RIGHT TO BE FORGOTTEN

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Abstract: *Scientific and technological progress does not only bring benefits, but also generates dangers for the members of the society. In order to ensure in this new context an efficient protection of the individuals, there was a need for the creation of new juridical instruments, out of which stands out the regulation of the personality rights, as rights inherent to human being.*

Among the personality rights, there is the right to protection of personal data, its regulation being exceeded by the amplitude of the use of the internet. A project for reform proposed by the European Commission in December 2012 aims to ensure a superior protection in these new condition. Among the novelties brought by this project it`s worth mentioning the widening of the possibilities to interfere offered to the person in question, including by invoking a „right to be forgotten", being understood as a right of the concerned question to obtain from the operator the deletion of the related personal data.

Keywords*: personality rights, processing personal data, right to be forgotten.*

1. Preliminaries. The progress of the society brings not only benefits to individuals, but also exposes them to new dangers. The industrial revolution was the one who highlighted the existence of new dangers and the impossibility to flexibly use the action in tort in order to sanction the harms brought to individuals in the new context. The doctrinal reaction came at the end of the 19th century from the German judicial space by the development of the theory of personality rights[1].

The personality rights, named also as "the primordial rights of the human being"[2] are inherent in the particular person, fact which means that they are directly attached to the existing person and they are inseparable from her. As a consequence, by the protection given to such rights, the legislator protects the natural person herself.

In comparison with the rights of estate and those of debt, these rights are not obtained as an effect of the human actions[3].

The dangers to the human being have multiplied along with the outstanding improvements made by the medical science and biology, but also by the information technology. Thus, new aspects of its existence appeared aspects which have to be protected by establishing new rights.

There are controversies in doctrine regarding the identification of the personality rights. But, the majority of the authors agree that the rights of such juridical nature are as follows: the right to physical integrity, the right to dignity, the right to image, the right to

[1] Regarding the genesis of the theory of personality rights, to be seen *F. Zenati-Castaing, Th. Revet,* Manuel de droit des personnes, Presses Universitaires de France Publishing house, Paris, 2006, p. 210-213.
[2] *G. Cornu,* Droit civil. Introduction.Les persones.Les biens, 12th edition, Montchrestien Publishing house, Paris, 2005, p. 215.
[3] To be seen, *Ph. Malaurie, L. Aynes,* Les personnes. Les incapacités, 5th edition, Cujas Publishing house, Paris, 1999, p. 113.

one's own voice, the right to respect for private and family life, the right to reply, the right to a name and others.

The right to privacy provisioned by Art. 8 of the European Convention of Human Rights and by Art. 71 and Art. 74 of the Romanian Civil code has a complex content, consisting of several rights which represents the social repect owed to individuals[4].

The concept of „private life" is determined by opposition with the public life and the public side of the professional life. It comprises the familial and conjugal life, the everyday life, the friendships, the spending of the spare time, the private aspect of the professional work, the modality and the place of the funeral[5].

From the wording of para. (2) and (3) of Art. 71 of the Romanian Civil Code, it results that the concept of „private life" includes the residence, correspondence, manuscripts, other personal documents, as well as information deriving from one's private life, but also the ones referring to the personal data. Therefore, the complex content of the right to privacy includes also the right of protection of the personal data[6].

In its entirety, the right to private life regards two aspects: a negative aspect, which implies the exclusion of third parties from the scope of privacy and a positive aspect, objectified in the control of the owner of the right over any information whatsoever concerning him[7].

Mutatis mutandis, the same two aspects must also be taken into consideration when talking about the protection of the personal data.

2. The national regulation of the right of protection of the personal data. After a long period of stiffness related to the communist political system, in which collecting and processing personal data were a privileged instrument of the absolute control exercised by the state authorities, the Romanian society entered into a new age of freedom,with regards to the aspect of the protection of the personal date. The orientation towards the integration within the European Union and the start of the adherence negotiations inevitably gave birth to a broad process of rendering compatible the national legislation with the European one, commonly known under as the *acquis communautaire.* As part of this process, the legislation meant to ensure the protection of the personal data belonging to natural persons was adopted.

Initially, Law no. 677/2001 for the protection of the persons with regards to the processing of the personal data and the free circulation of such data was adopted. This normative act transposed in the national regulation Directive 1995/46/CE of the European Parliament and of the Council of 24 October 1995 regarding the protection of the natural persons in what concerns the processing of the personal data and the free circulation of such data[8], which has general applicability in this matter. In the same time, a series of sectorial regulations were adopted, out of which the most important is Law no. 506/2004 regarding the processing of the personal data and the protection of the private life in the electronic communications sector, which transposes into the national legislation Directive no. 2002/58/CE of the European Parliament and Council.

