

REFLECTIONS ON THE CONDITION PROVIDED BY ART. 2 (1) GDPR: PERSONAL DATA TO BE PART OF A FILING SYSTEM

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Abstract

While the processing of personal data which are carried out in whole or in part by automated means are included in the material scope of 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, the latter applies to manual processing only in so far as personal data are part of or intended to be part of a filing system.

Consultation, disclosure by transmission, dissemination or making available in any other way constitutes processing within the meaning of the General Data Protection Regulation (GDPR). If such processing is carried out by processing other than by automated means, in order to be covered by Regulation (EU) 2016/679 the data must be part of a filing system or be intended to be part of such a system. Thus, a question arises: to what extent making available by manual processing falls within the material scope of the General Data Protection Regulation?

The fulfilment of the condition to form part of a filing system or to be intended to form part of a filing system depends on the specific situation and must be established on a case-by-case basis. On the other hand, the interpretation of the Court of Justice of the European Union, which has ruled that the concept of a 'filing system' covers data that are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use, without being necessary to include any search methods, must be taken into account in all cases. Nevertheless, if personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data is not easily retrievable, it is still protected under the right to privacy as long as the data belongs to the sphere of private life.

Keywords: GDPR, material scope, processing other than by automated means, filing system, paper records.

1. Preliminary considerations

Both art. 8 (1) of the Charter of Fundamental Rights of the European Union¹ and art. 16 (1) of the Treaty on the Functioning of the European Union² provide that everyone has the right to the protection of their personal data and, as Recital (4) of the General Data Protection Regulation (GDPR)³ states, "(t)he processing of personal data should be designed to serve mankind".

Captivated by fast-evolving technologies that more or less really serve mankind, we are tempted to be currently concerned only with the processing of personal data by automatic means, somehow overlooking *manual processing* executed by humans without using tools or machines (processing other than by automated means). However, the latter is not less relevant for the rights of data subjects, since information technology and digitization have not completely wiped out *paper records*.

On the other hand, the protection of individuals in relation to the processing of their personal data under

Regulation (EU) 2016/679 exists only as long as the data processing falls within its *material scope*. While the processing of personal data by automated means is covered by the General Data Protection Regulation, regardless of the technology used⁴, according to Recital (15), "(t)he protection of natural persons should apply [...] to manual processing, [only] if the personal data are contained or are intended to be contained in a *filing system*".

Thus it becomes obvious that, in order to qualify a *processing other than by automated means* as falling within the material scope of Regulation (EU) 2016/679, we need to have a clear view of the condition laid down in art. 2 (1) GDPR: "personal data which form part of a filing system or are intended to form part of a filing system", as only manual data processing that meets this condition falls under the General Data Protection Regulation.

In order to determine the limits of this so important condition for manual processing, the letter of the law, the relevant jurisprudence, as well as the doctrinal guidelines need to be analysed for a full view on the matter.

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¹ Published in the Official Journal of the European Union C 326 from 26 October 2012.

² *Ibidem*.

³ 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, published in the Official Journal of the European Union L 119 from 4 May 2016.

⁴ See Recital 15 GDPR: "In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used".

2. 'Filing system' as per Regulation (EU) 2016/679

Recital (15) tells us that "(i)n order to prevent creating a *serious risk of circumvention*, the protection of natural persons should be *technologically neutral* and should not depend on the techniques used. The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a *filing system*. Files or sets of files, as well as their cover pages, which are not *structured according to specific criteria* should not fall within the scope of this Regulation".

The recital sets out the reasons for the content of art. 2 (1) GDPR according to which "(t)his Regulation applies to the *processing of personal data wholly or partly by automated means* and to the processing *other than by automated means* of personal data which form part of a filing system or are intended to form part of a filing system". As well as for the art. 4 (6) GDPR which defines the 'filing system' as "any *structured set* of personal data which are accessible according to *specific criteria*, whether centralised, decentralised or dispersed on a functional or geographical basis".

These provisions have taken over the content of art. 2 (c) and art. 3 (1) from Directive 95/46/EC⁵ which has been superseded by the General Data Protection Regulation.

3. Interpretation of 'filing system' concept

The CJEU had the opportunity to interpret the notion of 'filing system' under Directive 95/46/EC in case C-25/17 - *Jehovan todistajat*. Since Regulation (EU) 2016/679 has taken over the provisions of the directive, the Court's interpretation is still relevant today.

