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SOME CONSIDERATIONS ON THE LAWFULNESS OF PERSONAL DATA PROCESSING BY PUBLIC ADMINISTRATION AUTHORITIES UNDER REGULATION (EU) 2016/679

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Abstract: *In this short paper we intend to examine the processing of personal data by the Romanian public administration authorities from the perspective of its lawfulness under the General Data Protection Regulation (GDPR). We will argue that the processing of personal data in violation of Regulation (EU) 2016/679 provisions for the purpose of issuing administrative acts by public authorities can affect not only the lawfulness of the latter, but such infringements lead also to the erosion of the concept of good administration, one of the key factors being that the Romanian Law 190/2018 on implementing measures for GDPR doesn't allow the possibility of imposing a contravention fine on public authorities when finding a GDPR infringement.*

Key words: *GDPR, personal data processing, lawfulness of processing, public administration authorities, national implementing measures.*

1. Introduction

Under Directive 95/46/EC all processing of personal data had to comply, first, with the principles relating to data quality and, secondly, with one of the criteria for making data processing legitimate (Judgement of 1 October 2015, Bara and Others, C‑ 201/14, paragraph 30). Likewise, Regulation (EU) 2016/679 provides that personal data processing must comply with the principles set out in article 5 and the processing is lawful only if and to the extent that at least one of the legal bases (legitimate grounds) applies.

These two conditions taken together constitute what we might call the lawfulness of the processing in a broad sense. In a narrower sense, the notion of lawfulness of the processing includes just the legal basis for the processing provided for in article 6 of the General Data Protection Regulation (GDPR).

In the following, we will present only some specific aspects regarding the processing of personal data by the public administration authorities, namely the lawfulness based on the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

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2. Article 6 (1) (e) GDPR: the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller – main legal basis of personal data processing by public administration authorities

Article 5 paragraph (1) letter a) GDPR requires personal data to be processed *lawfully* in relation to the data subject. The principle of lawfulness implies the need for a legitimate ground, such as the consent of the data subject, the performance of a contract, the performance of a task carried out in the exercise of public authority, the compliance with a legal obligation, the legitimate interests of the controller or third parties, or the protection of the data subject's vital interests.

The performance of a task carried out in the public interest or in the exercise of official authority vested in the controller as legitimate grounds for the personal data processing are *specific* to public authorities, including administrative ones. Consent doesn't provide a valid legal ground for the processing in cases "where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation" (recital 43). However, the use of consent as a lawful basis for data processing by public authorities is not totally excluded by the GDPR and consent can be appropriate under certain circumstances where there is no imbalance of power (Article 29 Data Protection Working Party, 2018, p. 6).

Likewise, legitimate interest cannot serve as legal basis to the processing by public authorities in the performance of their tasks because in such situations "it is for the legislator to provide by law for the legal basis for public authorities to process personal data" (recital 47).

According to recital (45) and article 6 paragraph (3) GDPR, when the processing is carried out in accordance with a legal obligation to which the controller is subject or it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority (public functions and powers), the basis for the processing has to be laid down either by Union law, or by the member state law to which the controller is subject. In these situations EU law or the law of the member states serves an objective of public interest and must be proportionate to the legitimate aim pursued [article 6 paragraph (3) GDPR in fine].

When the personal data is processed in order to perform a *specific task in the public interest* that is set out in law or to process personal data in the *exercise of official authority* (public functions and powers set out in law), the controller doesn't need a specific statutory power to process personal data, but its underlying task, function or power must have a clear basis in law (Information Commissioner's Office, 2018, p. 75).

If the controller has a specific statutory power to process personal data or it needs to process the personal data to comply with a statutory obligation, than the legal ground for the processing will be the *compliance with a legal obligation* to which the controller is subject according to article 6 paragraph (1) letter c) GDPR. However, the latest edition of the Handbook on European data protection law (2018, p. 151) mentions that "the legal obligations of public sector data controllers can also fall under Article 6 (1) (e) of the GDPR".

