

CONTROL IN THE SPHERE OF PERSONAL DATA PROTECTION EXERCISED BY THE INSPECTORATE TO THE SUPREME JUDICIAL COUNCIL

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Abstract

Supervision is the key aspect in the personal data protection regime. The issues related to the control over the keeping of the regulation in the sphere of personal data protection have been gaining momentum over the past years. This circumstance hails from the fact that the globally changing social and economic conditions and the enhanced introduction of new technologies predetermine a more intense information flow, including personal data and a growing number of cross-border data transfers. One of the negative consequences of this impact is the infringement of the inviolability of the individual and personal privacy through unauthorised collecting, processing and storing of personal data, which also exists in Bulgaria. That is why the efficiency of the control exercised by the supervisory authority influences the protection of natural persons in cases of illegal processing and its relegation to the relevant legislation. This survey analyses the supervising activities of the inspectorate to the supreme judicial council as a legally appointed authority within the judiciary, guaranteeing the compliance with the regulations for personal data protection when they are being processed for the purposes of court proceedings. Focus is put on the current and complex changes in the legislation introduced by 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 data¹, 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. On the grounds of the analysis conclusions are drawn on the application of the new regulations on personal data protection.

Keywords: supervision, personal data protection, legislature, prosecution, investigation, leverage tools.

1 INTRODUCTION

With the adoption of the last amendments and supplements in the Law on Protection of Personal Data (LPPD) 26 February 2019² the Bulgarian legislation was harmonised with the European Community Law in the sphere of personal data protection, namely: Regulation (EU) 2016/679 and Directive (EU) 2016/680. As a result, Bulgaria is one of the member states which put the responsibility for executing the obligations for personal data protection on more than one authority. The legislator imposes these functions to the Commission for Personal Data Protection (CPDP) and the Inspectorate to the Supreme Judicial Council (hereinafter called the Inspectorate). The introduced duality in the supervisory mechanism for applying the

¹ As of 25 May 2018, the European Union has started applying the new unified regulations for personal data protection, which is obligatory and is directly applicable in all European Union member states.

² State Gazette /Durzhaven Vestnik/, issue 17 of 2019.

personal data protection regulations is driven by the fact that the new legislative framework introduces special rules for personal data processing by the judiciary.

The dedicated legal regulations of the courts are based on the fact that they play a double role as personal data controllers. On the one hand, they process personal data for the purposes of their specific judicial functions (judicial activity), e.g. processing personal data for the purposes of the judicial process, and on the other, as *regular* controllers (administrative functions) of personal data, e.g. processing the personal data of the court employees in relation with their employment; competitions for new employees in courts; financial and accounting activities, related to paying the employee remunerations, as well as any other activity outside the judicial process (see Opinion of the CPDP, Ref. No. NDMSP0 (HDMCΠO)-17-865 / 12/10/2018 of 31/10/2018). This duality is reflected in the supervisory activities on the application of the rules for personal data protection.

Supervision is directed at guaranteeing protection for natural persons against unlawful processing of their personal data in the process of free movement of such data. In essence, it is part of the provisions concerning the integrity and privacy of the person, which activity is carried out by the CPDP. The Commission is a permanent independent body exercising full supervision and guaranteeing the compliance with Regulation 2016/679, the LPPD and the regulations in the sphere of personal data protection. Despite the fact that the range of supervision carried out by the commission is quite widely defined, there are certain exceptions related to the judicial process in courts. The goal is to guarantee the independence of the judiciary in the performance of their judicial tasks, including rulings. For that reason, when it comes to processing personal data by the courts for the purposes of the performance of their judicial functions (arg. Article 55, para 3 of the Regulation), we need to specify that despite the introduced derogation, the Regulation permits that the member states empower a judiciary authority to supervise the exemptions from the activities outside the competences of the national authority (see recital 20 of the Preamble to the Regulation). For that purpose, as the national authority in this sphere was appointed the Inspectorate to the Supreme Judicial Council, which as given new powers to supervise the processing of personal data by the courts, the prosecution and the investigation bodies in the performance of their functions as judicial authorities.

The purpose of this research is to study the new powers of the Inspectorate on exercising supervision in view of the latest changes in legislation guaranteeing the observance of the regulations for personal data protection through preventive action against breaches.

2 ESSENCE OF THE SUPERVISORY AUTHORITY OF THE INSPECTORATE

The Inspectorate is a relatively recent authority within the judicial system of the Republic of Bulgaria, created with the change in the Constitution of 2007³. The idea behind its creation was that it be a highly independent body which supervises the activity of all the bodies of the judiciary, without influencing the essence of their judicial activities (Mihaylova, 2017, p. 199), as well as achieving better accountability. The legal theory argues that independence does not exclude accountability. The two terms are not mutually exclusive, since each body which has been delegated powers of exercising governmental authority is accountable; accountability is also at the basis of democracy and is part of the principle of public sovereignty (Drumeva, 2008, p. 612-613).

