

LAW ON PERSONAL DATA PROTECTION

1.33

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Enact a new data protection law as soon as possible, reinstating the initial provision on legitimate interest and regulating specific forms of data processing.	2017	√		
Provide the Commissioner with better working conditions, equipment and staff to ensure an effective implementation of the new law.	2009			√
Determine supervisory bodies that will monitor the implementation of the data protection law in co-operation with the Commissioner.	2009			√
Issue precise instructions and standardized forms necessary to enable an effective implementation of the existing Data Protection Law until the adoption of a new one, especially with regard to the procedure for obtaining data transfer approvals and processing sensitive data.	2009			√
Establish better communication between the Commissioner and other state institutions, especially the Ministry of Justice, NGOs and international organizations.	2010			√
Conduct workshops and seminars to educate citizens and raise their awareness of the protection of their rights.	2009			√

CURRENT SITUATION

The Parliament of the Republic of Serbia enacted a new Law on Personal Data Protection, (RS Official Gazette No 87/2018), (hereinafter: “the new Law”) on November 13, 2018. The new Law entered into force on 21 November 2018, to be applied in nine months from the day of entering into force, i.e. on 21 August 2019. The new Law represents a translation of the General Data Protection Regulation 2016/679 (GDPR), without its recitals and with minor specifics reflecting features of the legal system of the Republic of Serbia. Although the new Law has been assessed as a robust document, which does not take into account specifics of Serbia’s legal system, the FIC is of the opinion that it may serve as solid legal ground for the promotion of European values in Serbia.

Legal solutions in the new Law clarify ambiguities, which existed in the previous Law on Personal Data Protection. A requirement that consent to the processing of personal data must be provided in writing, which made giving consent on a website impossible, has now been now changed. According to the new Law, consent is defined as 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 act, signifies agreement to the processing of personal data relating to him or her. This provision enables lawful processing of personal data on websites.

The new Law provides for additional legitimate grounds for processing personal data such as the legitimate interest controller or a third party. This legal institute covers situations in which no specific law provides a basis for processing and there are no legitimate reasons to require the data controller to obtain consent from the data subject. What is missing is an official interpretation by the legislator as to what can be considered a legitimate interest, especially because the recitals from GDPR explaining this legal ground for data processing are not incorporated into the new Law.

New rights have been recognised to data subjects such as the right to data portability and the right to objection, while the list of cases where the right to erasure (the right to be forgotten) can be exercised have been expanded. The new Law introduces new obligations to the controller with the aim to protect personal data, such as the obligation to comply with the privacy by design or privacy by default principle and the obligation to perform, in certain situations, data privacy impact assessment and in certain situations the obligation for controllers and processors to appoint data protection officers. Not only controllers, but also processors are responsible for the implementation of organizational and technical measures to secure personal data.

The legal regime applying to the transfer of personal data is now more liberal. Personal data can be transferred to countries which have not ratified the Council of Europe Convention

for the Protection of Individuals with Regard to Automatic Processing of Personal Data and to countries which the European Union (EU) considers to provide an appropriate level of personal data protection (third countries) on the ground of contractual clauses approved by the Commissioner for Information of Public Importance and Personal Data Protection ("the Commissioner"). New legal grounds for the transfer of personal data to third countries are codes of conduct and certificates issued by certification bodies. In addition, personal data can be transferred to companies belonging to multinational companies and having registered seats on the territory of third countries, based on binding corporate rules. The new Law introduces the possibility of setting up certification bodies authorized to verify the level of compliance of companies with the new Law and to issue certificates of compliance.

The new Law has abolished the provision of the still applicable law prescribing that the provisions of the Law on Personal Data Protection do not apply to data that are available to everyone and published in public media and various other publications... as well as data that a person capable of caring for his/hers interests, has published about himself/herself. The above should improve data protection regarding telesales (a form of sales widely present in Serbia), so vendors of such companies will no longer be able to contact persons whose data is publicly disclosed on websites or in different publications for the purpose of concluding various types of contracts and selling various types of goods. A data subject can now be contacted for marketing purposes in cases where it can be reasonably expected, due to an existing relationship with data controllers, that they may be contacted (legitimate interest of controllers or third parties) or when a data subject, in the course of establishing a business relationship, gives consent for personal data collection for marketing purposes.

