

UNIVERSITY „LUCIAN BLAGA” SIBIU  
FACULTY OF LAW „SIMION BĂRNUȚIU”

# DOCTORAL THESIS

**DOCTORAL SUPERVISOR**  
**PROF. UNIV. DR. OVIDIU UNGUREANU**

**PhD CANDIDATE**  
**ANDRA GIURGIU**

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2013

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**DATA PROTECTION FROM A  
EUROPEAN PERSPECTIVE**

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**Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [Extract]**

**KEYWORDS:** *privacy, personal data, data subject, consent, controller, processor, data protection principles, sensitive data, security and confidentiality, unsolicited communications, cookies, data retention, Genral Data Protection Regulation.*

## THESIS SUMMARY

Today's Internet age is marked by tremendous technological developments. These allow for the collection and processing of an indefinite number of personal data. Decades ago many of these data would have been simply forgotten. Today however the capacity to store information is almost limitless. So is the capacity of analysis and processing.

Isolated, each piece of personal information of our daily life doesn't necessarily endanger our personal privacy. Put together however all this information allows for the creation of profiles of our personality and such digital biographies increase our vulnerability with regard to a variety of dangers. The right to privacy and the right to data protection have thus become two of the most important fundamental rights of modern society. Developments in the field of privacy require an innovative legal and political framework which can guarantee that the technological implications are correctly understood and regulated accordingly.

The object of this paper is an in-depth study of the current legal framework in the field of personal data protection, by means of compared analysis, with the intention of showing to what extent an appropriate level of protection is achieved. The correct regulation, interpretation and application of European data protection legal norms by all member states, including Romania, is not possible if they are not known and well understood.

The paper analyses the European directives which form the current legal framework for data protection as well as the new proposal for a European regulation, which will replace the current Data Protection Directive.

Our study has been limited to the legal provisions applicable to the private sector, mainly to natural persons. Due to the complexity of this subject, we have also omitted the issues relating to the protection of individuals with regard to the processing of personal data by Community institutions and bodies, Regulation 45/2001 EC. Moreover, due to the fact that we have focused on matters of civil law we have also omitted the issues related to criminal and international law.

Of all the European directives we have concentrated on Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, on Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as well as on 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. These three legal instruments form the legal bases of European data protection.

The paper can be regarded as an introduction for Romanian research to the problem of European data protection. Due to the extremely vast topic the paper will focus on key concepts, fundamental principles and essential jurisprudence in the hope of creating a better understanding of these issues.

At European level and not only privacy is a fundamental right acknowledged in various legal instruments and by all instances. We have shown that the right to personal data protection has only gradually developed. In the course of this research we have analysed the relationship between these two rights, which has been complicated for a long time due to the fact that data protection has been seen from

the perspective of the right to privacy. Even after establishing the fundamental nature of the right to privacy through the Charter of Fundamental Rights of the European Union, the relationship between these two rights remained ambiguous. For these reasons we consider that approaching data protection from solely the privacy perspective is criticizable and we plead for the full recognition of the independence of the right to personal data protection, without denying the existence of the tight connection between the two rights.

We have also analysed the development of data protection from the first legal instruments which regulated it to the current European directives which form the bases of European protection.

Due to its essential nature in evaluating the level of European protection we have focused especially on Directive 95/46/EC. Researching the topic we have insisted on the key elements and on the main principles. We have shown what personal data are and how to separate them from simple information. Personal data are any information relating to an identified or identifiable natural person. By analysing the legal definition we have insisted on its key elements and have shown how new categories of information such as spacial information or information collected via RFID technology can become personal data.

After interpreting the fundamental concepts of „controller” and „processor” we have analysed the difficult distinction between the two categories. We have shown that the controller can be a natural or legal person, public authority or any other body which has the prerogative of establishing the purposes and the means of the processing. The control appears as an inherent element of the controller, both in the case of a simple or a pluralist control. We have also sought to illustrate the difficulty of distinguishing between the two categories by referring to the example of the social networking site Facebook.

The paper has elaborated on the principles of data quality, insisting on some of them such as the purpose specification principles or transparency. We have also allocated an important section to the criteria for making data processing legitimate.

The data subject's consent is the basic processing criteria and it has posed many problems. Together with the recent technological evolutions, which have radically altered interaction in today's society, the importance of consent has changed, practically losing some of its value. Therefore, especially in the online environment, it is considered that processing has to rely on an informed, express and unambiguous consent of the data subject. The latter must show an active conduct in accordance with the opt-in model to demonstrate that he or she agrees to the processing.

This paper has also analysed the problem of sensitive data which can be processed only under certain strict conditions, as well as that of the freedom of expression that might collide with the right to privacy. We have elaborated on the rights of the data subjects, as regulated by Directive 95/46/EC, and have discussed new rights such as the right to data portability or the right to be forgotten proposed by the new Regulation. Confidentiality and security of processing operations have been topics we have approached both from the perspective of Directive 95/46/CE and from that of the Commission's Regulation.

A separate section has been allocated to Directive 2002/58/EC. Analysing its historic background and specific provisions, we have concluded that the directive applies in parallel with Directive 95/46/EC, specifying and complementing it. We have shown how the situations that are not covered by Directive 2002/58/EC are covered by Directive 95/46/EC and that Directive 2002/58/EC has to be applied in a consistent manner with Directive 95/46/EC. We have also underlined that Directive 2002/58/EC is not based on the key concepts used by Directive 95/46/EC but is strictly related to the processing of personal pertaining to the provision of publicly available electronic communications services in public communication networks in the Community.

