

УНИВЕРЗИТЕТ У ПРИШТИНИ
СА ПРИВРЕМЕНИМ СЕДИШТЕМ
У КОСОВСКОЈ МИТРОВИЦИ

ПРАВНИ ФАКУЛТЕТ

ЉУДСКА ПРАВА ИЗМЕЂУ
ИДЕЈА И ИЗАЗОВА
САДАШЊОСТИ

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ПРЕГОВОР

Људска права чине нераздиојан део људског бића и, у појединим категоријама, неогуђиво трају током целог живота. Упоредо с тим, људска права су човека учинила субјектом међународног права и служе као моћан инструмент за заштиту појединца у државама у којима је заштита елементарних права свакако загарантована. Иако се идеје о ограничењу власти и људским правима и једнакости људи, појављују још у античком свету и првим правним споменцима, ова тема остаје вечито "млада" и изазовна као предмет правних, политиколошких, филозофских, социолошких, економских и других истраживања. Савремена цивилизација и државе почињу на поштовању, заштити и унапређењу људских права. Посебну димензију и значај, људска права попримају у постконфликтним друштвима, у којима су социјални односи оптерећени недавним потресима и сукобима, и латентним разлицима да се они понове. Примена људских права у доброј мери поджеже утицајима политике, што у нормативном смислу не утиче на међународноправну природу људских права, већ на степен примене и поштовања људских права.

Поштовање минимума људских права у Србији представља једину гаранцију да ће наше друштво учинити неопходан цивилизацијски корак напред. Сарадња на нивоу држава у сфери заштите људских права од фундаменталне је важности за функционисање и опстанак међународне заједнице. Међународни уговори о људским правима обавезују државе чланице да остваре резултат, односно заштите људска права, при чему су оне слободне да изаберу начин испуњења своје међународне обавезе. У Републици Србији је створен одговарајући нормативан оквир, којим се јемчи вршене и поштовање људских права свим особама које потпадају под надлежност домаћих органа. Циљ организатора научног скупа је да допринесе научној расправи о достигнућима у остваривању људских права, али и тешкоћама, могућностима њиховог превазилажења, као и да допринесе унапређењу људских права, како у нормативу, тако и у примени.

На Правном факултету Универзитета у Приштини са привременим седништем у Косовској Митровици 23. јуна 2016. године, поводом обележавања 55. година постојања и рада одржава се научна конференција са међународним учешћем на тему: „ЉУДСКА ПРАВА ИЗМЕНЉУ ИДЕАЛА И ИЗАЗОВА САДАШЊНОСТИ“. Правни ствараоци

су, са различитих аспеката, обрадили људска права која су инкорпорисана у значајне међународне и националне акте као средство за остваривање корективне правде. У циљу потпуног и детаљног сагледавања стања у области људских права аутори су имали могућност да изнесу своје ставове и закључке, са потребним степеном стручне и научне аргументације.

Публикација која је пред вама представља Зборник радова који су саопштени на овој конференцији. Велики број научних посленика из Русије, Републике Македоније, Црне Горе, Републике Српске и Србије послао је своје радове који су публиковани у тематском Зборнику радова.

Рецензирани радови су распоређени у шест целина: Грађанскоправна област, Привредноправна област, Правноекономска област, Теоријскоправна и историјскоправна област, Кривичноправна област и Уставноправна и управноправна област. Публикацију о људским правима предајемо на суд правничкој и стручној јавности.

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ADMINISTRATIVE CONTRACT AS PROBLEM OF LEGAL SCIENCE AND POSITIVE LAW: ADMINISTRATIVE ACT, CONTRACT, ADMINISTRATIVE CONTRACT

Summary

First, the difference between public law and private law is established, as administrative contract is an institute of public law. This article explains that the most correct foundation of this difference is the difference between public and private interests. Furthermore, the difference between a contract and an administrative act adopted at the request of a party is established. There is a difference, but the legislator can requalify such administrative act into an administrative contract and it is then an administrative contract in a formal sense. Administrative contract exists in a material sense when at least one of the contractual objectives is public interest. (The difference between a contract and an "agreement" is highlighted, as well as the one between a contract and a "complex administrative act".) The co-authors expose, in conclusion, a critical analysis of administrative contract regulations in the new Serbian Law on general administrative procedure.

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THE PROTECTION OF PERSONAL DATA IN THE LEGAL SYSTEM OF THE REPUBLIC OF MACEDONIA

Abstract

The paper examines the protection of personal data in the Legal System of the Republic of Macedonia according to the provisions of the Law for Protection of Personal Data from 2005. The analysis of the standards and regulations relating to protection of personal data is focused on the scope of implementation of the Law, the principles for data processing, conditions for data processing and the rights of the data subject guaranteed by the Law. Relevant case law of the Administrative Court and High Administrative Court of the Republic of Macedonia, Directorate (national data protection authority) and the European Court of Human Rights is also analyzed. Furthermore the paper examines the degree of harmonization of Macedonian law with the EU regulation relating to personal data protection.

