

PROTECTION OF PERSONAL DATA OF CHILDREN,
ACCORDING TO THE GDPR PROVISIONS

Elisabeta SLABU*

Abstract

Children are full-fledged holders of rights. The Treaty on European Union sets forth the Union's obligation to promote the protection of the rights of the child. The Charter of Fundamental Rights of the European Union, EU regulations and directives, as well as the jurisprudence of the Court of Justice of the EU, have contributed to further determining the protection of the rights of children. Data subjects have the right to erasure of data, which entails the possibility of having their personal data removed or deleted upon their request, and also the right to object to the processing of their personal data. The latter has become increasingly important for children because of the massive amount of children's personal data circulated and available through social networking. A child-friendly consent procedure would entail taking into account the child's evolving capacities, progressively involving him or her. The first step entails a child being consulted by his/her legal representative prior to providing consent, before moving on to a parallel consent of the child and his or her legal representative, to the sole consent of the adolescent child.

Keywords: children, protection of the rights of the child, protection of personal data, GDPR, UE.

1. Brief Introduction on the Notion of "Child" in International and European Law (FRA, 2015, 3-28)

Children are entitled to enjoy their full rights. The Treaty on European Union (TEU) establishes an obligation of the Union to further the protection of the rights of the child. The Charter of Fundamental Rights of the European Union (CDFUE), EU regulations and directives, as well as the case law of the Court of Justice of the European Union (CJEU) have also contributed to the regulation of the protection of the rights of the child. Within the Council of Europe, a large number of conventions focus on specific issues concerning the protection of the child's rights, from their rights and safety in cyberspace, to their adoption.

Children benefit from all human rights and at the same time are the object of special regulations, given their specific characteristics. The legislation must be adapted so as the specific interests and needs of children to be observed, being also highlighted the importance of the role played by parents /guardians or other legal representatives, in situations where the rights and responsibilities

fall, to a large extent, on the persons in whose care are the children. In such cases, it is adopted the approach of the Convention on the Rights of the Child (NATO,1989), according to which parental responsibilities must be exercised being pursued firstly the best interests of the child and in a manner

* Ph.D. Lecturer, "Dunarea de Jos" University of Galati, email: elisabeta.slabu@ugal.ro.

according to the ever-growing abilities of the child (FRA, 2015, 17). The Convention on the Rights of the Child also provides, in Article 1 that "a child shall mean any human being below the age of 18 years". This is the legal parameter currently used to define the notion of child, at international level.

The European Convention on Human Rights does not contain a definition of the term "child", but Article 1 provides the obligation of the States to guarantee to all persons being under their jurisdiction the rights rendered by the Convention. Article 14 of this guarantees the exercise of the rights provided in the Convention, prohibiting discrimination on any grounds, *including on grounds related to age*. The European Court of Human Rights (ECHR) has declared admissible the requests formulated by children directly or through a representative regardless of the age of the children. In its case law, the ECHR adopted the definition of the child provided for in the Convention concerning the Rights of the Child, accepting the criterion of age below 18 years (ECHR, 1979 / 2009).

In the EU law, there is no single official definition of the term "child" in treaties, legislation or case law. This definition can vary considerably in EU law, depending on the regulatory context. For example, the legislation regulating the right to free movement of citizens of the Union and members of their families defines children as 'direct descendants up to the age of 21 or who are dependent' (Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004), practically adopting a notion based on biological and economic relations, and not on the idea of minority. Other areas in the EU law, particularly those where EU actions complement those of Member States (such as social security, immigration and education) allow national law to determine who has the status of a child. In these contexts, it is generally adopted the definition in the Convention on the Rights of the Child. (FRA, 2015, 18)

The EU can only legislate in the areas where it has been conferred competence by treaties (Articles 2-4 in TFEU). Since the field of the rights of the child is cross-sectoral, the EU competence must be determined in each separate case. Up to now, **the relevant areas for the rights of children in which the EU**

has adopted a significant number of legislative acts are the following: data and consumer protection; asylum and migration; cooperation in civil and criminal matters. (FRA, 2015, 18)

The right to data protection is circumscribed to the *right of the child to private life* established in Article 16 of the Convention on the Rights of the Child. This article provides that no child shall be subjected to arbitrary or unlawful interference with his/her private life, family, home or correspondence, nor to unlawful attacks on his/her honor and reputation. This right must be respected by everyone, including the child's legal representative.

