This is the translation of the *BDK Advokati/Attorneys at Law* analysis of the draft Data Protection Law, submitted on 30 June 2014 to the Serbian Commissioner for Information of Public Importance and Data Protection. The Commissioner made its draft (“Model Law”) available for public debate in early June 2014 as the first step in a process that should lead to enactment of a new data protection law in Serbia. The original *BDK Advokati/Attorneys at Law* analysis of the draft, in Serbian, may be read here.

Analysis of the Model Law on the Protection of Personal Data

June 30, 2014

With this analysis of Commissioner’s Model Law on Protection of Personal Data, *BDK Advokati/Attorneys-at-Law* would like to contribute to the process of crafting a high-quality data protection statute in Serbia. A good law should be able to find proper balance between diverse rights and interests related to the processing of personal data, including privacy and dignity, the freedom to conduct economic activity, freedom of expression, and security concerns.

Our analysis focuses on the segments of the Model where, we believe, there is room for improving the current text. This does not mean that we are not aware of the important positive aspects of the Model. The Model evidently takes into account the current trends in Europe in the regulation of data processing, including solutions in the proposed Regulation on the protection of individuals with regard to the processing of personal data and the free movement of such data (Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data), from 25 January 2012 (“Regulation”). Compared to the existing law in Serbia, we find it particularly important that the Model simplifies the manner of giving consent to the processing of data and facilitates transfer of data from the country.

For the purpose of analysing the Model, we have made substantial use of the text of the proposed Regulation, including the amendments of the European Parliament adopted on 12 March 2014, as well as the text of the Directive 95/46/EC 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 ("Directive"). We have also taken into account the provisions from the following data protection laws:

- Italy – The Protection of Personal Data Code (Legislative Decree no. 196 of 30 June 2003) (English translation, from the website of the Italian Data Protection...
The sources above, when taken together, reflect the mainstream thinking and practice in Europe in the area of the protection of personal data. The countries referred to have standard provisions on the conditions and modalities of the processing of personal data. We did not include in the analysis the legislation of the United Kingdom, which is considered less rigorous (from the perspective of controllers and processors) than the legislation in Germany, France, Italy, and the Netherlands. In addition, the United Kingdom, according to authoritative assessments, has not implemented a number of provisions of Directive 95/46, and in this regard deviates to some extent from the mainstream of the European law on the protection of personal data.¹

In the remainder of this document, BDK Advokati/Attorneys-at-Law analyzes specific provisions in the Model and provides reasoning for each of the specific changes suggested by our law firm.

**Definitions**

**Article 3**

9) Consent means a freely given, unambiguous statement by data subject accepting the specific processing of his personal data, which can be given orally, in writing or by a clear affirmative action;

BDK Advokati, comment: The relevant provision of the proposed Regulation (article 4, Definitions) includes in the very notion of the data subject's consent the method of giving a consent ("either by a statement or by a clear affirmative action"), and the authors of the Model may have had that provision in mind when they defined consent in article 3, paragraph 9. It does not seem logical, however, to include the way of expressing consent (orally, in writing, or by a clear affirmative action) in the concept of consent. The issue of the method is a separate issue which is dealt with in an operative provision (article 25) elsewhere in the Model.

The laws of Germany, France and Italy do not contain a definition of consent. Definition in the Dutch law does not deal with the way in which consent may be given; the definition is limited to emphasizing that consent is a freely given, specific and informed expression of will.²

**Article 3**

12) Clear affirmative action (konkludentna radnja) means one or more actions, or conduct, which is clear and unambiguous, so that it may be reliably concluded from it that there the data subject has given consent, for example by means of: completing a form, entering an

² Art. 1(i).
area of video surveillance after receiving relevant information, **clicking a button or ticking a box** giving information when visiting an Internet website, displaying habitual signs, etc.

**BDK Advokati**, comment: It would be useful, given the widespread use of the Internet and the need to remove ambiguity in the application of the future law, to clarify that clicking a button and ticking a box are considered valid forms of expressing one’s consent to the processing of personal data, as forms of a clear affirmative action.

The amendment of the European Parliament to recital 25 of the Regulation clarifies that clear affirmative action may take the form of clicking a box when visiting a website.

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**Definitions**

**Article 3** [proposal for introduction of a new paragraph]

x) **Blocking** means temporary suspension of the processing of personal data.

**BDK Advokati**, comment: The sources consulted during the work on this analysis, from the Directive, via the national laws (Germany, Netherlands, France, Italy), to the Regulation, contain provisions stipulated that a data subject is entitled not only to correction and erasure of the data (the rights explicitly stipulated in article 46 of the Model), but also to have the data blocked.