Key words: *data protection, data subject, personal information, data protection authority, personal rights, right to privacy.*

In the modern world the ability to access and distribute information is considered to be an integrate part of contemporary living. The free flow of information, enabled by the fast development of technology, is proven to be beneficial for social, economical, scientific and other development. The new technologies providing free exchange of information also provide the bases for exercise of human rights such as freedom of expression, freedom of information, freedom of artistic and scientific expression, freedom of press and etc. However, the free and easy access to vast pull of information may also be subject to abuse and contribute to infringement of individual rights such as the right to privacy. The most common way of infringement of the right to privacy is by using and distributing information pertaining to aspects of the professional and personal life of individuals, thus the necessity for creating a legal framework for protection of personal data.

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Right to privacy in the legal system of the Republic of Macedonia is guaranteed by article 25 of the Constitution¹ “Every citizen is guaranteed the respect and protection of personal and family life, dignity and reputation”. The Constitution also contains an explicit provision regarding personal data in article 18 paragraph 1 where it is stated that “Security and confidentiality of personal data is guaranteed”. There are also other rights guaranteed by the Constitution that complement the right to privacy and confidentiality of personal data such as confidentiality of letters and other forms of communication² and the guarantee for protection of the home³.

Although, the Constitution of the Republic of Macedonia guarantees the protection of personal data, providing effective protection demands further regulation by law. The first law regulating protection of personal data in the Republic of Macedonia was passed in 1994. It was the Law for Protection of the Personal Data⁴. Later on, the Macedonian Parliament ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108, Strasbourg, 28.1.1981)⁵ and the Additional Protocol to the Convention⁶. In 2005 new legislation regulating protection of personal data was enforced with the Law for Protection of Personal Data⁷. Main objective of the new Law is to provide a higher degree of protection of personal data with accordance to the standards and legislation enforced in the European Union particularly the Convention 108 and the Directive 95/46/EC (Data Protection Directive)⁸.

1. Application of the Law for Protection of Personal Data

Protection of personal data, according to the Law for Protection of Personal Data, is closely linked to the protection of the right to privacy of individuals in the area of processing personal data (art. 1). In defining personal data the Law states that any information pertaining to an individual that is identified or may be identified (by specific data) is considered to be personal data and as such is protected by law. The Law also recognizes „special category of

personal data” such as: data relating to the racial or ethnic origin, political, religious, philosophical and other convictions, membership in syndical organizations and data relating to health, genetic information, biometric data and information relating sexuality. Identification number of individuals (social security number) is also considered to be „special category of personal data”. With respect to the „special category of personal data” the Law contains separate provisions regulating the conditions and manner of their processing that differ from the conditions for processing other personal data⁹.

In general, the Law for Protection of Personal Data applies to all forms of data processing, automatic or other¹⁰. However, there are some exceptions. When the personal data is being processed in interest of national security the controller is not obligated to inform or to ask authorization for data processing from the Directorate for personal data protection (Directorate)¹¹. In this case the rules for transfer of data in other countries and the provisions for distributing of personal data to users also do not apply¹². There are also exceptions when personal data is being processed for literary or artistic expression and professional journalism¹³. In such cases the controller is not obligated to inform the Directorate that personal

⁹ According to the separate provisions processing the special category of personal data is forbidden. By exception processing of such data may be permitted if: the data subject has given explicit consent (if giving consent is not excluded by law), the processing is for performance of right and duties of the controller in work relations, the processing is necessary for protection of crucial interest of the data subject or third party, the processing is done in the scope of activities of nonprofit organizations (it refers to personal data of member and other individuals that cooperate or perform other activities for the organizations), the personal data is published by the data subject, when processing of personal data is necessary for legal purposes or for protection of rights of the data subject before government bodies, for medical purposes and if the processing is done in public interest determined by law of with decision of the Directorate. Regarding the processing of identification number of individuals the law states that it is permitted only with consent of the data subject, for performance of rights and duties of the data subject or the controller and in other cases determined by law. In any case the controller is obligated to take precaution and to ensure that the identification number is not unnecessary visible, printed or accessed by third parties. The provisions relating to the special category of personal data also extend to data collected via video surveillance. See: art. 8, 9, 9-a, 9-b and 9-c, Law for Protection of Personal Data.

¹⁰ Law for Protection of Personal Data, at art. 3.

¹¹ The Directorate is organized as independent government body with the task to survey the implementation of the Law for Protection of Personal Information, to sanction violations and to perform consultative activities and other work. The directorate is founded by the Parliament of the Republic of Macedonia and it is financed by the budget of the Republic of Macedonia and other sources of income. For its work the Directorate is responsible before the Parliament. See: Law for Protection of Personal Data, at art. 34 and 48.

