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Maria DUMITRU[1]

Abstract

In order to ensure the protection of personal data and privacy through Regulation 2016/679 on data protection, several legal bases have been established that may underpin the legal collection and processing of personal data. In this article, we proposed to analyze if there is a hierarchy of them, a legal order of application or on the contrary, if there is a right of choice between the bases and, in this last situation, which is the concrete way in which the right of option is exercised.

Keywords

Personal data processing; legal basis; personal data.

IS THERE A RIGHT OF OPTION BETWEEN THE PROCESSING OF PERSONAL DATA LEGAL BASES REGARDIND GENERAL DATA PROTECTION REGULATION 2016/679?

I. GENERAL ASPECTS

1. The right to the protection of personal data is a fundamental human right, protected by the provisions of Article 8(1) of the Charter of Fundamental Rights of the European Union and of Article 16(1) of the Treaty on the Functioning of the European Union. In translation, in practice of the provisions of the mentioned article, it was adopted Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (from hereon "the Regulation") [1].

2. Since the 1970s, some national laws regarding the right to private life and the protection of personal data, anticipated consent as one of

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the legal bases for the processing of personal data (e.g. Article 31 of the French Law no. 78-17 from 6 January 1978 „relative a l'informatique, aux fichiers et aux libertés"). At EU level, the use of consent as a basis for ensuring the legality of data processing operations, has been foreseen since the beginning of the actions that were finalized by the adoption of Directive 95/46/EC [2]. The role of consent in the context of the legality of processing personal data was explicitly recognized in Article 8(2) of the Charter of the fundamental rights of the European Union which provides that personal data may be processed "on the basis of consent of the data subject or on another legitimate basis established by law".

II. THE LIMITS OF THE APPROACH

3. The consent of the data subject has always been a central notion in the field of personal data protection. Over time it has been concluded that it is not always clear in what situations the consent is needed as the basis of the processing and which are the conditions that consent should meet in order to be valid. This problem has become widespread as the processing of personal data has become a more and more obvious element in modern society, both in online and offline contexts, often involving individuals and data controllers from different member states.

4. Due to the evolution of technology, more and more individuals make public, voluntarily or involuntarily, personal information. Also motivated by the accelerated development of technology, private entities as well as public authorities, use personal data in their activities at an unprecedented level. So far, nothing undesirable. But it is necessary for individuals- the data subjects- to have control over their own personal data.

This control is increasingly difficult to obtain, due to the lack of transparency of confidentiality policies. Frequently, people do not know their rights or they do not express an informed consent. This is because sometimes, it is not known what a free, specific and unambiguous consent would mean- requirements imposed by Article 6(1)(a) of the Regulation. For example, not even at the actual moment, it is not clear whether the Internet browser settings express user's consent or not.

5. The ones mentioned above are the reasons why, from the vast problematic generated by the processing of personal data[2], we stopped

[2] According to Regulation 2016/679, Article 4(1): „personal data" means any information relating to an identified or identifiable natural person („data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an

on the consent- as a legal basis for the processing of personal data[3]. However, according to the Charter, consent is not the only legal basis for the processing of personal data, which expressly indicates that other legitimate bases may be established by law. This is the case of the Regulation that establishes in Article 6, besides the consent, five other bases that can justify the processing of personal data. Consent has an important role in the legal processing of personal data, but does not exclude the possibility of incidence of other legal bases that may be more appropriate in that case, both from the perspective of the operator and from the perspective of the data subject. The consent expressed in compliance with the conditions imposed by the Regulation represents a legal instrument that gives the data subject control over the processing of his personal data.

In consequence, we set out to analyze whether there is a right of option between the legal bases for the processing of personal data and, if so, who is the owner and what is the way in which this right of option is exercised.

III. THE NOTION OF „CONSENT". INTERFERENCES

6. The notion of „consent", as used so far in the Data Protection Directive and in the Electronic Communications and Privacy Directive, has evolved. The Regulation provides further clarifications and specifications regarding the requirements for obtaining and proving a valid consent.