2. Protection of Personal Data according to the EU Legislation

In the EU law, *the European Union disposes of the power to legislate on data protection, according to Article 16 TFEU. Article 8 para. (2) of the EU Charter of Fundamental Rights (CDFUE) provides the essential principles of data protection* (correct treatment, consent of the person concerned or a legitimate reason provided by the law, right of access to collected data and right to their rectification), while Article 8 para. (3) requires that the compliance with rules

on data protection be subject to control by an independent authority. The right to the protection of personal data established in Article 8 may be restricted in accordance with the law and in order to observe the principles of a democratic society such as the rights and freedoms of others (Article 52 of the CDFUE). The protection of personal data has become one of the key aspects of European

law on private life. The main legislative instrument in the field is **Regulation No. 679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of these data and repealing Directive 95/46/EC (General Data Protection Regulation) / GDPR.**

In most cases, the children, as well as other data subjects, are not aware that their personal data are the object of processing. In order to diminish the vulnerability of data subjects, the EU law guarantees children (and other data

subjects) specific individual rights, such as *the right to be informed concerning the collection of data related to them, the right to access stored data and to be informed on the details of the processing operations, the right to oppose to the illegal processing, the rights to rectify, delete and block the data.* The operators responsible for data processing must provide the person concerned

appropriate information regarding the processing of his/her data. An interpretation of the provisions in the best interests of the children implies that the language and form in which the information is provided be adapted to the level of maturity and understanding of the children. As a minimum requirement, it should be specified the purpose of the processing, as well as the identity and contact details of the operator.

3. Protection of the Rights of Minors according to the Provisions of GDPR

The Preamble to the **General Data Protection Regulation (GDPR)** provides from the beginning that: **“The protection of individuals with regard to the processing of personal data is a fundamental right.** Article 8 para. (1) of the Charter of Fundamental Rights of the European Union (CDFUE) and Article 16 para. (1) of the Treaty on the Functioning of the European Union (TFEU) stipulate the right of every person to the protection of personal data concerning him or her.”

The processing of personal data should be at the service of citizens. The right to the protection of personal data is not an absolute right; it must be taken into account in relation to the function it performs in the society and balanced with other fundamental rights, in accordance with the **principle of proportionality**. The Regulation respects the fundamental rights and freedoms and principles recognized by the CDFUE, as established in the Treaties, in particular **respect for private and family life**, residence and communications, **protection of personal data**, freedom of thought, conscience and religion, freedom of expression and information, freedom to carry out a business, the right to an effective remedy and to a fair trial, as well as cultural, religious and linguistic diversity.

Rapid technological developments and globalization have generated new challenges for the protection of personal data. The width of the collection and exchange of personal data has increased significantly. The technology enables both private companies and public authorities to use personal data at an unprecedented level in their activities. Increasingly, individuals are making personal information public worldwide. These evolutions call for a solid and more coherent framework for data protection in the Union. Individuals should have control over their own personal data, and legal certainty for individuals, economic operators and public authorities should be strengthened.

Children need specific protection of their personal data, as they may be less aware of their risks, consequences, guarantees and rights with regard to the processing of personal data. This specific protection should apply in particular to the use of personal data of children for marketing purposes or for the creation of personality or user profiles and to the collection of personal data concerning children at the time of using services provided directly to children. The consent of the holder of parental responsibility should not be required in the context of prevention or counseling services provided directly to children.

In order for the processing of personal data to be within the law, it should be carried out on the basis of the *consent of the person concerned* or *based on another legitimate reason*, provided by the law, either in this Regulation or in another act of Union or national law.

In case the processing is carried out in accordance with a legal obligation of the operator or if the processing is necessary for the accomplishment of a task which serves a public interest or is part of the exercise of public authority, *the processing should have a basis in the Union law or national law*. The Regulation does not require the existence of a specific law for each individual processing. A single law may be enough as a basis for several processing operations carried out in accordance with a legal obligation of the

operator or where the processing is necessary for the performance of a task serving a public interest or which is part of the exercise of public authority.

In addition, it should also be established in the Union or national law **whether the operator** performing a task which serves a public interest or is

part of the exercise of public authority **should be a public authority or another natural or legal person governed by public law or, when by reasons of public interest justify this, including for medical purposes, such as public health and social protection, as well as the management of health care services, under private law, such as a professional association.**

The processing of personal data should also be considered lawful in case it is necessary for the purpose of ensuring the protection of an interest which is essential for the life of the person concerned or for the life of another natural person.

According to the Regulation, the principle of transparency, applicable to the field of personal data protection, provides that *any piece of information that is addressed to the public or person in question must be concise, easily accessible and easy to understand and use simple and clear language, as well as viewing, where appropriate.* This information could be provided in electronic format, for example when it is addressed to the public, through a website. This is especially important in situations where, due to the multitude of actors and the complexity, from a technological point of view, of the practice, it is difficult for the person concerned to know and understand whether the personal data concerning him/her are collected, by whom and for what purpose, as is the case with online advertising. Whereas children need specific protection, any information and communication, if the processing targets a child, should be expressed in plain and simple language, so that the child can easily understand it.

