

**PROTECTION OF PERSONAL DATA IN FRANCE: PROBLEMS
OF IMPLEMENTING A PAN-EUROPEAN APPROACH**Adel I. Abdullin¹Stanislav A. Shadrin²

Abstract: The technological and social expansion of the personal data use including the possibility of their cross-border transfer and exchange increases the risks of their unfair use. The consistency and coherence in resolving issues on legal regulation of relations in the field of personal data protection are demonstrated by the European Union and its member states. Ensuring a uniform and consistent legal regulation at the level of the European Union largely depends on the actions of EU Member States to adopt national laws to implement the European approach, as well as their active participation in the development of new legal acts, the adoption of which is planned at the final stage of the legal regulation reform of protection personal data in the Union. This raises the question of how much the rules of individual states diverge since this significantly affects the practice of

applying the common European law on the protection of personal data. Indeed, when introducing the relevant provisions in their legislation, EU countries went in different ways [1]. This paper discusses the approach to the protection of personal data that was used in France.

Keywords: human rights, information, personal data, collection, processing, transfer, protection, personal data subject, responsibility.

1. Introduction

The next stage in the EU law development in the field of personal information protection for individuals is associated with the adoption in April 2016 of two regulatory documents governing the protection of personal data during their processing. We are talking about Regulation (EU) 2016/679

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(General Data Protection Regulation) [2] (hereinafter - the Regulation) and Directive (EU) No. 2016/680 (hereinafter - the Directive) [3]. It should be noted that the Regulation by its legal nature is an act that is directly applied in all EU Member States [4]. At the same time, these states must take certain measures when implementing the norms of European acts in their national legislation. So, France decided to adopt a single law to adapt the two European documents mentioned above, and not repeal the fundamental Law No. 78-17 dated January 6, 1978, concerning data, files and freedoms ³ (hereinafter - the Law “On Data, Files and Freedoms”).

In doing so, EU Member States must take into account the fact that any measures that may create obstacles to the direct application of the Regulation will be recognized as contrary to European law according to the case-law of the EU

Court ⁴. Nevertheless, if countries agree to do this, then data controllers throughout the Union will face fragmentation of legal norms and a lack of clarity on their scope.

In cases where the controllers do not fulfil the requirements of the Regulation for data processing, they will be held liable. One of the Regulation’s features is a significant increase in fines. Earlier in France, the National Commission on Informatics and Freedoms (Commission Nationale de L’informatique et des Libertés - CNIL) had the opportunity to impose a maximum fine of 150 thousand euros. Starting May 25, 2018, the European Direct Application Regulation abolished this part of French law and introduced new sanctions in the amount of up to 20 million euros or 4% of the annual global turnover of companies [5].

³ Loi n 78-17 du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés. Version consolidée au 25 avril 2019. The official website of the public service for publishing laws. [Electronic resource] – URL: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460>

⁴ See, for example Case 94/77 Fratelli Zerbone Snc v Amministrazione delle finanze dello Stato. ECLI:EU:C:1978:17 and 101. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0094>

2. Methods

The methodological basis of the study is composed of general scientific and particular scientific methods such as dialectical materialism, systemic, structural-functional, historical, general logical, formal-legal, and comparative legal.

3. Results And Discussion

First of all, we note that earlier the French approach to the protection of personal data was a kind of conglomerate of national and European norms and judicial provisions. The administrative traditions that are so characteristic of the French state fought European liberalism dictated by the neutrality of information technology and the increasing participation of private individuals in regulating the Internet. The need to protect personal data as an element of the individualism concept that underlies the theory of fundamental rights and freedoms did not raise doubts at the

doctrinal level but required the adoption of adequate legal and technical measures [6, p. 162]. And such measures are now taken.

The Law “On Data, Files and Freedoms” has been amended since June 22, 2018⁵. The initial amendments to this Law were adopted following the accelerated procedure in order to meet the deadlines established by the Regulations. Then Act No. 2018-493 dated June 20, 2018, on the Protection of Personal Data ⁶ introduced new amendments to the Law on Data, Files and Freedoms in order to use the opportunities provided for in the Regulation for derogation and to implement the Directive in French law. Law No. 2018-493 will be introduced in the legal system of France in stages.

The following should be highlighted among the main changes in French law adopted under the influence of European legal acts in this area.

