

GUIDELINES ON THE APPLICATION OF LAW NO. 363/2018

Law no. 363/2018 on the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection, prosecution and control of criminal offences or the execution of criminal penalties, educational and safety measures, as well as on the free movement of such data **implements**, in Romania, **Directive (EU) 2016/680** 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

1. What is the scope of Law no. 363/2018?

Law no. 363/2018 applies to the processing of personal data performed by the competent authorities for the purposes of the prevention, investigation, detection, prosecution and control of criminal offences, the execution of criminal penalties, educational and safety measures, as well as safeguarding and maintaining of public order and security by the competent authorities, within the competence limits established by law.

The processing of personal data for the execution of the activities for safeguarding and maintaining of the public order and safety is performed only if these are provided by law and are necessary for the prevention of a danger at least in relation to the life, physical integrity or health of a person or of his/her property, as well as for the combat of criminal offences.

Law no. 368/2018 applies to the processing of personal data performed wholly or partially by automated means, as well as to the processing, through other means than by automated ones, of personal data that are part of a record system or are intended to be included within such system.

(Article 1 paragraphs (1) and (2) and Article 3 paragraphs (1) and (2) of Law no. 363/2018)

2. When Law no. 363/2018 does not apply?

Law no. 363/2018 does not apply to the processing of personal data performed for the execution of the activities from the national defence and national security domain, within the limits and with the restrictions established under the legislation applicable herein.

(Article 3 paragraph (3) of Law no. 363/2018)

3. What does it mean competent authority?

Competent authority means any public authority or any other body or entity entrusted to exercise the public authority, competent for the prevention, investigation, detection, prosecution and control of the criminal offences or the execution of criminal penalties, including in the field of safeguarding and maintaining of the public order and safety (for example, law enforcement body, prosecution).

(Article 4 letter g) of Law no. 363/2018)

4. What does it mean controller and processor?

Controller means the competent authority which, alone or jointly with others, determines the purposes and means of the processing of personal data; when the means and purposes are determined through a legal act, the controller or the specific criteria for its establishment are provided under the reference legal act (please see point 3).

The processor means the natural or legal person, public institution/authority, agency or other body that processes personal data on behalf of the controller.

(Article 4 letters h) and i) of Law no. 363/2018)

5. Which is the National Supervisory Authority?

The supervision and control of the personal data processing performed based on Law no. 363/2018, for the purpose of the protection of the fundamental rights and freedoms of natural persons, regarding the processing and for facilitating the free movement of the personal data within EU, is performed by the National Supervisory Authority for Personal Data Processing, designated pursuant to Law no. 102/2005 on the set up, organisation and functioning of the National Supervisory Authority for Personal Data Processing, republished.

(Article 4 letter o) and Article 51 paragraph (1) of Law no. 363/2018)

6. The controllers or processors shall maintain a record of the processing activities?

The controller shall maintain the record of all categories of processing activities that are under its responsibility. The record of the processing activities includes the following information:

- a) the name and contact details of the controller and, where applicable, of the joint controller and of the data protection officer;
- b) the purpose or purposes of the processing;
- c) the categories of recipients to whom the personal data have been or will be disclosed, including the recipients in third countries or international organisations;
- d) a description of the categories of data subjects and of the categories of personal data processed;
- e) as the case may be, mentions regarding the use of profiling;
- f) as the case may be, categories of transfers of personal data to a third country or an international organisation;
- g) an indication of the legal basis of the processing, including of the transfers of personal data performed;
- h) if possible, a general description of the envisaged deadlines for the erasure of the different categories of personal data;
- i) if possible, a general description of the technical and organisational security measures referred to in Article 35 of Law no. 363/2018.

(Article 27 of Law no. 363/2018)

Also, the processor shall maintain the record of all categories of processing activities under its responsibility. This record shall contain the following information:

- a) the name and contact details of the processor or processors, of each controller on behalf of which the processor is acting and, as the case may be, of the data protection officer;
- b) the categories of processing activities carried out on behalf of each controller;
- c) as the case may be, the transfers of personal data to a third country or an international organisation, including the identification of the third country or of that international organisation, when explicit instructions have been received for this purpose from the controller;

- d) if possible, a general description of the technical and organisational security measures referred to in Article 35 of Law no. 363/2018.

(Article 28 of Law no. 363/2018)

7. The controller shall designate a data protection officer?

Yes, the controller shall appoint a data protection officer.