Moreover, according to the Regulation, a person concerned should have the right to the *rectification of personal data concerning him/her and the "right to be forgotten"*, if the retention of such data infringes the regulation or Union law or national law in the scope of which is the operator. In particular, the persons concerned should have the right to have their personal data deleted and no longer processed, in case personal data are no longer necessary for the purposes for which they are collected or are processed, where the persons concerned have withdrawn their consent to the processing or if they oppose to the processing of personal data concerning them or if the processing of their personal data fails to comply with this Regulation. This right is relevant especially when the person concerned has given his/her consent as a child and was not fully aware of the risks involved in the processing, and subsequently wishes to delete such personal data, in particular from the Internet. The person concerned should be able to exercise this right despite the fact that he/she is no longer a child.

Nevertheless, the continued retention of personal data should be lawful where it is necessary for the exercise of the right to freedom of expression and information, for observing a legal obligation, for the performance of a task serving a public interest, or resulting from the exercise of the public authority with which the operator is invested, for reasons of public interest in the field of public health, for archiving purposes in the public interest, for scientific or historical research or statistical

purposes or for establishing, exercising or defending a right in the court.

According to Article 8 of the Regulation, *the applicable conditions as regards the consent of children in connection with the information society services are the following:*

- When Article 6 (1) (a) (*The processing is lawful only if and to the extent that at least one of the following conditions applies: (a) the person concerned has given his/her consent to the processing of his/her personal data for one or more specific purposes*) applies, as concerns the provision of information society services **directly to a child**, the processing of a child's personal data is licit if the child is at least 16 years old. If the child is under the age of 16, **such processing is within the law only if and to the extent that that consent is given or authorized by the holder of parental responsibility over the child**. Member States may provide by law a lower age for these purposes, provided that lower age is not less than 13 years.
- The operator shall make all reasonable efforts to verify in such cases that the holder of parental responsibility has given or authorized the consent, taking into account the available technologies.
- The general law of contracts applicable in the Member States, such as the rules concerning the validity, conclusion or effects of a contract in relation to a child, is not affected.

Furthermore, Article 40 (1) of the Regulation establishes that "Member States, supervision authorities, the Committee and the Commission shall encourage the drafting of codes of conduct meant to contribute to the good application of the Regulation, considering the specific characteristics of the various sectors of processing and the specific needs of micro and small and medium-sized enterprises". Par. (2) of the same article also provides that: "Associations and other bodies representing categories of operators or person empowered by operators may prepare codes of conduct or amend or extend existing ones, for the purpose of specifying the application of the Regulation, such as, inter alia, *"informing and protecting children and the manner in which should be obtained the consent of the holders of parental responsibility over children"*.

Article 57 para. 1 (b) of the Regulation also specifies that "each supervisory authority, in its territory: ... **promotes actions of raising the awareness and understanding within the public of the risks, rules, guarantees and rights in the field of processing. A special attention is paid to activities that specifically address children.**"

4. Protection of Personal Data according to the National Legislation

As a result of the accession to the European Union, the provisions of the constitutive treaties of the European Union, as well as the other mandatory European regulations, prevail over the contrary provisions of domestic laws, in compliance with the provisions of the Act of Accession, as provided by Article 148 par. (2) of the Constitution. Therefore, the provisions of the General

Regulation on data protection are mandatory for personal data operators, both public and private.

According to para. (1) of Article 26 of the Fundamental Law, public authorities respect and protect intimate, family and private life, and according to par. (1) of Article 49, *children and young people enjoy a special regime of protection and assistance in the achievement of their rights*. This also implies identifying the manners in which rights of the children are respected and, as concerns their personal data, by assessing national regulations that have an impact in this field.

Thus, according to Article 41 of the Civil Code, the child who has reached the age of 14 has a narrow capacity to exercise, and the legal acts of the minor with limited capacity *are concluded by him/her, with the consent of the parents or, as the case may be, the guardian*, and in the cases provided by law, together with the authorization of the guardianship court. The consent or authorization may be given, at the latest, at the time of concluding the act. For children who do not have the capacity to exercise, the legal acts are concluded, on their behalf, by their legal representatives, according to Article 43 of the Civil Code.

On the other hand, Article 264 of the same Code specifies that “In administrative or judicial proceedings concerning him/her, *hearing the child who has reached the age of 10 is mandatory*. Nevertheless, **it may also be heard a child who has not reached the age of 10**, if the competent authority considers this necessary for settling the case. The right to be heard implies the possibility for the child to ask for and receive any information, according to his/her age, to express his/her opinion and to be informed on the consequences that this may have, if he/she is respected, as well as on the consequences of any decision that concerns him/her. The opinions of the listened child will be taken into account in relation to his/her age and degree of maturity.

