

# LAW ON PERSONAL DATA PROTECTION

1.00

## WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Provide the Commissioner with better working conditions, equipment and staff to ensure an effective implementation of the new Law.	2009			√
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.	2019			√
Harmonize Article 55 paragraph 10 of the new Law with Article 36, paragraph 5 of GDPR.	2019			√
Amend Article 65, paragraph 2 item 2 of the new Law in line with Article 46, paragraph 2, item c of GDPR, ECJ judgement (Case C-311/18) and new standard contractual clauses under the GDPR for data transfers from controllers or processors in the EU/EEA (or otherwise subject to the GDPR) to controllers or processors established outside the EU/EEA (and not subject to the GDPR) issued by European Commission on June 4, 2021 providing for the possibility for transfer personal data from a controller to a controller and a controller to a processor registered in third countries without authorization from the Commissioner and in internal market on the basis of standard contractual clauses drafted by the Commissioner, based on best European practice.	2021			√
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, applying best European practice.	2019			√
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, including on impact of ECJ judgement (Case C-311/18) on data transfer of personal data to countries which do not provide adequate level of protection of personal data,	2019			√
Provide an official interpretation including interpretation of Articles 41 and 50 of the new Law;	2021			√
Provide sanctions for non-compliance with Articles 41 and 50 of the new Law;	2021			√
Amend Decision on List of Countries, Parts of their Territories or One or More Sectors of Certain Activities in these States or of International Organisations for Which It Is Considered that Adequate Level of Protection Personal Data is Ensured – deleting formulation “United States (limited to Privacy Shield Framework”).	2020			√
Issuance of guidance in regard to application of the new Law in relation to remote work and other measures implemented by companies to prevent spread of SARS-CoV-2 virus in working environment.	2020			√
Enact conditions for the issuance of licences to certification bodies by the Commissioner	2020			√
Resolve ambiguities in Article 60 of the new Law in regard to competences of competent authorities for accreditation of the legal entities supervising implementation of codes of conduct.	2021			√

## CURRENT SITUATION

On November 13, 2018, the National Assembly of the Republic of Serbia adopted a new Personal Data Protection Law (Official Gazette of the RS No. 87/2018), (hereinafter referred to as: "new Law"). The new Law entered into force on November 21, 2018 and its implementation commenced after the expiration of nine months from the date of entry into force, i.e. from August 21, 2019. The new Law is, to a considerable extent, a translation of the General Data Protection Regulation 2016/679 (GDPR), without its recitals and with minor specificities reflecting the 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 the specificities of the Serbia's legal system, FIC believes that it may serve as a solid legal basis for the promotion of European values in Serbia.

The legal solutions in the new Law clarify the ambiguities that existed in the previous Personal Data Protection Law, such as the method of providing consent for the processing of personal data, introducing legitimate interest as the basis for data processing, recognizing the new rights of data subjects (right on data portability, right to object, right not to be subject to automated processing) or improving the content recognized by the old Personal Data Protection Law. The controllers are now obliged to implement additional measures to protect the rights of data subjects: when processing is likely to result in a high risk to the rights and freedoms of data subjects, controllers are obliged to carry out a data protection impact assessment and cooperate with the supervisory authority in the event that the organizational and technical measures proposed in the data protection assessment are not able to mitigate the risks to the rights and freedoms of data subjects to an acceptable level. The most important innovation is the fact that the controller is obliged to implement the appropriate technical, organizational and personnel measures to ensure that the processing is carried out in accordance with this law and be able to demonstrate this, taking into account the nature, scope, circumstances and purpose of the processing, as well as the probability of risk occurrence and the level of risk to the rights and freedoms of data subjects. Furthermore, the controllers shall demonstrate that they implement the appropriate organizational and technical measures. Controllers shall be obliged to report data breaches to the supervisory authority and notify the data subjects, in certain cases. In addition, the controller must enter into written agreements on data processing with the proces-

sors defining the subject and nature of the processing, data being processed, relationship with the subprocessors, applied organizational and technical measures, method of verification of their implementation by the controllers and the obligations of the contractual parties regarding data protection impact assessments and data breach, etc. The law introduces obligations for controllers and processors to appoint a personal data protection officer in certain cases and to establish and keep records of processing activities.

The legal regime applicable to the transfer of personal data is now more liberal. Personal data may be transferred to countries that have not ratified the Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data and to countries not considered by the European Union (EU) to ensure an adequate level of personal data protection (third countries) based on the Standard Contractual clauses approved by the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as: the Commissioner). The new lawful basis for the transfer of personal data to third countries are codes of conduct and certificates issued by certification bodies. Furthermore, personal data may be transferred to companies owned by multinational companies and having registered offices on the territory of third countries, based on binding business policies. The new Law introduces the possibility of establishing certification bodies authorized to verify the degree of compliance with the new Law and issue certificates of compliance.

## POSITIVE DEVELOPMENTS

The Commissioner has continued to take an active part in expert meetings related to the enforcement of the Law and public appearances with regard to highlighting the importance of privacy and data protection for citizens and controllers and processors and published excerpts from his opinions on the enforcement of the Law on his website. Certain explanations and a legitimate interest assessment model have been published related to the application of legitimate interest as a lawful basis for personal data processing. The number of staff members with the Commissioner has increased by 15 full-time employees.