¹² Id. at art. 4.

¹³ The exception only applies if the data processing is done in public interest prevailing over the private interest of the data subject.

¹ Official Gazette of the Republic of Macedonia, N° 52/92.
² Constitution of Republic of Macedonia, at art. 17.
³ Id. art. 26.
⁴ Official Gazette of Republic of Macedonia, N° 12/94 and 4/2002.
⁵ Law for Ratification of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Official Gazette of the Republic of Macedonia, N° 7/2005.
⁶ Law for Ratification of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Official Gazette of the Republic of Macedonia, N° 103/2008.
⁷ Official Gazette of the Republic of Macedonia N° 7/05.
⁸ Official Journal L 281, 23/1/1995 P. 0031 – 0050.

data is going to be processed, also consent of the data subject is not required for data processing. The controller is not obligated to inform the data subject prior to reviling personal data to third parties or to observe his or her right to be informed, right to access and right to object. The provisions of the Law are also not applicable when data is processed by individuals purely for personal activities and home life¹⁴.

For some types of personal data, such as data relating to criminal acts, criminal convictions and security measures, and personal data in court decisions the Law for Protection of Personal Data prescribes that the conditions and manner of processing are regulated with special laws that complement its provisions¹⁵. There are also other laws that contain particular provisions relating to personal data processing like the Law for Electronic Communications that regulates processing of personal data of users of communication services¹⁶, the Law for Medical Care contains provisions relating to processing and protection of personal data of patients¹⁷, the Law for Protection of Rights of Patients also contains provisions regulating personal right of patients (right of confidentiality, privacy and etc.)¹⁸, the Law for Biomedical Assisted Insemination regulates the protection of personal data of donors and recipients¹⁹, the Banks Law regulates personal data processing in banking²⁰, and other laws.

¹⁴ Regarding this exception it is important to point out that the processing of personal data doesn't fall under the provisions of the Law as long as the data processing remains private. But if the person collecting the personal data later chooses to make such data public, then the provisions of the law will be applicable. The European Court of Justice in the Bodil Lindqvist Case (C-101/01) ruled that the Data Protection Directive does apply when personal data is published on the Internet. Considering that the Macedonian Law for Data Protection is drafted to be in accordance to the Data Protection Directive it is conceivable that the same logic should be applied when deciding if the data processing extends beyond personal activities and home life.

¹⁵ Law for Protection of Personal Data, at. art. 7 and 7-a. The Law for National Criminal and Intelligence Database (Official Gazette of Republic of Macedonia, N° 120/09) regulates data processing in the National Criminal and Intelligence Database, use of the data and cooperation with foreign subjects. Data protection in court proceedings is regulated by the Law for Management and Distribution of Court Cases in the Courts (Official Gazette of Republic of Macedonia, N° 171/10).

¹⁶ Law for Electronic Communications, Official Gazette of Republic of Macedonia, N° 13/05, at art. 130, and 167.

¹⁷ Law for Medical Care, Official Gazette of Republic of Macedonia, N° 43/12, at. art. 39, 154 and 226-a.

¹⁸ Law for Protection of Rights of Patients, Official Gazette of Republic of Macedonia, N°82/08, at. art. 25, 26, 33, 34, 38, 60 and 62.

¹⁹ Law for Biomedical Assisted Insemination, Official Gazette of Republic of Macedonia, N° 37/08, at. art. 17, 46, 50 and 57.

²⁰ Banks Law, Official Gazette of Republic of Macedonia, N° 67/07, at. art. 10, 111 and 112.

With respect to territorial application of the Law for Protection of Personal Data, it is clear that the provisions are applicable to controllers registered in the Republic of Macedonia or have registered representatives in the Republic of Macedonia. However, the application is extended to the subsidiaries of the controllers in foreign countries, as well as embassies and consulates of the Republic of Macedonia. The Law is also applicable to controllers not registered in the Republic of Macedonia if the equipment for data processing is kept in Republic of Macedonia (with the exception of equipment used solely for transfer of data)²¹. The extended application of the provisions of the Law is intended to prevent controllers from circumventing the rules either by opening subsidiaries abroad or by registering abroad while they process the data on Macedonian territory.

2. Principles for Processing of Personal Data

The Law for Protection of Personal Data in article 5 sets forth the principles for data processing. According to this article data processing should be fair and lawful, the collection of data should be specific, clear and for purposes determined by law, the data must be adequate, relevant and restricted to the scope of the purpose for processing, the data must be accurate, complete and up to date, the data could be kept in form that provides identification of the data subject until completion of the purpose for processing²².

