

# INTERFERENCE BETWEEN THE PROTECTION OF PERSONAL DATA AND CONTRAVENTIONAL LEGISLATION

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## **Abstract**

31<sup>st</sup> July, 2018, Law no. 190/2018 regarding the application measures of the EU Regulation 2016/679 of the European Parliament and Council from April 27<sup>th</sup>, 2016 regarding the private person's protection concerning the private data and regarding the free circulation of this data and the 95/46/CE Directive abrogation (General Data Protection Regulation). In the European Union member States, the activity of checking the legislation regarding the personal data is done by the institutions or the authorities that are especially founded, to exert these competences. In Romania this public authority is called the "National Authority of Supervising the Personal Data Processing". This study analyses the interference between the personal data protection and the contraventional law beginning with the entry into force of the general Regulation regarding the protection of the personal data and the impact of this European act on the Romanian society. Using scientific methods such as the comparative, deductive, informatic and also other methods, the study aims to highlight the interest of the public and private sector to abide to the rules established by the new general regulation regarding the data protection.

**Keywords:** personal data, contravention, remediation plan, G.D.P.R., the National Authority of Supervising the Personal Data.

**JEL Classification:** K23, K33, K38.

## **1. Introduction**

Six months after the entry into force of the EU Regulation 2016/679 of the European Parliament and Council from April 27 regarding the individual's data protection and the free circulation of this data and the 95/46/CE<sup>2</sup> Directive abrogation titled G.D.P.R., in Romania we can assess the emitted acts for agreeing with this European act.

Taking into account the recent relative European legislation newly entered into force and the apparition of the national law to apply it, nearly two months from May 25<sup>th</sup>, 2018, we do not have a very developed doctrine in this newly formed area, but there are publications of the acts from the data protection or rare doctrinary studies<sup>3</sup>. Regarding the national jurisprudence, we mention that this is also forming under the new regulation auspicious regarding the personal data protection starting with the year 2018.

The structure of this paper wants to clarify some concepts in the area of the personal protection data, on one hand, then we will shortly mention the legal frame established by the national authority in this area regarding the investigations and the complaints procedure, and on the other hand we will comparatively analyze the new laws, Law no. 190/2018 regarding the

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<sup>2</sup> EU Regulation 2016/679 of the European Parliament and Council from April 27, 2016 regarding the private person's protection concerning the private data and regarding the free circulation of this data and the 95/46/CE Directive abrogation (the general Regulation regarding the data protection), document available online <https://eur-lex.europa.eu/legal-content/ro/TXT/PDF/?uri=CELEX:32016R0679>, last entry October 1<sup>st</sup>, 2018.

<sup>3</sup> For example, Nicolae Dragoș Ploșteanu, Vlad Lăcătușu, Darius Farcaș, *Personal Protection Data and the private life – ECHR and EUCJ*, Universul Juridic Publishing House, Bucharest, 2018; Andrei Săvescu, Irina Alexe, Daniel Alexie, Raluca Bengescu, Mihai Buciuman, Sergiu Crețu, Monica Livescu, Gelu Maravela, Alina Matei, Alis Pătlăgeanu, Laurențiu Petre, Ciprian Săraru, Simona Șandru, Daniel Mihail Șandru, Andreea Verțeș Olteanu, *GRDP – The General Regulation regarding the personal data protection. Commentaries and explications*, Hamangiu Publishing House, Bucharest, 2018; *The General Regulation regarding the personal data protection and the connex legislation updates September 17, 2018*, edition cared for and adnotated by Andrei Săvescu, Hamangiu Publishing House, Bucharest, 2018; Daniel Mihail Sandru, Irina Alexe, *Data protection; Column Personal Data Protection: a new begining?*, the „Judicial Courier” no. 2/2018, pp. 63-65; Ramona Liliac, Oana Duță, Nicoleta Magdalena Iacob, Benedictos Gheorghe Iorga, Costinela Luminița Defta, Carmen Gabriela Barbu, coordinators: Dragoș Marian Rădulescu, Daniela Iuliana Radu, Marius Eugen Radu, *The implementation and impact of the EU regulation regarding the personal data protection (GDPR) in Romania. Studies. Legislation. Jurisprudence*, Dio Publishing House, Bucharest, 2018; *Practical guide regarding the personal data protection at European level*, see [http://www.dataprotection.ro/?page=Ghid\\_preactic\\_european&lang=ro](http://www.dataprotection.ro/?page=Ghid_preactic_european&lang=ro) (last accessed October 30, 2018) etc.