**BDK Advokati** believes that this right, under the name of "blocking" or another appropriate term conveying the same meaning, should be added to the text of the Model, and in that case article 3 (Definitions) should contain a definition of "blocking". The proposed definition is largely based on the definition in the Italian law. The German law also contains similar definition. The Directive and the Regulation, as well as Dutch and French law, do not define “blocking”.

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**The principle of purpose limitation**

**Article 5**

[Paragraph 1] Personal data shall be processed only for purposes that are specified in accordance with the law, explicit lawful and legitimate.

The addition of the words "in accordance with the law" would add clarity to the provision, because it would explain from which source (i.e. this law) the determination of the purpose stems. The addition of the phrase "in accordance with the law" means, without stating it explicitly, that the purpose may be determined by a contract stipulating the rights and obligations of the controller and the processor (article 19 of the Model) or in the notice provided by the controller to the data subject (articles 23 and 24 of the Model).

The word *zakonite* ("lawful", in English) should be replaced by *izričito navedene* ("explicit", in English) or another appropriate translation (in Serbian) of the English word "explicit". The Directive (article 6(1)(b)) and Regulation (article 5(1)(b)) employ “explicit”, and it is clear from a document authored by the Article 29 Data Protection Working Party,

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3 Art. 12.
4 Section 20(3).
5 Art. 36.
6 Art. 40.
7 Section 143
8 Art. 17.
9 Section 4(o).
10 Art. 3(4)(3).
Opinion 03/2013 on purpose limitation, from 2013, that the creators of the Directive deliberately included the concept of "explicit" in the provision. Another concept (such as – in the Model – "lawful") cannot, lacking a convincing reason - which in article 5(1) is not perceptible – substitute "explicit".11

Another reason for not using the concept of "legality" in article 5 of the Model is the need to avoid repetitiveness, considering that the previous article (article 4) already provides that the processing of personal data must be "lawful".

The principle of purpose limitation
Article 5
Paragraph 2
Processing of personal data is not permitted if carried out for a purpose other than incompatible with the specified purpose.

BDK Advokati, comment: Paragraph 2 of the Model differs from the corresponding provisions in the Directive, the proposed Regulation, and the national laws consulted for the purposes of preparing this analysis. In these sources, the principle of purpose limitation is set more flexibly than in the Model, insofar as the Model does not permit further processing for a purpose other than that specified one, while the other sources allow for such processing, provided that the way in which the data are processed is not incompatible with the original purpose (see the relevant provisions in the Directive,12 the Regulation and the amendments of the European Parliament,13 and the laws of France,14 the Netherlands,15 Italy,16 and Germany17).

The principle of purpose limitation
Article 5
Paragraph 3
Data processing not incompatible with the specified purpose includes, in particular, processing of data Notwithstanding paragraph 2 of this Article, the data can be processed if it is necessary for conducting criminal proceedings or protecting the security of the Republic of Serbia, in the manner provided by law, and processing of data for historical, statistical or scientific purposes if done in accordance with the requirements under Article 12 of this Law.

BDK Advokati, comment: The wording proposed by BDK Advokati retains the examples of a permitted secondary processing from the Model, and, by adding the words "in particular", leaves room for other forms of secondary processing compatible with the original purpose.

The wording proposed by BDK Advokati treats the purpose in permissible instances of a secondary processing as compatible with the originally specified purpose, rather than “not different” from the original purpose. The approach taken in the current provision in the Model, whereby the purposes are not different, is both artificial and unnecessary.

12 Art. 6(1).
13 Art. 5(1).
14 Art. 6(2).
15 Art. 9(1).
16 Section 11(1).
17 Section 28.
The approach whereby processing of data for historical, statistical or scientific purposes is "not incompatible" with the purpose of the original purposing is the same as the approach in the French law, from where it also borrows the requirement that the processing must be done in accordance with the requirements that generally apply to processing for the said purposes. In Germany, the law provides for several situations in which recording, alteration or use of data for purposes other than the one specified for the initial processing may be lawful. When secondary processing is carried out by companies or other private actors, such processing is permitted if the personal data are generally available, and also (with the additional requirement that there is no reason to assume that the data subject has a clear and overriding interest in ruling out the possibility of processing or use) if the processing is necessary to protect legitimate interests of the controller or other persons, to prevent threats to state or public security, or to prosecute crimes.

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**[The principle of purpose limitation
Article 5]**

**[Paragraph 4]** Processing for historical, statistical or scientific purposes shall not be considered a change in the purpose of the processing in terms of this Act if it is done in accordance with the requirements under Article 12 of this Law.