The analysis of the two above mentioned directives was complemented by that of Directive 2006/24/CE. A thorough approach of the general European data protection framework would be incomplete without also analysing the Data Retention Directive. This directive

has profound implications with regard to the fundamental rights to privacy and personal data protection. It's not by chance that this directive is currently being examined by the Court of Justice of the European Union. As shown in our research, member states such as Germany, Romania, Cyprus, Bulgaria have already stated the unconstitutionality of the national laws transposing this directive. Moreover, Germany has declared solely the unconstitutionality of the implementation law whereas the Romanian Constitutional Court has condemned the very essence of the European directive. The Romanian court has criticized the fact that the directive imposes the continuous retention of personal data as this would transform the exemption from the principle of actual, real protection and that of freedom of expression to an absolute rule.

Corroborating the analysis of the aim of the directive, its object, the categories of data to be retained with arguments from the legal doctrine and European jurisprudence, we have concluded to the lack of proportionality and the excessive character of this directive. Valuable international studies such as that of the Max-Planck-Institute, have shown that data retention did not have a significant impact on the clearance rate. Those in favour of the directive argue that it doesn't apply to the content of communications and does not pose a threat to privacy. In our research we have tried to demonstrate the opposite. In today's society there are infinite possibilities of combining information so as to extract valuable data on the basis of which decisions that significantly affect a specific person are taken (in the specialized literature the expression „big data” is commonly used to illustrate this model).

According to the directive a big number of transfer data is to be retained. Even though it is not content data, by combining it with other information and analysing this data there are many conclusions to be drawn with regard to the content of the communication as well as to many other aspects related to the person's private life. This affects not only the persons actively involved in the communication, like the sender of a message, but also collaterals such as the recipients of an unsolicited message.

A constant surveillance overthrows the presumption of innocence thereby all citizens becoming potential suspects. The freedom of movement and the freedom of expression are

also put in danger. Despite all this persons with criminal intentions will be able to use anonymous methods such as pre-paid SIM cards or public wireless networks, to achieve their goals.

For all these reasons we argue in favour of the necessity to abolish this legal instrument which represents a severe threat to fundamental rights such as the right to privacy or the right to the protection of personal data.

An effective protection of privacy requires a legal „architecture” that regulates the way in which information is collected and used. The extremely rapid technological developments of the last decade have emphasized the obsolescent character of Directive 95/46/EC. The European legislator has understood the need of adaptation and has thus proposed a new regulation meant to replace the current directive.

The aim of the current research is therefore not only to analyse the current legal framework in the field of personal data protection but also to look into the future to new regulatory tendencies in this field. Through the method of compared analysis we have identified the main changes brought to the Directive 95/46/EC.

We welcome its replacement by a regulation with direct applicability in member states as it guarantees a greater legal stability due to the consistent application throughout the Union. A regulation also favors economic development while guaranteeing a high level of protection.

The extension of the territorial scope of the regulation to controllers not established in the Union also increases the protection of citizens. As long as an operator is offering goods or services to data subjects residing in the Union or is monitoring the behaviour of such data subjects, he will have to comply with the provisions of the European regulation.

A natural consequence related to the different type of relationships in the Internet era is also the broader scope of the concept of personal data so as to cover online identifiers provided by their devices, applications, tools and protocols, such as Internet Protocol addresses or cookie identifiers. The regulation has a complex approach, which also determines stricter rules with regard to consent. If the data subject's consent is to be given

in the context of a written declaration, which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter. Thus it has to be presented in a clear, explicit manner which would not allow any doubt which regard to the unequivocal character of the consent. At the premises of processing operations, which rely on consent must lie an active conduct, following the opt-in model, of the informed data subject. As a novelty the regulation prohibits the use of consent as a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller, such as in the employment context.

The regulation also confers broader rights to the data subjects. If the right to data portability is relatively easy to put in practice, the right to be forgotten represents a real challenge. Within our research we have shown that we don't consider the right to be forgotten to be a new right. At its grounds lie fundamental rights such as the right of erasure or rectification and, under its current form, it doesn't go beyond an obligation to inform. Independent of its controversial nature we have underlined the unfeasibility of this right. It remains to be seen if the right to be forgotten will undergo further amendments until the adoption of the proposed regulation.

The whole approach of the regulation is determined by the way in which technology has marked our society. The European legislator has tried to limit profiling by means of automated processing intended to evaluate certain personal aspects relating to a natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour. Moreover as an absolute novelty he has introduced principles like data protection by design and data protection by default.

Undoubtedly, some of these innovative provisions are absolutely necessary in order to cope with the new challenges of protecting personal data. We consider however that some provisions such as that referring to the right to be forgotten or to data protection by design and data protection by default are either too unclear or unfeasible and need rethinking. The drastic sanctions futurely imposed by the regulation which go up to the maximum of 1 000

000 EUR or, in case of an enterprise up to 2 % of its annual worldwide turnover, pose serious threats to operators.

In the context of society being more and more shaped by the development of areas such as biometrics, genetics, nanotechnology, RFID technology, video surveillance, human implants, online social networking etc. the need to counteract possible dangers to privacy is acute. The current legal framework is most certainly not able to cope with a society ruled by technology and the Internet. The virtual world and all our personal data, accumulated there pose a growing threat to our material existence. The future of individual identity is very uncertain in the context of the rapid scientific innovations. Data protection norms and not only they will have to face a double challenge: to be sufficiently detailed in order to cover real and concrete situations and, at the same time, to maintain their abstract character which allows them to last in time.

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