The principle of fair and lawful data processing underlines two aspects of data processing. First the data processing must be fair. The Law doesn't specify what will constitute fair data processing. It is considered that data processing is fair as long as the processing is lawful and data subject is informed in full with the reason and manner of collecting and processing of personal data²³. Concurrently, if the data processing is unlawful or the data subject is misinformed, then the data processing is unfair. The second aspect of this principle is that data processing must be with accordance to the law. To that effect, any data collecting and processing that is contrary to the law brings on criminal and civil liability for the

²¹ Law for Protection of Personal Data, at. art. 3 and 7-b.

²² The same principles for data processing are found both in Convention 108 (art.5) and the Data Protection Directive (art. 6).

²³ See: Јулијас Гудерман, Зоран Павлевиќ, *Коментар на Законот за заштита на личните податоци*, Државна агенција за заштита на личните податоци (ед), Скопје 2010, p. 25. Some authors note that EU countries have different approach to this issue. In some legal systems there are defined requirements for fair and lawful data processing, and in other it is left to the data protection authorities. Douwe Korff, *Data Protection Laws in the European Union*, Richard Hagle (ed), Federation of European Direct and Interactive Marketing and The Direct Marketing Association 2005, p. 37-38.

controller²⁴. With respect to the legality of data collecting and data processing the findings of the Directorate differ from the finding of the Administrative Court of Republic of Macedonia (Administrative Court) in case U.br. 4849/2009 from 23.06.2011. In this case the Court found that there is no violation of article 5 of the Law for Protection of Personal Data on part of the lawyer who had collected and processed personal data (linked to car accident) with intent to offer legal services to the data subject. The Administrative Court argued that the lawyer is not liable for violation of article 5 because the collected and processed data was not used or abused and was revealed only to the data subject in the offer for legal services. The Directorate on the other hand found that there is violation of article 5 and article 6 (processing personal data without consent of the data subject) because the lawyer had no legal base to collect and process personal data without the knowledge or consent of the data subject. However, the decision of the Court takes president over the decision of the Directorate, because the Administrative Court is authorized to resolve disputes between natural or juridical persons and the government bodies such as the Directorate²⁵.

According to the second principle, the collection of data should be specific, clear and for purposes determined by law (purpose limited). The controller is obligated to collect and process personal data for pre-determined purposes that will be made known to the data subject. There is liability for the controller or a third party if during the data processing the pre-determined

²⁴ Regarding the lawful data processing the European Court of Human Rights (ECHR) takes into account three requirements: to be in accordance with the law, for legitimate aim and necessary in democratic society. Taking this requirements as guidelines the ECHR in case *Rotary v Romania* (Application no. 28341/95) found that "domestic law rules providing that information affecting national security may be gathered, recorded and archived in secret files do not afford a sufficient degree of foreseeability". Further the ECHR concludes that "holding and use by the RIS of information on the applicant's private life were therefore not 'in accordance with the law', so that Article 8 was violated". Regarding the "legitimate aim" the ECHR found that "in respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate". As to the third requirement the ECHR concludes that "it would have rendered it unnecessary to determine whether the measure in question was necessary in a democratic society, because that test depends on the existence of a legitimate aim". The ECHR also notes that "States do not enjoy unlimited discretion to subject individuals to secret surveillance or a system of secret files... national security must be balanced against the seriousness of the interference with an applicant's right to respect for his or her private life".

²⁵ The decision of the Administrative Court is final. Still it raises the question if it is legal for layers of other subjects to collect and process data without the knowledge or consent of the data subject if the data is disclosed only to that subject but for purposes of conducting business, especially in light of the fact that the Law prohibits use of personal data for marketing without the explicit consent of the data subject (art. 13-a).

purposes have been exceed without consent on part of the data subject. In case UZ.br.1241/2013 from 19.03.2014 the High Administrative Court of the Republic of Macedonia (High Administrative Court) found that there is violation of article 5 of the Law for Protection on Personal Data on part of the photographer who sold a photo of a person (data subject) to a third party without the knowledge or consent of the data subject, and the photo was later used for making souvenirs and postcards. Although it is not precisely stated in the decision, it is obvious that the action of the photographer and the third party have exceeded the purpose for data processing known to the data subject.

The third principle sets the requirements for data collecting. The requirements are for the data to be adequate, relevant and restricted to the scope of the set purpose for processing²⁶. These requirements aim to prevent the invasion of privacy of the data subject by excessive collecting of personal data. Therefore, the controller is liable if in the course of collecting the personal data fails to meet these requirements. The Administrative Court in case U.br. 922/2013 from 24.10.2013 found that there is a breach of this principle on part of the bank that collected personal data of clients by scanning their identification cards. The bank argued that the collection of personal data of clients contained in identification cards is with accordance to the legal obligation set in article 10 of the Law for Prevention of Money Laundering and Other Incomes from Criminal Acts and Financing of Terrorism (Official Gazette of Republic of Macedonia NO 4/2008). According to the stated article the bank is obligated to confirm the identity of a client from a valid identification card, and it is obligated to keep copy of the identification card. The High Administrative Court found that the bank has exceeded the purpose for data processing determined by law since the Law only required for copy of the identification card to be obtained and not for the document (identification card) to be scanned.

