

THE ROLE OF THE NATIONAL AUTHORITY IN PROTECTING PERSONAL DATA

Adrian BOANTĂ*

ABSTRACT: *The protection of personal data implies, besides the existence of a particular legal frame-work (the Regulation, national legislation), also the participation in good faith of all involved parties in handling and protecting these rights. One of the parties involved is the National Supervisory Authority for Personal Data Processing (NSAPDP), authority that can establish secondary legislation in this field, has control attributions and can impose sanctions, when the case. The importance of this field implies also the increase of the importance the Authority enjoys, especially in the field of initiating and adopting secondary legislation in the field. The legal provisions adopted by the Parliament and later by the NSAPDP have created a national legal frame-work that establishes the role of NSAPDP in the field of protecting personal data.*

KEYWORDS: *protection of personal data; national authority; GDPR.*
JEL Code: *K10, K38*

The area of personal data protection is going through a new stage of development with the entry into force of *Regulation¹ (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 (Regulation)* but also due to the correlation of the provisions of national law with those of the European legislation in the matter.

The protection of personal data involves, beyond the legal framework (Regulation, national legislation), also the participation, in good faith, of the parties involved in the management and protection of these subjective rights. One of the actors involved is the The National Supervisory Authority For Personal Data Processing² (NSAPDP) (Nicolae Dragoş Ploeşteanu, 2018), authority that can establish secondary legislation in this field, has control attributions and can impose sanctions, when the case. The importance of this field implies also the increase of the importance the Authority enjoys, especially in the field of initiating and adopting secondary legislation in the field (Moldovan, 2018). The

* Lecturer PhD., Faculty of Economics and Law, "George Emil Palade" University of Medicine, Pharmacy, Sciences and Technology of Targu Mures, ROMANIA.

¹ The General Regulation of the protection of personal data has entered into force starting with the 25th of May, 2018, date at which Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data was repealed.

² The ECJ has stressed the importance that this authority be independent, See ECJ, Grand Chamber, Judgment from 9th of March 2010, Case C-518/07.

legal provisions adopted by the Parliament and later by the NSAPDP have created a national legal framework that establishes the role of NSAPDP in the field of protecting personal data.

The role of national authorities in supervising the processing of personal data, as evidenced by the provisions of the Regulation, but more so from the provisions of the national legislation, can lead to the conclusion that there exists a tendency towards the bureaucratization of the process of protecting personal data (Irina Alexe, 2017)³.

The powers, duties and responsibilities of the NSAPDP are described both in the Regulation and in the national legislation. Thus, chapter VI of the Regulation describes the role of the independent supervisory authority, and starting with art. 55 of the Regulation the skills, tasks and powers of the supervisory authority are established, stressing that all these provisions demonstrate an increase in the role of national authorities in the application of the Regulation (The Regulation established that the authority has the competence to investigate, correct, authorize and council). Regarding the national legislation, the powers and responsibilities of the authority are laid down in Law no. 102/2005 regarding the setting up, organization and functioning of the National Supervisory Authority for Personal Data Processing⁴ as well as in special laws⁵, namely administrative acts issued in the application of the legal provisions in this matter⁶.

The national legislation and the role of NSAPDP in its application and correlation with the provisions of the regulation has led, it's true in a short period of time, to a series of doctrinal discussions on the degree of fulfilment and implementation of the provisions of the regulation, shaping a coherent, predictable and non-discriminatory national legislative framework as well as the opportunity to apply administrative fines.

We aim to report on certain provisions from our national legislation that have created distinct categories of personal data controllers, categories that have a distinct (preferential) regime, including the sanctional one (Moldovan, 2017). A first legal issue starts from the comparative analysis of the provisions relating to the discovery and sanctioning of contraventions contained by Law no. 102/2005, republished, and by *Government Ordinance no. 2/2001 on the legal regime of contraventions*. Thus, G.O. no.

³ The authors wonder whether the provisions of the Regulation that have enhanced the powers of the supervisory authorities will not be in fact leading to a bureaucratization in this field and consider that this scenario is possible and that the final outcome depends in the manner in which the Regulation will be applied.

⁴ Republished on the grounds of art. IX of Law no. 129/2018 for the alteration and completion of Law no. 102/2005

regarding the setting up, organization and functioning of the National Supervisory Authority for Personal Data Processing, as well as for the repealing of Law no. 677/2001 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, published in the Official Gazette of Romania, Part I, no. 503 of June 19th 2018, giving a new number to its provisions.

⁵ See, as an example, Law no. 190 of July 18th 2018 on measures for the application of Regulation (EU) 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) published in the in the Official Gazette of Romania, Part I, no. 651 of July 26th 2018.

⁶ See, as examples, Decision no. 133/2018 regarding the procedure for handling complaints, published in the Official Gazette no. 600/13.07.2018 as well as Decision no. 161/2018 regarding the procedure for investigations, published in the Official Gazette no. 892/23.10.2018.