application of the EU Regulation 2016/679 of the European Parliament and Council from April 27 regarding the personal protection data and the free circulation of this data and the CE/95/46 Directive abrogation<sup>4</sup> and the prevention Law no. 270/2017<sup>5</sup>.

The research methods we use in this study are diverse and combined, such as the comparative method, logical method and especially deduction, informative method etc. The documentation for this paper always had in mind the combining of two grand lines: the legislation state, national and European from the area of the personal protection data, and the contraventional, national legislation.

The originality of this paper and its value consists in the used methodology and the presented information because a similar paper that combines the personal data protection legislation with the contraventional, in the format that we propose, had never been written before.

This research will underline the conclusion according to which law is a living discipline, adaptable to social restoring and, more than this, national legislation harmonizes continuously with the European one, in this sense, the study aims at highlighting the interest of the public and private sector to abide to the rules established by the new general Regulation regarding the data protection.

## 2. Content

At the moment on national plan, there is, on one hand, a law to apply the G.D.P.R., and, on the other hand, a series of Presidential of National Authority of Supervising the Personal Data Protection administrative acts. This must not trick us into thinking that these acts work independently of the existing legislation in the area of sanctioning the breach of the obligations regarding the data processing established by G.D.P.R., that correlates in this case with the new contraventional legislation, like we will develop in the following.

### 2.1. Conceptual clarifications from the personal data protection area

The concepts that operate in the area of the applicable legislation of the personal data protection are: operator, processing, personal data, consent, authorities and public organisms, responsible, for the data protection, widely processed, the concerned person's rights etc.

For example, according to G.D.P.R., *the personal data* is represented by "any information regarding an identified or identifiable individual (concerned person)". Identifiable person means "a person that can be identified, directly or indirectly, especially through reference to an identification element, such as a name, an identification number, local data, online identification or through one or more elements regarding the physiological, genetic, economic, cultural or social identity".

*Processing*, according to article 4 of G.D.P.R. is "any operation or set of operations done on the personal data or on the sets of personal data, with or without the use of automatic means (...)".

*Operator* is "the individual or judicial person, the public authority, agency or other organism that, on its own or with others, establishes the purpose and means of personal data processing". *The security breach of the personal data* is a "breach of the security that leads, accidentally or illegally, to the destruction, losing, modification or unauthorized telling of the personal data sent, stored or processed in another way or unauthorized access to them"<sup>6</sup>.

By far the most interesting concept of G.D.P.R. is the *right to be forgotten* or the right to data erasing, according to article 17 in correlation with the consent.

Accordingly, the concerned person has the right to obtain the personal data erasing from the operator, without any unjustifiable delays, and the operator has the obligation to erase the data, without any unjustifiable delays, in these situations:

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<sup>4</sup> Law no. 190/2018 regarding the application of the Regulation (EU) 2016/679 of the European Parliament and Council from April 27 regarding the individual's data protection regarding the processing of the personal data and the free circulation of this data and the CE/95/46 Directive abrogation, published in the Official Gazette no. 651 from July 26 2018.

<sup>5</sup> The Prevention Law no. 270/2017, published in the Official Gazette no. 1037 from December 28, 2017.

<sup>6</sup> For more details, see: [www.dataprotection.ro](http://www.dataprotection.ro), last accessed October 30, 2018.

