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## **NATIONALISING THE GENERAL DATA PROTECTION REGULATION IN WESTERN BALKAN**

*Data protection has become a buzzword worldwide since the adoption of the EU General Data Protection Regulation (GDPR) and its implementation in May 2018. The Regulation caused a significant effect on global data protection regulation mainly due to high fines envisaged as well as its broad territorial scope. The result thereof was several national legislations being adopted globally reflecting most or some of new European data protection provisions. The Regulation, as well as other pertinent legal documents, quite expectedly affected all EU candidate countries that initiated respective harmonization processes. Each of them had their own pace, as well as challenges, in adjusting national legal regimes to Union acquis. The paper aims at identifying the challenges faced by respective national legislators in the Western Balkans countries: Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia in their transposition of the GDPR, as well as the Law Enforcement Directive, into domestic law. In addition, the paper will try to examine the adaptiveness of national legislation to the EU regulation and the law-making processes in each country. Finally, the paper will estimate whether the sole reliance on the European legislation is suitable or may even cause confusion in the proper implementation and harmonisation with acquis, and where possible, suggest alternative approaches in respective WB countries to enable gradual compliance that may better serve the current state of data protection therein.*

*Keywords: data protection, GDPR, EU harmonisation*

### 1. INTRODUCTION

The adoption of the 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/

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EC (General Data Protection Regulation - GDPR)<sup>429</sup> and the 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,<sup>430</sup> further harmonised data protection in the European Union (Law Enforcement Directive - LED). Member States were given more than two years to prepare for a smooth implementation of the new regime, which imposed more stringent obligations on those that process personal data, greater control of individuals on how data were processed and vested significant power in independent data protection authorities, most notably the possibility to fine data controllers with large amounts of money.

These instruments, most notably the GDPR, resulted in worldwide advocacy and subsequently the adoption of national legislation, which mostly matched well to the GDPR,<sup>431</sup> while some provisions even taken verbatim. Inevitably, these included Western Balkan countries, all of which were obliged by the respective stabilisation and association agreements and all but one being the EU candidate countries.

Both, the GDPR and the LED have brought numerous novelties in data protection, from compulsory data protection officers for public authorities, through data breach notifications and stringent rules on data transfer to high administrative fines imposed on data controllers and processors by national data protection or other authorities. In comparison to the previous data protection regime defined under the Data Protection Directive 95/46/EC<sup>432</sup>, the leap was too high, and many Member States have undergone difficulties complying with the two.<sup>433</sup>

For the Western Balkan countries, the bar was even higher, having in mind that most national laws, as well as enforcement thereof, were not entirely in compliance with the Directive 95/46/EC, at the time of the adoption of the GDPR according to respective country reports. This observation was emphasised in respective country reports. Therefore, the choice of the approach in this law making is significant to securing a countrywide adoption of the law and the respect of the right to personal data protection.

## 2. SPECIFICS OF THE GENERAL DATA PROTECTION REGULATION

There are several features of the GDPR that are worth emphasising to better understand the importance of choosing the most appropriate manner by non-EU members when complying with national laws. These features pertain both to the process which lead to

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<sup>429</sup> Referred in the Article as the General Data Protection Regulation or GDPR.

<sup>430</sup> Referred in the Article as the Law Enforcement Directive or LED.

<sup>431</sup> Switzerland passed data protection legislation in 2020, which will come into effect in 2022. Most provisions match those of the GDPR.

<sup>432</sup> European Parliament and Council 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, 1995, O.J. (L 281).

<sup>433</sup> For example, Slovenia did not adopt a national legislation, a GDPR implementing law, before the entry into force, which resulted in Slovenian DPA not being competent to impose administrative fines set out by the GDPR.

the adoption of the provisions and the hierarchy of the GDPR in the EU legal system, as well as to its content and mechanisms to secure consistent application throughout the European Union (EU).