*BDK Advokati,* comment: The amendment suggested by *BDK Advokati* in paragraph 3 of this article makes paragraph 4 unnecessary. In any event, the wording of the current paragraph 4 is inadequate because it is based on the initial stance – which is not in accordance with the approach taken by legislators in Europe – that processing is not permitted if done "for a purpose other than” the one specified (against that backdrop, the Model then privileges processing for historical, statistical and scientific research purposes by saying that in such processing there is no change of the purpose). In fact, as we have shown above, under the prevailing approach in Europe permissibility of a secondary processing does not depend on whether the purpose is different from the initial one, but whether the secondary processing is compatible with the original purpose.

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**[The principle of purpose limitation
Article 5]**

**[New paragraph 4]** For the purposes of assessing whether processing is compatible with the specified purpose for which the data were collected, the following shall be taken into account:

a. the relationship between the purpose of the intended processing and the purpose for which the data were obtained;

b. the nature of the data concerned and the consequences of the intended processing for the data subject;

c. the manner in which the data have been obtained and the reasonable expectations of persons in relation to the possible secondary processing, and

d. the extent to which appropriate safeguards have been put in place to protect the rights and interests of individuals.

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18 Art. 6(2).
19 Section 28(5) and 28(2).
BDK Advokati, comment: The proposed provision should help the controllers and other stakeholders to assess whether the secondary processing is permissible or not. The proposed provision draws from two sources: article 9 (2) of the Dutch law\textsuperscript{20} and the section on “Key factors to be considered during the compatibility assessment”, in Opinion 03/2013 on purpose limitation of the Article 29 Data Protection Working Party (2013).\textsuperscript{21}

\begin{quote}
[The principle of accuracy of the data]
\textbf{Article 7}

\[A \text{ proposal to add paragraph 2] The controller shall take every reasonable step to ensure that inaccurate personal data are erased or rectified as soon as it becomes possible.}\]
\end{quote}

BDK Advokati, comment: With this addition to the current article 7 (in the Model), it would become clear that paragraph 1 ("Personal data must be accurate ") does not mean that the controller has an absolute duty to ensure accuracy. The requirement placed before the controller is more realistic: he must take every reasonable step to ensure that personal data that are inaccurate are erased or rectified without delay.

The proposed wording exists in the proposed Regulation,\textsuperscript{22} the Directive (with an addition that the controller has an identical obligation with regard to incomplete data as well, and without prescribing a deadline for fulfilment of the obligation),\textsuperscript{23} and in the French law (a provision identical to that in the Directive).\textsuperscript{24}

\begin{quote}
\textbf{Processing for historical, statistical or scientific purposes Article 12}

\[\text{Paragraph 2] For the purposes of the processing for historical, statistical or scientific purposes, the controller or processor shall submit the data shall be provided to the recipient in anonymised form, [...].}\]
\end{quote}

BDK Advokati, comment: The proposed amendment would lead to greater clarity of the provision, because it would specify who the subjects of the rights and obligations are.

\begin{quote}
\textbf{Article 12}

\[\text{Paragraph 3] The results of the processing shall be published in anonymised form, unless provided otherwise by law, or if the data subject consents in writing to the disclosure, or if publication of personal data in non-anonymised form is necessary to present research}\]
\end{quote}

\textsuperscript{20} "For the purposes of assessing whether processing is incompatible, as referred to under (1), the responsible party shall in any case take account of the following:
\begin{itemize}
\item a. the relationship between the purpose of the intended processing and the purpose for which the data have been obtained;
\item b. the nature of the data concerned;
\item c. the consequences of the intended processing for the data subject;
\item d. the manner in which the data have been obtained, and
\item e. the extent to which appropriate guarantees have been put in place with respect to the data subject”.
\textsuperscript{21} Opinion 03/2013 on purpose limitation (2 April 2013), pp. 23-27.
\textsuperscript{22} Art. 5(1).
\textsuperscript{23} Art. 6(1)(d).
\textsuperscript{24} Art. 6(4).
findings or to facilitate research insofar as the interests, dignity, or the fundamental rights or freedoms of the data subject do not override these interests. With regard to the personal data of a deceased person, a written consent to publication in non-anonymised form may be given by the surviving marital partner spouse, common-law partner, his children of the deceased or their descendants, or by the persons who under the statute governing inheritance have been declared as the successors.

