

Chapter 31

Data Protection

1. General

The legal issues of the processing of personal data have been approached at a legislative level, in a standardized frame, on the grounds of specific directives of the European Union, including the most recent one, namely the Directive 2002/58/CE of the European Parliament and the Council regarding the processing of personal data and the protection of privacy in the electronic communications sector.

The legislator has adopted a general law in this matter, as well as one with special character, whose necessity derives from the impact, of the new communication technology on the private sphere of the citizens. Apart from these two pieces of legislation, the Parliament also ratified an international convention in field, hence strengthening the entire legal framework in this field.

Two basic regulations in this matter have also a constitutional ground in article 26, paragraph 1 of the Romanian Constitution, a text that provides the duty of public authorities to respect and protect the private, intimate and family life of citizens.

2. Main Regulations

- Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data („Law No. 677/2001”);
- Law No. 682/2001 regarding the ratification of the Convention for the protection of persons towards the automatized processing of personal data, adopted at Strasbourg on the 28th of January 1981 („Law No. 682/2001”);
- Law No. 506/2004 regarding the processing of personal data and the protection of privacy in the electronic communications sector (“Law No. 506/2004”).

3. Purpose of the regulations

According to Law No.677/2001, processing of personal data means „any operation or set of operations that is performed upon personal data, by automatic or non-automatic means, like the collection, recording, organization, storing, adaptation or modification, extraction, consulting, using, disclosure towards third parties by transmission, dissemination or in any other way the annexation or combination, the blocking, deletion or destruction.”

The regulations are meant to guarantee and protect the fundamental rights and freedom of individuals, especially on the intimate, private and family life, relating to the processing of personal data.

4. General and special rules regarding the processing of personal data

4.1. General rules

Personal data designated to be subject to processing, must be:

- (i) processed in good faith and according to the legal provisions in force;
- (ii) collected for specific, explicit and legitimate purposes; subsequent processing of personal data for statistical purposes, historical or scientific research purposes will not be considered incompatible with the purpose of collection, if it is performed under observance of the legal provisions, including those that concern the notification of the monitoring authority, as well as of the guarantees regarding the processing of personal data, provided by the norms that regulate the statistical activity or the historic/scientific research;
- (iii) adequate, pertinent and not excessive, by relating to the purpose to which they are collected and subsequently processed;
- (iv) precise and updated if necessary; to this end, the necessary measures will be taken for the deletion or rectification of the inexact or incomplete data, that does not correspond to the set purpose;
- (v) stored in such a manner that allows the identification of the strictly concerned persons on the time period necessary for achieving the purposes to which the data is collected and subsequently processed; the storage of data for statistical purposes, for historical or scientific research on a period longer than the one mentioned, will be performed under the completion of the guarantees regarding the processing of personal data, provisioned within the norms that regulate these fields, and only on the period necessary for achieving these purposes.

Moreover, the law disposes the express consent of the concerned person regarding the collection of personal data for any kind of processing except for some cases such as:

- (i) when the processing is necessary in view of the performance of a contract or precontract to which the concerned person is a party or in view of undertaking some measures, at his/her request before concluding the contract or pre-contract;
- (ii) if the processing is necessary for the protection of the life, physical integrity or health of the concerned person or of another threatened person;
- (iii) when data processing is necessary in view of the settlement of a legal liability of the operator;
- (iv) when data processing is necessary in view of the accomplishment of some measures of public interest or regarding the exercising of the attributes of public authority delegated to the operator or third party to which the data is disclosed;

- (v) when data processing involves data obtained from documents available for the public, according to the law.

Additionally, Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy provides another case when the express consent of the concerned person is not required, i.e. the processing of personal data by credit institutions in view of complying with their obligations under such enactment or other legal provisions.

4.2. Special rules

Basically, the processing of personal data related to the racial or ethnical origin, the political, religious, philosophical beliefs or convictions of similar type, the union membership as well as the processing of personal data regarding the health state or sexual life, is prohibited.