The Inspectorate has its particulars as a body of the judiciary. Strictly speaking, it has not been constituted as an integral part of the judiciary – it does not participate in legislation, nor does it take part directly in the system management (Penev, 2017, p. 38). Its main function, for which it has been constituted, is only and exclusively to supervise and control the activities of the judiciary without affecting its independence. Except for that, Article 54 para.1 of the Law on the Judiciary stipulates the rights which it has as an independent state authority. Its most recent power is to supervise the activities exempted from the competencies of the CPDP. In this relation, the Inspectorate shall work for and contribute to the realisation of the protection of natural persons when they have their personal data processed or accessed by the courts, as well as supervise the observance of 2016/679, the LPPD and the other regulations in the sphere of personal data protection. Besides, it shall have the competence to control the observance of Directive (EU) 2016/680, which is applied for personal data processing by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

The literature on administrative law is pervaded by the opinion that supervision mainly concerns the issues of lawfulness (Dermendzhiev, 1976, p. 28; Kostov, 1981, p. 82). It also argues that in supervision, control

³ State Gazette /Durzhaven Vestnik/, issue 12 of 2007

activities are exercised in view of the lawful exercising of controlled activities, and not in view of their correctness (Dermendzhiev, Kostov and Hrusanov, 2001, p. 248-250). In this respect, we need to point out that supervision, as a control activity in the sphere of personal data, is a term of narrower range and content than control.

Supervision has as its subject matter, through guaranteeing data protection, to also guarantee the natural person's privacy and integrity. The inspectorate exercises supervisory powers on the observance of the regulations in the sphere of personal data protection and on the performance of controllers' tasks concerning data processing. In essence, the supervision is a means for observing the law in the relationship between the Inspectorate and the judiciary in their capacity as personal data controllers, when performing their judicial functions. For that reason, any breach in the obligations by controllers as per the Regulation and the LPPD is followed by administrative penalties.

Supervision concerns personal data processing, whether or not by automated means, when such data comprises or is meant to comprise part of a register. This is a specialised type of administrative supervision which is an integral part of the administration of the activities of the court, prosecution and investigation as judicial authorities processing personal data when performing their judicial functions. The regulation and supervision aim at ensuring effective protection of data subjects.

The goal of this specialised administrative supervision is to ensure appropriate and punctual conformity with the Regulation and the LPPD.

The legal content of supervision comprises two components – observation and correction. (Balabanova, 2004, p. 20). Basically, the Inspectorate's supervisory function has to determine whether there is or has been unlawful data processing by the courts, prosecution and investigation for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including prevention of threats to public order and security and their prevention. The main task of the Inspectorate is also related, being a systematic observation of the conformity of the performed activities of the data subjects and the guaranteeing of the conformity of the regulations with Chapter 8 of the LPPD. When, as a result of the supervision, a discrepancy is found between the regulations and their factual implementation and execution, the supervision is continued with the relevant impact tool concerning the supervised bodies. In this respect the Inspectorate's supervisory activities include two main phases – the phase of determining and the phase of impact. As a whole they define the typology of control as a specific managerial administrative activity (Kostov, 1979, p.21).

3 FIRST PHASE OF THE SUPERVISION CARRIED OUT BY THE INSPECTORATE

3.1 Power of Determining

This is the power to observe and investigate. Its goal is to gather the necessary information about the performed activities of the supervised bodies (controllers – the judiciary, prosecution and investigation) and on such grounds determine their true condition. The power also means the extent to which the obligations and the rights are performed, the obligations and rights conferred by the Regulation and the LPPD to the parties concerned with data protection and to the other legal entities to which the regulations of the effective law in this sphere are addressed. In this respect, the Inspectorate has the following determining powers:

3.1.1 Preliminary consultations

They happen with an injunction by the court, the prosecution or the investigative body, as per Article 17b and Article 65 of the LDP, when:

- The assessment of the impact on data protection by the controller shows that the processing is going to generate high risk and at the same time the controller has not undertaken measures for its limiting;
- The data processing is for the purpose of performing a task in the public interest.