“a.) the personal data are no longer necessary to achieve the purpose they were collected or processed for; b.) the concerned person takes back the consent through which the processing takes place and there is no other judicial basis for processing; c.) the concerned person is opposed to the processing invoking motifs of prevalence of interests, rights and its freedoms in regards with its legitimate and imperative interests and with the purpose of the conclusion, pursuit operator or protecting a right of the operator in court, or the concerned person is opposing to the processing of the personal data that aim direct marketing; d.) the personal data have been illegally processed; e.) the personal data must be erased to respect a legal obligation that comes from the operator on the basis of the EU law or the internal law under the incidence of which lies the operator; f.) the personal data have been collected with offering the informational services directly to a child”.

We will not insist on the concepts of this area because the better part of this study focuses on procedural and contraventional sanctions in the area.

## **2.2. The investigations procedure by the National Authority of Supervising the Processing of the Personal Data**

According to the national legislation, there is a public organism that supervises the enforcement of the legislation in the personal data protection area named the National Authority of Supervising the Personal Data Processing. We mention that the National Authority of Supervising the Personal Data Processing functions on the grounds of Law no. 102/2005 regarding the foundation, organization and functioning of the National Authority of Supervising the Personal Data Processing<sup>7</sup>.

The National Authority of Supervising the Personal Data Processing, according to the investigations procedure from October 9<sup>th</sup>, 2018, conducts investigations respecting this procedure that we will shortly describe next.

The investigations can be conducted on its own motion or from a complaint. The complaint form is available on the website of the National Authority of Supervising the Personal Data Processing, [www.dataprotection.ro](http://www.dataprotection.ro).

The complaints regarding the personal data processing that are found under the G.D.P.R. incidents are addressed to the National Authority of Supervising the Personal Data Processing – called in the following pages T.N.A.S.P.D.P. or the National Authority of Supervising. For this purpose, the President of the National Authority of Supervising the Personal Data Processing emitted the no. 133 from July 3<sup>rd</sup>, 2018 Decision regarding the approval of the complaints solving and receiving Procedure<sup>8</sup>. This procedure is for seen in annex 2 of the electronic complaint form.

### **2.2.1. The investigations procedure by the National Authority of Supervising the Personal Data Processing**

This time we mention the T.N.A.S.P.D.P. Decision no. 161/2018 regarding the investigations Procedure.

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<sup>7</sup> Law no. 102/2005 regarding the foundation, organisation and functioning of the National Authority of Supervising the Personal Data Processing, published in the Official Gazette no. 391, May 9<sup>th</sup>, 2005. Through Law no. 129 from June 15<sup>th</sup>, 2018 for modification and completing of Law no. 102/2005 regarding the foundation, organisation and functioning of the National Authority of Supervising the Personal Data Processing and for the abrogation of the Law no. 677/2001 for the person's protection regarding the processing of the personal data and the free circulation of this data, (published in the Official Gazette no. 503 from June 19<sup>th</sup>, 2018 ), the attributions of the National Authority of Supervising are, in general, the ones from the EU Regulation 2016/679 ( ... ) and through the national legislation of transposition of the EU Directive 2016/680 of the European Parliament and Council from April 27<sup>th</sup>, 2016 regarding the individual protection regarding the personal data processing by the competent authorities (...).

<sup>8</sup> The T.N.A.S.P.D.P. decision no. 133 from June 3<sup>rd</sup>, 2018 regarding the approval of the receiving and solving the complaints procedure, (published in the Official Gazette no. 600 from July 17<sup>th</sup>, 2018). The act is public and available on the National Authority of Supervising, [www.dataprotection.ro](http://www.dataprotection.ro), last accessed October 30<sup>th</sup>, 2018.