BDK Advokati, comment:

- **The form of consent**
  It is not clear why the data subject should be required to give in writing the consent to publication (in non-anonymised form) of the results of the processing. Unlike the Model, the proposed Regulation does not contain any limitation to the effect that only written consent qualifies.\(^{25}\) Similarly, the relevant provision in Germany provides that bodies conducting scientific research must obtain "consent" in order to be able to publish personal data,\(^{26}\) without limiting the way in which consent may be given to written form, and an analysis of the general provisions on consent in the German law would show that consent does not have to be in writing "if the defined purpose of research would be seriously affected if consent were obtained in writing."\(^{27}\)

- **Publication without consent, for the purpose of presenting research findings**
  Presentation of research findings should be a permissible basis for the publication of personal data in non-anonymised form, even in the absence of consent by the data subject. The Regulation contains such a provision, with an important addition that such disclosure may be allowed insofar as the interests or the fundamental rights or freedoms of the data subject do not override the interest in presenting the research findings.\(^{28}\) Italian Code of conduct and professional practice regarding the processing of personal data for historical purposes (2001) emphasizes the dignity of the person as a barrier to publication.\(^{29}\) Although the concept of dignity is indirectly present, through the concept of "the fundamental rights and freedoms", in the text which BDK Advokati proposes, it would be useful to explicitly refer to dignity, as a further guarantee that the controller shall diligently assess whether publication of the data is allowed, or not.
  In Germany, the corresponding provision specifies that the findings justifying publication without consent of the data subject must concern events of "contemporary history."\(^{30}\)

- **The spouse and common-law partner**
  The Family Act uses the term "spouse" (supružnik) instead of "marital partner" (bračni drug). Considering that the common-law partners have equal rights and responsibilities as the spouses, there is no justification for the approach taken in article 12, paragraph 3, where only the spouse is granted the authority to give written consent to non-anonymised publication of the results of the processing concerning the deceased person.

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\(^{25}\) Art. 83(2).
\(^{26}\) Section 40(3).
\(^{27}\) See Section 4a.
\(^{28}\) Art. 83(2).
\(^{29}\) Garante per la protezione dei dati personali, Code of conduct and professional practice regarding the processing of personal data for historical purposes, Art. 11, [http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/1565813](http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/1565813).
\(^{30}\) Section 40(3)(2).
Processing for historical, statistical or scientific purposes

Article 12

[Paragraph 4] The recipient shall erase the personal data collected for the purposes set forth in this Article no later than one year from the fulfilment of the purpose, unless it is otherwise provided by law.

BDK Advokati, comment: The suggested addition would bring the provision into conformity with article 47, paragraph 4 of the Model, which states that "the rights of persons under articles 44, 45 and 46 of this Law may be restricted by specific laws if the personal data are processed exclusively for historical, statistical or scientific purposes" (article 46 refers to, inter alia, the right of the data subject to have the data erased).

The addition "unless it is otherwise provided by law" is in any case necessary in order to provide a legal basis for the preservation of valuable personal data collected for historical, statistical or scientific purposes.

Competence and Deputy Commissioner

Article 15

In performing the tasks in the field of the protection of personal data, the Commissioner has the authority to:

... 9) give a prior opinion on whether the processing constitutes specific particular risk for rights and freedoms of citizens;

BDK Advokati, comment: The relevant provisions in the Directive (article 20) and the proposed Regulation (article 34) use the term specific. The corresponding translation of the term is konkretan ("specific") [and not specifičan ("particular"), as in the current draft of the Model].

Competence and Deputy Commissioner

Article 15

[...] 15) shall organize and carry out the taking of exams by data protection officers, prescribe the program, method and the costs of taking an exam, issue and revoke data protection licenses, and maintain a register thereabout;

BDK Advokati, comment: The logical sequence is that an activity is first organized and then implemented.

Legal basis when processing is performed by controllers who are not public bodies

Article 18

[Paragraph 2, continued] [...] and if the processing is necessary for achieving significant and legally based interest by the controller, and the rights, freedoms and legitimate interests of those interests outweigh the interests of the data subject do not override that interest of the controller.

BDK Advokati, comment: The Model sets a higher standard than the Directive or the proposed Regulation for the controller whose legitimate interests may serve as the basis for the
processing without consent of the person. The Model requires that in order for processing to be carried out without consent, the interest of the controller "must override" the interests of the data subject. In contrast, the Directive and the Regulation permit processing even if the interest of the controller is equal to that of the data subject: the processing is not allowed if the interests, rights and freedoms of the data subject "override" the interest of the controller (Directive, article 7(f), and Regulation, recital 38). The Italian law also takes this approach.\footnote{Section 24)(1)(g).}