The courts are exempted from the obligation to appoint a data protection officer when they act within the exercise of their judicial function.

(Article 40 paragraphs (1) and (2) of Law no. 363/2018)

8. Who can be designated as data protection officer?

Can be designated as data protection officer the person that fulfils the following conditions:

- a) has the corresponding professional qualities;
- b) has the expert knowledge in the field of the data protection law and practices;
- c) has the ability to fulfil the tasks referred to in Article 42 of Law no. 363/2018,

respectively:

- informs and advises the controller and his employees who carry out the processing of their obligations pursuant to Law no. 363/2018 and other legal provisions regarding the protection of personal data;
- monitors the observance of the provisions of Law no. 363/2018, of other legal provisions regarding the protection of personal data;
- provides advise, where requested, regarding the data protection impact assessment and monitors its performance;
- cooperates with the supervisory authority;
- is appointed as contact point for the supervisory authority on issues related to the processing.

(Article 40 and Article 42 of Law no. 363/2018)

9. How is the data protection officer notified to the National Supervisory Authority?

The controller has the obligation to publish the contact data of the data protection officer and to communicate them to the National Supervisory Authority (ANSPDCP).

The communication of the data protection officer to the National Supervisory Authority is performed by filling in the online form for declaring the data protection officer, available on the website of the National Supervisory Authority www.dataprotection.ro, under Section "Data protection officer", followed by clicking the button "Trimite chestionarul".

(Article 40 paragraph (5) of Law no. 363/2018)

10. How are the data of the data protection officer amended within the online form submitted to the National Supervisory Authority?

In the event of changes/completions regarding the information contained in the declaration form of the data protection officer, it is necessary to fill in and submit to the National Supervisory Authority a new form in the same way as described at point 9.

11. What are the rights of the data subject and how can these rights be exercised?

According to Law no. 363/2018, the data subject has certain rights:

- **right to information** (Articles 13 and 14);
- **right of access** (Article 16);
- **right not to be subject to a decision based solely on automated processing** (Article 11);
- **right to rectification** (Article 18);
- **right to erasure** (Article 18);
- **right to restriction** (Article 18);
- **right to submit a complaint to the National Supervisory Authority** (Article 57).

In order to exercise their rights is necessary for the data subject to submit a request to the controller in this respect. (Article 12)

12. What is the timeframe for the controller to answer to a request of exercise of the rights of the data subject?

The controller shall inform the data subject, in writing, regarding the outcome of the requests submitted based on this law within maximum 60 calendar days.

In case the requests from a data subject are manifestly unfounded or excessive, in particular due to their repetitive nature, the controller may:

- a) charge a reasonable fee based on the administrative costs for the provision or communication of the information or for carrying out the measures requested; or
- b) to refuse to treat the request.

The amount of the fee shall be established, respectively updated through an administrative act issued at the level of the controller.

(Article 12 of Law no. 363/2018)

13. What information shall the controller provide to the data subject?

The controller shall provide the data subjects with the following categories of information:

- a) the identity and contact details of the controller;
- b) the contact details of the data protection officer, as the case may be;
- c) the purposes for which the personal data are processed;
- d) the right to lodge a complaint to the National Supervisory Authority and the contact details of the latter;
- e) the right to request to the controller access to the personal data concerning the data subject or the rectification or erasure of this data or the restriction of their processing.

When the law does not provide otherwise, the controller shall provide the data subject also with the following additional information:

- a) the legal basis for the processing;
- b) the period for which the personal data will be stored or, where it is not possible, the criteria used to determine that period;
- c) as the case may be, the categories of recipients of the personal data, including from third countries or international organisations;

- d) any other additional information, depending on the specificity of the processing activities, in particular where the personal data are collected without the knowledge of the data subject.

(Article 13 and Article 14 of Law no. 363/2018)

14. When can the controller decide the delay, restriction or omission of the information of the data subject?

The controller may decide, as the case may be, the delay, restriction or omission to provide the information to the data subject according to the provisions of Article 14 of Law no. 363/2018 only if, taking into consideration the fundamental rights and the legitimate interest of the data subject, such a measure is necessary and proportionate in a democratic society in order to:

- a) avoid obstructing the proper conduct of the criminal case;
- b) avoid prejudicing the prevention, detection, investigation, prosecution and control of the criminal offences or the execution of penalties;
- c) protect public order and security;
- d) protect national security;
- e) protect the rights and freedoms of others.

