ПРАВО ЕВРОПЕЙСКОГО СОЮЗА

UDK 341.01

GENERAL DATA PROTECTION REGULATION IN THE EU IN RELATION TO CHILDREN: SCOPE OF APPLICATION

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SUMMARY

The article discloses the age requirements for the legality of processing personal data. It is concluded, that the current wording of Article 8 GDPR will lead to significant inconsistencies in practice. An analysis of the content of information provided to children is carried out. It is proposed to establish a relationship between the child's right to access the Internet and the right to protection of personal data. Web sites that contain violent content should have limited access through registration. During registration the age of the person should be checked using online technologies. In the case of a registration of a person under the age of 18, companies must request the consent from the parents for child's registration and processing of personal data, or evidence of child's emancipation.

Key words: personal data, GDPR, child, consent, international law, European law, American law.

ГЕНЕРАЛЬНИЙ РЕГЛАМЕНТ ЄС ЩОДО ЗАХИСТУ ПЕРСОНАЛЬНИХ ДАНИХ СТОСОВНО ДІТЕЙ: СФЕРА ЗАСТОСУВАННЯ

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АНОТАЦІЯ

У статті розкриваються вимоги до віку щодо законності обробки персональних даних. Зроблено висновок, що чинна редакція статті 8 Регламенту призведе до значних суперечностей на практиці. Проведено аналіз змісту інформації, що надається дітям. Пропонується встановити зв'язок між правом дитини на доступ до Інтернету та правом на захист персональних даних. Веб-сайти, які містять насильницький вміст, мусять мати обмежений доступ через реєстрацію. Під час реєстрації вік людини слід перевіряти за допомогою онлайнових технологій. У разі реєстрації особи молодше 18 років компанії мають вимагати від батьків згоду на реєстрацію дитини та обробку персональних даних або документ про емансипацію дитини.

Ключові слова: особисті дані, Генеральний регламент ЄС щодо захисту персональних даних, дитина, згода, міжнародне право, європейське право, американське право.

Statement of the problem. Society in a network world is not restricted with any boundaries. This fact has both positive and negative aspects. On the one hand, the absence of any boundaries intensifies the processes of human development, because since 1969, when the special network, named ARPANET [1], was founded and became the prototype of the modern Internet, humanity got the opportunity to obtain information from any source, to communicate, to develop any projects, to use the copyright objects, etc. On the other hand, boundlessness of the Internet created the background for numerous legal violations, which constitute challenges not only for individual national legal systems, but also for European and international law in general. Illegal personal data processing is one of such violations.

The relevance of the research topic is confirmed by the degree of non-disclosure of the general data protection regulation in the EU in relation to children.

Status of research. Scientific analysis of the problems of the age requirements for the legality of processing personal data is carried out by many foreign scientists. Among them it is necessary to name Dorde Krivokapic and Jelena Adamovic, Irene Kamara and Joseph Carr.

The Object and Purpose of the Article is the study of the scope application of general data protection regulation in the EU in relation to children.

Presentation of the main material. In May 2018 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) enter into the force. It is the first time, when the norms of direct action, which establish the protection of personal data of children, were established by the GDPR on the territory of Member States. A characteristic feature of legal regulation of personal data protection in the EU is equal status of children and adults, which is manifested in the absence of a separate legal act of the protection of children's rights online (compared, for example, with the United States, where the Act of the protection of children privacy online (COPPA) was adopted in 1998), and in the same definition of their rights regarding the personal data processing.

However, the GDPR contains norms, addressed directly to children. Particularly, according to the part 1 of Article 8 of the GDPR processing of personal data is considered to be legal in case of having the consent of a child, who is 16 years old. In cases with individuals, aged less than 16 years, it is necessary to obtain the consent of a child's parents or persons with parental responsibility in order to make data processing legal. Deviating from the general norms in Paragraph 2 of Part 1 of Article 8, European lawmaker provided an opportunity for states to set a lower age limit, but not crossing the threshold level of 13 years' age [2].

Thus, the national legislation of Member States of the EU must set the requirement to obtain parents' or guardians' consent for the legitimacy of data processing of children, aged 13 to 16 years. Moreover, such a flexible approach to determining the age limit produces many legal collapses.