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[4] *C. Bîrsan,* Convenţia europeană a drepturilor omului. Comentariu pe articole, ed. 2, ed. C.H. Beck, Bucureşti, 2010, p. 596.

[5] A se vedea *G. Cornu*, op. cit., p. 246.

[6] Pentru conținutul dreptului la viață privată, în reglementarea Codului civil român a se vedea *E. Chelaru,* Drept civil. Persoanele, ed. 3, Ed. C.H. Beck, București, 2012, p. 35-37.

[7] *C. Jugastru,* Les droits de la personalitè, Ed. de la Tannerie, 2006, p. 188.

[8] Published in the Official Gazette of the European Communities L 281/31 of 23 November 1995.

The new Romanian Civil Code also contains a provision dedicated to protection of the personal data, which is part of the regulation of the personality rights.

Pursuant to the provisions of Art. 77 of the Civil Code, any processing of personal data, through automatic or non-automatic means can only be performed in the conditions and cases provisioned by the special law[9].

In what concerns Law no. 677/2001, its scope is to guarantee and protect the rights and fundamental liberties of natural persons, especially the right to intimacy, private and familial life, with regards to the processing of the personal data. The aforementioned law also explains the content of the terms referred to by Art. 77 of the Romanian Civil Code.

Personal data are, according to Art. 3 para. (1) letter a), "any information regarding an identified or identifiable natural person; a person identifiable is that person who can be identified, directly or indirectly, particularly by reference to an identification number or to one or more factors specific to his physical, mental, physiological, economical, cultural or social identity".

The processing of personal data is, according to Art. 3 para. (1) letter b), "any operation or set of operations which are performed upon the personal data, through automatic or non-automatic means, such as collecting, recording, organizing, storage, adapting or modifying, extract, consulting, use, disclosure to third parties by transmitting, dissemination or in any other way, joining or combining, blocking, deletion or destruction".

Unlike Directive no. 1995/46/CE, the Romanian law does not expressly provide who is responsible for the processing of the personal data. They can be, however, identified by construing the provisions of the law. The conclusion is that the operators, respectively natural or public or private legal persons, including the public authorities, institutions and afferent territorial structures, which have the competence to accomplish the scope and to apply the means of processing the dates[10].

Only natural persons can be the subject of such protection.

The law regulates, among others, the right of the concerned person to be informed about the fact that his personal data are object to a processing, the right of access to such data, the right of intervention on the data, which includes the right to obtain from the operator the rectification, update, blocking or deletion of the data whose processing is not complying with the law, especially of the incomplete or inaccurate data, the right of opposition at any moment, only grounded on legitimate and compelling reasons connected to his particular situation, as data concerning him to be subject to a processing, except the cases where the law provisions otherwise.

In the context of the object of our present analysis,the right of intervention over the data and the opposition right of the concerned person is relevant.

According to Art. 13 of the Law no. 677/2001, any person has the right to obtain from the operator, on demand and free of charge, besides the rectification, update, blocking or deletion of certain data, the conversion into anonymous the data whose processing is not complying with the provisions of this normative act. The same legal provision entitles the owner of the right to ask the notification of the third parties to whom the data of any rectification, update, blocking, deletion or transformation into anonymous operations that were performed in relation to the data concerning him were disclosed, if

[9] For the comments of this provision, to see *E. Chelaru*, in The New Civil Code. Comments on articles, Ed. C.H. Beck, Bucharest, 2012, p. 88.

[10] A se vedea *C. Jugastru*, Les droits de la personalitè, Ed. de la Tannerie, 2006, p. 191-192.

this notification does not prove to be impossible or does not imply a disproportionate effort towards the legitimate interest that could be violated.

The second right is regulated by Art. 15 of the same law. It is represented by the right of the concerned person to make an opposition in any moment, grounded on legitimate and compelling reasons connected to his particular situation, as data concerning him to be subject to a processing, except the cases where the law provisions otherwise. In case of justified opposition, the processing cannot cover the data in question. This person has the right of opposition in any moment, free of charge and without any justification in order the data concerning her not to be processed for direct marketing purposes, in the name of the operation or of any third party or to be disclosed to third parties for such purpose.

The breach of the aforementioned rights can be sanctioned by claiming in court an action in tort.

These right can be subject to restrictions in case of data of public interest[11].