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<th>Delegating tasks related to processing</th>
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<td><strong>Article 19</strong></td>
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<td>[Paragraph 4] The contract shall bind the processor to perform the tasks related to the processing of personal data only within the limits of the authority granted, and in particular not to disclose the personal data to other parties without a written permission of the controller and not to process the data for any purpose other than the one agreed upon, to provide appropriate organizational and technical measures to protect the data, and to ensure that the individuals who undertake the processing on behalf of the processor shall act in accordance with the obligation of the processor not to disclose personal data to third parties shall be bound by the obligation of professional secrecy.</td>
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**BDK Advokati**, comment: The concept of "professional secrecy" is generally associated with lawyers, physicians, and confessors.\footnote{Videti, npr., Zakon o krivičnom postupku ("Sl. glasnik RS", br. 72/2011), art. 248, st. 1, tačka 3, i prethodni Zakon o krivičnom postupku ("Sl. list SRJ", br. 70/2001 i 68/2002 i "Sl. glasnik RS", br. 58/2004, 85/2005, 115/2005, 85/2005 - dr. zakon, 49/2007, 20/2009 - dr. zakon, 72/2009 i 76/2010), Art. 97, st. 1, tačka 3.} Application of this concept to individuals who on behalf of the processor carry out processing activities is likely to cause confusion. Use of the term "the obligation not to disclose personal data to third parties", which does not cause association with lawyers, psychologists, or confessors, therefore appears more appropriate. The laws of other countries - including Germany\footnote{Section 5.} and the Netherlands\footnote{Art. 12(2).} - also do not use the term "professional secrecy"; they speak of a duty to preserve confidentiality.

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<th>Protection of the vital interests of persons</th>
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<tr>
<td><strong>Article 20</strong></td>
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<td>Processing of personal data can be done without a legal basis in terms of this law, if it is necessary to protect the vital interests of another person, such as life, health and physical integrity of a person, to the extent necessary to protect those interests.</td>
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**BDK Advokati**, comment: In order to eliminate ambiguity in the possible application of the provision, it is advisable not to use the term "vital interests." While some other sources use the concept of "vital interests", the UK Information Commissioner's Office has rightly observed that the phrase "vital interests" has always been controversial: it is not clear whether this is a matter of life and death, or is it about protection of health or wellbeing more generally.\footnote{ICO, Proposed new EU General Data Protection Regulation: Article-by-article analysis paper (2013), p. 12, http://ico.org.uk/news/~/media/documents/library/Data_Protection/Research_and_reports/ico_proposed_dp_regulation_analysis_paper_20130212.pdf.} The
French data protection law only speaks of "protection of life", and the Italian law refers to the protection of "life or physical integrity" of the individuals. The laws of Germany and the Netherlands speak only of "vital interests", without suggesting however that in addition to the protection of life, health and physical integrity there are some other "vital interests."

**Processing of sensitive data**

**Article 21**

**Paragraph 1** Sensitive personal data may be processed only if the data subject has given his consent in writing.

*BDK Advokati*, comment: With regard to the method of giving consent, the Regulation does not draw a distinction depending on whether the consent concerns sensitive data or data that are not of sensitive nature. In either case, the consent must be "explicit", and, as explained in recital 25 of the Regulation, explicit consent may be given "by any appropriate method enabling a freely given specific and informed indication of the data subject's wishes, either by a statement or by a clear affirmative action by the data subject".

In France, the data subject must give "explicit consent" (consentement exprès) to the processing of sensitive data. The Dutch law also takes that approach.

German law is somewhat specific in this regard, but even there the sensitivity of the data does not entail a method of giving consent different from the method of consenting to the processing of other types of personal data. The general rule is that consent must be given in writing, "unless special circumstances warrant any other form." In regard to the processing of sensitive data there is one additional requirement for a valid consent, but it refers to the content of the consent (not to the form): the consent must specifically refer to the (sensitive) data.

**Processing of sensitive data**

**Article 21**

**Paragraph 2** Notwithstanding paragraph 1 of this Article, sensitive personal data may be processed ...

3) when necessary to protect the life, health or other vital interests the bodily integrity of the data subject or other persons, and the person is unable to personally give consent;

*BDK Advokati*, comment: See comment to article 20.

**Processing of sensitive data**

**Article 21**

**Paragraph 2, to be added as one of the points** x) when processing is carried out in the course of its legitimate activities by a foundation, association or any other body with a political, philosophical, religious or trade-union aim and on condition that the processing

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36 Art. 7(II), Art. 8 (II)(2), i Art. 69(1).
37 Section 24(1)(e), section 26(4)(b), and section 43(1)(d).
38 Art. 8(II)(1).
39 Art. 21(1).
40 Section 4a(1).
41 Section 4a(3).
relates solely to the members of the body, or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.