At first, the age requirements of the GDPR do not correspond with the Basic international law in the sphere of protection of the children rights – the Convention on the rights of the child (hereinafter – the Convention). Particularly, according to Article 1 of the Convention a child means every human, being below the age of 18 years old, if under the law, applicable to the person, he/she doesn't reach adulthood earlier. Thus, the analysis of legal norms of the Convention and the GDPR gives the opportunity to state the following legal assessment: 1. The norms of law of the EU contradicts international law; 2. This contradiction generates two streams of the legal requirements for children personal data processing: 18 year age limit is to be applied to all norms, that contain mention of a child. Article 8 has a separate legal regime: it is applied to children under the age of 13–16 years. This duality of the rules regarding children may potentially cause some misunderstandings and misuse of the GDPR. [3] I'd like to draw your attention to the spirit of the GDPR, that does not foresee the dual legal regulation of the processing of personal data for children, and the possibility for minors to provide their own consent to the processing of personal data can be explained as follows.

Theoretically substantiate of the age requirement that set in the GDPR depends from the establishing for which law this age applies. The resolution of this issue is peculiar in the EU law, since the Charter of Fundamental Rights of the European Union (the Charter) provides the right to protection of personal data as a distinct right that is not covered by the right of respect for private life. So, Article 7 says that everyone has the right to respect for his private life. Article 8 establishes the right to protection of personal data. A slightly different approach is provided in the Convention on the Rights of the Child (Article 16) and the Convention on the Protection of Human Rights and Fundamental Freedoms (Article 8): the right to protection of personal data is not allocated as a distinct right, but it is considered within the framework of the right to respect for private life.

In spite of the poly-mediation of the definition of the right to protection of personal data and the right to respect for private life, both of these rights are non-property rights that are regulated by civil law in the countries of the continental legal family, respectively, the question of the age-old ability to exercise these rights must be decided on the basis of civil law.

On E.O. Khariton's opinion, right to respect for private life is an element of legal capacity [4]. The dynamic and static theories distinguish the legal content of legal capacity in the theory of civil law. In accordance with the dynamic theory, the content of legal capacity depends not only on its state recognition, but also on what specific rights has a legal person, and in which relations with other actors person actually resides [5].

According to the static theory, the content of legal capacity is entirely dependent on its state recognition. It doesn't depend on the relations of its carrier with other persons. In relations with other actors, specific powers and responsibilities are formed, the composition of which does not really remain unchanged for each individual legal person. But legal capacity is not specific right or responsibility, but an abstract and general precondition of their possession.

Given the fact that the right to protection of personal data is clearly regulated by a legal act, the static theory of legal capacity seems more appropriate. Accordingly, the right to protect personal data as an element of legal capacity abstractly arises from the moment of birth. Parents have particular powers of the subject of personal data until the child reaches the appropriate age (13–16 years).

A minor is empowered to exercise the right to protection of personal data when reaching a certain age. Similarly, for example, the right to a name is regulated, which arises from the moment of birth. Initially, it is carried out by parents – they register the newborn. The subsequent name change has certain age limits: for example, under Article 61-2 of the French Civil Code, parents may change the name of the child from 13 years old only with his/her consent [6]. From 16 years of age a minor can change her/his name on their own mind.

The coverage of the age limit for consenting to the processing of personal data through the prism of defining the legal nature of the right to the protection of personal data as an element of legal capacity allows us to state the absence of two legal flows, as indicated by Helen Costa and Milda Matsenayt. By setting the age of consent, the state thereby distributes the powers of the right to protection of personal data between parents and children, which are the only legal field (without graduation of rights based on age, as suggested by the scholars).

Thus, before reaching the relevant age (13–16 years) the right to protection of personal data (right to be forgotten, the right to access personal data, the right to amend, the right to restrict processing, the right to data portability, the right to object, etc.) belong to parents (guardians or other lawful representatives). From the moment of age, established by the state for granting consent, the juvenile independently carries out the foreseen powers.

Based on the foregoing, it can be stated that the GDPR does not contradict the Convention on the Rights of the Child on the definition of the age limits of childhood, since the General Regulations do not speak about who is a child, but only establishes the peculiarities of the realization of such non-property rights as the right to protection of personal data.

In addition, peculiarities of national legislation of EU Member States regarding the emancipation of juveniles were not taken into account during the development of the GDPR. For example, in Lithuania or Estonia juvenile may be emancipated, when they are 15 years, on the basis of a court resolution. For girls the age of emancipation can be less than 15 years in the case of pregnancy [7]. Based on the fact, that due to emancipation the young person gets full capacity, 16 age limit regarding consent for personal data processing contradicts the content of the category "capacity", and therefore the article requires clarification in this part.

