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## Jurisprudential developments

Regarding the activity of representation in court, in the period 2019-2022, the National Authority for the Supervision of the Processing of Personal Data received a total number of 127 requests to be summoned to court, and of these 49 requests contested the sanctions applied in the checks carried out.

In 2022, 42 new requests for summons were received, of which 22 requests have as their object the challenge of the minutes of sanctions concluded by the ANSPDCP.

Among the litigations through which the sanctions/measures applied were contested, until March 31, 2023, 23 files were finalized, and in 18 of these cases, final solutions were pronounced in favor of the ANSPDCP.

Thus, the courts fully confirmed the fines applied by our institution to the following 11 operators:

Banca Transilvania SA (100,000 euros)

I want Credit SRL (20,000 euros)

Proleasing Motors SRL (15,000 euros)

Hora Credit IFN SA (14,000 euros)

Dada Creation SRL (5,000 euros)

Actamedica SRL (3,000 euros)

Dante International (3,000 euros)

Royal President SRL (2,500 euros)

CN Romanian Post (2,000 euros)

Nobiotic Pharma SRL (2,000 euros)

CN Romanian Post (1,000 euros)

At the same time, 5 disputes were resolved in favor of the National Supervisory Authority, by maintaining the minutes of ascertainment/sanctioning in the sense of retaining the contraventional character of the facts, with the reduction of the amount of the fine or its replacement with a warning, as regards the operators: SC Entirely Shipping & Trading SRL (decrease), World Trade Center Bucharest SA, Legal Company & Tax Hub SRL, Raiffeisen Bank (decrease), A-Car Vaslui Road Assistance Association.

5 contravention complaints filed by the following operators were admitted: ING Bank N.V. AMSTERDAM, CN Tarom, Tip Top Food Industry SRL, Artmark Holding, Viva Credit IFN SA.

In this context, we mention that the decisions issued by our institution ordering the termination of processing and the deletion of personal data were contested in court, among which we highlight the disputes with UAT Cluj (Local Police) and UAT Constanța (Local Police), which had as object the illegal use of portable audio-video surveillance by the local police (body camera).

Following the investigations carried out, it was found that the operators mentioned above violated the provisions of art. 5 para. (1) lit. a) related to art. 6 para. (1) of Regulation (EU) 2016/679, because the Local Police personnel, in the exercise of specific missions and activities, processed personal data by using the portable audio-video system of the "Body-Worn Camera" type (image and voice ), without there being a legal obligation of the operator and without fulfilling any other conditions provided for in art. 6 para. (1) of the GDPR.

As such, the sanction of the warning was applied, accompanied by a Decision by which it was ordered that the respective operators cease any operation or set of operations of processing personal data carried out through the audio-video systems of the "Body-Worn Camera" type and delete the personal data record system established as a result of the use of such systems. We point out that, through final decisions from 2022 and 2023, the courts upheld the Authority's decisions ordering the termination of processing and the deletion of the images collected by the local police, following checks that found the lack of legality of the respective data processing.

In order to support operators concerned with the correct application of data protection rules, we present below, as an example, some extracts from relevant cases in which the courts have retained the legality and validity of the minutes drawn up by the ANSPDCP, confirming the institution's approach.

◆ Regarding the sanction of the fine in the total amount of 3,000 euros, by final decision, the Bucharest Court of Appeal confirmed the sanction ordered by the ANSPDCP to the Dante International operator.

Thus, the appellate court noted that:

"In the case, the sanction applied by the authority fully corresponds to these proportionality requirements in the conditions where, as already noted, the act was committed in the conditions in which the person who formulated the notification had expressly requested that the appellant-complainant not- i also send commercial messages.

At the same time, from the content of the summons and the appeal, it does not appear that the appellant-plaintiff understood the fact that he had carried out illegal processing, his arguments being centered on the fact that he acted fully in accordance with the legal provisions, by trying to to disguise under the guise of a transactional message a direct marketing message. Also, the Court notes that the appellant-plaintiff has also been sanctioned for violations of the legal provisions regarding the processing of personal data (...).

On the other hand, the amount of the fine established by the appellant-defendant through the infringement report (equivalent to 3000 euros) is oriented towards the minimum specially established by law and has a much lower value than sanctions applied to other economic operators for similar acts."

♦ The Craiova Court of Appeal upheld, like the trial court, the penalty of a fine in the amount of 2000 euros, imposed on the operator Nobiotic Pharma SRL, which did not provide the information requested by ANSPDCP during the investigation, which constituted a violation of the provisions of art. 85 para. (5) lit. e) in conjunction with art. 58 para. (1) from Regulation (EU) no. 679/2016.

Thus, it was held that "the petitioner did not communicate the information requested by the respondent (ANSPDCP), although three notifications were sent to her in this regard, which is why the court considers that the respondent was legally found to have committed the contravention of art. 58 of Regulation (EU) no. 679/2016."

Regarding the individualization of the sanction applied, "the court finds that the sanction of the fine in the amount of 9,890 lei, the equivalent of 2,000 euros, is proportional to the degree of social danger of the act committed regarding the protection of personal data and to the provisions of art. 85 para. (5) lit. e) from Regulation (EU) no. 679/2016."