**BDK Advokati**, comment: The provision to this effect is present in all sources consulted for the purpose of developing this analysis – the Regulation, the Directive, and the laws in France, Germany, Italy, and the Netherlands – with an additional requirement that the body in question must be of non-profit character. In the Netherlands, a number of provisions in the law elaborate the right of associations and institutions of this kind to process sensitive personal data.

**[Processing of sensitive data Article 21]**

Paragraph 2, proposal to add the following text:

\( y) \) where the processing is necessary for the purposes of carrying out the obligations and specific rights of use of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards.

**BDK Advokati**, comment: This provision, which presents an additional ground for processing sensitive data without the consent of the data subject, is included in the Directive, as well as in the proposed Regulation and the amendments of the European Parliament.

**[Notification to the person from whom data are collected Article 23]**

Paragraph 1] If personal data are collected directly from the data subject, the controller must adequately notify him in advance, or as soon as is becomes possible, about: [...–3] the legal basis of the data processing:

**BDK Advokati**, comment: The Directive does not specify when the controller is obliged to give notice to the data subject. According to the proposed Regulation, such obligation exists at the time the personal data are obtained from the data subject. "Without undue delay" is the formulation used in the European Parliament's amendment to this provision (article 14 (4), point a).

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42 Art. 9(2)(d).
43 Art. 8(2)(d).
44 Art. 8(l)(3).
45 Section 28(9).
46 Section 26(4)(a).
47 Articles 17-22.
48 Art. 8(2)(b).
49 Art. 9(2).
50 Paragraph 1 shall not apply if one of the following applies: ... (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller in the field of employment law in so far as it is authorised by Union law or Member State law or collective agreements providing for adequate safeguards for the fundamental rights and the interests of the data subject such as right to non-discrimination, ...".
51 Art. 14(4)(a).
52 "... at the time when the personal data are obtained from the data subject or without undue delay where the above is not feasible".
We suggest that the words "the legal basis of the processing" should be deleted because it is unlikely that such information has practical significance to the data subject. The obligation to include that information in the notice does not appear in the sources consulted during the work on this analysis.

**Withdrawal of consent by the data subject**  
**Article 26**  
**Paragraph 2** Consent may be lawfully given in writing or by a clear affirmative action.

_BDK Advokati_, comment: A provision specifically regulating the method of withdrawing the consent is unnecessary. It does not seem logical that the conditions for a withdrawal are more stringent than those for giving consent. Accordingly, the Directive, Regulation, and the national laws do not include stricter requirements for withdrawal. The European Parliament amendment to article 7 of the proposed Regulation explicitly states that "it shall be as easy to withdraw consent as to give it."

**Submission of data about the deceased person**  
**Article 29**  
**Paragraph 3** Unless otherwise provided by law, Controller may submit data about the deceased person to a third party solely in order for the data to be processed for historical, statistical or scientific purposes, provided that the deceased during the lifetime had not prohibited in written such submission and that such prohibition has not been made by his successors unless the disclosure would likely adversely affect the privacy, the rights or the legitimate interests of the deceased person or his successors.

_BDK Advokati_, comment: The provision in the Model privileges the deceased persons in relation to other data subjects, for no apparent reason and without taking into account the importance of freedom of expression. The proposed Regulation does not contain such a limitation or, indeed, regulate the processing of data on deceased persons in the first place.

The part "unless otherwise provided by law" should be removed because it is not clear to which segment of the provision it pertains. Such a formulation is in any event unnecessary if the phrase "unless the disclosure would likely adversely affect the privacy, the rights or the legitimate interests" is added. With that addition, the legitimate interests of a deceased person, or his successors, are sufficiently protected, while the freedom of expression is not unduly restricted.

The proposed wording is in line with a standard which, in its general form (i.e. not in the context of a provision that would specifically relate to the processing of data about deceased persons), is present in the European Parliament's amendment to article 32 of the Regulation. The amendment provides for an obligation on the part of the controller and processor to carry out a risk analysis of the potential impact of the intended data processing on the rights and freedoms of the data subjects. “The privacy, the rights or the legitimate interests of the person” are among the factors to be taken into consideration by the controller, i.e. processor.\(^{53}\)

**Video surveillance of access to official and business premises**  
**Article 34**  
\(^{53}\) Art. 32a.
Controller may by means of video surveillance process personal data with regard to access to official or business premises and facilities (hereinafter referred to as office space), if this is necessary essential for the safety of persons and property, in order to control entry to or exit from office space, and if due to the nature of the work there is a risk for the employees and other users of the area.