Secondly, Article 8 of the GDPR brings an inconsistency among Member States in the European digital environment [8]. Particularly, the following question appears: if one state sets the requirement to get the parents' consent for the personal data processing at 13 years age, and another one sets the same requirement at 16 years' age, will the consent, given by persons over 13 year age, be valid in this another state? In addition, as according to the Article 3 of the Regulation it may be applied to enterprises, which are established or having domicile outside the territory of the EU, but offer services or goods to EU citizens, there is the incompatibility of the requirements of the GDPR with the American COPPA. Thus, according to the Article 1 of COPPA a child is a person under 13 years' age [9]. The relevant position of the USA compared with the EU

does not violate the norms of international law, because the USA is one of the three countries, which still has not signed the Convention on the rights of the child. The fact of "non-signing" of the Convention tells of open disregard of the international standards in the sphere of children rights protection by the United States of America. Accordingly, U.S. companies will require consent only from parents, whose children have not reached 13 years' age, what will determine inconsistency of its activity to the higher age requirements of European countries.

From the point of view of practical implementation of this provision, there may be some difficulties in checking of the age of the person, who registers or provides information. Existing web sites and services usually determine the minimum age (at least 16 or 18 years) in the information field of services using. In the graph "The terms and conditions of use" is prescribed: users should be aware, that in case of use of the services they are not less than 16 years for all third parties [10]. Before GDPR's entry into the force such privacy policy was generally acceptable. Further improvement of the mechanism of children rights online protection requires mandatory measures of verification of the person during registration, especially as to child's access to "adult" sites. Due to the above-mentioned, it is necessary to find out to which online content the requirement of parents' consent providing for the child's personal data processing is applied.

A literal interpretation of Article 8 of the GDPR indicates that parents' consent is required only in respect of offers of information society services directly to a child.

According to the Article 2 (a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, the information society service is any paid service, that is provided remotely using electronic means and upon individual request [11]. If to use this definition of information society services, the scope of applying of the requirement of parents' consent providing is limited. Particularly, consent is required only when paid services are provided, based on what the personal data processing in social networks, while receiving personal data from web sites, that provide free services, remains outside the scope of the Regulation, and accordingly, child's personal data would remain unprotected. However, systematic interpretation of the GDPR testifies, that the developers of the Regulation have expanded the concept of "information society service". Thus, Article 3 refers to the expansion of the GDPR rules for all operations, related to the offer of goods or services, regardless of payment. Of course, the ambiguity of these EU legal acts generates multi interpretation for category "information society service".

The GDPR contains direct regulations of a restrictive nature, which will influence negatively on the state of children personal data protection. Article 2 of the Regulation provides the extension of its provisions only to the personal data processing totally or partially with automated means of data processing. The GDPR left out the data processing, which occurs outside of an automated system, – in case of social networks or non-skilled users. [2]

In this context, one of COPPA's rules may attract the attention. According to Article 4 information about the child can be obtained from the web site or online service, dedicated to children, through the home page of the web site; preferential service; electronic mail; ads web site or in chat. [9] This Article has double restrictive meaning compared with the GDPR. At first, the American legislator has limited the effect of normative rules with indication on the direction of web sites – they contain information and provide services, dedicated just for children. It means that, for example, the requirement of parents' consent does not apply for scientific and educational sites. Secondly, the completeness of the Internet sources list of information about a child limits the cases of its application.

Conclusions. Thus, age limits for the consent providing for personal data processing require some refinement. With the purpose of bringing into line with the normative provisions of the Convention on the rights of the child, it is necessary to set 18 years' age to provide independent consent for personal data processing, except the cases of emancipation of juveniles, provided for by laws of states. The 18 year age limit will contribute to establishing of additional guarantees regarding the limitation and control of children access to web sites, which contains information of a sexual or violent nature, by parents. Information society service is any paid or free service, which is provided remotely via electronic means and upon individual request. Depending on the type (content) provided services should be classified into: 1) services, provided with verification of the person registering; 2) services, that do not require verification of the person registering. Such cooperation of protective measures regarding the realization of the right of access to the Internet and the right for personal data protection will provide an effective mechanism for their realization taking into account network threats.

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