For example, pursuant to Government Emergency Ordinance no. 24/2008 regarding the access to the personal file and the disclosure of the Security, every Romanian citizen, residing in the country or abroad, as well as the printed and broadcast media, political parties, nongovernmental organizations legally established, authorities and public institutions have the right to be informed, on demand, about the existence or inexistence of the quality of Security worker or Security collaborator, in terms of the quoted normative act, of the candidates to the presidential elections, general, locale and for the European Parliament, as well as of the persons having the dignities or positions provisioned by the respective normative act.

Likewise, Law no. 115/1996 regarding the declaration and control of assets of the dignitaries, magistrates, person with management and control positions and of the public servants imposes to the aforementioned category of persons the obligation to declare their assets publicly. This information, which constitutes personal data, is published by posting on the website of the public institution in which the concerned persons perform their activity.

3. The European regulation. As already stated, the basic regulation of the protection of personal data in the European Union is contained by Directive 95/46/CE of the European Parliament and the Council dated 24 October 1995 regarding the protection of natural persons in what concerns the processing of the personal data and the free circulation of such data[12].

This regulation was adopted in the context of the measures deemed necessary for the accomplishment of the directions of the first pylon of the European Community – internal market. In order to accomplish these directions, the member states of the European Union proposed, among others, a dual purpose: on the one hand, ensuring the free circulation of the information and, on the other hand, granting the rights and liberties of the persons, including by protecting of the personal data[13].

The Directive established a right to be forgotten, which can be expressed by the principle according to which the data permitting the identification of a person and which

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[11] *S. Șandru, Ensuring the right of protection of the personal data, in the context of the legislation regarding the free access to public information*, Dreptul no. 2/2006, p. 125-133.

[12] For correlations between this directive and the sectorial regulation of electronic communications, *L. Dubouis, Cl. Bluman,* Droit matériel de l`Union européene, 4 ed., Ed. Montchrestien, Paris, 2006, p. 429-430.

[13] *S. Șandru, Ensuring the right of protection of the personal data, in the context of the legislation regarding the free access to public information, Dreptul no. 2/2006*, p. 123.

has been collected in order to achieve a specific objective must be stored in this form only for the period necessary for the achievement of this scope.

Although the Directive expressly refers to the protection of the personal data belonging to natural persons, it allows member states to include among the beneficiaries the legal persons.

At the time when this Directive was adopted, the internet was used on relatively small scale.. The outstanding progresses achieved in informatics and electronic communication provide to those who are interested, authorities, economic operators and some private legal entities the possibility to access the personal data of millions of people, which can be processed including illegitimate purposes. Unauthorized access attempts to such data lawful held by various operators, among which some of them some successful, increased the concerns related to the efficiency of the protection of personal data.

For these reasons, it is deemed that many of the provisions of the actual Directive are not adapted to new realities.

Thus, as a result of the development of the internet and globalization, especially of the social networks, information storage on servers, of the development of the location based services, etc., we leave digital traces with every movement. In connection to this reality, a recently conducted survey[14] showed that 72% of the Europeans using internet are worried about disclosing on-line too much personal information.

In order to improve the personal data protection system and to eliminate deficiencies of the unequal protection of such data in the member states, on 25 January 2012, the European Commission proposed a reformation of the personal data legislation of the European Union.

4.The reform project. Following the impact of the reform[15], the Commission has proposed the adoption of personal data protection consolidated rules under the form of (i) a regulation regarding the protection of the personal data, in general and (ii) a directive in the field of police cooperation and judicial cooperation in criminal matters. An important reduction of the fragmentation and the legal uncertainty in the European Union is expected, fact that characterizes the current normative regime.

One of the major objectives of the reform project is to strengthen the trust in the online media, in order to secure the economic development.

(a) The main proposed amendments with impact over the online media are:
(a) granting the concerned person easy access to personal data;
(b) regulation of a right permitting the concerned person to easily and freely transfer personal data from an operator to another (data portability);
(c) ensuring the only possibility to explicitly express the consent of the concerned person for processing certain personal data;
(d) increasing the responsibility and liability of the operators by establishing the principles “privacy by default” and “privacy by design”, in order to ensure in a easily understandable manner the information of the concerned person about the modality of processing the data;
(e) regulation of a “right to be forgotten” involving that, in case the concerned person does no longer desire his personal data to be processed and there is no good reason for the operator to keep them, the personal data shall be deleted. This right, also known by the current legislation, is going to be strengthened.

[14] Eurobarometer special no. 359.
[15] Summary of the impact assessment SEC (2012) 73 final.