On the one hand, the referring court argued that the lack of specific lists or data sheets or other comparable search method makes it impossible to classify as a 'filing system' the data processed

manually under the Finnish law. On the other hand, it raised the issue of the effect on that classification of the fact that the data can be easily searched for later use and without excessive cost.⁶

The Advocate General considered that the criterion of data accessibility is fulfilled when a structure, even if not particularly sophisticated, allows easy access to the data collected⁷. In the same vein, the Court ruled that "(a)s is clear from recitals 15⁸ and 27⁹ of Directive 95/46, the content of a filing system must be structured in order to allow easy access to personal data. Furthermore, although art. 2 (c) of that directive does not set out the criteria according to which that filing system must be structured, it is clear from those recitals that those criteria must be 'relat[ed] to individuals'. Therefore, it appears that the requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved.

Apart from that requirement, art. 2 (c) of Directive 95/46 does not lay down the practical means by which a filing system is [to] be structured or the form in which it is to be presented. In particular, it does not follow from that provision, or from any other provision of that directive, that the personal data at issue must be contained in data sheets or specific lists or in another search method, in order to establish the existence of a filing system within the meaning of that directive"¹⁰.

Even under the General Data Protection Regulation the requirement that the set of personal data must be '*structured according to specific criteria*' is simply intended to enable personal data to be easily retrieved. Consequently, as the CJEU ruled, in order for a set of data to fall within the concept of a 'filing system', it is not necessary that they include data sheets, specific lists or other search methods.

For this reason, natural persons acting under the authority of the controller or the processor might not even realize that the way they centralize certain data has created a data filing system for the purpose of the definition provided by art. 4 (6) GDPR¹¹. On the other

⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Communities L 281 from 23 November 1995.

⁶ CJEU, *Opinion of Advocate General Mengozzi*, delivered on 1 February 2018, C-25/17 - *Jehovan todistajat*, ECLI:EU:C:2018:57, para. 53.

⁷ *Idem*, para. 57.

⁸ Recital (15) of Directive 95/46/EC: "(w)hereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question".

⁹ Recital (27) of Directive 95/46/EC: "[...] whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data [...]".

¹⁰ CJEU, *Judgment of 10 July 2018*, C-25/17 - *Jehovan todistajat*, ECLI:EU:C:2018:551, published in the electronic Reports of Cases (Court Reports - general), para. 57 and 58.

¹¹ Daniela Simionovici, Daniela Irina Cireașă, Cătălina Lungu, Marius Florian Dan, *GDPR aplicat: instrument de lucru pentru implementarea Regulamentului UE 679/2016* [Applied GDPR: Working Tool for the Implementation of Regulation (EU) 2016/679] (Iași, Lumen, 2019), p. 60.

hand, certain records, as most employment records kept on paper, are likely to fall within this definition¹².

As the scope of the protection conferred on data subjects by Regulation (EU) 2016/679 does not depend on the techniques used, since the protection of natural persons should be technologically neutral, the concept of ‘filing system’ was broadly defined precisely to avoid the risk of that protection being circumvented. Since there are no strict or restrictive rules on how to structure the filing system, the criteria by which the data are structured may differ from case to case, depending on the nature of the data, the nature of the activity or the purpose for which it is processed¹³.

Thus, when analysing a filing system created by manual processing, the structuring according to specific criteria has to be viewed in terms of data accessibility. As one author said, “(t)he touchstone is that the processing of personal data other than by automated means will be subject to the GDPR if the data is structured in such way that information about particular individuals can be readily located”¹⁴. Evidently, the data can be structured according to *any* specific criteria.

For this reason the files or sets of files, as well as their cover pages, which are not structured according to specific criteria are excluded from the material scope of the General Data Protection Regulation as such sets of personal data are not easily retrievable for subsequent use. That is why we can speak of an absolute presumption of accessibility in the case of processing of personal data by automated means.

It has been stated in the literature that “manual processing only falls within the definition of ‘processing’ under the GDPR if *two conditions* are met: said data must be contained or be intended to be contained in a filing system [...] [and] those files must be structured according to specific criteria”¹⁵.

In reality we are dealing with only one condition: *data to be structured according to specific criteria*. As

soon as the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system. Or, put more simply, structured sets of data make a filing system, considering that paper files can be structured in a way which makes finding information quick and easy¹⁶. As one author observed, “l’ordre et la méthode conduisent inévitablement à l’application de la loi”¹⁷ (order and method unavoidably lead to the application of the law).