The drafting of the document took several years. It commenced in 2012, when the European Commission proposed a comprehensive reform of the Data Protection Directive 95/46/EC to strengthen online privacy rights.<sup>434</sup> The work on the draft was finalised in 2014 and the Draft was adopted by the European Parliament. More than 4,000 amendments were submitted by MEPs, which is the highest number of amendments in the history of the EU Parliament, and the overall process will be remembered by the great number of lobbying groups and stakeholders.<sup>435</sup>

The GDPR not only substituted the former directive, but it placed data protection to a higher level of coherence Europe-wide. In contrast to directives, regulations are immediately applicable and enforceable in all Member States. Nonetheless, considering the vast scope as well as the omnipresence of data processing, the GDPR provided possibility, albeit envisaged by very few provisions, to allow margin of appreciation and accommodate national specific rules. When adopted in April 2016, the Member States were given the deadline longer than two years to prepare for its implementation, as well as to regulate those areas that were left open for national legislators, such as the age of a minor to provide consent for data processing happening online, or the procedure for compliance certification.

The GDPR is intended to serve as a comprehensive data protection regulatory framework, save for those areas, such as public security and fight against crime,<sup>436</sup> or national security,<sup>437</sup> which fall outside the scope of general regime. By the time the law-making was finalised, new issues pertinent to data protection emerged that the GDPR failed to regulate, such as big data. In addition, matters such as e-privacy were subject to other directives.<sup>438</sup>

Notwithstanding few provisions allowing specific national provisions to secure consistent application of the GDPR, its whole chapter was dedicated to the establishment of a consistency mechanism, which included strict rules and procedures. The European Data Protection Board (EDPB), as a separate legal entity with the task to ensure consistent application was established.<sup>439</sup> The EDPB is competent for, *inter alia*, issuing opinions and guidelines aimed at either specific provisions of the GDPR or specific issues that might emerge through the practice, therefore making the GDPR a living instrument. In other words, apart from the GDPR and its preamble that serves as applicable explanatory memorandum, the EU general data protection regime is supported by soft law regulation, that in return makes those interpretation relevant for all data controllers and processors. Such a characteristic is unique.

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<sup>434</sup> European Data Protection Supervisor, The History of the General Data Protection Regulation, available at: [https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation\\_en](https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en), (1.9.2021.).

<sup>435</sup> The drafting of the GDPR, the advocacy is well presented in the documentary directed by David Bernet, *Democracy: Im Rausch der Daten*, 2015.

<sup>436</sup> The matter is regulated under Law Enforcement Directive.

<sup>437</sup> This matter is outside the current competences of the EU.

<sup>438</sup> i.e. e-Privacy Directive. Currently, the new e-privacy regulation is being finalised.

<sup>439</sup> Art. 70 of the GDPR.

### 3. DATA AND METHODS

Having in mind that sources on the law-making processes in Western Balkan countries are scarce, including academic articles, this comparative analysis, in addition to official documents and other existing sources, rests on data – facts and observations – gathered from interviews that were conducted with high officials of respective national data protection authorities, as well as with, where applicable, representatives of public authorities competent for the preparation of the legislation. In addition, interviews were conducted with representatives of civil society organisations prominent in the field of data protection, where applicable, having in mind that in most countries civil society organisations have not been involved in the processes, nor have they taken part in other initiatives vis-à-vis personal data protection, or EU integration in this field. The interviews were conducted in August 2021.

### 4. GDPR AND LED IN THE WESTERN BALKANS – NATIONAL APPROACHES

#### 4.1. Albania

Albania is an EU candidate country since 2014. According to the Stabilisation and Association Agreement, signed in 2006 which entered into force in 2009, Albania is obliged to harmonise its legislation concerning personal data protection with Community law and other European and international legislation on privacy, including the establishment of independent supervisory bodies with sufficient financial and human resources to efficiently monitor and guarantee the enforcement of national legislation on personal data protection.<sup>440</sup>