The Commissioner has not yet issued guidance on legitimate interest. The application of the new Law will start soon, while, on the other hand, data controllers might take several months to evaluate the lawfulness of processing based on legitimate interest. It shall be clarified by the Commissioner whether controllers, in the course of evaluating the lawfulness of processing based on legitimate interest shall rely on GDPR recitals, opinions of other European supervisory authorities and opinions of the European Data Protection Board or whether they should expect that the Commissioner shall issue guidance for data controllers in regard to legitimate interest. In addition, the Commissioner shall issue an explanation whether and to what extent it takes into account the practice of European legis-

lators when interpreting the new Law, particularly bearing in mind that there has been no practice in Serbia so far.

POSITIVE DEVELOPMENTS

In 2019, the Commissioner undertook numerous activities to inform citizens about the importance of personal data protection. On 17 and 18 April 2019, the Commissioner organized an international conference dedicated to GDPR. The Commissioner has enacted several by-laws defining certain issues in a more detailed manner such as: the content of the notification form in case of data breach, the content of records of processing activities, the content of complaints and types of processing activities for which a data privacy impact assessment and his opinion are required. The Commissioner has continued issuing publications expressing its positions and opinion on the application of the new Law.

The new Law introduces the concept of joint controllers - if two or more controllers jointly determine the purpose and method of personal data processing, they are considered joint controllers. The joint controllers referred to in Article 43 of the new Law should determine in a transparent manner the responsibility of each of them for the fulfilment of the obligations prescribed by the new Law, and in particular the obligation regarding the exercise of the rights of data subjects and the fulfilment of their obligations to provide that person with the relevant information on data processing prescribed by the new Law. A data subject may exercise his or her rights prescribed by the new Law by reaching any of the joint controllers.

REMAINING ISSUES

A major issue is that the state does not allocate sufficient funds for the activities of the Commissioner, contrary to commitments outlined in the Action Plan for Chapter 23 (on Judiciary and Fundamental Rights) of the EU acquis, released by the Government of Serbia in September 2015, proclaiming the strengthening of the Commissioner's resources as its goal.

The other important issue is whether and to which extent the state has the intent to promote values proclaimed in the new Law. The state should put much more efforts in raising data subjects' awareness of the significance of the abovementioned values by organizing broadcast public debates or public conferences where data subjects can learn more about their rights contained in the new Law. In addition, the state should exercise its authorities to implement the new Law at state bodies and to align the work of

state bodies with measures imposed by the Commissioner.

The new Law does not regulate specific forms of personal data processing, such as video surveillance, processing employees' personal data, and processing for the purpose of scientific and historical research and for statistical purposes. The absence of regulations creates legal uncertainty for controllers that will significantly hamper their ability to conduct business.

Article 65, paragraph 2, item 2, governing the transfer of personal data to third countries with the application of appropriate safeguards without a specific authorization from the Commissioner prescribes that appropriate safeguards may be provided by standard contractual clauses drafted by the Commissioner, in accordance with Article 45 of the new Law, defining in whole the relationship between the controller and the processor. Reference to Article 45 is not appropriate because GDPR recitals 79 and 81 and Articles 26 and 28 of GDPR do not prescribe that personal data can be transferred to third countries on the ground of contracts whose content is defined by the said articles. Moreover, Article 65, paragraph 2, item 2 does not prescribe possibility for controllers registered in Serbia to transfer personal data to controllers in third countries on the basis of standard contractual clauses drafted by the Commissioner and without requiring any specific authorization from the Commissioner. This condition is not in line with Article 46, paragraph 2, item c) of GDPR, which prescribes that the appropriate safeguards may be provided for, without requiring any specific authorization from a supervisory authority, with standard data protection clauses adopted by the Commissioner in accordance with the examination procedure referred to in Article 93 of GDPR. The European Commission adopted decisions in 2001, 2004 and 2010, providing for standard contractual clauses as grounds for the transfer personal data from controllers to controllers and from controllers to processors in third countries without requiring any specific authorization from a supervisory authority. Regardless of the fact that Serbia is not part of the EU and cannot apply EU standard contractual clauses rendered by the European Commission automatically, the new Law must implement the provision laid down in Article 46, paragraph 2, item c) of GDPR and establish the same legal regime of the transfer of personal data to third countries as in the EU. In particular, the new Law must provide for the possibility of transferring personal data to third countries on the basis of standard contractual clauses - controller to controller and controller to processor - drafted by the Commissioner without any specific authorization from the Commissioner. The content of these standard contractual clauses shall correspond to the European practice. In addition, Article 77 of