⁵, See: <https://www.cnil.fr/fr/loi-78-17-du-6-janvier-1978-modifiee>

⁶ Loi n 2018-493 du 20 juin 2018 relative à la protection des données personnelles. Official website of the public service for

publishing French laws. URL: <https://www.legifrance.gouv.fr/eli/loi/2018/6/20/JUSC1732261L/jo/texte#JORFSCTA000037085954>

*Protection of personal data of
minors*

The regulation in its paragraph 1, Article 8, sets the age of the individual's independent consent to the processing of personal data at 16 years but allows the EU Member States to reduce it to 13 years in their laws. Consent to the processing of the child's personal data must be granted to the legal representatives (parent or guardian).

In the current version of the French Law "On Data, Files and Freedoms", Clause 7-1 is additionally introduced in Section 1 of Chapter II; it stipulates that minors may agree to the processing of their personal data regarding the offer of information services to them independently from the age of 15 (the initial text of the bill provided from 16 years). From 13 to 15 years old, the consent of the child and his/her representatives is required. For those under 13 years old, any data collection is prohibited. The French lawmaker argued for choosing such an age threshold by that 15 years old is the age when a minor usually goes to high school, and when his/her maturity allows him/her, in principle, to control the use of his/her data on the Internet [7].

*Processing special categories
of personal data*

Article 9 of the Regulation gives the EU Member States some discretion with regard to the determination of additional legal grounds allowing the processing of special categories of data (for example, ethnic origin, state of health, union membership, political, religious or philosophical beliefs, etc.).

According to article 32 of the Law on Data, Files and Freedoms, the processing of personal data carried out on behalf of the state and associated with the genetic or biometric data necessary for authentication or verification of the identity of a person must be previously authorized by decree of the State Council of the French Republic. This decree is adopted after obtaining a reasonable and publicly disclosed opinion by an independent oversight body - the National Commission on Informatics and Freedoms (Commission Nationale de L'informatique et des Libertés - CNIL). In addition, in exceptional cases, the processing of sensitive data is authorized by a decision of the State Council adopted after obtaining a reasonable and publicly disclosed

opinion by CNIL (Section 31 of the Law on Data, Files and Freedoms).

According to the new pan-European approach, CNIL is preserved in France, but the functions of this body are significantly changed. So, the Regulation provides for the cancellation of prior coordination with supervisory authorities. Unless otherwise specified, no declarations or applications for authorization are needed prior to the processing of personal data. On the other hand, CNIL is tasked with monitoring the implementation of the Law on Data, Files and Freedoms and, therefore, European regulation. To solve this problem, supervisory authorities are vested with important powers, including in the area of investigation of offences and the application of sanctions. In this way, CNIL and supervisory authorities in other EU member states are becoming national agents of the European policy of reconciliation, and the development of the digital economy and the people's privacy protection [8].

Criminal measures

A feature of the Regulation is that it allows the EU Member States to provide for criminal measures in their national legislation. The Regulation

contains provisions on sanctions against violators of personal data in Articles 83 and 84. In particular, EU Member States must establish liability for violations that are not subject to administrative fines and must take all necessary measures to implement it.

In accordance with the French Law “On Data, Files and Freedoms”, crimes include the violation of personal data referred to in Chapter VIII “Criminal Provisions”. Sanctions in the form of imprisonment for up to five years and a fine of 300 thousand euros are established for crimes provided for in Articles 226-16 to 226-24 of the French Penal Code.

In addition, Section 51 of the Law “On Data, Files and Freedoms” contains a punishment in the form of one-year imprisonment and a fine of 15 thousand euros for obstructing the actions of the National Commission on Informatics and Freedoms (CNIL) and its authorized officials.

For disclosing information of a secret nature, a person who is the custodian of such information and acts on behalf of the state or in connection with the performance of his/her professional activities or the performance of his duties (including

temporarily) is punishable by deprivation of liberty for a term of one year and a fine of 15 thousand euros (Art.226-13 of the French Penal Code).

The uniform application of the European right to the protection of personal data in the EU member states can be achieved by harmonizing the laws of all EU countries without exception [9, P. 21]. However, when considering the features of the EU legal acts implementation on personal data protection, it is noteworthy that France violates the European rules when interpreting certain provisions of the Data Protection Regulation. As examples, we consider the cases of processing the most sensitive data.