Albania adopted the Law on the Protection of Personal Data establishing a data protection authority in 2008,<sup>441</sup> which was later amended in 2012 and 2014. In 2012 Progress Report, it was noted that some progress vis-à-vis further approximation with the EU acquis was made with amendments to the Law.<sup>442</sup> The compliance of national data protection legislation has not been notified in the following reports until 2018, and the focus was on the implementation thereof. In 2018, the European Commission noted that the alignment of national data protection law with the GDPR and the LED was needed,<sup>443</sup> which was reiterated in the latest Report.<sup>444</sup>

Albania ratified the Convention for the Protection of Individuals with regard to

<sup>440</sup> Article 79 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, 2009, O.J. (L107). Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0428\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0428(02)) (1.9.2021.).

<sup>441</sup> Official Journal No. 9887 of 10.3.2008., amended in 2012 (OJ No. 48/2012) and in 2014 (OJ No. 120/2014).

<sup>442</sup> European Commission, 2012, Albania 2012 Progress Report, 10.10.2012, SWD(2012) 334 final, p. 55, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2012/package/al\\_rapport\\_2012\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/al_rapport_2012_en.pdf) (1.9.2021.).

<sup>443</sup> European Commission, 2018, Albania 2018 Report, 17.4.2018., SWD(2018) 151 final, p. 26, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf>, (1.9.2021.).

<sup>444</sup> European Commission, 2020, Albania 2020 Report, 6.10.2020, SWD(2020) 354 final, p. 30, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania\\_report\\_2020.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania_report_2020.pdf) (1.9.2021.).

Automatic Processing of Personal Data<sup>445</sup> as well as the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows<sup>446</sup> in 2005. However, it has not yet signed the 2018 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>447</sup>

In late 2020, the Albanian Data Protection Authority (Albanian DPA) commenced the drafting of the new law jointly with external experts engaged through an EU funded project.<sup>448</sup> The new data protection law in line with the GDPR and the LED has been jointly drafted by the project and the Albanian DPA's experts and will be submitted within September 2021 with the Ministry of Justice, since it is the competence of the latter to initiate a legislative process in this field.

The new personal data protection law is expected to be adopted by the end of 2021.<sup>449</sup>

#### 4.2. Bosnia and Herzegovina

Bosnia and Herzegovina signed the Stabilisation and Association Agreement back in 2008, which came into force in 2015.<sup>450</sup> Harmonisation of data protection legislation, including the establishment of independent authorities is envisaged in Article 79 of the Agreement. Following the adoption of the GDPR as well as the LED, no new laws, both federal and laws of entities, have been adopted. The Data Protection Authority (BiH DPA) is established in 2006<sup>451</sup>, as a federal authority independent from the executive power.

The Law was last amended in 2011<sup>452</sup> and, according to the 2014 Progress Report, "preparations for personal data protection are still at an early stage."<sup>453</sup>

<sup>445</sup> CETS. 108, Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108).

<sup>446</sup> CETS. 181, Council of Europe, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows

<sup>447</sup> Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223> (1.9.2021.).

<sup>448</sup> According to the interlocutor from the Albanian DPA, the DPA is a beneficiary of a Twinning Project entitled "Institution-building for alignment with the Union acquis on the protection of personal data", a Member State consortium from Italy and Austria, comprising of the Italian Personal Data Protection Authority (Garante per la Protezione dei Dati Personali), supported by the Austrian Human Rights Institute Ludwig Boltzmann Gesellschaft and CSI-Piemonte in Italy.

<sup>449</sup> Ibid.

<sup>450</sup> Council Decision (EU) 2015/997 of 16 June 2008 on the signing on behalf of the European Community of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 2015, O.J. (L164). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2015:164:FULL&from=en> (1.9.2021.).

<sup>451</sup> Law on Personal Data Protection ("Official Gazette BH", No. 49/06), later amended and currently Law on Personal Data Protection ("Official Gazette BH", No. 49/06, 76/11 and 89/11).

<sup>452</sup> Law on Amending the Law on Personal Data Protection ("Official Gazette BH", No. 89/11).