In some countries, the national law provides that public authorities are responsible for the processing of personal data within the context of their duties – explicit legal competence (Article 29 Data Protection Working Party, 2010, p. 10). On the other hand, more frequent is the case where the law, rather than directly appointing the controller or setting out the criteria for his appointment, establishes a task or imposes a duty on an entity to collect and process certain data. Also, an entity can be entrusted with certain public tasks which cannot be fulfilled without collecting at least some personal data.

As far as we are concerned, we believe that public administration authorities can rely on the ground provided by article 6 paragraph (1) letter e) GDPR only to the extent that, although the law doesn't provide for the obligation to process personal data, this processing is intrinsic to the performance of a task carried out in the public interest or to the exercise of official authority vested in the controller. Thus, the public administration authorities will be able to resort to article 6 paragraph (1) letter e) GDPR when, although their relevant task, function or power that entails the personal data processing is set out in law, they cannot identify in addition the specific legal provision that clearly sets out their obligation to process personal data.

3. Sanctions for the infringement of the GDPR by public administration authorities

The GDPR allows member states to decide whether and to what extent administrative fines may be imposed on public authorities and bodies established in that particular member state.

For example, the National Commission for Data Protection of the Grand-Duchy of Luxembourg may impose, according to article 48 of the Law from 1 August 2018, administrative fines as provided for in article 83 of Regulation (EU) 2016/679, except against the *state* or *municipalities*. The Belgian Data Protection Authority, according to article 221 § 1 and 2 of the Law from 30 July 2018 on the protection of individuals with regard to the processing of personal data, cannot impose an administrative fine in the case of processing performed by the *judicial authorities*, such as the ordinary courts and the public prosecutor's office, in the exercise of their jurisdictional functions, nor in the case of *public authorities* and their *agents*, except in the case of legal persons governed by public law who offer goods or services on a public market.

In France, article 45-III 7° of Law no. 78-17 of 6 January 1978 relating to data, files and freedoms, as modified by Law no. 2018-493 from 20 June 2018, provides that the National Commission on Informatics and Liberty can impose an administrative fine, with the exception of cases where the treatment is implemented by the *state*. Ireland has a different approach, in the sense that public authorities and bodies can be fined, but article 141 paragraph (4) of Data protection act 2018 limits the administrative fine to 1.000.000 € where the Data Protection Commission decides to impose an administrative fine on a controller or processor that is a *public authority* or a *public body* (that doesn't act as an undertaking within the meaning of the Competition Act 2002).

Although the Romanian law's initiators have stated that the absence of a fine in the public sphere would encourage the infringement of the data subjects' rights or interests who are in a position of inequality with respect to that public institution or authority

[The Explanatory Memorandum to the Bill on implementing measures for Regulation (EU) 2016/679, p. 6], in the case of public authorities or a public body, the adopted version of the law favours a two step approach as to the sanctions applicable to infringements of the General Data Protection Regulation.

Article 2 paragraph (1) letter a) of the Law no. 190/2018, in the application of the GDPR and this law, defines the *public authorities and bodies* as the Chamber of Deputies and the Senate, the Presidential Administration, the Government, the ministries, the other specialized bodies of the central public administration, the autonomous public authorities and institutions, the county and local public administration authorities, other public authorities, as well as the subordinated or coordinated institutions. Also, for the purposes of this law, cult units, associations and public utility foundations are assimilated to public authorities and bodies. Some of these, like the Government, are also public *administration* authorities.

Law no. 190 from 18th of July 2018 on implementing measures for Regulation (EU) 2016/679 stipulates that in the event of an infringement of the GDPR's provisions by the public authorities/bodies, the National Supervisory Authority for Personal Data Processing (NSAPDP) shall conclude a report on the finding and sanctioning of the contravention by which it will apply the *sanction of the warning* and to which it will attach a *remedial plan*. The remedial period shall be determined by the risks associated with the processing and the steps needed to be taken to ensure the compliance of the processing with the GDPR. Within 10 days of the expiry date of the remedial period, the National Supervisory Authority *may* (but is not obliged to) resume the control.