Briefly, regarding the investigations Procedure from October 9<sup>th</sup>, 2018<sup>9</sup>, is interesting that, it is expressly mentioned that, if the organ is prevented from performing the investigation, in article 20 of the investigations Procedure is mentioned the possibility of soliciting the judicial authorisation by the National Authority of Supervising, being in the jurisprudence of the Bucharest Court of Appeal or of a delegated judge. The closing of the judicial authorisation can be appealed in 72 hours at the High Court of Cassation and Justice through contestation. The investigations can be conducted on the field, at the authority's headquarters or in written.

Through the legal possibilities of the organ that conducts the investigation on the field, we mention: the identification and guarding of the objects, seals application, expertise conducting, persons hearing etc. At the end of the control a report of observation/sanctioning of the controlled entity is closed, report that is a debt title and payment notification. The contraventional sanctions applied by the National Authority of Supervising are, according to article 24 from the investigations Procedure: admonition and fine.

Also, in the case in which there is a possibility that, through processing operations through which an operator or a delegated person by the operator intends to perform, the applicable legislation can be breached, according to the investigations Procedure, the National Authority of Supervising can issue a *warning* for the controlled entity. Beside the application of the contraventions mentioned by law, after the investigation, the National Authority of Supervising can order other *corrective measures* and can formulate recommendations.

The corrective measures can be: "the obligation of the operator or the empowered person to respect the concerned person's rights, to ensure the conformity of the processing operations with the applicable dispositions, the restriction of the processing etc."

According to article 28 of the investigations Procedure, against the observation/sanctioning and/or corrective applicable decision, as appropriate, the operator or the empowered person by the operator can submit a contestation at the administrative litigation of the tribunal, in 15 days from the communication of the report of observation/sanctioning or of the Presidents of the National Authority of Supervising Decision.

### **2.2.2. The complaints solving and receiving procedure by the National Authority of Supervising the Personal Data Processing**

According to the Presidents of the National Authority of Supervising the Personal Data Processing Decision no. 133/2018 regarding the solving and receiving Procedure approval of the complaints, the complaints can be addressed by any interested person, identified, according to this procedure's stipulations, that considers that its data processing breaks the legal provisions, especially in the case in which, its normal residence, its work place or the so called breach, are or, as appropriate, takes place in Romania.

The procedure foresees conditions for admitting the complaint, in the sense of imposing the fulfilment of some form and fond conditions, such as: they have to be written, in Romanian or English and they have to mention the person's data: name, surname, home address, e-mail, phone number, registration number in the associations and foundations registry, if it is necessary; the complaint must be signed in manuscript or electronically.

According to article 5 of the Procedure, when the complaint is submitted is mandatory to specify the object, the steps the interested person took at the reported operator level or of the empowered person or, as appropriate, the available information to sustain the affirmations and adding the conclusive evidence, if it has them. The complaints receiving by the National Authority of Supervising Personal Data Processing is free.

Also, according to the Procedure, the concerned person has the possibility to address the competent court from the operator's/empowered person's by the operator headquarters or the

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<sup>9</sup> The T.N.A.S.P.D.P. Decision no. 161/2018 regarding the investigations Procedure, published in the Official Gazette no. 892 from October 23<sup>rd</sup>, 2018. The act is public and available on the National Authority of Supervising, [www.dataprotection.ro](http://www.dataprotection.ro), last accessed October 30<sup>th</sup>, 2018.

normal residence of the concerned person, without a stamp fee. The evolution or the result of the undertaken investigation is brought to the attention of the concerned person in 3 months' time from the date that it's been communicated that the complaint is admissible.

### 2.3. The interference of the legislation of the personal protection data with the contraventional legislation

About the nomination of the *contravention* as judicial response, namely administrative-contraventional.

The National Authority of Supervising the Personal Data Processing, in order to respect the personal data protection legislation, can impose contraventional sanctions and other corrective measures. Law no. 190/2018 regarding measures of applying the EU Regulation 2016/679 (...) establishes in Chapter VI entitled *Corrective measures and sanctions*, in article 12 *General dispositions regarding corrective measures and sanctions* that "the breach of certain provisions from the law is contravention".