The commissioner takes part in the implementation of the short study program "Training of managers for the protection of personal data" implemented by the Faculty of Security of the University of Belgrade, as well as in the implementation of the short program "Legal data protection

and access to information” implemented by the Faculty of Law of the University of Kragujevac. The implementation of these study programs contributes to the education and training of personal data protection officers within the higher education system of the Republic of Serbia.

## REMAINING ISSUES

The new Law does not regulate special forms of processing of personal data, such as video surveillance, processing of employees’ personal data and processing for the purpose of scientific and historical research, or for statistical purposes. The absence of regulations creates legal uncertainty for controllers, which will significantly hinder their ability to carry out operations. The provision provided for in Article 100 of the Law has not been implemented, the provisions of other laws relating to the processing of personal data should have been harmonized with the provisions of this Law by the end of 2020. The formation of a working group to develop a strategy for the protection of personal data is only a small step in the implementation of much-needed steps to resolve issues in this area.

An important question is whether and to what extent the government intends to promote the values proclaimed by the new Law. In addition to the Commissioner, the government should put in much more effort in raising the awareness of data subjects about the importance of the above-mentioned values by organizing public debates or public conferences where data subjects can learn more about their rights contained in the new Law. The Commissioner is not the only state authority obliged to promote the enforcement of the new Law. Additionally, state authorities should put in more efforts in the implementation of the new Law. The lack of enforcement of the law by state authorities creates an atmosphere that other entities to which the new law applies are not obliged to implement it either. Despite the official warnings of the Commissioner that most controllers have not appointed data protection officers, many of them have not fulfilled this obligation yet.

With regard to the implementation of Articles 41 and 50 of the Law, which refer to the implementation of appropriate technical, personnel and organizational measures, for

the purpose of more efficient implementation and better understanding of these provisions by the economy and the public sector, we believe that guidelines could be published by the Commissioner, based on the best European practice, in order to facilitate the application of these provisions and thus improve data security.

A deficiency in the new Law regarding the authority of the Commissioner to enact standard contractual clauses in order to enable the data transfer to controllers located in countries that do not provide adequate protection of personal data, prevents the transfer in these situations, i.e. enables the transfer of personal data without the appropriate protection measures. Making the instrument for data transfer on the territory of Serbia and to countries with adequate protection of personal data equivalent with the instruments for transfer to third countries is inadequate. The Ministry of Justice must consider the content of the new standard contractual clauses under the GDPR for the transfer of data from controllers or processors in the EU/EEA to controllers or processors based outside the EU/EEA issued by the European Commission on June 4, 2021.

It is necessary to intensify activities on the adoption of the guidelines by the Commissioner in order to facilitate the enforcement and interpretation of the Law.

By the time this edition of the White Book was closed, the Commissioner has not yet exercised his authority to prescribe conditions for the issuance of licenses to certification bodies. In addition, the ambiguities in Article 60 of the new Law regarding the accreditation of the legal entity that supervises the implementation of the code of conduct and the competence of the Commissioner make it impossible to supervise the implementation of the code of conduct.

In the context of the judgment of the European Court of Justice C-311/18, the Council expects the Government of the Republic of Serbia to amend its Decision on the List of States, Part of their Territories or One or More Sectors of Certain Activities in Such States and International Organizations Considered to Provide an Adequate Personal Data Protection Level and delete the wording: “United States (limited to Privacy Shield.)

## FIC RECOMMENDATIONS

- Provide the Commissioner with better working conditions, equipment and staff to ensure an effective implementation of the new Law.
- Harmonize all laws with the Personal Data Protection Law.
- Enact/amend laws regulating special forms of personal data processing, such as video surveillance, employees' personal data processing and processing for scientific and historical research and statistical purposes.
- Amendments to the Personal Data Protection Law should provide for the recognition of the validity of binding business policies approved by the body responsible for the protection of personal data in the EU and recognize the validity of the Personal Data Processing Agreement concluded by the controller with the processor from abroad using standard contractual clauses published by the European Commission. This would provide the same degree of protection and there would be no negative consequences for the protection of personal data of citizens of the Republic of Serbia, bearing in mind that the controller would still be liable under the domestic law.
- Article 65, paragraph 2, item 2 of the new Law should be amended in accordance with Article 46, paragraph 2, item c of the GDPR, judgment of the European Court (case C-311/18) and the new standard contract clauses under the GDPR for transfer of data from controllers or processors in the EU/EEA to controllers or processors based outside the EU/EEA issued by the European Commission on June 4, 2021, providing for the possibility of transferring personal data from the controllers to the controllers and from the controllers to the processors registered in third countries without the authorization of the Commissioner and in the internal market based on standard contractual clauses drafted by the Commissioner, based on the best European practice;
- Article 77 of the new Law should be amended and it should be provided for the obligation of the Commissioner to draft standard contractual clauses for the transfer of personal data between joint controllers, applying the best European practice;
- More active adoption of guidelines by the Commissioner in order to facilitate the enforcement and interpretation of the Law:
- Adopt guidelines on the implementation of Articles 41 and 50 of the new Law;
- Amend the Decision on the List of States, Part of their Territories or One or More Sectors of Certain Activities in Such States and International Organizations Considered to Provide an Adequate Personal Data Protection Level and delete the wording "United States (limited to Privacy Shield.)"
- Enact conditions for issuing licenses to certification bodies by the Commissioner.
- Eliminate ambiguities from Article 60 of the new Law regarding the competence of competent bodies for accreditation of legal entities that supervise the implementation of the code of conduct.