If NSAPDP decides to resume the control, and it finds that the public authority/body has not fully implemented the measures set out in the remedial plan, depending on the circumstances of each case, it *may* (but is not obliged to) impose a *fine*. According to article 14 paragraph (4) of Law no. 190/2018, the fine for public authorities and bodies ranges from 10,000 lei to 100,000 lei (≈ from 2150 € to 21.500 €), while for other controllers the application of contravention sanctions takes place in accordance with the provisions of the GDPR (article 83 on the general conditions for imposing administrative fines) and the fines can mount up to 20.000.000 €, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

Even though the measures in the remedial plan aim at the fulfilment by the public authority/body of the obligations stipulated by the provisions on the protection of personal data, in view of the above, the fine no longer seems to sanction the infringement of the provisions of the General Data Protection Regulation but rather the failure to comply with the remedial plan. Not least, this legislative solution also runs counter to the spirit of the GDPR, given that, according to recital (152) "Member States should implement a system which provides for effective, proportionate and *dissuasive* penalties".

Basically, since the sanction of the warning to which is attached a remedial plan cannot be considered dissuasive, we find that public authorities or bodies have no actual interest in implementing the GDPR provisions before they are presented with a remedial plan, since – regardless of the nature, gravity and duration of the infringement, the number of data subjects affected and the level of damage suffered by them – no pecuniary sanction can be applied at the moment when the infringement is discovered.

Therefore the lack of interest in implementing the GDPR provisions will most likely lead to personal data processing in violation of this regulation which can only result in the erosion of the concept of good administration.

In this context, the question arises whether an issued administrative act implying an unlawful processing of personal data (e.g. an act issued in violation of the data minimisation principle) could be annulled through administrative litigation in view of the fact that, according to article 1 paragraph (1) of Law no. 554 from 2nd of December 2004 on the administrative litigation, any person whose right or legitimate interest has been harmed by a public authority through an administrative act may appeal to the administrative court for the annulment of the act and the repair of the damage caused.

We don't have in view the hypothesis where the act was issued as a result of an unlawful processing of personal data, but the one in which the administrative act itself (*instrumentum*) contains the unlawful processed data, as it happens when the disclosure of personal data violates the principle of minimizing data.

In the absence of relevant case-law, it is difficult to assess to what extent the administrative courts would admit that an administrative act issued in breach of the GDPR provisions could be the subject of an action for annulment. That's why we can only look forward to the motivation of the decision by which an administrative contentious court will accept or reject such a request.

However, in the meantime, we deem that the data subject should be allowed to demand and obtain the annulment of such administrative acts, considering that article 14^{11} of Law no. 102/2005 on the establishment, organization and functioning of the National Supervisory Authority for Personal Data Processing provides that "the data subjects have the right to appeal to the competent court for the defence of the rights guaranteed by applicable law, which have been violated".

As administrative acts are concerned, the material jurisdiction will lie with the courts of administrative litigation. In the case of administrative acts issued or concluded by local and county public authorities, territorial jurisdiction rests with the courts and, in the case of those issued or concluded by the central public authorities, the competence lies with the administrative litigation divisions of the courts of appeal.

Since the provisions of Law no. 190/2018 are completed with the provisions of Law no. 554/2004, insofar as it does not provide otherwise [article 14^{10} paragraph (3) of the Law no. 190/2018], the data subject can address the administrative section of the competent court only after going through the preliminary procedure provided by the Law on administrative litigation. Thus the data subject is obliged to request the issuing public authority or the superior hierarchical authority, if any, the revocation, in whole or in part, of the administrative act. Only the data subject dissatisfied with the response to this prior complaint or who has not received any response within the legal time limit can appeal to the competent administrative court to request the total or partial annulment of the administrative act issued in violation of the GDPR provisions.

Last but not least, we express our hope that, despite the lack of dissuasive sanctions, public authorities or bodies will process personal data in compliance with the General Data Protection Regulation, thus preventing the issuance of administrative acts that might infringe upon the rights of the data subjects. To achieve this objective the public

administration authorities should appoint Data Protection Officers not just formally, but in view of their personal professional qualities and level of expertise of data protection law and practices.

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