Yet, as an exception, such processing is also permitted, if, among others:

- (i) the concerned person has expressly given his/her consent for such a processing;
- (ii) the processing is necessary in view of the performance of the liabilities or of the specific rights of the operator in the field of labor, under the observance of the guarantees provided by law;
- (iii) processing is necessary for the protection of the life, physical integrity or the health of the concerned person or of another person, if the concerned person is physically or legally unable to give his/her consent;
- (iv) processing refers to data expressly made public by the concerned person;
- (v) processing is necessary for the establishment, the exercising or the defense of certain rights in court;
- (vi) processing is necessary for purposes regarding the preventive medicine, the establishment of medical diagnosis, the administration of medical treatment and care for the concerned person or for the management of the medical services that serve the interests of the concerned person, under the condition that the processing of the respective data is conducted by or under the surveillance of a physician, subject to the medical confidentiality or under the surveillance of another person subject to an equivalent obligation of confidentiality.

5. Rights of the concerned person, in the context of the processing of personal data

If personal data is obtained directly from the concerned person, the operator is compelled to provide at least the following information to the concerned person, if he/she is not already aware of the respective information:

- (i) identity of the operator and of its representative, if necessary;
- (ii) purpose for which the data processing is conducted;
- (iii) additional information, like the targeted persons or the category of targeted persons of the data; if the providing of all required data is compulsory, the consequences of a refusal to provide them; the existence of the rights provided by law for the concerned person, especially the access and intervention rights upon the data and the debating rights, as well as the conditions under which they can be enforced;
- (iv) any information whose delivery is imposed by provisions of the surveillance authority, considering the specific character of the processing.

If the data is not obtained directly from the concerned person, the operator is compelled to provide at least the following information to the concerned person (if he/she is not already aware of the respective information), as of the data collection, if it is designated to be disclosed to third parties, or at the moment of the first disclosure at the latest:

- a) identity of the operator and of its representative, if necessary;
- b) purpose for which the data processing is conducted;
- c) additional information, like the targeted persons or the category of targeted persons of the data; if the providing of all the required data is compulsory, the consequences of a refusal to provide them; the existence of the rights provisioned by law for the concerned person, especially the access and intervention rights upon the data and the debating rights, as well as the conditions under which they can be enforced;
- d) any information whose delivery is imposed by provisions of the surveillance authority, considering the specific character of the processing.

These provisions will not apply when data processing is performed exclusively for media, literary or artistic purposes, if their applying would indicate the information sources.

The concerned persons are entitled to obtain from the operator, free of charge and upon request:

- (i) the rectification, updating, blocking or deletion of data whose processing is in violation of the law, especially of the incomplete or imprecise data;
- (ii) transformation in anonymous data of the data whose processing disregards the law;
- (iii) notification of third parties, to which the disclosure was made, upon any operation performed according to the letters (i) or (ii) above, if this notification does not prove to be impossible or does not require an effort that does not match the legitimate interest that could be injured.

The operator is compelled to communicate the disposed measures to the concerned person and, as the case may be, the name of the third party to which the respective data was disclosed, within 15 days from receiving of the application.

6. Oversight authority

According to Law No. 102/2005, the oversight prerogatives in the field of the processing of personal data belong to the National Authority for Supervising the Processing of Personal Data (the “National Authority”), acting as an independent and autonomous public authority and reports to the Senate of Romania.

The National Authority monitors and controls, from a legal standpoint, the personal data processing, according to detailed prerogatives outlined in the Law No. 677/2001.

The operator is compelled to notify the National Authority, personally or by representatives, before performing any processing or group of data processing having the same purpose or correlated purposes. The notification will comprise, among others, at least the following information:

- (i) name and domicile or the headquarter of the operator and of the representative assigned by the latter, as the case may be;
- (ii) purpose of the processing;
- (iii) description of the category/categories of persons concerned and of the data/data categories to be processed;
- (iv) target persons/categories of target persons to which the data is meant to be disclosed;
- (v) guarantees which accompany the disclosure of data to third parties;
- (vi) data transfers designated towards other countries;
- (vii) specification of any evidence system of data with personal character, that is related to the processing, as well as of the possible connections to other data processing or to other evidence systems of data with personal character, irrelevant of their performance on Romanian or foreign territory.

If the data to be processed will be transferred abroad, the notification will also comprise the data categories subject to the transfer, as well as the target country for each data category.

The notification is free of charge. If the National Authority concludes, on the basis of the notification, that the processing operations are of potential special risk for the rights and freedoms of the persons, he will be compelled to trigger the performance of a control prior to the beginning of the respective processing, with the notification of the operator.