The consent is defined in Article 4 point 11 of the Regulation, with the marginal naming „*Definitions*": „*For the purposes of this Regulation: „consent" of the data subject means* „*any* ***freely given, specific, informed and unambiguous*** *indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".

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identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

[3] According to Regulation 2016/679, Article 4(2): „processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

7. Consent is a concept used in different branches of national law, especially in civil law. But when considering compliance with the requirements required by the law in order to have a valid consent, other issues will be taken into account, such as- in the absence of consent defects, and not the criteria provided by the Regulation. It is not about the mutual exclusion of these conditions but, on the contrary, of overlapping, of the cumulative meeting of the requirements, both those stipulated by the Regulation and the specific ones from the national legislation. In the fields of application of civil law and of the Regulation, the requirements overlap: The Regulation does not refer to the general conditions of validity of the consent in a civil law context, but not the application of national law. For example, in the context where the legal basis for data processing is Article 6(b), this means that, in order to evaluate the validity of the contract, the rules of the Civil Code, provided in art. 1204, will be applied with priority. However, from the perspective of the legislation regarding the existence of a valid consent, in addition to applying these general conditions for the validity of the consent according to the civil law, it is also necessary to meet the conditions provided by Article 4(11) and Article 6(a) of the Regulation.

An example in this regard is given by the provisions of Article 8 of the Regulation- with the marginal naming „*Conditions applicable to child's consent in relation to information society services*"- which in paragraph 3 provides that „*Paragraph 1 shall not affect the general contract law of Member States such as the rules on the* validity*, formation or effect of a contract in relation to a child*".

8. Moreover, in certain specific areas- such as electronic confidentiality, e-governance, for example, consent is specifically defined, with specific conditions being imposed for its validity. As a result, in these situations, the concept of „consent" that appeared in the special legislation for that domain, will interfere with the one created in the general data protection legislation. In these situations, in order to be valid, the consent must cumulatively fulfill the requirements provided in the two categories of normative acts.

As stated above, and as provided in the Directive, and as it is expressly provided in Article 6 of the Regulation, consent is not the only basis for ensuring legality.

IV. IS THERE A RIGHT OF OPTION?

9. The clarifying of the relationship between consent and other legal bases- for example, in relation to contracts or the attributions of the public authorities or of the legitimate interest of the controller- will contribute to highlighting the role of consent.

10. In Article 6- „*Lawfulness of processing*", consent is first mentioned, then the other bases, including contracts and legal obligations, are listed, gradually reaching the balance of interests: „ *(1) Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*".

At first glance, being tributary to our privatization skills, we would be tempted to give consent the role of „king" of the bases. It helped us to form such an opinion the order in which the legal bases are mentioned in Article 6 of the Regulation, making us wonder if it is relevant.

We should also note that in the case of the other five bases listed in the Article 6 of the Regulation, after consent, a "necessity" test must be carried out, which greatly limits their field of incidence. It would seem that the imposition of an additional test- the condition of necessity- generates, in opposition to the consent, an easier, more flexible conditional context; it is only an illusion because in reality- as we will show- for obtaining a valid consent, there is no room for maneuver wider than for the other bases indicated in Article 6.

Moreover, upon closer examination, it can be observed that there are multiple situations in which consent is not the most appropriate basis to guarantee the legality of the processing of personal data, as we will show in the following.

a) The obligation to comply with the principles related to the processing of personal data stipulated in Article 5[4] of the Regulation, also

[4] Article 5 of the Regulation has the following content: „***Principles relating to processing of personal data:*** (1) Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'); (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial

exists in the case in which there is the consent of the data subject or an another legal basis of the processing.

For example, even if the processing of personal data is based on the consent of the user, this does not justify the collection of data beyond what is necessary, in relation to a specific purpose. Article 5 expressly shows us that it is necessary to "minimize the data" which is being collected. The data should only be collected and processed if it is strictly necessary for a specific purpose, brought to the attention of the data subject before he or she expresses his/her consent.

b) Also, the existence of consent does not allow the circumvention of other provisions from the Regulation. Only in some very rare cases, when such a possibility is expressly enshrined, consent can remove the prohibition of performing data processing activities such as the one provided by Article 9[5] of the Regulation, regarding the processing of special categories of personal data, such as that of sensitive data. It is the exceptional situation provided by Article 9(2) that expressly states that: „*Paragraph 1 shall not apply if one of the following applies: (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject*".