Also, it expressly mentions that, for the breach of the dispositions mentioned in article 83, paragraphs (4) – (6) from G.D.P.R. the main contraventional sanctions are "*admonition and contraventional fine*". We mention that, on the other hand, in contraventional common law, according to the Government Ordinance no. 2/2001 regarding the judicial regime of the contraventions<sup>10</sup>, the main contraventional sanctions are: admonition, fine and the provision of some community service and according to the law of prevention, sanctions are admonition and / or establishing a remediation plan.

Besides this, the remediation law is evasive in the case in which, after some time, the contraventional relapse interfere, sense in which is mentioned: the legal provisions regarding the constatation and sanctioning of the contraventions are directly applicable. From another point of view, the contraventional sanctions are: admonition and fine but also warning (we mentioned this before) can be disposed separately or together with other corrective measures: admonition, fine of maximum or over 300.000 euros.

About the breach of other personal data categories, such as: "genetic data, biometric data, health data, the processing of a national identification number, the personal data processing in work relations context, personal data processing and personal data processing special categories in the fulfilment of a task that serves a public interest etc." Law no. 190/2018 (...) mentions that "it is sanctioned according to article 83, line 5 of G.D.P.R."

*About the remediation plan.* A resemblance between the two laws refers to the significance given to the remediation plan that is defined as being: annex to the report of constatation and sanctioning of the contravention (Law no. 190/2018...) and annex to the report of contravention constatation and appliance of the sanction (the prevention Law) by which measures and a remediation term are established.

The differences are more between the two comparative acts. The first difference between the two laws, regarding the remediation plan, refers to the fact that, while the prevention Law refers mainly to the officer, Law no. 190/2018 (...) mentions the National Authority of Supervising the Personal Data Processing.

Another difference between the two compared acts is the fact that, while the remediation plan form is mentioned as an annex of Law no. 190/2018 (...), in the contraventional law area, the plan of remediation form is mentioned in the Government Decision no. 33/2018 regarding the establishing of the contraventions that enter under the incidence of the prevention Law no. 270/2017, and also of the plan of remediation<sup>11</sup>, administrative act later issued, for the appliance of the prevention Law.

<sup>10</sup> The Government Ordinance no. 2/2001 regarding the judicial regime of the contraventions, published in the Official Gazette no. 410 from July 25<sup>th</sup>, 2001, with the following modifications and additions.

<sup>11</sup> The Government Decision no. 33/2018 regarding the establishing of the contraventions that enter under the incidence of the prevention Law no 270/2017, and also of the plan of remediation, published in the Official Gazette no. 107 from February 5<sup>th</sup>, 2018.

*About the remediation measure.* Under this aspect we note a difference in the sense that, while Law no. 190/2018 (...) defines the remediation measure as being: “a solution disposed by the National Authority of Supervising in the remediation plan regarding the fulfilment by the authority/public organism of the obligations foreseen by law”. The prevention Law defines the remediation measure as: “any measure disposed by the officer in the remediation plan that follows the fulfilment by the offender of the obligations foreseen by law in its task”.

Thus, Law no. 190/2018 (...) refers to a “solution disposed by ...”, while the prevention Law refers to “any measure disposed by ...”, the difference being noticed by the regulations between the two acts.

*How to calculate the remediation term?* The difference between the two acts, that we already talked about, foresees:

- Law no. 190/2018 foresees that the remediation term is the period “of 90 days’ tops from the date of communication of the constatation and sanctioning of the contravention report, in which the authority/public organism has the possibility of remediating the noticed irregularities and the fulfilment of the legal obligations”.
- The prevention Law mentions: that the remediation term is the period of time “of maximum 90 calendar days’ tops from the date of the handout or, if it is the case, of the communication of the contravention and appliance report (...), in which the offender has the possibility to remediate the noticed irregularities and the fulfilment of the legal obligations”.
- While the prevention law says: the remediation term is established by taking into consideration the circumstances that led to the committing of the fact and the duration necessary for the fulfilment of the legal obligations; the remediation term established by the control organ cannot be modified, Law no. 190/2018 (...) does not mention anything in this sense.