If the prior control was initiated, the National Authority is liable of revealing to the operator the result of the control conducted and the issued decision, within 30 days at most from the date of the notification.

7. Transfer of personal data abroad

Transfer of data with personal character abroad must firstly be notified to the National Authority.

Transfer abroad of data with personal character subject to a processing or designed to be processed after the transfer is concluded, can be concluded:

- (i) if the target country of the transfer ensures an appropriate protection level. The protection level is evaluated by the National Authority, considering all the circumstances in which the data transfer is performed (type of the data transmitted, goal of the processing and the period assigned for the processing, the country of origin and the target country, the legislation of the applicant country.) If the National Authority establishes that the protection level provided by the target country is unsatisfactory, it can prohibit the data transfer. Pursuant to Romania's accession to the EU, the National Authority issued, in March 2007, Decision No. 28 providing that personal data processing implying the transfer of such data in a EU or EEA member state, or in states outside EU or EEA but recognized by the European Commission as having an adequate level of protection, are solely declared to the National Authority and transfer of such data is not subject to authorization;
- (ii) with the clearance of the National Authority, in case of transfer of personal data to a country whose legislation does not provision a protection level at least equal with that provided by the Romanian law, if the operator submits sufficient guarantees regarding the protection of fundamental rights of persons. These guarantees have to be set up within contracts concluded between the operators and the legal or natural entities who initiated the transfer.

Data transfer is always allowed in the following situations:

- (i) when the concerned person has explicitly given his/her consent for the conduct of the transfer;
- (ii) when it is required for the performance of a contract concluded between the concerned person and the operator or for the enforcement of some pre-contractual measures enclosed at the request of the concerned person;
- (iii) when it is necessary for the concluding of a contract or for the performance of a contract already concluded or expected to be concluded, in the interest of the concerned person, between the operator and the third party;
- (iv) when it is necessary for the accomplishment of some major public interest, as well as a national defense, public order or national security, for the appropriate leading of a law suit or for the establishment, the enforcement or the defense of some right in justice, under the condition that the data is processed for this purpose, and no longer than necessary;

- (v) when it is necessary for the protection of the life, the physical integrity or the health of the concerned person;
- (vi) when it occurs as a result of a prior request to access official documents that are available for the public or of an request for information that can be obtained from files or any other documents available for the public.

8. Processing of personal data in the electronic communications sector

The main framework regulating this aspect is the Law No.506/2004.

The law sets a protection frame for personal data specific to the electronic media of data transmission, provisioning a series of aspects like: security measures that a supplier of electronic communications services has to adopt in view of guaranteeing the security of the service and of the network, the confidentiality of information, the data regarding the traffic and the bill, as well as the audition, recording, storing prohibition, including any other form of intercepting or monitoring communication.

By derogation from the above rule mentioned, the law allows the audition, recording, storing including any other form of intercepting or monitoring communication in the following situations:

- (i) if the actions mentioned above are accomplished by the participants at the respective communication;
- (ii) if there is a prior agreement of the users that will participate in the respective communication, on the actions mentioned;
- (iii) if the actions mentioned are performed by virtue of the attributes of public authority under the provisions of law.

Data regarding the traffic, that concern the subscribers and the users, processed in view of the establishment of the conversations, stored by the supplier of electronic communication services designated for the public, must be deleted or made anonymous at the completion of the communication.

Processing of traffic performed with the purpose of drafting the bills of the subscribers or for the establishment of the payments for interconnection, is allowed only within 3 years from the date due for the payment liable for the bill, respectively from the date due for the payment liability relating to the interconnection.

The law also contains special provisions with respect to unsolicited communications, disclosure and restriction of identity of the calling line and of the connected line, processing location data, others than traffic data, and subscribers' registries.

9. Data retention

Following the issuance of the European Union Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, the Romanian Parliament had adopted the Law No.298/2008 which was meant to regulate retention of such electronic data.

Due to serious privacy concerns raised by the applicability its provisions, the Constitutional Court of Romania struck down the law through the Decision No. 1258/2009, thus affirming the law's unconstitutionality. Since then, neither the Government, nor the Parliament took the initiative of drafting a new law in this field, which would however need to be in full compliance with the constitutional requirements set forth in the Constitutional Court's decision.