Although another author considers that the data of a specific person should be found “without the need to perform a time consuming search through all entries in the set”¹⁸, it is obvious that data accessibility exists even if the data of that specific person is the last entry in the set, as we find what we are looking for in the last place we look.

Also, “personal data are subject to legal protection even if they merely may be included in a personal data filing system, irrespective of whether they are eventually included in such a filing system”¹⁹, so the fact that the data collected have not yet been included in a record system does not preclude the application of the Regulation²⁰.

In view of the above, it can happen that personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data doesn’t meet the condition to form part of a filing system or to be intended to form part of such a system, or better said for the data is not structured according to specific criteria and consequently it is not easily retrievable.

However this doesn’t mean that such data is unprotected under the law, as long as they belong to the sphere of private life protected by art. 7 of the Charter of Fundamental Rights of the European Union, art. 8 (1) of the European Convention On Human Rights²¹, and last but not least by art. 26 (1) of the Romanian Constitution²² and art. 71 of the Civil Code²³. Thus, even the personal data contained in files or sets of files,

¹² Article 29 - Data Protection Working Party, *Opinion 8/2001 on the processing of personal data in the employment context* (5062/01/EN/Final WP 48, adopted on 13 September 2001), 13, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp48_en.pdf.

¹³ Flavia Barbur, *Protecția datelor cu caracter personal: ghid practic* [Protection of Personal Data: A Practical Guide], C.H. Beck Publishing House, Bucharest, 2020, p. 18.

¹⁴ Philip Coppel, *Information Rights: A Practitioner’s Guide to Data Protection, Freedom of Information and other Information Rights*, fifth edition (Oxford: Hart Publishing, 2020), p. 184, Google Books.

¹⁵ Paul Voigt, Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Cham: Springer Nature, 2017), 10, Google Books. See also Luca Tosoni in Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Laura Drechsler (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: Oxford University Press, 2020), p. 142.

¹⁶ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law* (Luxembourg: Publications Office of the European Union, 2018), p. 100.

¹⁷ Cécile de Terwangne, “La difficile application de la législation de protection des données à caractère personnel: observations sous Cass. (2e ch.), 22/02/2017”, *Journal des Tribunaux* 38, no. 6708 (2017): p. 753.

¹⁸ Mariusz Krzysztofek, *GDPR: Personal Data Protection in the European Union* (Alphen aan den Rijn: Kluwer Law International, 2021), §3.06 Key Definitions [C] Filing System, Google Books.

¹⁹ *Idem*, §3.02 Material Scope.

²⁰ Flavia Barbur, *Protecția datelor cu caracter personal: ghid practic* [Protection of Personal Data: A Practical Guide], p. 15.

²¹ Ratified by Law no. 30 of 18 May 1994, published in the Official Gazette of Romania, Part I, no. 135 from 31 May 1994.

²² Republished in the Official Gazette of Romania, Part I, no. 767 from 31 October 2003.

²³ *Law no. 287 of 17 July 2009* on the Civil code, republished in the Official Gazette of Romania, Part I, no. 505 from 15 July 2011.

as well as in their cover pages, which are not structured according to specific criteria, are protected under the law, albeit not by Regulation (EU) 2016/679.

Another hypothesis is that of personal *data processed partly by automated means*, in which case the General Data Protection Regulation applies without any other distinction. Actually, most processing today is in part automated considering a typical life cycle of data that starts with the collection and ends with its erasure. Somewhere along the way we are bound to find some degree of automation, such as scanning a document submitted on paper, entering the data from paper documents to computerised systems or parallel archiving of paper and digitalised documents²⁴.

As already mentioned, information technology and digitization have not completely wiped out paper records, but in most cases these records are tainted by some automated processing which ensures their entry into the material scope of Regulation (EU) 2016/679, irrespective of the fact that the personal data are contained or are intended to be contained in a filing system. Thus, an absolute presumption of accessibility exists even in the case of processing done in part by automated means.

However, “taking of notes on sheets, the consultation of isolated paper documents or the sending by ordinary mail of photocopies of paper documents which are not extracted from a «structured set of personal data which are accessible according to specific criteria» are, as for them, outside the scope of the GDPR”²⁵, personal data contained therein being protected under the right to privacy.