The Inspectorate rules on the plea with a written ruling within a deadline which is different for the different bodies of the judiciary, as per Article 94b of the Regulations on the Organisation of the Activity of the Inspectorate to the Supreme Judicial Council on the Activities of the Administration and the experts⁴. The above regulation determines a deadline of eight weeks for ruling, in the event that the plea has been submitted in court. In this case, in view of the complexity of the planned processing, the deadline can be extended with further six weeks. When the plea is filed by the prosecution or the investigation, the opinion is

⁴ As amended and supplemented, State Gazette /Durzhaven Vestnik/, issue 35 of 30.04.2019, valid as of 05.2019.

to be filed within six weeks, which deadline can be extended with another month. It is important to note that before the aforesaid deadlines have matured, the Inspectorate can allow preliminary processing of the data.

The preliminary consultation must establish the technical and organisational measures in data processing taken by the court, prosecution or (data controllers), as well as the admissible type of protection and their conformity with the requirement of the applicable law. The moment of assessment allows the Inspectorate to determine the condition and the results and to appoint possible measures for impact, if necessary.

3.1.2 Inspections

In connection with the compliance with the requirements of the Regulation (EU) 2016/679 and the LPPD, the Inspectorate carries out inspections included in its annual programme or after signals for possible violations. The significance of the inspections on the lawfulness of the data processing shows the preventive role the Inspectorate plays for preventing and eliminating the causes and conditions which engender unlawful data processing.

Planned inspections are carried out in accordance with the procedure referred to in Articles 54-56 of the Regulations on the Organisation of the Activities of the Inspectorate to the Supreme Judicial Council and the Activities of the Administration and the Experts. They can be:

- Complex inspections, which are related to the overall activity of the judiciary;
- Thematic inspections, carried out as per a particular topic on the application of the LPPD by the judiciary body during the inspection period – a judge, a prosecutor or investigator;
- Controlling inspections, which are carried out after a complex or thematic inspection, where certain recommendations are given for overcoming established negative practices.

Inspections are material and technical activities preceding legal work. They do not engender legal consequences in themselves, unless they are related to such legal actions as statements on established violations, mandatory instructions, etc. Based on these inspections, the Chief Inspector, or the inspector appointed by him/her, reveals their findings by drafting a declaratory statement. As per Article 19, para.1 of the LPPD, the inspection ends with a certificate of inspection which lists the findings and makes recommendations, if necessary. When the inspection has established a violation of the regulations on data protection, the legislator envisages the implementation of coercive administrative action as per Article 84, para. 1 of the LPPD and/or the imposing of administrative sanctions as per Chapter Nine of the LPPD, depending on the character and the level of the established violation.

A signal is any request, different from complaint from a data subject, submitted to the Inspectorate in relation with breaches of the Regulation and/or the LPPD. A publication in the media can also be deemed as an alert.

3.1.3 Petitions

In cases of data processing by the court, prosecution or investigation for the performance of their functions as bodies of the judiciary, the LPPD has stipulated special mechanisms for personal data protection. They include a procedure before the specialised Inspectorate or a petition submitted in the court in accordance with the Code of Administrative Procedure (APC). The choice which one of the two mechanisms to use, must be made by the person seeking protection.

The right of protection is exercised through a petition which can be submitted in writing, by fax or e-mail in accordance with the Law for the Electronic Document and Electronic Signature. Anonymous petitions are not reviewed, nor are ones not signed by the petitioner or the petitioner's representative.

The inspectorate reviews petitions by data subjects on cases of breach of their rights as per the Regulation and the LPPD when they have their personal data processed by the court, prosecution or investigation for the performance of their functions as bodies of the judiciary. The petition is submitted in the Inspectorate within six months from receiving knowledge of the infringement, but no later than two years of the date of the committing. When an infringement of the Regulation or the LPPD is established to exist after reviewing the petition, coercive measures are applied as per Article 84 para.1 of the LPPD and/or an administrative penalty is imposed as per Chapter 9 of the LPPD, depending on the character and level of the infringement.

3.1.4 International Cooperation

The Inspectorate realizes international cooperation with other supervisory bodies and international organisations for respecting the rules for personal data protection. Such cooperation is done through

information exchange, as well as requesting and addressing requests for consultations, check-ups and investigations. In this respect, the Inspectorate informs the requesting supervisory body about the results or the progress of the measures taken in answer to the request. The exchanged information is used only for the purposes for which it has been requested.

4 SECOND STAGE OF THE SUPERVISORY PROCESS CARRIED OUT BY THE INSPECTORATE

4.1 Means of Impact

As a result of the exercising of the declaratory powers, the second stage is reached – bringing the power of impact into action. The means of impact are a possible way for effective application of the regulation on personal data protection. They are not obligatory if no infringement of the regulation in this sphere has been established. The measures imposed by the Inspectorate concern only the activities of the data controllers (court, prosecution, investigation authorities), connected with unlawful processing of the personal data of natural persons. Their purpose is to affect the respondents through the application of measures of different character (coercive measures and sanctions).