The measures of delay of providing the information can be taken for a period that cannot exceed one year, in case the applicability of the conditions that make impossible the communication is limited in time. The measure of delay can be extended within the one year term. At the expiration of the term for which the delay measure for the provision of information has been taken, the controller provides the information provided by law.

The data subject is informed in writing, in maximum 60 calendar days as of the registration of the request, regarding the term for which this measure has been taken, as well as the fact that it can lodge with the supervisory authority a complaint against the decision of the controller or can challenge in court the decision of the controller.

The measure of restriction of providing the information can be decided in case the applicability of the conditions that make the communication impossible is not limited in time. In case of restriction of the provision of information, the controller provides to the data subject an answer. The form and content of the answer are established by each controller.

The measure of omission of providing the information is taken in case even the simple information of the data subject regarding one or several processing operations is able to affect one of the activities mentioned above at letters a)-d).

The omission of providing the information can be partial or total. In case of partial omission, the data subject is informed, within maximum 60 calendar days from the registration of the request, regarding the categories of processing that are not able to affect the activities above mentioned. In case of total omission, the controller provides to the data subject an answer. The form and content of the answer are established by each controller.

(Article 15 of Law no. 363/2018)

15. Can the data subject have access to his personal data?

The data subject has the right to obtain from the controller, at request and free of charge, the confirmation of the fact that his personal data are or are not processed by it. In case it processes personal data concerning the data subject, the controller shall inform him/her, within maximum 60 calendar days from the registration of the request, together with the confirmation, inclusively the personal data that are subject to the processing, as well as the following information:

- a) the purposes and legal basis for the processing;
- b) the categories of personal data concerned;
- c) the categories of recipients of the personal data to whom the personal data have been disclosed, in particular the recipients from third countries or international organisations;
- d) where it is possible, the period for which the personal data will be stored or, where it is not possible, the criteria used to determine that period;
- e) the right to request to the controller the rectification or erasure of the personal data or the restriction of the processing of the personal data concerning the data subject;
- f) the right to lodge a complaint to the National Supervisory Authority and the contact details of the latter;
- g) the communication of the personal data that are currently processed and any available information regarding the origin of the personal data.

(Article 16 of Law no. 363/2018)

16. Can the controller decide the limitation of the access right?

The controller can decide to limit the right of access taking into consideration the fundamental rights and legitimate interests of the natural person, if such measures is necessary and proportionate in a democratic society, in order to:

- a) avoid obstructing the proper conduct of the criminal case;
- b) avoid prejudicing the prevention, detection, investigation, prosecution and control of the criminal offences or the execution of penalties;
- c) protect public order and security;
- d) protect national security;
- e) protect the rights and freedoms of others.

(Article 17 of Law no. 363/2018)

17. Can the data subject obtain the rectification, erasure or restriction of the personal data?

The data subject has the right to obtain from the controller, at request and free of charge, the rectification of the inaccurate personal data relating to him/her.

The data subject has the right to have the personal data relating to him/her completed, including by means of providing a supplementary statement.

The controller has the obligation to restrict the processing of personal data (and not to erase them) in case one of the following cases is applicable:

- a) the accuracy of the personal data is contested by the data subject and their accuracy or inaccuracy cannot be ascertained; or
- b) the personal data must be maintained for the purposes of evidence.

In case of restriction, erasure or restriction of the personal data the controller shall verify if these have been made available to a recipient before the rectification.

In case the personal data have been made available to a recipient before the rectification, the controller shall provide it with a notice regarding the rectification, erasure or restriction of the processing of personal data, as the case may be.

(Article 18 and Article 19 of Law no. 363/2018)

18. How is the transfer of data to a third country or international organisation performed?

The transfer of personal data which are undergoing processing or are intended for processing after the transfer to a third country (outside the European Union and the European Economic Area) or to an international organisation, including subsequent transfers to another third country or another international organisation, can take place solely with the observance of the provisions of this law and only if the following conditions are met:

- a) the transfer is necessary for the purposes provided in Article 1 of Law no. 363/2018, respectively: for the purposes of the prevention, investigation, detection, prosecution and control of criminal offences or the execution of criminal penalties, educational and safety measures, as well as for the safeguarding and maintaining of the public order and safety by the competent authorities;
- b) the personal data are transferred to a controller in a third country, that is a competent authority, in the sense of Article 4 letter g) of Law no. 363/2018, or to an international organisation, established for the purpose provided in article 1 of Law no. 363/2018;
- c) where the personal data have been provided or made available by the competent authorities of another Member State, that Member State has given its prior authorisation to the performance of the transfer, according with its national law;
- d) the Commission has adopted an adequacy decision pursuant to Article 36 of Directive (EU) 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA or, in absence of such a decision, appropriate safeguards exist or have been provided in accordance with Article 37 of the Directive or, in the absence of an adequacy decision according to Article 36 and of appropriate safeguards in accordance with Article 37, derogations for specific situations apply pursuant to Article 38;
- e) in the case of a subsequent transfer to another Member State or international organization, the competent authority that carried out the initial transfer or another competent authority of the same Member State authorises the subsequent transfer, taking into due consideration all the relevant factors.

The Romanian competent authorities authorize the personal data transfer to a third country or international organization, at the request of a competent authority from a Member State only subject to the fulfilment of the conditions laid down by Law no. 363/2018.

(Article 43 of Law no. 363/2018)

19. When is the transfer of data to a third country or international organisation always allowed?

The transfer of personal data to a third country or international organisation is always possible when **the European Commission has decided that the third country**, territory or one or several determined administrative units from that third country or international organisation **ensures an adequate level of protection**.

The Romanian competent authorities shall monitor the list of third countries, territories and determined administrative units from third countries and of international organisations for which the European Commission decided that the adequate level of security is ensured or is no longer ensured, by consulting the Official Journal of the European Union and the website of the European Commission.

(Article 44 of Law no. 363/2018)

20. What are the other cases in which the transfer of personal data to a third country or international organisation can be performed?

In the absence of a decision adopted by the European Union, the personal data transfer to a third country or international organisation **may take place where:**

- a) appropriate safeguards regarding the protection of personal data have been established in a legally binding act; or
- b) the controller has assessed all the circumstances regarding the transfer of personal data and concluded that there are appropriate safeguards with regard to the protection of personal data.

In case the above conditions can not be fulfilled, a transfer or a category of transfers of personal data to a third country or an international organisation can be carried out only if the transfer is necessary for achieving one of the following purposes:

- a) to protect the vital interests of the data subject of another person, such as the prevention of an immediate threat against their life, physical health or health;

- b) to safeguard the legitimate interests of the data subject, in case there is a specific legal provision in this respect;
- c) to prevent an immediate and serious threat to the public order and security of a Member State or third country;
- d) in individual cases for the purposes set out in Article 1 of Law no. 363/2018;
- e) in an individual case for the establishment, exercise or defence of a right before courts in relation to the purposes set out in Article 1 of Law no. 363/2018.

(Article 45 and Article 46 of Law no. 363/2018)

21. What does it mean interoperability?

Interoperability means the operation to connect the personal data contained within a file, database or automated evidence system with those contained in one or more files, databases or automated evidence systems that are managed by different controllers or by the same controller, but having different purposes, similar or correlated, as the case may be.

(Article 4 letter q) of Law no. 363/2018)

22. Can the personal data record systems be interoperated?

The personal data record systems or, as the case may be, the automated means for personal data processing that the controllers hold, for different purposes, can be interoperated for the achievement of the research and prevention of crimes activities.

The interoperability of the personal data record systems or of the automated means for personal data processing can also be carried out with record systems or automated means for personal data processing owned by other controllers, national public authorities and institutions for the purpose of performing research and prevention of crimes activities.

In case of the crimes prevention activities, for safeguarding and maintaining of the public order and safety, the personal data record systems or automated means for the personal data processing can be interoperated with:

- a) The National Registry for Persons Record;
- b) The National Registry for Simple Passports Record;
- c) The National Registry for Driver Licenses and Registered Vehicles Record.

(Article 49 and Article 50 of Law no. 363/2018)

23. What measures should the controllers and processors take in order to ensure the security of the processing of personal data?

The controller, taking into consideration the nature, the scope, context and purposes of the processing, as well as the degree of interference for the rights and freedoms of natural persons, shall implement appropriate technical and organisational measures to ensure and be able to demonstrate the carrying out of the processing according to this law.

The measures implemented shall be proportionate to the processing operations carried out by the controller and include corresponding policies for the personal data protection.

