

Personal Data Protection in EU, Where to?

Tache BOCĂNIALĂ¹

Abstract: The protection of individuals regarding the processing of personal data and free movement of such data represents a growing concern of the States, but also of the EU bodies. At the level of EU Member States, the issue of protecting the individuals regarding the processing of personal data and free movement of such data poses no particular problems. Internationally and especially between the member states of the European Union, the existing regulatory framework no longer responds to these needs such as: online activities, digital economy, internet banking, etc., being increasingly obvious the tendency of fragmentation of the movement of personal data.

Keywords: personal data; protection; freedom of movement; processing

1. Introduction

Personal data is defined as any information concerning an identified or identifiable natural person.

The right to personal data protection is a right provided by the article 8 of the Charter of Fundamental Rights of EU, article 16 TFEU and article 8 of European Convention on Human Rights. For regulating this domain it has left from the feature of the fundamental right to protection of personal data. But as the EU Court of Justice points out², the right to protection of personal data is, however, an absolute right, but it must be considered in relation to its function in society.³

Protection of data is closely related to respecting the privacy and the family, protected by the article 7 of the Charter. This is reflected in article 1 (1) of Directive 95/46/EC which provides that Member States must protect the

¹ Senior Lecturer, PhD, Faculty of Law, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author : tachebocaniala@univ-danubius.ro.

² EU Court of Justice, judgment of 11.09.2010 in Joined Cases C-92/09 and C-93/09 Volker and Markus Schecke and Eifert, Rep., 2010 ECR I-0000.

³ In accordance with article 52 (1) of the Charter, there may be imposed limitations on the right to data protection, as long as they are set by law, and it respects the essence of those rights and freedoms and, according to the principle of proportionality, there are necessary only if they genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

fundamental rights and freedoms of individuals and, in particular their right to privacy regarding the processing of personal data. The EU Member States have transposed into the national legislation the provisions of the aforementioned European regulations and therefore, internally, the issue of protection of individuals regarding the processing of personal data and free movement of such data poses no particular problem.

In Romania, the discussed domain is governed by Law no. 677/2001 *for the protection of individuals regarding the processing of personal data and the free movement of such data* which has as purpose the insurance and protection of the fundamental rights and freedoms of individuals, especially the right to intimate, family and private life, on processing the personal data.

It should be noted however that the national borders are no longer an obstacle to the transfer personal data that flows ever faster. The necessity that was imposed and the speed, with which the transfer process takes place, fail to consider the practical difficulties in applying the data protection legislation.

The online activities, digital economy, internet banking, the online applications, data portability and other operations involving the processing and circulation of personal data, all represent growing challenges for the institutions in charge with regulating and protecting such data.

The analysis of the current regulatory framework on processing of personal data and free movement of such data proves that, in general, the principles upon which it relies remain valid, but it is necessary to adjust the regulations in detail in order to better meet the challenges generated by the growing evolution of new technologies (especially those online) and the ever-expanding globalization, maintaining at the same time the technological neutrality of the legal framework. The fragmented approach of personal data protection in the EU has done and continues to be a vehemently disputed object.

The harmonization of rules on personal data protection is especially required by the interested parties in the economic domain which require a more enhanced legal security. Currently, according to the expressed opinions, the complexity and diversity of norms on international transfers of personal data is a growing impediment for the performed operations, as the economic entities cannot evolve without having to regularly transfer personal data from the EU to other parts of the world.

Against this background it is shaped more urgently the need for cooperation between Member States and their authorities, the cooperation should be organized at EU level in order to ensure uniform application of EU law.

2. Personal Data Protection Perspective in EU

The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union regarding the processing of personal data and free movement of such data are currently implemented in EU law.

The document underpinning the existing EU legislation on protection of personal data, the Directive 95/46/EC¹ was adopted in 1995, has two main objectives: to protect the fundamental right to data protection and guaranteeing the free movement of personal data between Member States. This Directive has been complemented by Framework Decision 2008/977/JHA, a general instrument, at EU level, in order to protect the personal data in police and judicial cooperation in criminal matters.²

The current framework may still be considered satisfactory in terms of objectives and principles. But it did not aim at preventing fragmentation on how personal data protection is implemented throughout the EU, which creates legal uncertainty and it emphasizes a more widespread public perception according to which there are significant risks, particularly associated with online activity.³ For these reasons, it was concluded that a more solid framework should be developed on data protection in the EU, which, together with a rigorous application of rules in this field would allow the digital economy to flourish throughout the internal market ensuring a control by the people on their own data and also strengthening the legal and practical security for economic operators and public authorities.

The approaches on how to solve these problems ranged from bringing some legal minimal changes to the current framework, including specific funding programs and technical tools, others had in view a set of regulations aimed at addressing all the reported needs, and a third option regarded the centralization of EU data protection through accurate and detailed regulations covering all segments and also creating an EU Agency to monitor and implement the provisions. These approaches cannot take into account also the principles of subsidiarity and proportionality.

The principle of subsidiarity [Article 5 (3) TEU], provides that there are measures taken at EU level in the situation when the objectives cannot be achieved effectively by the Member States and it considers that the objectives can be better achieved at Union level. In the light of the above mentioned problems, the

¹ Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and free movement of such data, OJ L 281, 23.11.1995, p 31.

² Framework Decision 2008/977/JHA of 27 November 2008 on protection of personal data processed in police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p 60 (“the Framework Decision”).