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purposes ('purpose limitation'); (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation'); (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy'); (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation'); (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality'). (2) The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')".

[5] Article 9 of the Regulation provides that: „ (1) Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited".

EXERCISING THE RIGHT OF OPTION

11. The right to choose belongs to the controller as he processes the data for a specific purpose and must have a basis from the ones provided by the law to carry out a legal processing. Choosing the most appropriate legal basis is not always an easy task. Probably the fiercest dispute takes place between the basis provided by article 6(a) and the one enshrined in art. 6 (b), that is, between the consent of the data subject, respectively the need to conclude or perform a contract to which the data subject will be/is a party.

12. According to Article 6(b) of the Regulation, processing is legal if „it is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract". A data operator who uses as a legal basis for processing the provisions of Article 6(b), for the purpose of concluding a contract, cannot extend the application of this provision to justify the processing of data for another purpose, such as the execution of the contract. For the legality of the extended processing of the data, for the purpose of the execution of the contract, it is necessary either to prove the necessity of this processing and to inform the data subject of this aspect, either to obtain, for the further processing, a consent in accordance with Article 6(a). In other words, there can be two variants. One would be for the data controller to obtain the free consent, expressed in accordance with Article 6, of the data subject, for the processing of his/her personal data. The second one, that occurs when the legal basis of the first processing considers it necessary to conclude the contract (so in the absence of consent). For the processing of the data during the performing of the contract- an addition to the first basis is necessary- either the processing is necessary for the execution of a contract, either for the processing part, related to the performing of the contract, the consent is obtained.

13. Any activity of data processing must be permanently justified by one or more legal bases. There are legal operations for which, from the beginning, it is indicated that, at different stages of development, they will demand distinct legal grounds for processing; that means they will coexist/apply several legal bases at the same time. But this does not exclude the simultaneous use of several grounds, provided they are used in the right context. For example, in the case of the conclusion of a sale contract, with the object of a motor vehicle, the data controller is entitled to process personal data for different purposes and on different bases. He can process the data necessary for the conclusion of the sale contract- pursuant to

Article 6(b); he has the right to process the data contained in the specific documents of the vehicle, in order to fulfill a legal obligation- pursuant to Article 6(c); the selling company can also process the data because it is necessary for the service of records and customer management, an activity that is justified by its own interests [for example, to ensure the car service to different affiliated undertakings in the EU territory, under and in accordance with Article 6(f)].

14. However, if the operator will want to process the data in order to transfer it to third parties, for their marketing activities, it is necessary to have for this purpose- the transmission for the marketing activity- the free, clear consent of the client- the data subject, expressed by an unequivocal statement or action, in accordance with Article 6(a).

15. Consent is not always the most appropriate way to substantiate the legality of the processing of personal data. When it is extended or limited in order to be adapted to situations where it was not meant to be used, the consent loses its substance. The use of consent „in the right context" is essential. If it is used in situations where it is unlikely to meet the requirements that make a consent valid, the role of the data subject, who expresses his/her consent- but a questionable one, most likely invalid- is diminished. As it is not always clear what constitutes a real and unambiguous consent, some data controllers exploit this uncertainty, using inadequate methods to obtain consent. On the other hand, the complexity of data collection practices and technical issues often exceed the capacity of the data subject to make decisions in order to exercise control over the way in which his/her personal data are collected and processed.

CONCLUSIONS

Although it would seem that there is a hierarchy of bases that can underpin the processing of personal data and at the top of which the consent would be, nevertheless a closer analysis of the legal provisions, united with the reality, reveals the opposite. It is found that it is only a tendency born from the habit and from the false impression that the existence of consent leaves a wider room for maneuver; that it is easier to obtain and more convenient to use than the other bases that justify the processing of personal data. But it is just an appearance...

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