particular the right to private and family life, with regard to personal data processing and free movement of these data. In order to achieve this objective it has been granted the independent and autonomous status in relationship with any other public authority or private entity; moreover, the Authority exercises its attributions in a transparent and impartial manner²⁷.

The Romanian Legislative Body empowered the National Supervisory Authority for Personal Data Processing as the protector of the right to private life of the natural persons, right that may be affected by an unlawfully personal data processing, thus, the defender of the right to protection of personal data.

The observance of this right implies supervision of the application by the data controllers of the general and special regulations for personal data processing, as well as the control of the effective exertion of the rights stated in art. 12-17, as mentioned above. For this purpose, any person that may be offended can file a complaint to the supervisory authority which, by its control duties, shall be able to dispose a set of measures, such as contravention sanctioning of the responsible data controller, issuing administrative decisions for deletion of the illegally processed data and ceasing the data processing, notifying the criminal prosecution bodies or filing complaints to a court of law.

Thus, non-compliance with the right to information, as well as with the rest of the data subjects' rights may constitute a minor offense (contravention) for "illegal personal data processing" that may be fined from 1000 to 25.000 lei, as provisioned by art. 32 of Law no.677/2001²⁸. Such sanctions can also occur while the *ex officio* controls occur, especially in case of the theme investigations, yearly planned in specific field of activity²⁹.

Along with the control duties, the supervisory authority contributes to ensuring transparency over personal data processing by its public informing duties, such as: publicity for data processing operations notified by the data controllers, issuing opinions and decisions or assents on request, organizing seminaries and conferences, posting information on the Authority's website, media participation, issuing press releases, brochures, leaflets, phone or headquartered consultations³⁰.

All these activities and duties aim at rising of the public awareness on the rights within the personal data protection field, and also the obligations of the data controllers.

²⁷ For a detailed analysis of the data protection authority's duties, see M. Petroiu *Protecția datelor cu caracter personal în România, prin intermediul atribuțiilor autorității naționale de supraveghere*, in "Pandectele Române" no. 9/2012.

²⁸ In a case, the National Supervisory Authority for Personal Data Processing issued a fine for a financial-banking institution for illegal personal data processing, for reporting to the Credit Bureau the personal data of a petitioner without informing the data subject in advance, according to its obligation as provided by the Decision no. 105/2007. (see more in the 2012 Annual Report, available at <http://www.dataprotection.ro/servlet/ViewDocument?id=870>, p. 35).

²⁹ For instance, in the banking field investigations, some data controllers were not complying with the legal obligations on the right of informing the data subject/s (see more in the 2006 Annual report, available at http://www.dataprotection.ro/?page=Rapoarte_anuale&lang=ro, p. 45).

³⁰ See more in the Annual Reports, available at http://www.dataprotection.ro/?page=Rapoarte_anuale&lang=ro.

5. Conclusions

The right to personal data protection is quite complex, as it was the basis for other subjective rights to be born, among which is highlighted the importance of the right of informing the data subject, which implies the obligation of the data controller to notice the data subject whose personal data are to be processed, before the processing starts, on its purpose, the possible recipients of the data and their right to be exerted.

Ensuring this right represents the main condition for effective exertion of the other rights by the data subject in relation with the data controller while collecting and processing his/her data, empowering a real transparency of the personal data processing.

Taking into account that the Romanian Constitution does not explicitly provide the right of personal data protection, we are proposing the consecration of this fundamental right at the constitutional level, aside with the right to private life, as there are similar approaches within the EU legislation.