**BDK Advokati**, comment: Article 34 of the Model deals with video surveillance of the access to official and business premises, i.e. with the monitoring of entries into a building or other objects. The purpose of the surveillance is evidently protection of security. There is no elevated risk that the interests of privacy would be violated by means of such surveillance, because the person is subjected to surveillance during a short interval only. Therefore, it is not necessary to place before the potential controller the high standard ("essential") that needs to be satisfied in order for the use of video surveillance to be permissible.

In contrast, there are significant privacy interests involved in the situations addressed by the following article (art. 35), insofar as the data subjects within the business area would be monitored virtually all the time; and for that type of surveillance, the controller must meet a higher standard ("essential").

*Video surveillance in official and business premises*  
**Article 34**  
[Paragraph 4] Employees who work in the business area under video surveillance referred to in paragraph 1 of this Article shall be notified in writing about the use of video surveillance, in accordance with Article 23 of this Law.

**BDK Advokati**, comment: It would be useful to specify whether each employee must be informed in person about the use of video surveillance systems, or the controller can fulfil its obligation by displaying a notification within the office space.

*Video surveillance in a business area*  
**Article 35**  
[Paragraph 4] Data controller shall, before making a decision on the introduction of video surveillance referred to in paragraph 1 of this Article, obtain opinion of the representative union at the controller entity, if such a union exists.

**BDK Advokati**, comment: The proposed addition would clarify that the controller is not required to obtain an opinion from a union which is representative at another level (such as the branch trade union).

*Video surveillance in a business area*  
**Article 35**  
[Paragraph 5] The employees must be informed in writing about the introduction of video surveillance, prior to the commencement of surveillance, in accordance with Article 23, paragraph 1, of the Law.
BDK Advokati, comment: It would be useful to specify whether each employee must be informed in person about the use of video surveillance systems, or the controller can fulfil its obligation by displaying a notification within the office space.

[Video surveillance in residential buildings
Article 37]
[Paragraph 4] It is not allowed to perform Video surveillance of entrances to private apartments shall be permitted if carried out in accordance with Article 38 and if there are no indications of overriding legitimate interests of the data subjects.

BDK Advokati, comment: This formulation significantly reduces the space for possible misuse of video surveillance of entrances to private apartments, without calling into question the permissibility of video surveillance as such. The reference to the guarantees from article 38 ensures that video surveillance is carried out in order to protect one’s own safety and property, that the exterior or interior of other apartments and houses is not surveilled, and that the owners prominently display a notice of video surveillance. The proposed provision also contains the addition, "if there are no indications of overriding legitimate interests of the data subjects," based on the general provision in the German law (section 6b) on the conditions for the permissibility of video surveillance.

[Direct marketing
Article 40]
[Paragraph 5] If the data controller intends to submit personal data referred to in paragraph 2 of this Article to third parties or processors for the purpose of direct marketing, he must inform the data subject first and obtain the subject’s approval consent in writing.

BDK Advokati, comment: The term used throughout the statute is "consent" (rather than "approval"). It is not clear why the way in which the subject should consent to the submission of personal data (for the purposes of direct marketing) should – via the requirement of a written consent – be particularly onerous for the controller. No such provision exists in the proposed Regulation. In practice, such a demand could result in inability of the users of the internet to click the button or tick the box in order to give valid consent to the controller to submit to other processors the data obtained by the use of cookies.

[The rights of the data subject to rectify, complete, block, or erase the data
Article 46]
[Paragraph 1] Data subject shall have the right to request from the controller to rectify, complete, block, or erase the processed data if he proves that the data are false, incomplete, or out-of-date, or if the data are not processed in accordance with the provisions of this Law.

BDK Advokati, comment: See above (article 3, Definitions) for a brief explanation of the need for adding the right to request blocking of the data to other rights enjoyed by the data subject. Instances in which blocking may be appropriate are listed in article 17(4) of the proposed Regulation:
(a) the data subject contests the accuracy of the data, and the data are blocked for a period enabling the controller to verify the accuracy of the data;
(b) personal data are no longer required the controller to accomplish their tasks, but no need to be kept in order to prove;
(c) the processing is unlawful and the person objects to the deletion of the data and instead requires their block;
(d) the person requires that personal data transferred to other automated processing system.

Due consideration should be given to the possibility that, with regard to any of the measures requested by the data subject, the burden of proof is allocated depending on the origin of the data. If the data were obtained from the data subject with his consent, such person should have the burden of proof that the data is inaccurate, incomplete, out-of-date, or not processed in conformity with the provisions of the Law; if, however, the data were obtained from third parties, the burden of proof would be on the controller. The French law contains a rule to this effect.54

BND Advokati, comment: The category "especially sensitive data" does not exist in the Model.