the new Law does not provide for the obligation of the Commissioner to draft standard contractual clauses enabling the transfer of personal data to third countries without authorization of the Commissioner, but only the obligation to draft standard contractual clauses from Article 45 of the new Law, which regulates the transfer of personal data between controllers and processors in Serbia. The FIC expresses concerns in regard to the latest statement of the Commissioner that drafting standard contractual clauses is not its priority. The Commissioner expressed concerns because EU standard contractual clauses are subject to reference for a preliminary ruling from the High Court (Ireland) made on 9 May 2018 – Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems (Case C-311/18). Standard contractual clauses are still a valid ground for the transfer from EU Member States to third countries designed by the European Commission to facilitate a substantial increase in cross-border flows of personal data, while, on the other side, providing appropriate safeguards for the protection of personal data. On the other hand, a decision of the European Court of Justice in Case C-311/18 has not yet been rendered; a decision is expected to be rendered by the end of 2019 or at the beginning of 2020. Regardless the ambiguities in the new Law concerning wording in Article 65 paragraph 2 item 2, legal authorisation of the Commissioner to draft standard contractual clauses defining data transfer from a controller to a processor is indisputable. Therefore, the FIC believes that the Commissioner should exercise its powers stipulated by the new Law as soon as possible and enable the implementation of standard contractual clauses by Serbian data controllers in order to be able to conduct business with third countries. In case the European Court of Justice invalidates the standard contractual clauses, the Commissioner may put drafted standard contractual clauses out of force and lawmakers can amend the new Law accordingly.

By the time this edition of the White Book was closed, the Commissioner had not yet drafted standard contractual clauses that could be used by controllers to transfer personal data to third countries. The same applies to the Commissioner's authority to prescribe conditions for the issuance of licences to certification bodies.

Article 55, paragraph 10 of the new Law has not been aligned with Article 36, paragraph 5 of GDPR. Concerning the obligation of a data controller to request an opinion of the supervisory authority regarding data privacy impact assessment, Article 36, paragraph 5 of GDPR prescribes that EU Member states may require controllers to consult with, and obtain prior authorisation from the supervisory authority in relation to

processing by a controller for the performance of a task carried out in the public interest, including processing in relation to social protection and public health. On the other side, Article 55 paragraph, 10 of the new Law prescribes that the Commissioner may draft and publish on its website a list of processing activities for which its opinion must be requested. Based on authorities provided in Article 55, paragraph 10 of the new Law, the Commissioner has rendered the Decision on processing activities for which data privacy impact assessment must be performed and the opinion of the Commissioner requested (RS Official Gazette RS 45/2019).

GDPR limits the authority of Member States to prescribe cases in which controllers, with regard to data privacy impact assessment, shall consult with, and obtain prior authorization from, the supervisory authority. The cases are limited in relation to processing by a controller for the performance of

a task carried out in the public interest, including processing in relation to social protection and public health. The new Law authorizes the Commissioner to determine processing activities for which its opinion must be requested. As a result of the broad authority of the Commissioner to determine processing activities in relation to which its opinion about data privacy impact assessment must be requested, the Commissioner has prescribed that its opinion is required for all processing activities for which data privacy impact assessment is obligatory.

The FIC is of the opinion that such broad legal authorities of the Commissioner and the list of activities in relation to which its opinion about data privacy impact assessment must be requested are not in line with the intent of GDPR to limit Member States' capacities to define the types of processing activities in relation to which an opinion of the supervisory authority about data privacy impact assessment must be requested.

FIC RECOMMENDATIONS

- Provide the Commissioner with better working conditions, equipment and staff to ensure an effective implementation of the new Law.
- Render/amend laws governing specific forms of personal data processing, such as video surveillance, processing employees' personal data, and processing for the purpose of scientific and historical research and for statistical purposes.
- Harmonize Article 55 paragraph 10 of the new Law with Article 36, paragraph 5 of GDPR.
- Amend Article 65, paragraph 2 of the new Law in line with Article 46, paragraph 2, item c of GDPR providing for the possibility to transfer personal data from a controller to a controller and a controller to a processor registered in third countries without authorization from the Commissioner on the basis of standard contractual clauses drafted by the Commissioner.
- Amend Article 77 of the new Law and provide for the obligation of the Commissioner to draft standard contractual clauses for the transfer of personal data from controllers in Serbia to controllers in third countries.
- Provide an official interpretation of the legislator as to what can be considered a legitimate interest and provide other interpretations for all other issues closely explained in the recitals of GDPR
- Draft contractual clauses for the transfer of personal data from controllers in Serbia to processors in third countries and enact conditions for the issuance of licences to certification bodies by the Commissioner.
- Establish better communication between the Commissioner and other state institutions, especially with the Ministry of Justice, NGOs and international organizations.
- Conduct workshops and seminars to educate citizens and raise their awareness of the protection of their rights.