To resolve disputes, the European Commission may initiate lawsuits against violating states in the courts of the EU. It should be noted that the case-law of the EU Court of Justice has already influenced the process of

implementation by states of the provisions provided for in the Rules. Thus, when establishing the right to challenge by the independent supervisory authority (CNIL) the legality of decisions on the adequacy of the EU Commission, French lawmakers refer to the existing judicial practice of the EU Court, in particular, to the decision on the “Shrems case”⁷ on the invalidity of the adequacy decision regarding the Safe Harbour Agreement adopted by the USA on the basis of Articles 25 and 28, Directive 95/46 / EC and the EU Charter of Fundamental Rights. CNIL is entitled to apply to the State Council of the French Republic to file a complaint when in doubt as to legality of the decision on the adequacy of the EU Commission regarding the transfer of data to a third country. A statement to the State Council may require the suspension or termination of the transfer of relevant personal data.

⁷ In its decision on the “Shrems case” dated 10/06/2015, the EU Court ruled that national data protection authorities in the Member States of the European Union should retain the power to protect personal data, in accordance with Directive 95/46 / EC and the Charter of Fundamental Rights EU, and

these powers cannot be limited by the decision of the European Commission. CJUE, 6 Oct. 2015, aff. C-362/14, Schrems vs Data Protection Commissioner, ECLI:EU:C:2015:650. URL: <http://curia.europa.eu/juris/document/document.jsf?docid=169195&doclang=DE>

Based on such an appeal, the State Council may, if it considers necessary, apply to the Court of Justice of the EU to assess the validity of the decision on adequacy, as well as other acts of the EU Commission, if such transfer of data is not carried out by the courts within their jurisdictional powers (Art.43 of the Law “On Data, Files and Freedoms”).

The decision on the “Shrems case” is significant of that it removes existing restrictions on the powers of national supervisory authorities that could prevent the latter from examining an individual’s claims regarding the level of personal data protection in a third country, despite the decision on the adequacy of the EU Commission and, if necessary, take action. The supervisory authorities themselves cannot take measures that contradict the Commission's decision on adequacy, but they receive the right to appeal such decisions in court.

4. Summary

From the analysis devoted to the legal regulation of the personal data protection in France it follows that using the room for manoeuvre provided for in the Regulations in certain cases, France acted on the basis of its internal interests

and needs. However, unlike other EU member states, and primarily Germany and Ireland, France uses fewer opportunities provided by the Regulation. The French Law “On Data, Files and Freedoms” establishes additional conditions for the processing of genetic and biometric data, as well as defines numerous conditions for restricting the rights of individuals for national security and defence purposes. In addition, French law provides for some of the most serious criminal liability measures in the European Union.

However, it should be noted that France, like many other EU member states, has adopted several controversial provisions, the legitimacy of which, apparently, will be established by the EU Court [10]. In particular, Article 79 of the Rules states that claims against a controller or processor are brought before the courts of an EU Member State where the controller or processor is registered. Alternatively, a lawsuit may be filed with the courts of an EU member state, where the individual data subject has a permanent residence. On the other hand, France chose the place of permanent residence of the person concerned as the main criterion for

establishing territorial jurisdiction. It seems that the idea is to prohibit the French from applying the right of another EU member state when using the services of such international companies as, for example, Google or Facebook, which European headquarters are in Ireland. The choice of this criterion for the application of French law to supervisors not established in France may lead to “operational difficulties” with countries that choose a different approach [11].

Thus, it cannot be recognized as a positive point that, in accordance with the Regulation, the EU Member States received certain freedom of action to interpret its provisions. At the moment, doubts are already being raised about the legality of the introduction by states in their legislation of certain provisions in derogation from the Rules. Thus, the French Law on Data, Files and Freedoms

contains numerous references to the provisions of the Regulation and the Directive⁸, despite the fact that most of the definitions and rights were agreed at the EU level within the framework of the Regulation, which means that these provisions have a direct effect and therefore cannot be revised or supplemented in the national law⁹. These conflicts may interfere with the uniform application of the Regulation in the EU and create controversial situations, for example, on issues of cross-border transfer of personal data.

5. Conclusions

In conclusion, we note that while the State Council of the French Republic confirms the importance of simplification and the quality of the law [12], the legal regulation reform of the personal data protection largely does not

⁸ The final text of the French Law contains 54 references to Regulation (EU) 2016/679, including 10 in the titles (of chapters, sections) which are also related to the transposition of the Directive (EU) 2016/680.

⁹ A precedent of the EU Court is the provision that the adoption of national

measures aimed at revising the provisions of a regulatory act with direct effect is a violation of the European Union’s legislation. See ECJ, February 7th. 1973, approx. C-39/72, Commission against Italy, ECLI: EU: C: 1973.

meet this noble objective. It is still unknown whether the new European acts on personal data protection can prevent the occurrence of lawsuits and contribute to the effective protection of the rights of individuals. However, the expectations from the reform of personal data protection are enormous [13].

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