BND Advokati, comment: The word “prevention of” is erroneously omitted from the current text.

BND Advokati, comment: This provision should be formulated more clearly. The current wording used to describe the obligation by the controller to submit in advance “the

54 Art. 40(3).
record of the processing" implies that the controller already (i.e. before establishing a data filing system) possesses data (about the data subject) processed on behalf of the controller up to that point. This would mean that processing is lawful even before the controller notifies the Commissioner about the intent to process. This approach would differ from the one in the law currently in force (article 49).

If the provision in fact still provides that the controller must notify the Commissioner of the intention to process the personal data, then paragraph 1 should be reworded and read as follows: “No later than 30 days before establishing a data filing system, the controller must submit the record of a notification of the intent to carry out data processing, for each data filing system run by the controller—the controller intends to establish, to the Data Protection Commissioner, in a prescribed form, for the purpose of registration at the Central Register kept by the Commissioner.”

BDK Advokati, comment: This provision should be formulated more clearly, by making it plain whether it only provides for an exception from the obligation to submit the record (as in the first sentence of the provision) or also an exception to the record-keeping requirement (as suggested by the title of article 73). We believe that, in those instances in which the controller is already required under law to keep records of the personal data, an obligation to submit the record to the Data Protection Commissioner would constitute an unnecessary burden.

BDK Advokati, comment: The structure and the wording of article 74 as currently proposed in the Model make the provision difficult to understand. It is our understanding that paragraphs 2 to 5 pertain to the countries or international organizations with respect to which...
Serbia has not ratified agreements regulating the exchange of data. Among such countries, there is a further distinction (between the countries in respect of which there is irrefutable presumption of an adequate protection of personal data, and those in respect to which there is no such presumption), but in any case they all fundamentally differ from the countries and international organizations referred to in paragraph 1 which refers to the countries or international organizations with which Serbia has entered into agreements with provisions on the exchange of data, and the agreements have been ratified. This fundamental difference should be emphasized by adding – at the beginning of paragraph 2 – the words "In addition to the cases referred to in paragraph 1 of this Article", in order to underscore the key difference between paragraph 1 and the subsequent paragraphs.

**[Request for transfer of the data](#)**

**Article 75**

**[Paragraph 1]** Prior to the transfer of personal data from the Republic of Serbia to another country or an international organization, the controller shall submit to the Commissioner a request for a transfer or a set of transfers of personal data, in a form prescribed by the Commissioner.

_BDK Advokati_, comment: The wording comprising “a set of transfers” exists in the Directive\(^{55}\) and the proposed Regulation,\(^{56}\) as well as in the laws of the Netherlands\(^{57}\) and Germany.\(^{58}\)

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**[The rights and duties of the supervised subject](#)**

**Article 80**

**[Paragraph 2]** Upon the authorized person’s request and for the time the supervision is in progress, the supervised subject shall make available to the authorized person adequate working space and provide other necessary conditions for its work, appoint one or more representatives to take part in the process of establishing the facts, and provide all necessary documents, records and other documentation.

_BDK Advokati_, comment: The phrase "documents and other documentation” is not appropriate.

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**Explanatory text**

[Section on biometrics (concerning Articles 30-32)]

[...] The processing of biometric data is a form of processing of sensitive data, due to the fact that the biometric data do not change during the life of a person, and it is therefore important to process the data with due care and only exceptionally, which is in accordance with Directive 95/46/EC and the proposed E.U. Regulation on the protection of personal data.

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\(^{55}\) Art. 26(2).

\(^{56}\) Art. 42(5).

\(^{57}\) Art. 77(2).

\(^{58}\) Section 4b(3) and Art. 4c(2).
BDK Advokati, comment: The statement in the Explanatory text may be inaccurate. Characteristics of a conduct of a person clearly change and so do some physical, i.e. physiological, characteristics. See in this regard, e.g., Els Kindt, "Biometric applications and the data protection legislation," Datenschutz und Datensicherheit (2007), p. 168.59

59 Specific forms of biometric data which relate to a human characteristic that changes over time, for example, if the individual grows older. The reference biometric data relating to hand geometry or face of younger persons, for example pupils of a school, may at a certain point not be of any good quality anymore, as the characteristics change and these changes are not reflected in the reference data. The article may be read at [http://www.fidis.net/fileadmin/fidis/publications/2007/DuD3_2007_166.pdf](http://www.fidis.net/fileadmin/fidis/publications/2007/DuD3_2007_166.pdf)