<sup>453</sup> European Commission, 2014, Bosnia and Herzegovina 2014 Progress Report, Brussels, 8.10.2014., COM(2014)700 final, p. 58, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-bosnia-and-herzegovina-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf) (1.9.2021.).

In 2017, the BiH DPA urged the BiH Council of Ministers to harmonise the law with the recently adopted GDPR and LED, with the aim of launching certain activities on this issue. Since the Council did not react, the BiH DPA undertook activities to draft a proposal for a new Law on Personal Data Protection.<sup>454</sup> In doing so, the BiH DPA relied on, apart from its own internal resources, the exchange of expertise and experience with counterparts from Province of Saxony (Germany) and Croatia, as well as individual experts' inputs through different projects supported by the EU.<sup>455</sup> The Draft was then submitted to the Council of Ministers, which later, in 2018, commissioned the BiH Ministry of Civil Affairs<sup>456</sup> to establish an intersectoral Working Group to draft a new Law Personal Data Protection. The Working Group, consisting of representatives of public authorities, notably of federal ministries, relied on the Draft prepared by the BiH DPA.<sup>457</sup>

In the meantime, the Council of Europe adopted the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+)<sup>458</sup>, which BiH signed in 2020, however, not ratified.<sup>459</sup> BiH is a member of both the Convention 108 and its Additional Protocol CETS. 181.

In mid-2019, the Draft Data Protection Law was submitted to the Council of Europe Office in Sarajevo, EU Delegation to Bosnia and Herzegovina as well as Special representative of the EU in Bosnia and Herzegovina for comments.<sup>460</sup> A public consultation, as a formal stage in the law-making process, has been organised. However, there is no available reporting on the matter in the media.

It is important to emphasise that no civil society organisations have been involved in the process of the law-making, nor during any public discussion about the provisions of the law. Allegedly, *ad-hoc* consultations with different stakeholders, including chambers of commerce, have been held.<sup>461</sup>

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<sup>454</sup> Personal Data Protection Agency in Bosnia and Herzegovina, Annual Report on Personal Data Protection in Bosnia and Herzegovina for 2018 (Izveštaj o zaštiti podataka o ličnosti u Bosni i Hercegovini za 2018. godinu), 2019 (No. 01-02-4-638-1/19 Date: 14.5.2019.), p. 3. Available at (in Bosnian only): [http://www.azlp.ba/publikacije/Archive.aspx?langTag=bs-BA&template\\_id=149&pageIndex=2](http://www.azlp.ba/publikacije/Archive.aspx?langTag=bs-BA&template_id=149&pageIndex=2) (1.9.2021.).

<sup>455</sup> Personal Data Protection Agency in Bosnia and Herzegovina, Annual Report on Personal Data Protection in Bosnia and Herzegovina for 2018, 2019 (No. 01-02-4-638-1/19 Date: 14.5.2019.), p. 3. According to the interlocutor from the BiH DPA much of the draft law was written by BiH DPA staff, and these experts provided ad hoc comments pertaining to specific provisions.

<sup>456</sup> The Ministry has a mandate related to establishing the basic principles of coordinating activities, coherence of the plans of entity authorities and defining strategies at the international level in the fields: health and social protection, pensions, science and education, work and employment, culture and sports, geodetic, geological, and meteorological affairs. For personal data protection, the Ministry of Civil Affairs has a sole competence.

<sup>457</sup> Information provided by the interlocutor from the BiH DPA.

<sup>458</sup> CETS. 2018, Council of Europe, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223)

<sup>459</sup> BiH signed the Protocol on 2.7.2020., however, it has not ratified it by the end of preparing this article.

<sup>460</sup> According to the interlocutor for the BiH DPA no analyses of the Draft Law have been provided so far. The author, however, was commissioned by the Council of Europe to provide analysis on the compliance of the Draft Law with CoE conventions, hence, acquainted with the content of the Draft.

<sup>461</sup> These consultations, according to the interlocutor from the BiH DPA, have not been a part of formal consultations.