³ Special Eurobarometer (EB) 359 - Data Protection and Electronic Identity in the EU (2011).

subsidiarity analysis reveals the need for action at EU level, based on the following reasons:

- the right to the protection of personal data referred to in article 8 of the Charter of Fundamental Rights of the European Union, it requires the same level of data protection throughout the Union. The absence of common EU rules would create the risk of different levels of protection in the Member States and the emergence of restrictions on cross-border flows of personal data between Member States with different standards in data protection matters;
- personal data is transferred rapidly across beyond the national borders, both internal and external. In addition, there are practical difficulties in applying data protection law and being necessary a better cooperation between Member States and their authorities, to be organized at EU level in order to ensure the uniform application of EU law. The EU is best placed to effectively and consistently provide the same level of protection for individuals when their personal data is transferred to third countries;
- the member states may not alleviate individually the problems that occur in the current situation, particularly those related to fragmentation of national laws. Therefore, there is a specific need to establish a harmonized and coherent framework, allowing to easily transfer personal data from a Member State to another, within the EU, while ensuring an effective protection for all individuals throughout the EU;
- the proposed legislative action at EU level will be more effective than similar actions at the Member States' level, because of the nature and extent of problems, which are not limited to one or more Member States.

In turn, the principle of proportionality requires each EU intervention to aim at a target and not exceed what is necessary for its achievement.

The new regulatory framework should lead to the improvement of legal security for data controllers and citizens, to reduce administrative burdens, to a more consistent application of data protection legislation in the Union, the actual ability of people to exercise their rights in data protection matters, to the protection of personal data within the EU and to an improvement of efficiency regarding the supervision and enforcement of rules in this area, contributing also to meeting the Commission objective on simplifying and reducing the administrative burden and the Digital Agenda for Europe, Stockholm Action Plan and Europe 2020 Strategy.

Starting from the idea that the regulation is most appropriate legal instrument for defining the protection of personal data in the Union, the European Parliament has approved, by its resolution of 6 July 2011, a report that supported the

Commission's approach in relation to reform framework on the protection of data.¹ In turn, on February 24, 2011, the EU Council adopted the conclusions which support to great extent the Commission's intention to reform the data protection framework and approved many elements of the Commission's approach. Also, the Economic and Social Committee declared in favor of a revision of Directive 95/46/EC, supporting the Commission's objective to ensure a more consistent application of EU rules on data protection in all Member States.

The resolution in Madrid on international standards of protection of personal data and privacy² has raised the issue of obligation that operators have in order to provide transparent, easily accessible and understandable information.

It is becoming increasingly obvious the need for uniform procedures and mechanisms for exercising the rights of regarded person by processing data, including means for making applications electronically, setting the deadline for responding to a request of the concerned person and motivation of refusals.

The new regulations should define unitarily the obligations in information matters of the operator towards the regarded person and providing additional information, including data on storage period and the right to file a complaint regarding the international transfers and the source of data, their right on modifying their data, "the right to be forgotten", the right to delete personal data and the right of the regarded person to data portability, that is to transfer data from one electronic processing system to another, without being hindered by the operator to do so.

Another argument in favor of such reforms result from the article 16 of TFEU which is the legal basis for adopting new rules on data protection, introduced by the Lisbon Treaty, which permits the adoption of norms concerning the protection of individuals regarding the processing of personal data by Member States when carrying out activities within the scope of Union law. The same reason allows the adoption of rules on free movement of personal data, including data processed by Member States or private entities.

3. Conclusions

In its communication on "A global approach of protecting personal data in the European Union", the Commission concluded that the EU needs a more comprehensive and coherent policy on the fundamental right to the protection of personal data. The direct applicability of a regulation under Article 288 TFEU will reduce the legislative

¹ EP resolution of 6 July 2011 on a comprehensive approach to protection of personal data in the European Union [2011/2025 (INI)].

² Adopted within the International Conference of Commissioners for data protection and privacy of November 5, 2009. Also, under article 13 (3) of the proposed regulation on common European legislation on sale matters[COM (2011) 635 final].

fragmentation and it will provide greater legal security by introducing a harmonized set of ground rules, helping to improve the protection of fundamental rights and the internal market functioning. This should contribute to the achievement of a space of freedom, security and justice and an economic union, of a social and economic progress, to the consolidation and convergence of economies in the internal market framework and to the welfare of individuals.

It must still be analyzed to what extent such an approach would affect other fundamental rights established in the Charter of Fundamental Rights, such as: freedom of expression (article 11 of the Charter); freedom to conduct a business (article 16); the property rights and, in particular, the protection of intellectual property [article 17 (2)]; prohibiting the discrimination based inter alia on grounds of race, ethnicity, genetics, religion or beliefs, political opinions or of any other nature, disability or sexual orientation (article 21); the rights of the child (article 24); the right to a high level of human health protection (article 35); the right of access to documents (article 42); the right to an effective way of appeal and to a fair trial (article 47), however it represent a challenge that remains open for further study.

4. References

*** Lisbon Treaty, Treaty on the European Union and the Treaty on the functioning of the European Union, published in the Official Monitor of the European Union on 05.09. 2008.

*** Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and free movement of such data, OJ L 281, 23.11.1995.

*** EP resolution of 6 July 2011 on a comprehensive approach to the protection of personal data in the European Union [2011/2025 (INI)]

*** Framework Decision 2008/977/JHA of the Council of 27 November 2008 on the protection of personal data processed within police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008.

*** Law no. 677/2001 for the protection of individuals regarding the processing of personal data and free movement of such data, published in Official Monitor no. 790 of 12 December 2001.

*** Law no. 302/2004 on the international judicial cooperation in criminal matters, with the subsequent modifications and completions, published in the Official Monitor no. 594 on July 1st, 2004.

*** http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf.