

Cover article: “ GDPR – One Year Down, Forever to Go”

by Marta Popa, Senior Partner Voicu & Filipescu

At least in theory, the General Data Privacy Directive (GDPR or the “Regulation”) was the Year2k in data privacy, not only in Europe, but worldwide. Certainly, organizations around the world scrambled to comply with it, fearing very onerous consequences for noncompliance. But the GDPR often vaguely written and does not provide single or sufficiently clear solutions, so compliance in many cases has been a guessing game. So, a year later, where are we? Have things cleared up enough so that we now have some clarity?

Legal Changes of April 2019

Voicu & Filipescu is a full service law firm, covering all legal areas relevant to your company’s activity. This issue of our monthly newsletter provides you with a brief description of some of the recent legal amendments in:

- **Constructions**
- **Data Protection**
- **Employment**
- **Infrastructure**
- **Insurance**
- **PPP & Concessions**
- **Public Procurement**

+ VF News

Article “GDPR fine for the failure to fulfill the information obligation: The personal data protection authority in Poland imposes a fine of EUR 220,000 to a data broker” by Voicu & Filipescu Senior Partner Marta Popa and Senior associate Andreea Botez published in Romanian Review of Data Protection. Click [here](#) to read the article.

Chambers and Partners Europe, 2019 edition recommends Voicu & Filipescu for Corporate and M&A practice.

IFLR 1000, 2019 edition recommends Voicu & Filipescu for our lawyer’s activity in three practice areas: M&A, Banking and Finance and Project Development.

Legal500 EMEA 2019 edition recommends Voicu & Filipescu for our lawyers’ activity in 6 practice areas: Corporate, Commercial and M & A, Employment, PPP and Procurement, Real Estate and Construction, Restructuring and Insolvency and TMT. Daniel Voicu, Mugur Filipescu, Marta Popa, Roxana Negutu, Raluca Mihai, and Mariana Popa are also recommended by the prestigious guide for their activity.

cover article

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GDPR – One Year Down, Forever to Go

At least in theory, the General Data Privacy Directive (GDPR or the “Regulation”) was the Year2k in data privacy, not only in Europe, but worldwide. Certainly, organizations around the world scrambled to comply with it, fearing very onerous consequences for noncompliance. But the GDPR often vaguely written and does not provide single or sufficiently clear solutions, so compliance in many cases has been a guessing game. So, a year later, where are we? Have things cleared up enough so that we now have some clarity?

2018 – GDPR takes effect and national law is adapted

Shortly after the entry into effect of the GDPR, national legislation received new provisions for adapting the GDPR to the local context. Thus, Law no. 190/2018 has brought on a few special requirements for processing of certain categories of personal data as well as a few derogations from processing personal data in certain situations (e.g. for journalistic purposes). The Romanian Data Protection Authority has proven to be active in issuing secondary legislation regulating situations when the data protection impact assessments are mandatory or the procedure for receiving and solving complaints or performing investigations.

GDPR breaches found and the first related penalties

There appeared the first penalties issued by data protection authorities across the EU for GDPR breaches. Some examples include:

- Facebook was fined £500,000 for collecting personal data about the Facebook friends of users, without those friends being informed that their data was being collected, and without them being asked for consent.
- The Polish Data Protection Authority (UODO) applied the first fine on the basis of GDPR to a data broker for non-compliance with the information obligation under Art. 14 paragraph (1) and (2) of the Regulation. The fine applied amounts to EUR 220,000.
- Uber were fined £385,000 for inadequate security arrangements that led to cyber attackers being able to download a large amount of personal data about drivers and customers.

Some penalties are within the financial penalty limits permitted by the data protection legislation prior to the GDPR and you might think that not much has changed in this regard. However, CNIL (the French data protection regulator) **imposed a fine of 50 million euros against Google, a significantly higher award than that**

provided under the previous legislation. CNIL said Google's processings in relation to its advert personalization lacked transparency, contained inadequate information and lacked valid consent.

What next?

What is on the horizon with regards to GDPR? Well, we must expect that there will be further legislation in the data protection and electronic communications area including the E-Privacy Regulation. We will see increased enforcement and impact in day-to-day activities, including application of significant fines and other penalties. We may also expect that Brexit will impact data protection obligations for some companies. Other future concerns include those regarding Artificial Intelligence (AI) and liability of robots.

Activity in the name of GDPR compliance is thus expected to increase rather than decrease in the second year. True privacy protection and ultimate compliance with GDPR and other privacy regulations is going to require more effort and more investments than anyone likely foresaw.

What can you do if you haven't complied with the GDPR during 2018? Or if you are not sure you have implemented GDPR correctly?

Here is a (non-exhaustive) GDPR compliance list that any company should check:

Action	Concrete Measures
Awareness at Company level. Establishing a framework of corporate governance and responsibility	Inform your employees about GDPR implementation and give them training on the core principles and essential elements of this new regulation. Compliance with GDPR requires actual support at board level but is a team effort. Recommend to the board the GDPR risks and opportunities. Name a GDPR project manager. Incorporate the risk of data protection in corporate risk management and internal control.
Making a data inventory and mapping the data flow	Perform an internal investigation to map operational activities that involve processing of personal data, identify such data, what are the data collection channels, and whether you transfer them outside of the company. Prepare the processing activities registry. Assess the legal basis of your company's data processing.
Performing a detailed gap analysis	Perform an audit of the current state of compliance with GDPR requirements as well as the list of steps to take for

	compliance. Pay particular attention to the impact of GDPR on employment relations.
Creating operational policies, procedures and processes	Prepare the supporting documents for these policies in order to ensure implementation of set rules.
Ensuring personal data security through procedural and technical measures	Implement the "adequate technical and organizational measures" under the IT Security Policy that you establish. Keep in mind the principles of Privacy by design and Privacy by default.
GDPR Compliance of electronic communications	Check and ensure GDPR compliance of electronic communications used at company level (e.g. email, internet, CCTV, GPS applications).
GDPR Compliance of the company's website	The website is your company's business card but also an important way to interact with existing customers, potential customers, or simple visitors. Make sure that the interaction is GDPR-compliant.
Continuous GDPR monitoring and compliance	<p>Set up corporate rules to permanently monitor GDPR compliance, which should include at least periodic internal audits, updating of personal data protection processes, internal processing registers, periodic employee training, testing of IT security systems.</p> <p>For companies which made internal efforts to comply with the GDPR, use of an external GDPR consultant is most recommendable in order to audit the compliance level and remedy any deficiencies.</p>

What can the Voicu & Filipescu data protection team do for its clients:

- Data protection audits and trainings
- GDPR implementation and continuous compliance
- Assuming the DPO position
- Assuming the position of UE representative of companies based outside the Union which process EU citizens' personal data.

Do not hesitate to contact us for any of these services. GDPR is not here today and gone tomorrow!

constructions - legal changes published in April 2019

Law no. 97/2019 for amending and completing Law no.10/1995 on the quality of constructions, promulgated by the President of Romania by Decree no. 435/2019,

provides that a construction can only be used after approval of the reception at the completion of works.

In this respect, investors will only be allowed to dispose of the construction after approval of the reception at the completion of works, both in the case of new investments and in the case of modifications to the existing constructions that were not used during the execution of the construction works. At the same time, the owners of the construction will allow the use only after approval of the reception at the completion of works. In case of modifications to the existing constructions that were not used during the execution of the construction works. Failure to comply with these obligations will be punished by a fine ranging from RON 20,000 to 40,000.

The aforementioned regulations will come into force as a result of their publication in the Official Gazette of Romania.

Decision of the High Court of Cassation and Justice no. 13/2019 regarding the examination of the referral lodged by the Board of the Bucharest Court of Appeal regarding the interpretation and application of the provisions of art. 492 of the Civil Code of 1864, art. 579 par. (1), art. 577 par. (2) of the Civil Code, art. 37 par. (5) of the Law no. 50/1991 regarding the authorization of construction works, republished, with subsequent amendments and additions and art. 37 paragraph (1) of the Cadastral and Real Estate Publicity Law no. 7/1996, republished, as amended and supplemented.

The High Court of Cassation and Justice upheld the appeal in the interest of the law and established that the lack of the building permit or the non-observance of its provisions, as well as the absence of the reception protocol at the completion of the works, represent impediments for judicial recognition, by way of declaratory action, of the right of ownership on a construction built by the owner of the land using their own materials.

The decision will be mandatory upon publication in the Official Gazette of Romania.

data protection - legal changes published in April 2019

On April 9th and 10th, the EEA Data Protection Authorities and the European Data Protection Supervisor, assembled in the European Data Protection Board, met for their ninth plenary session.

During the plenary, the EDPB adopted guidelines on the scope and application of Article 6(1)(b)* GDPR in the context of information society services. In its guidelines, the Board makes general observations regarding data protection principles and the interaction of Article 6(1)(b) with other lawful bases. In addition, the guidelines contain guidance on the applicability of Article 6(1)(b) in case of bundling of separate services and termination of contract.

Guidelines no. 2/2019 on the application of Art. 6 par. (1) let. b) GDPR within the activities of Information Society services are subject to public consultation and observations can be submitted by May 24, 2019.

employment - legal changes published in April 2019

Government Emergency Ordinance no. 26/2019 regarding the amendment and supplementation of certain normative acts was published in the Official Gazette of Romania, Part I, no. 309 of 19 April 2019, entering into force on the same date.

Among others, this Ordinance brings two changes of interest in the field of employment law.

- (I) The first of these is the amendment of Law no. 52/2011 regarding occasional activities performed by dayworkers.

Thus, the legislator revises the changes implemented at the end of 2018 (whereby the areas where the day workers could be used were drastically restricted) adding new areas as follows:

- organization of exhibitions, trade shows and congresses - group 823;
- advertising - group 731;
- artistic interpretation - performances - class 9001, artistic interpretation activities - performances - class 9002 and performing arts management activities - class 9004;
- farming and husbandry of semi-domesticated animals and other animals - class 0149;
- catering for events - class 5621;
- landscape maintenance activities - planting, care and maintenance of parks and gardens, except for private housing facilities - class 8130;
- restaurants - class 5610;
- bars and other beverage serving activities - class 5630;
- activities of zoos, botanical gardens and nature reserves - class 9140

Also, in art. 4 par. (4) it is stipulated that no day worker can carry out activities for **the same beneficiary** for a period **longer than 90 days** cumulated over a calendar year, except for those engaged in activities in the following areas: agriculture, extensive animal farming through seasonal grazing activities of sheep, cattle, horses, seasonal activities in botanical gardens under accredited universities, and in the wine sector - for those **a maximum of 180 cumulative days** is provided for a calendar year, both in the case of activities for a single beneficiary, and for several beneficiaries.

The Ordinance introduces the concept of the Electronic Registry of Dayworkers - as the only way of sending the data on the records of dayworkers, **which will be set up on December 20, 2019**. The Labor Inspectorate will be the institution that will acquire the computer system related to this registry, and the

methodology of compiling and sending the electronic registry by the beneficiaries, as well as the records that will have to be made thereto, shall be established by order of the minister of labor and social justice, within 60 days from the establishment of the registry.

Also, new obligations for beneficiaries are introduced:

- to establish, fill in and send the Electronic registry of dayworkers according to the methodology and model established by order of the minister of labor and social justice;
- to send the electronic registry of dayworkers to the labor inspectorate, daily, before the start of the activity by each person who will be in a work relationship with the beneficiary;
- to submit the Electronic registry of dayworkers before the competent control bodies.

These provisions will apply from the entry into force of the aforementioned order of the minister of labor and social justice, most likely in 2020.

Regarding the **dayworker's pay**, it is stipulated that it will be subject to income tax, according to the provisions of Law no. 227/2015 regarding the Fiscal Code. *Thus, the calculation, payment and declaration of income tax due for the income from the activity performed by the dayworker is the beneficiary's responsibility.*

Another novelty is **the introduction of the obligation to pay the social security contribution due to the state social insurance budget for the income from the activity performed by the dayworkers**, according to the provisions of Law no. 227/2015 regarding the Fiscal Code, awarding the dayworker quality of insured person in the public pension system. The obligation to calculate, declare and make the payment belongs to the beneficiary.

Last but not least, although the dayworker is not insured for work accidents and occupational diseases, in the event of an accident at work or occupational disease, **the beneficiary is obliged to pay the related medical expenses.**

- (II) The second major change provided in GEO no. 26/2019 targets the Labor Code. As a novelty, an additional, paid, three-day rest leave will be granted to employees undergoing an *in vitro* fertilization procedure.

In order to benefit from this leave, the employee must submit to the employer an application accompanied by the medical letter issued by the specialist physician.

Order no. 635/1.348/2019 on amending and supplementing the Classification of Occupations in Romania - level of occupation (six characters), approved by Order of the Minister of Labor, Family and Social Protection and of the President of the National

Institute of Statistics no. 1.832/856/2011 was published in the Official Gazette of Romania, Part I, no. 308 of 19 April 2019, entering into force on the same date.

Firstly, we mention that the Order introduces new occupations, mostly in IT, as follows:

- Software developer engineer – COR code 251207;
- Measuring equipment engineer – COR code 215242;
- Web application developer engineer – COR code 251208;
- Optical systems engineer – COR code 214956.

Also, a number of occupations are renamed, and others are moving into other groups. For example, the former "building manager" is currently called "condominium manager".

infrastructure - legal changes published in April 2019

Government Decision no. 177/2019 regarding the approval of the substantiation study for the Târgu Neamț-Iași motorway was published in the Official Gazette, Part I no. 263 of April 5, 2019, entering into force on the same date.

The Decision approved the substantiation study for the public-private partnership construction of the Târgu Neamț-Iași motorway.

According to the substantiation study, the Târgu Mureș-Târgu Neamț - Iași - Ungheni motorway, including the section pertaining to the Decision, Târgu Neamț-Iași, shall cross the Mureș, Harghita, Neamț and Iași counties and will have a total length of approx. 320 km.

At the same time, it is mentioned that the total value of the investment for the construction of the motorway is estimated at 1.2 billion Euros and the period of designing and building the motorway is 48 months from the signing of the public-private partnership contract.

insurance - legal changes published in April 2019

Law no. 71/2019 on mutual insurance companies was published in the Official Gazette no. 323 of April 24, 2019 and applies from April 27, 2019. The Financial Supervisory Authority

(FSA) is to elaborate the secondary legislation for the application of this law.

As a novelty for the Romanian insurance market, the Law regulates the possibility of establishing mutual insurance companies, their method of organization and the specific requirements for their authorization and operation.

A mutual insurance company is defined as a "non-profit legal person" with the purpose of "covering, by means of insurance contracts, the risks of its members and the payment of indemnities and insurance claims to them, the beneficiaries of the contracts and /or injured third parties. Mutual insurance companies only engage in business activities directly related to insurance activity for their members, on the basis of the principle of mutuality. By way of exception, mutual companies may conclude with their members who are legal entities or entities without legal personality group insurance contracts for their employees, without the latter ones becoming members, the obligation to pay the contributions provided for by this law, by the articles of association and by the contracts in question, shall belong to said members. "

Individuals, legal entities and/or entities without legal personality may become members of the mutual insurance company. The number of members shall be at least 5. Members contributing with at least 10% of the total amount shall be subject to the approval of the FSA. Each member is entitled to one vote. The general meetings of the members are regulated similarly with the provisions of Law 31/1990, republished, (the shareholders are referred to as members of the mutual insurance company), with the exceptions and modifications provided by the hereby law. References to "share capital" are considered to be made to the "contribution (reserve) fund", and references to "dividend distributions" are considered to be made to "use of the distributable surplus funds".

In order to obtain the operating authorization from the FSA, the paid-up contribution (reserve) fund shall represent at least 80% of the values stipulated in art. 95 par. (1) let. d) of Insurance Law no. 237/2015, as subsequently amended and supplemented, for the mutual companies supervised under the Solvency II regime, and from the safety fund provided under art. 173 par. (1) lit. a) of the same law, for the mutual companies supervised under the national regime.

The articles of association of a mutual insurance company may provide that, while the original contribution fund is not wholly or partly repaid to the founders' members, said members are entitled to receive interest.

The mutual companies organize their management in a similar way to the joint-stock companies, respectively in a unitary or dualistic system, applying the provisions of art. 137-158 of the Law no. 31/1990, republished, insofar as they do not breach the legal provisions and the hereby law. By way of derogation from the provisions of art. 143 para. (1) of the Law no. 31/1990, republished, the delegation of the executive management is carried out to at least two persons. Mutual companies will appoint persons with key positions or other critical positions according to the law.

The authorization process and the assessment of the fulfillment of the conditions for authorization by the FSA is carried out in two stages, as follows: a) prior approval for registration at the trade registry office b) issuance of the operating license.

Members of the mutual insurance companies conclude the insurance contract and acquire the capacity of insured after obtaining the operating license.

The insurance contract shall include provisions in respect to the members of the mutual insurance company, their rights and obligations as members, starting from the provisions of the articles of association. Also the insurance contracts shall include clauses regarding the additional contributions that may be required from the members.

Mutual insurance companies can change their legal form into a joint stock company with the object of carrying out the insurance activity with the prior approval of the FSA.

PPP & Concessions - legal changes published in April 2019

Government Decision no. 209/2019 for the approval of the General Framework regarding the legal regime of concession contracts for the natural gas distribution public utility service, the procedures for concession granting, the framework content of the technical specifications was published in the Official Gazette, Part I no. 284 of 15 April 2019, in force from the same date.

According to GD no. 209/2019, the concession contract for the natural gas distribution public utility service shall be awarded through the open public procurement procedure organized by the local public administration authorities in the administrative-territorial units or associations thereof, through a representative. In case of an association between several local public administration authorities in the territorial-administrative units, they will materialize this in a document assumed by all the participating representatives of the association, and the document will include the designation of a representative thereof who will organize the tender and conclude the concession contract, and subsequently will monitor its performance.

The Decision contains detailed provisions on the stages of the procedure for the award of concession contracts for the public utility service for the distribution of natural gas:

- a) Initiation of the concession procedure;
- b) the authority's drafting of the substantiation study for the concession decision;
- c) approval of the concession of the natural gas distribution public utility service for one or more specific areas - administrative-territorial units: communes, towns and counties; under the law, some cities can be declared municipalities;
- d) preparation of the awarding documentation, according to the open tender framework documentation, as set out in Annex A (the framework content of the technical specifications being included in Annex B);
- e) organizing and conducting the public open tender;
- f) concluding the concession contract for the public utility service for distribution of natural gas (the model of which is included in Annex C of the Decision).

Since the entry into force of the GD no. 209/2019 takes, Government Decision no. 749/2014 for the approval of the Norms for the application of the provisions related to the awarding of concession contracts for the public service of natural gas distribution, published in the Official Gazette of Romania, Part I, no. 709 of September 29, 2014, is repealed.

public procurement - legal changes published in April 2019

Decision of the Constitutional Court of Romania no. 738/2018 regarding the admissibility of the objection of unconstitutionality of the provisions of art. 167 par. (4) of the Law no. 98/2016 on public procurement was published in the Official Gazette of Romania, Part I, no. 260 of April 4, 2019, being applicable from the same date.

The Constitutional Court was notified with the objection of the unconstitutionality of the provisions of art. 167 par. (1) let. c) and par. (4) and art. 164 of Law no. 98/2016 on public procurement, by arguing that the legal provisions criticized violate the principle of the presumption of innocence and the principle of equality before the law, as it prevents the participation of some economic operators in public procurement procedures. Thus, a sanction is applied to a person only because they are subject to a judicial investigation procedure in connection with committing certain deeds, without the court having issued a final conviction for committing an offense.

In its analysis of the objection, the Court mentioned that the sanction of the exclusion of an economic operator from the award procedure occurs when the contracting authority establishes that it has been convicted by a final judgment of a court for one of the offenses listed strictly and restrictively by art. 164 par. (1) of the Law no. 98/2016. Also, according to art. 167 par. (1) let. (c) of the law, the contracting authority, in the light of a decision of a court or administrative authority, excludes from the award procedure of the public procurement contract/framework agreement any economic operator who has committed a serious professional misconduct questioning its integrity.

Conversely, the Court has established that in the case of art. 167 par. (4) of the Law no. 98/2016 which extends the scope of situations in which an economic operator is excluded from the public procurement procedure when it is the subject of an ongoing investigation for committing offenses under art. 164 of the Law, the contracting authority has the task of determining whether the economic operator committed a serious professional misconduct in relation to the alleged offense, thus substituting a competent court or administrative authority, because, under art. 167 par. (1) of the Law, proof of serious professional misconduct is made by any appropriate means of evidence, such as a decision of a court or administrative authority. Thus, according to the legal provision criticized, the contracting authority has a broad margin of appreciation regarding the conditions for committing a suspected offense and the integrity and reputation of the economic operator determined by reference to the circumstances of the criminal offense, and may decide on these elements before its guilt have been determined by a court of law.

Therefore, if a court did not pronounce a final judgment for the conviction of the economic operator for committing an offense, the Constitutional Court decided that the contracting authority restricts their participation in the procurement procedure by violating the presumption of innocence, thus disregarding art. 23 par. (11) of the Constitution.

For these reasons, the Constitutional Court upheld the objection of unconstitutionality raised by Polaris M Holding Ltd. from Constanta in Case no. 583/54/2017 before the Craiova Court of Appeal - Administrative and fiscal litigation division, and decided that the provisions of art. 167 par. (4) of the Law no. 98/2016 on public procurement are unconstitutional.

Instruction of the National Agency for Public Procurement no. 1/2019 amending the Instruction of the President of the National Agency for Public Procurement no. 2/2018 regarding the price adjustment of a public/sectoral procurement contract was published in the Official Gazette of Romania, Part I, no. 296 of 17 April 2019, applicable from the same date.

The Instruction amends the Instruction of the President of the National Agency for Public Procurement no. 2/2018 regarding the price adjustment of the public/sector procurement contract, published in the Official Gazette of Romania, Part I, no. 32 of January 11, 2019, as follows:

- Art. 4 par. (4) is amended, underlining that "*the lack of the details provided under par. (1) determines the inapplicability of the possibility of adjustment by revision of the price of the public/sector procurement contract*";
- Par. (2) and (5) of art. 4, which referred to the procedures and contracts in progress and how to approach the possibility of price adjustment are repealed;
- Art. 5 is amended, establishing that if the adjustment by revision is of the type of an adjustment quotient and it has a sub-unitary value, the price of the contracts will not be adjusted by revision;
- Art. 6 is amended, providing that the price will be adjusted by updating the cost/price elements that have undergone changes whenever an unforeseeable event occurs at any time during the contract performance period (the old regulation provided for the period of the award procedure and/or the contract performance period); in addition, it is underlined that the price update of the public/sectoral procurement contract will be performed during the contract's validity period whenever an unforeseeable event occurs, irrespective of the duration of the contract (the old regulation stipulated that the adjustment was made upon signing of the contract);
- Art. 7 par. (2) is amended, relating to cases that are assimilated to unforeseeable events, which cause the price of the contract to be adjusted;
- Art. 9 par. (4) establishes that the contracting authority/entity may use both the review of prices in the procurement contract and their updating (the old regulation provided that both the adjustment of the prices in the procurement contract and their updating could be used concurrently because the proposed option only takes into account the difference in overall price evolution);

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- Par. (2), (3), (5) and (6) of art. 9, art. 10 and art. 11, which provided a calculation formula for price adjustment and how it could be applied in unforeseeable events are repealed.

For additional details on this material, please do not hesitate to contact us.

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