The process of the adoption of the law in Bosnia and Herzegovina is still pending. When it comes to the content of the perspective data protection legislation, according to the available version of the BiH Draft Law on Personal Data Protection, it appears as a transposition of both relevant EU data protection legal instruments into domestic legislation. It seems to have been written reflecting the GDPR as well as the LED. The structure of the Draft Law is set to divide provisions transposing the GDPR from those transposing the LED.

In a nutshell, the draft Law, save from few articles could be best described as a translation of the two EU legal instruments. These include provisions that are prescribed by the GDPR for the EU Member States to regulate those specific situations in accordance with their legal systems, such as those pertaining to the processing on personal data in the context of employment.<sup>462</sup> Original provisions of the Draft Law refer to video surveillance. In addition, the Draft Law contains no reference to the Convention 108 or other Council of Europe legal instruments.

### 4.3. Montenegro

Montenegro signed the Stabilisation and Association Agreement in October 2007 which entered into force in May 2010.<sup>463</sup> Harmonisation with EU legislation in the field of data protection, as well as the establishment of a data protection authority, are envisaged in Article 81.

According to the 2012 Progress Report, a good progress was made regarding the right of individuals to personal data protection, notably due to the Law on Personal Data, the Information Secrecy Act and the Law on Free Access to Information. Nonetheless, it was noted that “further efforts [were] needed to implement the national legislation in line with the EU acquis in this area”<sup>464</sup> which was essential also for the cooperation with Eurojust.<sup>465</sup> Subsequently, the Law was amended only once in 2017, however, new provisions pertained to video surveillance.<sup>466</sup> In 2020 Report, the European Commission noted that a new law on protection of personal data was in preparation with the aim of aligning it with the GDPR and the LED.<sup>467</sup>

The work on the drafting of the new law started in 2017 and was coordinated by the Ministry of Interior. The working group comprised of representatives of public authorities, including the Montenegrin Data Protection Authority (Montenegrin DPA). Though envisaged

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<sup>462</sup> Christopher Kuner, Lee A. Bygrave and Christopher Docksey (eds.), 2020, *The EU General Data Regulation (GDPR) – a Commentary*, Oxford: OUP Oxford, pp. 1229-1238.

<sup>463</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 2010, O.J. (L 108). Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2010.108.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2010.108.01.0001.01.ENG) (1.9.2021.).

<sup>464</sup> European Commission, 2012, Montenegro Progress Report, Brussels, 10.10.2012., SWD(2012) 331 final, p. 50, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2012/package/mn\\_rapport\\_2012\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf) (1.9.2021.).

<sup>465</sup> Ibid, p. 52.

<sup>466</sup> Official Journal of Montenegro, 22/2017.

<sup>467</sup> European Commission, 2020, Montenegro 2020 Report, Brussels, 6.10.2020., SWD(2020) 353 final, available at: [https://www.ecoi.net/en/file/local/2040146/montenegro\\_report\\_2020.pdf](https://www.ecoi.net/en/file/local/2040146/montenegro_report_2020.pdf) (1.9.2021.).

as an inclusive process by the Ministry, civil society organisations did not take part in it.<sup>468</sup>

Initially, the draft law was to harmonise national legislation with both the GDPR and the LED.<sup>469</sup> In July 2018, Montenegrin DPA announced the work on new data protection law and the compliance thereof with the GDPR.<sup>470</sup> However, during the drafting process, it was advised by experts engaged through EU funded projects to separate pieces of legislation, having in mind that the EU legal instruments were of different level.<sup>471</sup> The work was put off and later continued only vis-à-vis general data protection regime.

The process of the adoption of the law in Montenegro is still pending, the law complying national data protection legislation with the GDPR is expected by the end of 2021.

Montenegro ratified the Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2005<sup>472</sup> and 2010<sup>473</sup> respectively. However, it has not yet signed the 2018 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>474</sup> Content-wise national legislation is expected to follow the provisions as in the GDPR, as well as the order thereof.