The fourth principle relates to quality of personal data that is collected. The data must be accurate, complete and up to date. Accuracy of personal data may be very important for the controller and also for the data subject. Inaccurate or false data may lead to loss of rights or damages for the controller or the data subject (For example if the Real Estate Cadastre registers rights using inaccurate personal data, then the registration may be contested). The need for complete and up to date personal data depends on the purpose for data processing, and the controller is responsible for the quality of the personal data. However, in some cases updating

²⁶ Data processing for statistic, scientific or historical research doesn't fall under restriction for data to be used solely for pre-determined purposes, but only if protection measures are undertaken such as making the data anonymous. Relating to this type of data processing the Law states that the right to privacy, personal and family life of the data subject must be respected.

personal data is not necessary or even prohibited by law if the purpose for data processing is to document facts or events.

The fifth principle indicates that storing personal data is time limited. The data may be kept in form that provides identification of the data subject until completion of the purpose for processing. Upon the completion of the data processing the controller is obligated to delete the personal data or to make the data anonymous so that is no longer personal data²⁷.

3. Conditions for Processing of Personal Data

Before processing personal data on part of the controller two conditions must be met: the controller needs to acquire consent from the data subject and the controller is obligated to inform the Directorate for the data processing.

Consent of the data subject is the most important condition in regard of personal data processing²⁸. The Law defines consent as "*free and explicit will of the data subject consenting to processing of personal data for pre-determined purposes*"²⁹. The Law also states that the burden of proof regarding the existence of the consent falls on the controller.

The Data Protection Directive, similar to Macedonian Law, contains specifics about the quality of the consent and states that the consent must be voluntary, specific, informed (art. 2h) and unambiguous. Given consent is considered voluntary if the data subject is in position to exercise a real choice free from deception, coercion, intimidation and fear from significant negative consequences³⁰. Informed consent is determined case to case, however it is considered that the data subject may give inform consent only if he or she is provided with the necessary information in a clear and understandable way before making his or her decision³¹. The consent also needs to be specific meaning it has to refer to the pre-determined purposes for processing of personal data. According to the Data Protection Directive the consent must also be unambiguous. This doesn't mean that the consent may only be given in explicit form (orally or in writing). It is considered that the consent may be given in non-explicit way, if by the circumstances it can be determined that the data subject consents to processing of personal data (with the exception of consent for processing of special category

²⁷ Data are considered anonymous if all identifying elements are eliminated. See: Handbook on European Data Protection Law, European Union Agency for Fundamental Rights, Council of Europe, 2014, p. 44, available at FRA website at: fra.europa.eu.

²⁸ Law for Protection of Personal Data, at art. 6.

²⁹ Id. at. art. 2(9).

³⁰ See: Working Party (2011), Opinion 15/2011 on the notion of consent, WP 187, Brussels, 13 July 2011, p. 12. See also: Handbook on European Data Protection Law, op. c., p. 57.

³¹ See: Handbook on European Data Protection Law, p. 59.

of personal data that must be expressed explicitly)³². However, inactivity of data subject can't be construed as non-explicit consent³³.

In Macedonian law the definition of consent excludes the possibility for non-explicit consent. This coincides with the opinion of the High Administrative Court expressed in case number UZ br. 1075/2012 from 08.11.2012 where it is concluded that leaving the identification card at a registration desk doesn't mean that the data subject has given consent for processing of personal data contained in the card. The issue of specific consent was addressed in case number UZ 731/2012 from 24.02.2012 of the High Administrative Court. The High Administrative Court found that processing personal data by the Social services is in breach of article 6 (1) of the Law for Protection of Personal Data because the data subject has given consent to the social service officers to inspect his home in order to determine his living conditions and income, but has not consented for additional information to be acquired by interviewing his neighbors.

Consent of the data subject is not required for processing of personal data if it is done: for performance of a contract where the data subject is a contract party or prior to conclusion of a contract upon request of the data subject, for compliance with legal obligations of the controller, for protection of the life and vital interests of the data subject, for performance of activities in public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed and for pursuing legitimate interests of the controller, third party or person to whom the data is disclosed insofar that the right and liberties of the data subject do not prevail over such interests.

When the personal data is processed for performance of a contract between the controller and the data subject explicit consent is not required, this extends to the time before the conclusion of the contract since the data processing may be necessary in order for the contract to be drafted.

Compliance with legal obligations of the controller also excludes the need for consent in regard of data processing. It refers to mandatory obligations determined by law.