2/2001 – legislative act that establishes the general framework in matters of administrative offences, sets out in art. 2 the forms of normative acts that establish and sanction contraventions: „*In all areas of activity, contraventions can be provided for and sanctioned through laws, ordinances or government decisions.*”

On the other hand, Law no. 102/2005 merely references to the provisions of art. 83 of the Regulation, without specifically establishing, within its own provisions, which deeds can constitute contraventions, nor any sort of sanction limitations: Art. 15 paragr. 1 – *The main contravention sanctions that can be applied by the National Supervisory Authority, according to art. 58 paragr. (2) letters b) and (i) of the General Data Protection Regulation, are the warning and the fine. The application of the fine shall be made under art. 83 of the General Data Protection Regulation.*” This legal clarification cannot provide adequate procedural safeguards in accordance with Union law or national law, including effective judicial remedies and the right to a fair trial, as set out in art. 83 paragr. 8 of the Regulation. We believe that it is appropriate for the legislator to establish, within the provisions of law no. 102/2005 – republished, exactly what deeds represent administrative offences, as well as the minimum and maximum limits of the applicable fines, of course in close connection with the provisions of art. 83 of the Regulation to which reference is made. This clarification is even more so necessary in the light of analysing art. 3 (1) of G.O. no 2/2001: „*The normative acts establishing contraventions shall comprise the description of the facts constituting contraventions and the sanctions that are to be applied for each of them; in the case of fine sanctions, the minimum and maximum limit shall be set or, where applicable, the percentage shares of certain values; charges may also be established for determining the compensations for the damages caused by committing contraventions.*” This legal operation was all the more necessary given that Law no. 190/2018 specifically lays down the deeds that represent contraventions, and also expressly provides the applicable sanctions for public authorities or bodies⁷. The need for such a regulation lies in the necessity to eliminate arbitration in the application of contravention sanctions and to ensure compliance with the principles laid down by the art. 29 Working Group for Data protection⁸. At present, if we were to reference to the principles of law, it would be possible to reach the conclusion that the minimum level of the fine that can be applied by NSAPDP to operators (other than public authorities or bodies) is *of 25 lei*, as set out in paragr. 2 of art. 8 of G.O. no. 2/2001, the general law in this matter. A special situation may arise out of the application of the fine, namely its minimum, if the data controller is a public authority, or if the respective data controller is a private one. Thus, in those cases when the the data

⁷Art. 14 of Law no. 190/2018:

(2) *The breach, by the public authorities/bodies, of the following provisions of the General Data Protection Regulation represents an administrative offence:*

a) *the obligations of the controller and processor under Art. 8, Art. 11, Arts. 25-39, Arts. 42 and 43;*

b) *the obligations of the certification body pursuant to Arts. 42 and 43;*

c) *the obligations of the monitoring body pursuant to Art. 41 paragraph (4);*

(3) *The breach, by the public authorities/bodies, of the provisions of Arts. 3-9 of the present law represents an administrative offence.*

(4) *The administrative offences provided under paragraphs (2) and (3) shall be penalized by an administrative fine ranging from 10.000 lei to 100.000 lei.*

⁸Guidelines on the application and establishment of administrative fines within the meaning of Regulation 2016/679 http://ec.europa.eu/justice/data-protection/index_en.htm

controller is a public authority, the minimum fine established by art. 14 of Law no. 190/2018 is of 10.000 lei, whereas in those cases when the data controller is a private body, by reference to the rules of interpretation and application of the principles of law, the minimum level is of 25 lei.

These different minimum thresholds can generate also different applications of the rule set up by art. 28 of G.O. no. 2/2001, article which has been amended by Law no. 203/2018 and which establishes that: *„The offender may, no later than 15 days after the date the contravention report is delivered or communicated, pay half of the minimum of the fine provided for by the normative act, the agent making mention of that possibility in the report.”*

Concerning the possibility of paying half of the minimum fine, we want to make the following clarifications:

1) Decision no. 161/2018 on the approval of the procedure for conducting investigations, *a normative administrative act*, establishes this possibility to pay half of the minimum in annex 2 with the indication that this legal provision applies only to sanctions applicable to public authorities, public bodies as regulated by Law no. 190/2018;

2) Law no. 203/2018 establishes this possibility for all categories of offenders, underlying that the provision in question is applicable in all cases, irrespective of whether the facility is foreseen by the normative act. In the same vein, the Legislative Council noted that *„the modification of art. 28 paragr. (1) proposed at art. 20, section 7 of the draft - Law no. 203/2018 has the effect of changing the rules applicable to the system of ablation, as it is currently regulated by the provisions of Government Ordinance no. 2/2001. Thus, at present, the possibility of paying half of the minimum fine must be expressly provided for in the normative act establishing the contravention. Therefore, if the normative act does not include this rule, the offender does not benefit from this possibility. From the modification of art. 28 paragr. (1), proposed in the project, it results that this possibility is granted to offenders in all cases, not only when the normative act expressly provides for it. This solution is also confirmed by the proposed provision for art. 24 paragr. (2) of the project, according to which the provisions of normative acts establishing the possibility of paying half of the minimum fine are repealed”*.⁹

3) The doctrine¹⁰ opines that *these legislative changes are the equivalent of a return to the system set-up by Law no. 32/1968 which provided for the payment of half of the minimum of any fine within 48 hours of the notification of the contravention report. This system had been abandoned with the adoption of Government Ordinance no. 2/2001 which provided for the possibility of paying half of the minimum of the fine only in the situation where the special normative act of contravention 'incrimination' expressly provided for this possibility.*

In conclusion, we consider that the NSAPDP decision no. 161/2018 must be interpreted in close connection with the principle of the hierarchy of legal norms, meaning in which all categories of offenders have the possibility to pay half the

⁹<http://www.cdep.ro/proiecte/2015/500/50/4/cl682.pdf>

¹⁰<https://www.juridice.ro/595296/toate-amenzile-contraventionale-neexecutate-se-reduc-la-jumatate-din-minimul-legal-incepand-cu-24-august-2018-este-legea-nr-203-2018-o-lege-contraventionala-mai-favorabila.html>

minimum provided for in the normative act, without knowing, at present, what that minimum is, in the case of individuals. This analysis in the field of administrative offences emphasises that a number of legislative amendments are required in order to have apredictable legislation on the protection of personal data in this particular aspect concerning the discovery and sanction of contraventions.

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