*About the subjects of the contravention.* From this point of view, we also noticed differences between the two laws we compare.

In Law no. 190/2018 (...) in Chapter VI titled: *Corrective measures and sanctions*, article 13 that refers to the appliance of the corrective measures to the “authorities and public organisms” but in the prevention Law it mentions: “a person that commits more contraventions” (article 5) or “the offender” (articles 6, 8, 9 etc.).

On the other hand, Law no. 190/2018 (...) mentions what “*authorities and public organisms*” means: the Deputies Chamber and the Senate, the Presidential Administration, the Government, the ministries, the other specialized organs of the central public administration, autonomous authorities and public institutions, local and county public administration authorities, other public authorities, and also the institutions under their coordination/subordination.

Law no. 190/2018 (...) says that “the cult units and public utility foundations and associations” are assimilated to them.

*About the procedure of committing a contravention.* Under this aspect we also noticed similarities and differences between the two acts.

The similarities refer to the applicability of the admonition to which they annex a remediation plan, in both cases; to the resume of the control in 10 days’ term from the expiration date of the remediation term.

Differences we find in the case of the contraventions constatation and applicability of the public authorities sanctions, sense in which, only Law no. 190/2018 (...) expressly mentions, “if the measures mentioned in the remediation plan have not been fulfilled, the National Authority of Supervising can apply the contraventional sanction of the fine”. Thus, it is mentioned the amount of the fine and what has been breached from the general data protection Regulation is enumerated – G.D.P.R. On the other hand, the prevention Law does not detail what sanctions are applied if the measures from the remediation plan are not respected.

We will not mention any more of the amount of the fines, allowing an opening for further research that we will do.

### 3. Conclusions

Like we showed in the introduction, after six months after the entry into force of the EU Regulation 2016/679 of the European Parliament and Council from April 27 regarding the individual's protection regarding the personal data processing and the free circulation of this data and the abrogation of CE/46/95 Directive entitled from now on G.D.P.R., the objective of this study has been the assessment of the acts emitted in Romania for putting into accord with this European act and the highlight of the interest in public and private area to respect the rules established by the new general Regulation regarding the data protection.

By far, a first conclusion is that, on national plan there is an authority that supervises the respecting of the legislation in the data protection area and we mention here the National Authority of Supervising the Personal Data Processing.

A second conclusion refers to the fact that ever since the EU 2016/679 Regulation of the European Parliament and Council from April 27 regarding the individual's data protection and the free circulation of this data and the abrogation of the CE/95/46 Directive entered into force, on national plan efforts have been made to put into accord with this European act by emitting many laws and administrative acts of the President of the National Authority of Supervising the Personal Data Processing.

We did not want to develop the subject of the crimes that may be committed in the area of personal data processing or the security incidents, which is why we focused on the similarities identified in the legislation from the point of view of the contraventional sanctions, situation in which we have compared the two areas, the data protection and the national contraventional legislation.

We appreciate that, even though the main contraventional sanction, the fine, is rather burdensome for the sanctioned operators, the existence of the admonition and the remediation plan, in an established term, represents a very important factor for the public and private area to respect the new legislation, prevention being what we consider is emerging from the law philosophy and not sanctioning. The impact of this European act – G.D.P.R. stretches equally over the public and private area, because, like we know, in law, “no one is above the law”.

Finally, as a final conclusion, against the novelty of this study, we notice that we could not observe the forming of a national jurisprudence in 2018, having the basis of personal data protection breach but with another research, we will focus on the European jurisprudence in this area.

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