#### 4.4. North Macedonia

North Macedonia signed the Stabilisation and Association Agreement back in 2001, which came into effect in 2004.<sup>475</sup> North Macedonia ratified the Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2006<sup>476</sup> and 2009<sup>477</sup> respectively.

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<sup>468</sup> According to the interlocutor from the Ministry, CSOs were not active in the field of personal data protection.

<sup>469</sup> According to the interlocutor from the Ministry.

<sup>470</sup> Agency for Personal Data Protection and Free Access to Information, 2018, (press release 24.7.2018.), Law on Personal Data Protection: the Law shall be in compliance with General Data Protection Regulation (GDPR) (in Montenegrin only: Zakon o zaštiti podataka o ličnosti: Zakon će biti usklađen sa Opštom uredbom o zaštiti ličnih podataka (GDPR) <https://www.paragraf.me/dnevne-vijesti/24072018/24072018-vijest2.html> (1.9.2021.).

<sup>471</sup> According to the interlocutor from the Ministry.

<sup>472</sup> Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108> (1.9.2021.).

<sup>473</sup> Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=181> (1.9.2021.).

<sup>474</sup> Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223> (1.9.2021.).

<sup>475</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, 2004, O.J. (L 84).

<sup>476</sup> Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108> (1.9.2021.).

<sup>477</sup> Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=181> (1.9.2021.).

In 2019, it signed the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, however, it has not ratified it yet.<sup>478</sup>

The first initiative regarding the alignment of national data protection legislation with EU law was of Macedonian Data Protection Authority (Macedonian DPA) in 2017. According to the 2017 annual report,<sup>479</sup> the DPA prepared a draft law, even though without legislative competences. As noted in the Report, public discussions had been organised with different stakeholders including one for civil society organisations, however, without significant interest.<sup>480</sup> The draft was also subject to review by external experts engaged through the EU funded project.<sup>481</sup> The process was then shifted to the Ministry of Justice,<sup>482</sup> which established a multistakeholder working group comprising of representatives of ministries, DPA, national experts and a CSO prominent in the field of digital technologies.

The Law on Personal Data Protection was adopted in early 2020 giving a grace period of 18 months for data controllers and processors to comply with new requirements, thus came in effect in late August 2021.<sup>483</sup> The Law transposes the GDPR into national legal system and to the great extent it is a genuine piece.

#### 4.5. Serbia

Serbia signed the Stabilisation and Association Agreement in 2008, which Serbia ratified same year and came into effect only in 2013.<sup>484</sup> Harmonisation with EU legislation in the field of data protection is envisaged in Article 81, as well as the establishment of a data protection authority. With the adoption of the Data Protection Act in 2008, the competencies of a data protection authority were attributed to the existing independent authority – Commissioner for Information of Public Importance established in 2004.

The first initiative to adopt a new law was initiated by the Serbian Data Protection Authority (Serbian DPA)<sup>485</sup> that drafted a Model Law in 2014 and submitted to the Ministry of Justice.<sup>486</sup> This Model Law, as presented in the accompanying explanatory memorandum,

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<sup>478</sup> Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223> (1.9.2021.).

<sup>479</sup> Macedonian DPA, 2018, 2017 Annual Report, p. 10, available (in Macedonian only) at: [https://dzlp.mk/sites/default/files/u4/godisen\\_izvestaj\\_dzlp\\_2017\\_web\\_2.pdf](https://dzlp.mk/sites/default/files/u4/godisen_izvestaj_dzlp_2017_web_2.pdf) (1.9.2021.).

<sup>480</sup> According to the interlocutor, there was one organization present.

<sup>481</sup> Macedonian DPA, 2019, 2018 Annual Report, p. 8, available at: [https://dzlp.mk/sites/default/files/u4/annual\\_report\\_dpdp\\_2018\\_en.pdf](https://dzlp.mk/sites/default/files/u4/annual_report_dpdp_2018_en.pdf) (1.9.2021.).

