



GDPR alert

No. 2

GDPR national phase: Clarifications on situations requiring high risk process analysis (DPIA).

DPIA – specific guidelines for Romanian controllers

What is the Decision status?

First fines applied for non-compliant video monitoring

On 01.10.2018, the National Supervisory Authority for Personal Data Processing (DPA) published on its website (www.dataprotection.ro) a draft Decision on the operations where a Data Protection Impact Assessment (DPIA) is required. At this point, we can only talk about a draft Decision (containing the proposed list of situations requiring the impact assessment). The draft, which is in public consultation for 10 calendar days from publication on the authority's website, will follow the specific approval and adoption procedure. The Decision of the DPA President will enter into force at the moment of its publication in the Official Gazette of Romania.

The Romanian authorities' approach is part of an action coordinated by the European Data Protection Board (EDPB), which analyzed by the end of September 2018 the lists proposed by 22 national authorities in the European Union including processing operations that require personal data protection impact assessments (DPIA).

In the same context and in relation to the DPIA situations, we also highlight the first actual examples of GDPR sanctions applied by authorities in the Central and Eastern European region. Thus, the Austrian Supervisory Authority (DSB) has recently sanctioned a local contractor with a fine of EUR 4,800 for non-compliant video monitoring of the pavement in front of its headquarters (large-scale monitoring of a public space, non-existent markings). Specifically, the breached principle in this case was that of transparency.

Why a Decision on processing requiring DPIA?

We mention that under Article 35 (1) of Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("General Data Protection Regulation" or "GDPR") a DPIA is required when a type of personal data processing activity is likely to generate a high risk for individuals' rights and freedoms. DPIA must be done before processing. Article 35 (4) of the General Data Protection Regulation provides that supervisory authorities prepare and publish a list of the types of processing operations that are subject to the DPIA requirement, which are notified to the EDPB.

According to EDPB recommendations issued to the Romanian authority on September 25, 2018, the proposed list of operations for which DPIA is required must be indicative (not exhaustive). EDPB also recommended that the Romanian authorities add to the Decision a statement to clarify that the list is based on the 248 rev.01 Guidelines issued by the former Article 29 Working Party on Personal Data Protection (Working Party 29 or WP29) regarding DPIA and has the role of supplementing and detailing the Guidelines.

DPIA – when is it required?

Is the proposed list of processing operations exhaustive?

According to the list proposed by the Romanian DPA, the following operations require a personal data protection impact assessment to be made by the controllers in accordance with GDPR:

- (a) the processing of personal data in order to carry out a systematic and comprehensive assessment of personal aspects relating to individuals, which is based on automated processing means, including profiling, and which is the basis for decisions which produce legal effects on the individual or that similarly affects them to a significant extent;
- (b) the widespread processing of personal data revealing racial or ethnic origin, political opinions, religious confession or philosophical beliefs or membership of trade unions, genetic data, biometric data for the sole identification of an individual, data on gender, sexuality or sexual orientation of an individual or personal data relating to criminal convictions and offenses;
- (c) processing of personal data for the purpose of systematic a large scale monitoring of a publicly accessible area such as video surveillance in public areas such as access ways, markets, parks or other such spaces;

- (d) the large scale processing of personal data of vulnerable persons, especially minors, by means of automated means of monitoring and / or systematic recording of behavior, including for the pursuit of advertising, marketing and publicity activities;
- (e) the large scale processing of personal data through the innovative use or implementation of new automated technological solutions, in particular where the operations in question limit the ability of data subjects to exercise their rights, such as the use of facial recognition techniques in order to facilitate access to different premises;
- (f) the large scale processing of data generated by devices with sensors transmitting data over the Internet or other means ("Internet of Things" devices such as smart TVs, connected vehicles, smart meters, smart toys, smart cities or other such applications) for purposes such as assessing the economic situation, health, preferences or personal interests, solvency, behavior, or geographical location of the data subjects;
- (g) the large scale and / or systematic processing of telephony, internet or other communications data, metadata or location or tracking data of individuals (such as Wi-Fi tracking, geographical location data processing of passengers in public transport or other such situations) where processing is not necessary for the provision of a service requested by the data subject.

Regarding the proposed list by the Romanian DPA, in its opinion issued on 25.09.2018, EDPB issued the following advice and recommendations:

- **Monitoring of employees** - EDPB believes a DPIA may be necessary in this situation. As the Romanian supervisory authority already included these activities, EDPB recommends the inclusion of an explicit reference to WP29 Guidelines 248 rev.01 on data processing for vulnerable persons and systematic data monitoring, considering that the analysis should be carried out in this context. We note that, although mentioned in the EDPD opinion dated 25.09.2018 under the chapter "Analysis of the proposed list", the monitoring of employees is not provided as such in the list issued by ANSPDCP, but it can be found in the operations under a), d), e), f) or g) of the draft Decision.

**Will there be a single list
of operations for the
entire EU?**

- **Biometric data processing** - EDPB confirms the proposal of the national authority, considering that the processing of these types of data in order to uniquely identify an individual, made in conjunction with at least one of the other criteria determining the need for DPIA according to the Guidelines 248 rev.01, is consistent with other proposals of the other national authorities.
- **Genetic data processing** - EDPB confirms the proposal of the national authority, considering that processing of this type of data, if done in conjunction with one of the other criteria determining the need for DPIA according to the Instructions 248 rev.01, will require the DPIA.

As EDPB itself states, the role of EDPB's opinions is not to impose a single list of processes that require DPIAs. Rather, it is intended to establish a harmonized and consistent approach in all EU Member States to avoid inconsistencies that may affect the equivalent protection of individuals concerned in these countries and freedom of movement within the Union.

According to the collaboration procedure between the national authorities and EDPB, the Romanian authority (and other national authorities to which recommendations have been sent) will send its final opinion on the list within 2 weeks (thus, around 15.10.2018), and will either implement the recommendations and amend the proposed list accordingly or maintain it (specifying the relevant reasons). It remains to be seen what will be Romania's final position towards the EDPB recommendations and proposals from the civil society, but given the relatively minor nature of EDPB's recommendations, it is expected that they will be implemented. Publication of the decision in the Official Gazette is estimated for October 2018.

The information provided herein presents general information and should not be relied on as legal advice when analyzing and resolving a specific legal issue. If you have specific questions regarding a particular fact situation, please address your queries to:

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