5.The content of the right to be forgotten. The "right to be forgotten" is a right of the concerned person to obtain from the operator the deletion of the personal data regarding him or her. Likewise, this implies the possibility to coerce the operator to refrain from future disclosing such data, especially in relation to the personal data provided by the concerned person during infancy (until the age of 18).

This right is outlined by Art. 17 of the Regulation of the European Parliament and of the Council project for the protection of the persons with regards to the personal data and free circulation of such data[16] and is partially regulated by Art. 16 of the Directive project of the European Parliament and of the Council for the protection of individuals with regards to processing the personal data by the competent authorities in order to prevent, identify, investigate or criminal prosecute or to execute the sentences and free circulation of such data.

Such data can no longer be stored or processed unless there is a legitimate reason enforcing the achievement of such operation.

6.Exercising the right to be forgotten. In order to be able to obtain the specific effects of the "right to be forgotten", at least one of the following conditions must be fulfilled:

(a) the data is no longer required for the scope was processed or collected for. The scope of collection must be, at its turn, specified, explicit and legitimate. Any subsequent processing shall have to be compliant with the scope;
(b) the concerned person retracts his or hers consent for one or more specific scopes on which the processing is based, or when the storage period for which the consent was given has expired and there is no legal ground for processing the data;
(c) the concerned person makes an opposition to the processing of the personal data for reasons related to his particular situation, when this processing is necessary for (i) protecting the vital interests of the concerned person, (ii) executing a task of public interest or for the execution of the official authority wherewith the operator was invested or (iii) fulfilling the legitimate interest of the operator, except for the cases when this interest is less important than the interests or rights and fundamental liberties of the concerned person that require the protection of the personal data, particularly when the concerned person is a child;
(d) Processing the data is not compliant with the provisions of the Regulation for any other reasons whatsoever.

A special situation is when the operator made public the personal data, in which case he shall take all the reasonable measures to inform the third parties processing these data with regards to the demand of deletion of the links to personal data or copies of such data of the concerned person.

7.Exceptions. There are provisioned cases when the operator is exempted from the obligation to delete the personal data on demand, namely when these data are necessary:

(a) for exercising the right to free expression. In order for this exception to be applicable, the processing of the data shall be performed only for (i) journalistic, (ii) artistic, (iii) literary scopes.
(b) on grounds of public interest regarding the public health, when the personal data are necessary for (i) preventive medicine, labor medicine, diagnosis, treatment, health services management, with the observance of the professional secrecy, (ii) protection against trans-boundary serious threats to health or for the insurance of a

[16] 2012/0011 (COD) SEC(2012) 73 final.

high standard of quality and security of the safety of the medical products or (iii) other reasons of public interest, such as social protection, especially for granting the quality and competitiveness of the proceedings for the settlement of the claims for benefits and services related to the health insurance system;

(c) on historical, statistic or scientific grounds, only if (i) the pursued scope cannot be achieved, by processing the data which does not allow or not allow anymore the identification of the concerned person and (ii) the data allowing the assignment of the information to a concerned identified or identifiable person is being kept separately from the rest of the information as long as the scope can be achieved in this manner;

(d) for the observance of a legal obligation to retain the personal data imposed by the European Union legislation or by the national law of the operator;

(e) in those cases where instead of deletion, the operator restricts the processing of the personal data, respectively when (i) the accuracy is contested by the concerned person, while they are verified, (ii) the operator does not need anymore the personal data for achieving his goal, but he must preserve them as evidence, (iii) the processing of the data is illegal and the concerned person opposes to the deletion, requesting the restriction of the use instead or (iv) the concerned person requests the transmission of the data to another automatic processing system, in case the concerned person provided the personal data and their processing is performed based on his or hers consent or on a contract.

8. Conclusions. The possibility to claim the deletion of the personal data is also regulated currently, but in a more restrictive way than provisioned by the Regulation project.

The remarkable novelty of the project consists in reversal of the burden of proof in proving the necessity of keeping the personal data by the operators.

Thus, the operators will be obliged to prove the necessity to keep the data, the concerned person being sufficient to demand the deletion of such data. In concrete, the respective operators shall be required to prove that the scope for which they consider necessary to keep the personal data falls under the exceptions provisioned by the Regulation project.

Likewise, an obligation to inform with clarity on the scope and the limits of processing the personal data shall be imposed to operators.

The operators shall be obliged to apply those measures granting the maximum of protection of the personal data, both in terms of legitimate preserving and using, as well as to forbid access to unauthorized third parties.

In this way, an increase of the public confidence in using online services which are able to facilitate the access to the internal market of the European Union will be made possible.

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