<sup>482</sup> Macedonian DPA, 2019, 2018 Annual Report, available at: [https://dzlp.mk/sites/default/files/u4/annual\\_report\\_dpdp\\_2018\\_en.pdf](https://dzlp.mk/sites/default/files/u4/annual_report_dpdp_2018_en.pdf) (1.9.2021.).

<sup>483</sup> O.J. of the Republic of North Macedonia, No. 42/2020.

<sup>484</sup> Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, 2013, O.J. (L 278). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22013A1018%2801%29> (1.9.2021.).

<sup>485</sup> Full name: Commissioner of Information of Public Importance and Personal Data Protection.

<sup>486</sup> Commissioner for Information of Public Importance and Personal Data Protection, 2014 (press release 17.10.2014.), *Commissioner submits Model of new Law on Personal Data Protection to the Government*, available

aimed at complying the national legal regime with the then relevant EU regulation, notably Data Protection Directive, as well as the then work of the Council of Europe on modernising the Convention 108.<sup>487</sup> As a response to this, the Ministry of Justice presented a Draft Law in October 2015, and opened discussion. However, the Draft was heavily criticised both by the Serbian DPA<sup>488</sup> and civil society organisations on the process and its content, while the latter emphasised the failure of the process to involve stakeholders other than representatives of the executive and security sector.<sup>489</sup> The process was consequently put off.

Later in 2017, following the adoption of the GDPR and the LED, the Serbian DPA submitted the second Model Law on Personal Data Protection.<sup>490</sup> Similarly to the first Model Law, there were no actions taken on behalf the Government, and in late 2017, the Ministry of Justice opened a public debate on the Second Draft Law on Personal Data Protection and in March 2018 provided a report acknowledging a number of comments submitted by various stakeholders, such as public authorities including the Serbian DPA, association of judges, business actors and legal offices, IT associations and human rights organisations.<sup>491</sup> Most of the criticism related to the fact that provisions of EU legal acts are taken verbatim and to great extent inapplicable in the national legal regimes. According to the Ministry, the work of the drafting group was supported by experts engaged through EU funded projects.

Eventually, the Law was adopted in November 2018<sup>492</sup> without substantial deliberation in the Parliament and entered into force in August 2019, leaving nine months to prepare for the implementation.

Serbia ratified Council of Europe's Convention 108 as its Additional Protocol CETS. 181, in 2005<sup>493</sup> and 2008<sup>494</sup> respectively. In 2020, Serbia ratified the Protocol amending

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at: <https://www.poverenik.rs/en/press-releases/1900-poverenik-stavio-na-raspolaganje-vladi-model-novog-zakona-o-zastiti-podataka-o-licnosti.html> (1.9.2021.)

<sup>487</sup> Commissioner for Information of Public Importance and Personal Data Protection, Data Protection Model Law 2014, available in Serbian only.

<sup>488</sup> Commissioner for Information of Public Importance and Personal Data Protection, 2015 (press release 4.11.2015.), *Unsatisfactory Draft Law on Personal Data Protection*, available at: <https://www.poverenik.rs/en/press-releases/2219-nezadovoljavajuci-nact-zakona-o-zastiti-podataka-o-licnosti.html> (1.9.2021.).

<sup>489</sup> Share Foundation, 2015, Letter to the Ministry of Justice - Comments on the Draft Data Protection Law, available (in Serbian only) at: [https://resursi.sharefoundation.info/wp-content/uploads/2016/11/share\\_fondacija\\_komentari\\_na\\_nact\\_zakona\\_o\\_zastiti\\_podataka\\_o\\_licnosti.pdf](https://resursi.sharefoundation.info/wp-content/uploads/2016/11/share_fondacija_komentari_na_nact_zakona_o_zastiti_podataka_o_licnosti.pdf) (1.9.2021.).