4.1.1 Coercive Measures

Coercive administrative measures (CAM) as a form of state (administrative) coercion are the powers of the Inspectorate conferred by the Regulation and the LPPD which facilitate and support the performance of its prerogatives as a public authority. As per Article 84, para.1 of the LPPD, the Inspectorate applies the following administrative coercion: as per Article 80, para.1, clauses 3, 4 and 5 of the LPPD. These are mainly warnings, provisions and temporary bans, which by their very nature are means for exerting influence for providing administrative coercion by the Inspectorate in its function as a supervisory authority. As legal instruments, these are coercive administrative measures pursuant to Articles 22 and 23 of the Law on Administrative Violations and Sanctions (LAVS). CAM is a kind of administrative coercion which is not a sanction in character (Keremedchiev, 2004, p. 42). They are applied with the issuance of individual administrative actions or through the issuance of a general non-regulatory administrative action (Genev, 1991, p. 22) by the Inspectorate.

For preventing and terminating any infringements related to the performance of the obligations as per the Regulation and the LPPD, as well as to the eliminating of the negative effects arising from such infringements, the Inspectorate may impose temporary or final limitation (including a ban on data processing). The temporary ban on data processing which has infringed upon the norms for personal data protection, in its legal intensity is one of the strongest coercive administrative measures. It presupposes an infringement of the norms for personal data protection which threatens the inviolability and privacy of the natural person. Such a threat, however, needs to be real and not only assumed.

In the event of forthcoming or commenced illegal activities which may cause damage to the data subjects, the most appropriate type of interference is stopping such activities, so that any negative aftermath can be avoided. It would be quite unjustifiable to wait for their occurrence and only then attempt to rectify the damage or hold the perpetrator liable.

The application of CAM is the conclusive stage of the supervisory activity, but it is not obligatory, just possible, since not in all of the cases infringements of the Regulation or the LPPD will be established and thus such measures should not be taken. But when applied, they are an important tool for the observance and applying of the legislation on personal data protection.

4.1.2 Sanctions

Penal rulings are another instrument for protecting the lawfulness of personal data protection. The Chief Inspector or an inspector explicitly appointed by the Chief Inspector issues penal rulings for breaches in the sphere of personal data protection within the meaning of Article 87, para.3 of the LPPD. Administrative penalties are imposed with jurisdictional acts, i.e. penal rulings, which are not administrative actions. In its essence, a penal ruling is a jurisdictional act of administrative sanction with which the fact of the administrative breach is established and relates to a specific perpetrator who is accordingly penalized as per the applicable law (Dermendzhiev et al., 2012, p. 336; Tsankov, Andreeva, Yolova and Dimitrova, 2006, p. 129). In this respect, it is a juridical act issued by the Chief Inspector of the Inspectorate with a view to materializing the claim of the state in its administrative relations with the data controller to impose a penalty payment in the event of a particular breach of the provisions of Regulation 2016/679 and the LPPD concerning the processing of personal data of natural persons by the judiciary.

The determining of the violation, the issuing, appealing and execution of the penal rulings is done in accordance with the provisions of the Law on Administrative Violations and Sanctions.

5 CONCLUSION

On the grounds of the survey on the supervision carried out by the Inspectorate, we can summarize its advantages and disadvantages.

The main disadvantage of the supervision is the time necessary to get acquainted with the subject matter of personal data protection, as the prerogative to supervise and guarantee the compliance with Regulation (EU) 2016/679, the LPPD and the regulations in the sphere of personal data protection is new to the Inspectorate. The supervision is limited, and the object is not the whole activity of the controlled subjects but only this part with which the Inspectorate is empowered by the law to observe. It is mainly current and very rarely preventive. It has quite limited legal instruments to exert influence, as well as there are no disciplinary measures concerning data controllers. The Inspectorate can involve the offenders of the applicable law in administrative liability only by imposing the administrative penalties provided by the Regulation or the LPPD.

Despite all the above disadvantages, we can say that as a whole the supervisory activity of the Inspectorate allows it to play an important role in the attempts to guarantee the lawfulness in the sphere of personal data protection. Its main advantage is that the inspections are carried out not only after a infringement alert, but also as part of its annual action programme. The timely identification and penalizing of the offenders of the applicable law in the sphere of personal data protection act as preventive and disciplinary measures in view of preventing and eliminating the causes and conditions for such infringements. Yet another advantage is that it performs an important informative function in respect of the right of the data subjects to defend themselves against any unlawful processing of their personal data though alerting the relevant supervisory authorities.

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