

In Search of a Data Protection Officer

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In view of the brocard *nemo censetur ignorare legem* (nobody is thought to be ignorant of the law), probably every law student promised himself/herself that after graduation they will read the Official Journal of Romania (at least Part I – legislation) while having the morning coffee. In practice, however, at best we have set some alarms for legislative events suffered by normative acts of immediate interest, service provided by some software for legal documentation and research.

I managed to fulfil the promise made as a student when the SARS-CoV-2 virus visited our lands and the state of emergency made the publication of the legislation to be done especially in the dead of night. So, for almost two years, I have been reading the titles of normative acts. A couple of days ago, seeing the publication of a Regulation on the organization and operation of the *online switching platform* for electricity and natural gas suppliers and for contracting the supply of electricity and natural gas¹, I sniffed out a personal data processing.

Looking at the penultimate article of this regulation one can read that: „the users of POSF [the online platform for end customer to change the electricity and/or natural gas supplier] are required to comply with 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, in and in connection with the POSF in relation to CF [end customers’] data and information [...]”². I sighed...

Mentioning the General Data Protection Regulation has become a figure of speech, especially in normative administrative acts. Usually such a reference takes the form: „in accordance with the provisions of Regulation (EU) 2016/679”, as if this formula had the ability of providing by magic, like a simple rotation of the wand or a ring twist, the protection of natural persons in relation to personal data processing or ensure the implementation of data protection principles.

Driven by a mischievous thought, I decided to ask the personal data controller a question under the free access to information of public interest. As it results from Article 8 (1) of the Regulation on the organization and operation of the online platform, the administrator and controller of the platform will be the National Energy Regulatory Authority (ANRE) – the issuer of the said regulation – and ANRE is an autonomous

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¹ Approved by Article 1 of the President of the National Energy Regulatory Authority Order no. 3 of 26 January 2022, published in the Official Journal of Romania, Part I no. 108 from 3 February 2022.

² It is further stated that the obligation to comply with Regulation (EU) 2016/679 exists “both at the time of their introduction [personal data of end customers] in the POSF and in the event that updates are required”, hence it follows that the reference to the General Data Protection Regulation seems to take into account only the *principle of data accuracy* provided by Article 5 (1) (d) GDPR, ignoring the rest.

administrative authority³. Thus, I asked to be told „which will be the legal basis (provided by Article 6 GDPR) for the processing of end consumers – natural persons – personal data, within the POSF platform”.

For my surprise, less than an hour after sending the request, I received a response from the Data Protection Officer within ANRE (he also has the title of „IT Office Expert”) who, after confirming receipt of the request⁴, stated that: „one of the IT experts will be back shortly with more information”. At such times, the easily influenced (and less knowledgeable) start to have doubts about the provisions of Regulation (EU) 2016/679.

According to Article 39 (1) (b) GDPR, the data protection officer (DPO) monitors the compliance with the General Data Protection Regulation, to this end providing the controller with guidance on the demonstration of compliance⁵. As the controller is responsible for complying with the principles relating to processing of personal data, including demonstrating the lawfulness of the processing, it is unnatural that the person who is tasked with assisting the operator in monitoring compliance does not know the answer to a question about the legal basis for processing. This all the more so as Article 37 (5) GDPR states that the DPO is designated on the basis of professional qualities and, *in particular, expert knowledge of data protection law and practices*⁶, and the obligation to inform the data subjects, when the platform becomes operational, will include the communication of the legal basis for processing.

Although one cannot deny the contribution of an „IT Office Expert” to the proper implementation of technical and organizational security measures, reducing the DPO to competences that are not fully in line with the wording and spirit of Regulation (EU) 2016/679 is detrimental to any public authority or private body and not without impact on the effective protection of data subjects’ rights.

In the heliocentric system of the General Data Protection Regulation, IT systems are not at its core, but the individuals are and their fundamental right to protection in relation to the processing of their personal data. In this respect, Recital (15) GDPR points out that „the protection of natural persons should be technologically neutral and should not depend on the techniques used”, so that information technology expertise is not enough (and maybe not even necessary) to qualify as a DPO. Just as a crown does not a king make, a job title does not make a DPO. However, the paper bears anything⁷ and so does a business card.

³ See Article 1 (1) of the Government Emergency Ordinance no. 33 of 4 May 2007 on the organization and functioning of the National Energy Regulatory Authority, published in the Official Journal of Romania, Part I no. 337 from 18 May 2007, with subsequent amendments.

⁴ <https://servicedesk.intern.anre/Ticket/13923>.

⁵ In this respect, see Recital (77) GDPR.

⁶ See also Recital (97) GDPR which explicitly states that, where the processing is carried out by a public authority, the data protection officer should be „a person with expert knowledge of data protection law and practices [and] should assist the controller or processor to monitor internal compliance with this Regulation”.

⁷ The remark also concerns the decision of the National Energy Regulatory Authority, as a controller, to designate a data protection officer according to Article 37 (1) (a) GDPR.