And Article 488 of the Civil Code expressly mentions that “parents have the obligation to raise the child in conditions that ensure his/her physical, mental, spiritual, moral and social development in a harmonious way. To this end, the parents are obliged: *a) to cooperate with the child and to respect his/her intimate, private life and dignity; b) to present and allow the information and explaining to the child on all the acts and facts that could affect him/her and to take into account his/her opinion; c) to take all necessary measures for the protection and realization of the child's rights; d) to cooperate with individuals and legal entities with responsibilities in the field of nurse, education and training of the child.*

Analyzing the provisions above mentioned, the question arises: how to proceed when it comes to the personal data protection of children? *What is the age at which it is necessary and mandatory to inform the child regarding the processing of the personal data of a child?* The ages of 10, 14 or 16 (as mentioned in Article 8 of the DGPR regarding the obtaining of consent from a child)? Moreover, *what is the age at which it is mandatory to obtain the consent necessary for the processing of personal data from children?*

As a practitioner in the field of child rights protection, I consider it necessary and mandatory to inform the child who has reached the age of 10, taking into account his/her ability to understand some notions regarding the rights he/she has as a person, so that at 14 years – to be able to express learnedly the consent to the processing of his/her personal data.

In addition, of great importance is the manner in which it is obtained the *consent of the holders of parental responsibility on children under the age of 14*, given that very many parents go abroad to work and the children actually remain in the care of relatives, but not in the conditions provided by law, through a decision of the court to transfer parental authority from parents to relatives, according to the provisions of Law No. 272/2004 on the protection and promotion of rights of the children).

In respect of the parents who share custody of children and fail to agree on many decisions to be made in relation to minors, there should be made efforts for verifying in such cases that the true holder of parental responsibility has conferred or authorized the child's consent. Which is quite difficult to establish in the present conditions, due to the lack of information and legal knowledge of many people who are part of the staff of the personal data operator.

5. Conclusions

Children enjoy rights in the European space, rights recognized both by the domestic law of the EU Member States and by the European legislative instruments. With regard to the protection of personal data, both children and their legal representatives are not yet sufficiently ready to be able to make an informed decision when their personal data is used by various personal data operators.

In accordance with local legal provisions, children who have reached the age of 10, but are not older than 14, should be informed by both legal representatives and teachers/professors as concerns the definition of personal data and regarding the importance of the protection of these data, although the consent for the processing of personal data will be expressed by the legal representative. The motivation for this conclusion is based on the **right of the child to be heard**, which implies the child's possibility to ask for and receive any information, according to his/her age, to express his/her opinion and to be informed about the consequences it may have, if it is respected, as well as on the consequences of any decision concerning it (*art. 264 of the Romanian Civil Code*).

The child who has reached the age of 14 will have to be informed and only then he/she will express his/her consent for the processing of personal data, under the close supervision of the legal representative.

After reaching the age of 18, it is considered that the young person

has enough discernment to be able to express alone his/her consent for the processing of personal data.

And the minor who requested and obtained emancipation, after reaching the age of 16, will be able to express alone his/her consent from the date on which the court recognized his/her full capacity to exercise.

Since it has not passed another year from the beginning of the GDPR application, it is found that the personal data operators, both public and private, still have a lot to learn in order to be able to apply the GDPR provisions as correctly as possible. And with relation to the processing of children's personal data, operators must also know the basic notions of civil law, but also the specific legislation applicable to the protection of the rights of the children, in order to be able to correctly determine who is the adult they should inform regarding the processing of personal data of minors, as well as the person who can consent to the processing of such data, in the place of or along with children.

References:

Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989. The Convention was also assumed by Romania by adopting Law No. 18/1990 on the ratification of the Convention on the Rights of the Child (published in the Official Gazette No. 314 of 13 June 2001).

Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to free movement and residence within the territory of the Member States, amending Regulation (EEC) No 2454/93 1612/68 and repealing the Directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE și 93/96/CEE, JO L 158, 30 April 2004 și JO L 158, 29 April 2004, Article 2 par(2) (c).

ECHR, *Güveç/Turkey*, No. 70337/01, 20 January 2009.

ECHR, *Marckx/Belgium*, No. 6833/74, 13 June 1979, in which the applicant child was six years old at the date of delivering the judgment by the Court;

Manual of European Law on the Rights of the Child, European Union Agency for Fundamental Rights and Council of Europe, 2015, p. 3-28, available on page file:///C:/Users/acasa/Downloads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_ro.pdf