The consent for processing of personal data is not required in exigent circumstances when the life or the vital interests of the data subject are in danger. For example the doctor doesn't need consent for collecting personal data like the patient name and address when the patient is admitted in the emergency room unresponsive.

When personal data is processed for performance of activities in public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed consent of data subject is also not required.

³² Ibid, p. 56.

³³ Ibid.

Government bodies, institutions and other legal entities perform activities in public interest and act in official authority that usually involves processing of personal data. The consent of the data subject isn't necessary in such situations as long as the public interest, authorizations and the need for processing of personal data had been determined by law. The same applies to individuals that have public authorizations like notary publics, lawyers or executors and etc.

Processing personal data without consent of the data subject for pursuing legitimate interests of the controller, third party or person to whom the data is disclosed is a general provision based on the principle for balancing of interest. In situations when the legitimate interests of the controller, the third party or other person in possession of personal data collide with the rights and liberties of the data subject a fair balance must be achieved. When deciding on the fair balance it is considered that certain issues must be taken into account such as the nature of the rights of the data subject that will be affected, the negative consequences for both sides (like damages), the importance and availability of the personal data in question and etc.³⁴.

The second condition for data processing is observing the duty of the controller to inform the Directorate for processing of personal data. The information act needs to contain specific information regarding the: collection of personal data, information about the controller, purpose for data processing, legal bases for processing, information about the data subjects, time limit for processing, distribution in foreign countries and description of the protection measures³⁵. Every change in the information must also be reported in 30 days. Upon receiving the confirmation letter the controller may start the processing of personal data. The controller's obligation to inform is excluded when the personal data are part of public collections, the personal data refers to group of employees at the controller not larger than ten persons or the processing of personal data refers to member of political, philosophical, religious and syndical organizations³⁶.

When processing involves the special category of personal data (in cases when processing is permitted) the mere information on part of the controller is not sufficient. In this case the controller is obligated to obtain a permit for data processing from the Directorate unless the processing is determined by law³⁷. Upon request of the controller the Directorate renders a decision regarding the permit for processing of special category of personal data³⁸. The decision of the Directorate may be subject to lawsuit before the Administrative Court³⁹.

³⁴ See: Јураќа Тупреман, *Зопан Пазарец*, op. c., p. 37.

³⁵ Law for Protection of Personal Information, at. art. 27.

³⁶ Id. et. art. 28.

³⁷ Id. et. art. 29.

³⁸ Id. at. art. 29-a (1).

³⁹ Id. at. art. 29-a(2).

4. Rights of the Data Subject

The rights of the data subject are guaranteed by the Law for Protection of Personal Data. According to the provisions of the law the data subject has right to be informed about the data processing, right to access and right to object. The same rights are found in the Data protection Directive⁴⁰.

Right of information of the data subject refers to situations when the personal data is collected by the controller from the data subject⁴¹. The data subject in such occasions is entitled to the information pertaining to the identity of the controller and its legal representative in the Republic of Macedonia, the purpose of data processing, the users or categories of user of the personal data, the obligatory and non obligatory questions in the questioner, the consequences from withholding data and to be made aware of the right to access and the right to object. By exception, the controller is not obligated to observe the right to information of the data subject if the information is already known to the data subject.

Right to access is guaranteed for the data subject when the personal information hadn't been collected directly from the data subject⁴². The controller is obligated to inform the data subject about the identity of controller and its legal representative, purpose for data processing, categories of data subject to processing, users and categories of users of personal data and to be made aware of the right to access and the right to object. The duty to inform is a positive obligation of the controller, meaning that the controller needs to provide the information on personal initiative as soon as the collecting of the data has started. If the personal data are used by a third party the duty needs to be observed the moment the data is reviled for the first time. There are several exclusions relating to the controller's duty to inform. Controller is not due to inform the data subject for the data processing if: the subject is already aware of that fact, the data are processed for historical, scientific of statistical purposes, the notification is not possible without extreme effort and expenses and if the collection of personal data is determined by law.

The right to access also includes the prerogative of the data subject to demand information from the controller whether his or her personal data are processed, the purposes and legal base for processing, users and categories of users of the personal data, the type of personal data, the source and the logic for automated processing⁴³. The controller is obligated to respond in 15 days upon receiving the request for access. However, the law protects the controller from

⁴⁰ Data Protection Directive, at. art. 10, 12 and 14.

⁴¹ Law for Protection of Personal Data, at. art. 10.

⁴² Id. at. art. 11.

⁴³ Id. at. art. 12.

frequent access requests. If the controller has responded to the request for access on part of the data subject, the controller is not obligated to respond to a new request for access when there are no changes in the personal data, unless six months have passed since the last request for access. When the personal data are used strictly for scientific and statistical purposes the controller is also not obligated to respond to the access request of the data subject.