For the purpose of efficient application of the personal data protection principles, as well as for the minimisation of personal data processing, but also for the integration of the necessary guarantees within the processing, in order to fulfil the requirements of Law no. 363/2018 and for the protection of the data subject rights, the controller shall, when establishing the processing means, as well as the effective processing, to implement appropriate technical and organisational measures, considering:

- a) the current state of technology;
- b) the costs of implementation;
- c) the nature, scope, context and purposes of the processing;
- d) the risks with varying degrees of likelihood and gravity to the rights and freedoms of natural persons that the processing presents.

The controller shall implement appropriate technical and organisational measures to ensure that, by default, only personal data necessary for each specific purpose of the processing are processed.

(Article 22 and Article 23 of Law no. 363/2018)

24. What are the tasks of the National Supervisory Authority (ANSPDCP)?

The National Supervisory Authority fulfils the monitoring and control tasks provided under Article 57 paragraph (1) letters b), c) and t) from Regulation (EU) 2016/679, as well as the following:

- a) promotes public awareness actions addressed to the controllers and processors in relation to the obligations incumbent according to Law no. 363/2018;
- b) provides, at request, to any data subject information regarding the exercise of his/her rights based on Law no. 363/2018 and, as the case may be, to cooperate with the supervision authorities from other Member States for this purpose;

- c) receives the complaints lodged by a data subject or by an entity, organisation or association, according to Article 55 or 57 of Law no. 363/2018, investigates in an appropriate manner the object of the complaint and informs the person that lodged the complaint on the evolution and result of the investigation, within a reasonable deadline, specifically if it is necessary to perform a more detailed analysis or the coordination with another supervisory authority;
- d) verifies the lawfulness of the processing in accordance with Article 20 of Law no. 363/2018 and informs the data subject, within a reasonable deadline, regarding the result of the check based on Article 20 paragraph (3) of the same law or regarding the reasons for which the check did not take place;
- e) cooperates, including by exchanging information, with other supervisory authorities and offers mutual assistance to ensure the consistency of the application and observance of Law no. 363/2018;
- f) performs investigations regarding the application of Law no. 363/2018, inclusively based on information received from another supervisory authority or public authority;
- g) monitors the relevant evolutions, to the extent these have an impact on personal data protection, in particular the evolution of the information and communication technology;
- h) offers counselling regarding the processing operations mentioned in Articles 33 and 34 of Law no. 363/2018.

Also, the National Supervisory Authority has the following powers:

- a) to issue warnings in attention of a controller or processor regarding the likelihood for the envisaged processing activities to breach the provisions of Law no. 363/2018;
- b) to order the controller or processor to ensure the compliance of the processing activities with the provisions of Law no. 363/2018, mentioning, as the case may be, the manner and deadline for this, in particular by ordering the rectification or erasure of personal data or the restriction of their processing, according to Article 18 of Law no. 363/2018;
- c) to order the temporary or final prohibition of processing.

When exercising the investigative powers, the National Supervisory Authority has access to all personal data processed by the controller and processor, as well as to all information necessary to carry out its tasks.

The National Supervisory Authority shall not be competent to supervise processing operations of courts acting in their judicial capacity.

(Article 52 and Article 53 of Law no. 363/2018)

25. What sanctions can the National Supervisory Authority apply in case it finds the violation of the provisions of Law no. 363/2018?

In case a violation of the provisions of Law no. 363/2018 by the controller or, as the case may be, by the processor is found, the National Supervisory Authority issues a minutes of finding and sanction of the contravention through which it imposes the **warning** sanction, according to Article 58 paragraph (2) letter b) of General Data Protection Regulation, to which it shall attach a **remedial plan**.

The remediation deadline is established depending on the risks associated to the processing, as well as on the measures necessary to be taken in order to ensure the compliance of the processing.

Within 10 days from the expiry of the remediation deadline, the **National Supervisory Authority may resume the control**.

If, when resuming the control, the National Supervisory Authority finds that the controller did not totally take the measures provided by the remedial plan, depending on the circumstances of each case, the Authority may impose the administrative sanction of fine.

The National Supervisory Authority may impose fines from Lei 10,000 to Lei 100,000, respectively from Lei 20,000 to Lei 200,000, depending on the contraventions provided by Article 61 of Law no. 363/2008 found.

(Article 61, Article 62 and Article 63 of Law no. 363/2018)