<sup>490</sup> Commissioner for Information of Public Importance and Personal Data Protection, 2017 (press release 6.7.2017.), *Commissioner puts model personal data protection law at disposal of government*, available at: <https://www.poverenik.rs/en/press-releases/2622-commissioner-puts-model-personal-data-protection-law-at-disposal-of-government.html> (1.9.2021.).

<sup>491</sup> Ministry of Justice, 2018 (press release), *Report on public debate on the Draft Law on Personal Data Protection*, available (in Serbian only) at: <https://paragraflex.rs/dnevne-vesti/230318/230318-vest11.html> (1.9.2021.).

<sup>492</sup> Republic of Serbia Official Gazette, No. 87/2018.

<sup>493</sup> Council of Europe, Chart of signatures and ratifications of Treaty 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&tratynum=108> (1.9.2021.).

<sup>494</sup> Council of Europe, Chart of signatures and ratifications of Treaty 181, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&tratynum=181> (1.9.2021.).

the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>495</sup>

Regarding the content of the Serbian Data Protection Act it complies of both GDPR and LED, while the provisions of the two documents intertwine to the extent that the order of provisions in the GDPR is changed due to insertion of provisions of the LED pertaining to the same issues, such as data subject rights. Many of those GDPR provisions that are allowing EU Members States to further regulate remained open in the national law. In addition, provisions of the LED are taken with no further elaboration nor with more instructive wordings.

## 5. COMMONALITIES AND DIFFERENCES WITHIN THE WESTERN BALKAN REGION

In two, North Macedonia and Serbia, out of five countries a law has been adopted to harmonise EU data protection regime. Notwithstanding the difference in pace amongst respective law-making processes throughout the region, certain commonalities may be drowned.

What is evident is that the process was by default initiated by a national data protection authority, which has no legislative powers, including the competence to draft legislation. Nonetheless, in some cases (Bosnia and Herzegovina, North Macedonia and Serbia), the DPAs took action and drafted their own proposal.

Each process was supported by an external expertise, in different stages, through projects and other activities funded by the EU, such as TAIEX or IPA funds.

What is lacking in all these processes, is an overall assessment of the impact of the transposition of the GDPR into domestic legal systems and what such a decision may entail vis-à-vis other pieces of legislation. As an example, while preparing for EU membership<sup>496</sup> Slovenia authorities reviewed and revised, where applicable, several hundreds of laws and bylaws to adjust with the Data Protection Directive.<sup>497</sup>

Civil society organisations did not take active part neither in law-making, nor in advocacy, in most of countries, save in North Macedonia, in which one organisation was actively involved in the drafting of the law, and in Serbia, in which a great number of organisations criticised both the process and the content of the law.

Only one country ratified the Council of Europe Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (so-called Convention 108+) even though each of them is a member state of the Council of Europe and signatory to the other treaties pertaining to personal data protection.

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<sup>495</sup> Council of Europe, Chart of signatures and ratifications of Treaty 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Status as of 02/09/2021., available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223> (1.9.2021.).

<sup>496</sup> Slovenia became an EU Member State in 2004.

<sup>497</sup> Ruzic, N., 2018, (5.3.2018.) *Srbija u susret GDPR-u*, PC Press, available (in Serbian only) at: <https://pcpress.rs/srbija-u-susret-gdpr-u/> (1.9.2021.).

## 6. CONCLUSION

Legislative reform such as in the field of personal data protection should have been dealt with more systemic approach, needs assessment as well as with the estimation about how effective new rules may be applied.

Any process, in general, may be observed as one that could have been more inclusive. However, the processes led in Western Balkan countries are best described as top-down processes with no, or very little involvement of non-state stakeholders.

As often is the case, candidate countries tend to legislate national rules in accordance with Union acquis simply by translating provisions of relevant legal instruments. However, this is fallible on several grounds. The EU data protection instruments, notably the GDPR, are a product of long advocacy, lobbying and deliberations, which relied not only on the goals but also on best practices, or even failures, throughout EU Members States. The lack of knowledge about the logic behind certain provisions inevitably leads to misunderstanding of the application thereof.

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