Regarding the effective realization of the right to access the European Court of Human Rights in several decisions has reinforced the importance of having impartial decision making body where the right to access is disputed⁴⁴. According to Macedonian law the data subject has the right to file complaint before the Directorate in all cases when rights guaranteed by the Law for Protection of Personal Information have been disputed⁴⁵.

The right to object is considered complementary to the right to be informed and the right to access, since the last two are preconditions for the right to object. This means that the data subject won't be able to realize the right to object if he or she is not informed or granted access with respect to the personal data processing. Right to access includes authority for the data subject to demand for personal data to be supplemented, changed and erased or to demand for the data processing to be stopped if the respected data are inaccurate, incomplete, not updated or the processing is contrary to the law⁴⁶. The data subject also has the authority to stop the data processing if the data is processed without his or her consent for performance of activities in public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed and for perusing legitimate interests of the controller, third party or person to whom the data is disclosed⁴⁷.

Although the Law guarantees certain rights to the data subject, all rights may be suspended in case when the exercise of such rights may endanger the fulfillment of the obligations of the controller determined by law, especially referring to national security, prosecution of crimes, infringement of professional ethics, protection of vital economical and financial interest of the state or the European union and for the protection of rights and liberties of the data subject and other individuals⁴⁸.

⁴⁴ See: ECHR, *Leander v. Sweden*, application no. 9248/81, judgment of 26 March 1987. ECHR, *Gaskin v. the United Kingdom*, application no. 10454/83, judgment of 7 July 1989. ECHR, *Odièvre v. France*, application no. 42326/98, judgment of 13 February 2003.

⁴⁵ Law for Protection of Personal Information, at. art. 18. Liability for damages for infringement of the right of the data subject is also recognized. See: art. 21.

⁴⁶ The controller may supplement, change or delete the incomplete, inaccurate and un-updated data on personal initiative, and then inform the data subject. Id. at. art. 14.

⁴⁷ Id. at. art. 13.

⁴⁸ Id. at. art. 15.

The provisions of the Law for Protection of Personal Data pertaining to principles and conditions for data processing, as well as the provision pertaining to the rights of the data subject coincide with EU regulations (Convention 108 and Data Protection Directive). However, in order for the provisions of the Law to take full effect, efforts need to be made for educating professionals in the area of data protection, and raising the awareness of the public about the importance of data protection as integrate part of right to privacy. Soon enough, Macedonian legislator will face the challenges emerging from the Reform of EU data protection rules put forward in January 2012 and resulted with the adoption of Regulation (EU) 2016/679 and the Directive (EU) 2016/680. The Regulation will enter into force on 24 of May 2016, and it shall apply from 25 of May 2018. The Directive entered into force on 5 of May 2016. The EU Member States have to transpose it into national law by 6 of May 2018⁴⁹.

Conclusion

Right to privacy and the protection of personal data are guaranteed by the Constitution of the Republic of Macedonia as well as other complementary rights such as confidentiality of letters and other forms of communication and the protection of the home. Besides the constitutional guarantees, protection of personal data in Macedonian legal system is also regulated by law. The first law regulating the protection of personal data was passed in 1994.

Protection of personal data was re-enforced in 2005 with the new Law for Protection of Personal Data. Main objective of the new Law is to provide a higher degree of protection of personal data with accordance to the standards and legislation enforced in the European Union particularly the Convention 108 and the Directive 95/46/EC (Data Protection Directive).

According to the Law for Protection of Personal Data, protection of personal data is closely linked to the protection of the right to privacy. The Law considers any information pertaining to an individual that is identified or may be identified (by specific data) to be personal data and as such is protected by law. The rules set forth in the Law apply to all forms of data processing (automatic or other) with exception of data processing for national security reasons, for literary or artistic expression and professional journalism. For some types of personal data special regulations are also enforced.

The Law for Protection of Personal Data sets forth the principles for data processing as follows: data processing should be fair and lawful, the collection of data should be specific, clear and for purposes determined by law, the data must be adequate, relevant and restricted to the scope of the purpose for processing, the

⁴⁹ http://ec.europa.eu/justice/data-protection/reform/index_en.htm

data must be accurate, complete and up to date, the data could be kept in form that provides identification of the data subject until completion of the purpose for processing.

Processing personal data on part of the controller is under two conditions: the controller needs to acquire consent from the data subject and the controller is obligated to inform the Directorate for the data processing. Free, explicit and specific consent of the data subject is crucial condition in personal data processing. Consent is not required only in cases determined by law. The second condition for data processing is observing the duty of the controller to inform the Directorate for processing of personal data. Upon receiving the confirmation letter the controller may start the processing. When processing involves the special category of personal data (if permitted) the controller is obligated to obtain a permit for data processing from the Directorate (unless the processing is determined by law).

The rights of the data subject guaranteed by the Law for Protection of Personal Data are: the right to be informed, right to access and right to object. The same rights are found in the Data protection Directive.