4. Correlations between making data available and the ‘filing system’

The concept of ‘processing’ defined in art. 4 (2) GDPR covers all the life cycle of data from collection to erasure or destruction. In between the two moments there are operations that stand alone as processing, such as consultation, disclosure by transmission, dissemination or otherwise making available, operations not without impact on fundamental rights and freedoms.

If such processing is carried out manually, in order to be covered by Regulation (EU) 2016/679, the data must be part of a filing system or be intended to be part of such a system. Thus, a question arises: to what

extent does the consultation, disclosure by transmission, dissemination or making available by manual means fall within the material scope of the General Data Protection Regulation?

Returning to CJEU’s interpretation in case C-25/17 - *Jehovan todistajat*, we have to remember that “the requirement for the set of personal data to be ‘structured according to specific criteria’ is simply intended to enable personal data to be easily retrieved”²⁶.

So, as soon as the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system, the information being quick and easy to find. Also, the fact that data can be structured according to *any* specific criteria must not be overlooked.

The core of the ‘filing system’ concept is the easy access to the data collected. Data accessibility favours consultation, disclosure by transmission and dissemination of personal data. In short, it makes the personal data available. This is the reason why the material scope of Regulation (EU) 2016/679 covers even manual processing, although “this works much slower and less data can be processed”²⁷.

The ease of access explains the need for technical and organisational measures for protecting personal data against unauthorised access, accidental or unlawful disclosure, transfer or other unlawful processing. That is why art. 31 (4) is particularly relevant for manual processing, which provides that “(t)he controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller”. Also, offering adequate data security training and education to staff members is an important element of effective security precautions, but without overlooking verification procedures to ensure that appropriate measures not only exist on paper but are implemented and work in practice²⁸.

As mentioned, if personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data is not easily retrievable, it is still protected under the right to privacy as long as the data belongs to the sphere of private life. Therefore, the disclosure of such data to an unauthorised person it’s not without consequences.

²⁴ Mariusz Krzysztofek, *GDPR: Personal Data Protection in the European Union*, §3.02 Material Scope.

²⁵ “La prise de notes sur des feuillets, la consultation de documents papier isolés ou l’envoi par courrier ordinaire de photocopies de documents papier qui ne sont pas extraits d’un «ensemble structuré de données à caractère personnel accessibles selon des critères déterminés» sont, quant à eux, hors champ du RGPD” – Cécile de Terwangne in C. de Terwangne, K. Rosier (eds.), *Le Règlement général sur la protection des données (RGPD / GDPR)*. Analyse approfondie (Bruxelles: Éditions Larcier, 2018), p. 70.

²⁶ CJEU, *Judgment of 10 July 2018, C-25/17 - Jehovan todistajat*, ECLI:EU:C:2018:551, published in the electronic Reports of Cases (Court Reports - general), para. 57.

²⁷ Paul Voigt, Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide*, p. 10.

²⁸ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law*, p. 167.

5. Conclusions

Since information technology and digitization have not completely wiped out paper records, manual processing of personal data is not less relevant for the rights of data subjects. However, the fulfilment of the condition to form part of a filing system or to be intended to form part of a filing system depends on the specific processing situation and must be established on a case-by-case basis.

In all cases must be taken into account the interpretation of the Court of Justice of the European Union, which has ruled that the concept of a 'filing system' covers data that are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use, without being necessary to include any search methods.

Consequently, when assessing a filing system created by manual processing, the structuring according to specific criteria has to be viewed in terms of data accessibility, without overlooking the fact that data can be structured according to any specific criteria and that in most cases these records are tainted by some automated processing which ensures their entry into the material scope of Regulation (EU) 2016/679.

A key point is that manual processing falls within the material scope of the General Data Protection Regulation as soon as the personal data is structured according to specific criteria. Once the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system, the order and method unavoidably leading to the application of Regulation (EU) 2016/679, even if natural persons acting under the authority of the controller or the processor don't realize that the way they centralize certain data has created a data filing system for the purpose of the definition provided by art. 4 (6) GDPR

The core of the 'filing system' concept being the easy access to the data collected, files or sets of files, as well as their cover pages, which are not structured according to specific criteria do not fall within the scope of Regulation (EU) 2016/679, since they are not accessible / retrievable according to specific criteria.

Nonetheless, their consultation, disclosure by transmission or dissemination is protected under the right to privacy, as long as the personal data belong to the sphere of private life.

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