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ЗАШТИТА ПОДАТАКА О ЛИЧНОСТИ У ПРАВНОМ СИСТЕМУ РЕПУБЛИКЕ МАКЕДОНИЈЕ

Апстракт:

У раду се разматра заштита података о личности у правном систему Републике Македоније у складу са одредбама Закона о заштити података о личности из 2005 године. Анализа стандарда и правила који се односе на заштиту података о личности је фокусирана на обим примене Закона, принципе за обраду података, услове за обраду података и права носиоца података гарантована законом. Такође, у раду се анализира судска пракса Управног суда и Вишег управног суда Републике Македоније, одлуке Дирекције за заштиту података о личности и судска пракса Европског суда за људска права. Поред тога, рад испитује усклађеност македонског закона са прописима ЕУ који се односе на заштиту података о личности.

Кључне речи: *заштита података, носиоци података, подаци о личности, орган за заштиту података, лична права, право на приватност.*

Закључак

Право на приватност и заштиту података о личности су гарантована Уставом Републике Македоније, као и других конституентних права, као што је тајност писма и других облика комуникације и заштити дома. Поред уставних гаранција, заштита личних података у македонском правном систему је такође регулисана законом. Први закон који регулише заштиту личних података је усвојен 1994. године.

Новине у односу на заштиту личних података спроведене су 2005. године са новим Законом о заштити личних података. Главни циљ новог закона је да обезбеди већи степен заштите личних података у складу са стандардима и прописима који важе у Европској унији, нарочито Конвенција 108 и Директива 95/46 / ЕС (Директива о заштити података).

Према Закону о заштити личних података, заштита личних података је уско повезана са заштитом права на приватност. Закон сматра да било какве информације које се односе на појединца који је идентификован или може бити идентификован су лични подаци заштићени законом. Правила у Закону важе за све облике обраде података (аутоматско или друго) са изузетком обраде података из разлога националне безбедности, за

књижевног или уметничког изражавања и професионалног новинарства. За неке врсте личних података посебни закони се такође примењују.

Закон за заштиту личних података утврђује принципе за обраду података на следећи начин: обрада података треба да буде фер и законита, прикупљање података треба да буде конкретно, јасно и за намену утврђене законом, подаци морају бити адекватни, релевантни и ограничени у оквиру намене за обраду, подаци морају бити тачни, потпуни и ажурни, лични подаци могу се чувати на начин који омогућава идентификацију носиоца података до окончања потребе за обраду.

Контролор може обрађивати личне податке ако: прибави сагласност носиоца података и обавести Дирекцију за обраду података. Добровољна, експлицитна и специфична сагласност носиоца података је кључни услов за обраду личних података. Сагласност није потребна само у случајевима утврђеним законом. Други услов за обраду података је дужност контролора да обавести Дирекцију за обраду личних података. Након добијања потврде писма контролор може почети обраду. Када обрада укључује посебну категорију личних података (уколико је дозвољена) контролор је дужан да прибави дозволу за обраду података из Дирекције (осим ако је обрада утврђена са законом).

Права субјекта података гарантована Законом о заштити личних података су: право да буде информисан, право на приступ и право на преговор. Иста права се налазе у Директиви о заштити података (Директива 95/46/ЕС).

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ЗАШТИТА ПРАВА НА ПРИВАТНОСТ ЗАПОСЛЕНИХ

Анстракт:

Аутори у раду врше анализу заштите права на приватност запослених. Ово право радника је данас због напретка информационих и комуникационих технологија у великој мери угрожено. На почетку, аутори врше осврт на личне податке запослених и њихову заштиту. У Србији заштита личних података је извршена посебним законом. Међутим, ово не смањује ризик од њихове злоупотребе од стране послодавца. Право на приватност запослених је угрожено и због развоја друштвених мрежа. Бројни запослени, као и тражиоци посла, на њима објављују информације, које могу бити предмет злоупотребе послодавца. Ове информације, послодавац само изузетно може користити у циљу покретања дисциплинског поступка због повреде радне обавезе или радне дисциплине, или као разлог за престанак радног односа. Такође, надзор послодавца над средствима за комуникацију запослених, може се вршити само уз испуњене одређених услова, који су у недостатку позитивноправних прописа, одређени посредством праксе Европског суда за људска права и правне теорије. Предмет надзора, могу бити само средства за комуникацију која се користе у службене сврхе.

Кључне речи: *заштита права на приватност запослених, право на приватност, лични подаци запослених, друштвене мреже, надзор запослених, одговорност запослених.*

УВОД

Технолошки развој произвео је бројне научне, информационе и комуникационе промене које су се рефлектовале на друштвене, па између осталих, и на радне односе. Рад и радни односи данас су суочени са бројним изазовима на које је тек делимично одговорено.

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