Regarding the limitation period for the application of the fine, the Craiova Court of Appeal found that: "the provisions of OG no. 2/2001 are, in contravention matters, norms of a general nature, finding their applicability whenever a special norm is not applicable. In the case brought to trial, as the court of first instance correctly held, in terms of the prescription of the application of the incidental contravention fine, the provisions of art. 15 paragraph 4 of Law no. 102/2005 on the establishment, organization and operation of the National Supervisory Authority for the Processing of Personal Data, a norm of a special nature and which applies with priority over the specialia generalibus derogant principle (the special derogates from the general). Therefore, whenever there are derogatory provisions provided in special laws, incidents in question, the latter have priority.

Or, in the case before the court, just such a special norm, Law no. 102/2005 derogating from the norm of common law, OG no. 2/2001, is incidental.

As such, the provisions of art. 15 para. 4 of Law no. 102/2005, according to which, the sanctions provided for in para. 1 can be applied within 3 years from the date of the act. "

♦ The Târgu-Mureș Court of Appeal upheld, definitively, the sanction of the fine in the amount of 3000 euros and the warning applied by ANSPDCP to the operator Actamedica SRL, for violating the provisions of art. 12 para. (3), art. 15 para. (1), art. 28 para. (1), art. 32, and art. 33 of Regulation (EU) 2016/679, as a result of a complaint regarding the loss of biological samples and a sum of money sent through a courier company.

The appellate court confirmed the decision of the trial court, noting, among other things, that:

"The claims (Actamedica) regarding its lack of liability cannot be accepted, the provisions contained in the contracts concluded with other parties not being opposable to the persons who addressed exclusively the appellant-defendant (Actamedica), entrusting her with the biological samples. in the same sense, the respondent-defendant also showed that, in its capacity as a personal data operator, the appellant-defendant, together with the authorized person, had to implement appropriate technical and organizational measures so that the rights and freedoms of natural persons are not in danger, all the more so as the transport included sensitive data, respectively to ensure that the authorized person offers sufficient guarantees for the implementation of technical and organizational measures, in this sense being the provisions of art. 28 para. 1 and art. 32 of the GDPR. (...)

Moreover, as shown by the respondent-defendant, the appellant S.C. Actamedica S.R.L, is at fault, since, in the situation in which it would have consulted the Fan Courier website [www.fancourier.ro](http://www.fancourier.ro) regarding the general conditions regarding the provision of postal services and the "Packaging Guide", it could have easily found that states that biological substances/samples are prohibited from transport, and, at the same time, that postal items cannot include "goods for which special transport conditions are established, by administrative, economic, sanitary legal provisions (...)".

In the same litigation, the court ruled that: "the fine in the amount applied is legal, effective, proportionate and dissuasive and was established taking into account the nature, seriousness and consequences of the violation, as well as all the other criteria provided by the Regulation, criteria that were correctly analyzed by the defendant".

He also emphasized that "The Regulation introduced a much higher level of responsibility of the data operator compared to

Directive 95/46/EC on data protection, and articles 25 and 32 of the Regulation provide that operators take into account the current state of technology, the costs of implementation and the nature, scope, context, purposes of the processing, as well as the risks of varying degrees of probability and severity for the rights and freedoms of natural persons that the processing presents".

"Regarding the merits of sanctioning the plaintiff, (...) the defendant proved that the constitutive elements of the detained contraventions are met. At the same time, the plaintiff (Actamedica) did not prove the existence of a different state of facts, than the one recorded in the disputed statement of findings."

On the other hand, in order to ensure full information to the general public, we point out a new aspect that has recently occurred, regarding the order by the Bucharest Court of Appeal to send some preliminary questions to the Court of Justice of the European Union, in file no. . 31192/3/2019\*, in which Inteligo Media SA challenged the fine of 9,000 euros applied by ANSPDCP, because it violated the principles of processing, including the conditions for obtaining consent, by not complying with the provisions of art. 5 para. (1) lit. a) and b), art. 6 para. (1) letter a) and art. 7 of the General Data Protection Regulation. The preliminary questions are as follows:

"1. In the situation where an editor of an online press publication informing the general public, non-specialist in the field, regarding the legislative changes appearing daily in Romania, obtains the e-mail address of a user on the occasion of creation by the latter, with free title, of a user account that gives him the right (i) to access, for free, an additional number of articles of the publication in question, (ii) to receive, by e-mail, a daily information including a synthesis with legislative news treated in articles within the publication and hyperlinks to the respective articles and (iii) to access, for a fee, additional and/or more extensive articles and analyzes of the publication compared to the daily information transmitted free of charge:

a) Is the respective e-mail address obtained by the publisher of the online press publication "in the context of the sale of a product or service", in the sense of art. 13 para. (2) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of confidentiality in the public communications sector (Directive on privacy and electronic communications) ("Directive 2002/58/EC")?

b) The transmission by the press editor of an information of the type described in point (ii) represents "the direct promotion of one's own products or similar services", in the sense of art. 13 para. (2) of Directive 2002/58/EC?

2. If the answers to questions no. 1 lit. (a) and lit. (b) are affirmative, which of the conditions provided for in art. 6 para. (1) lit.

(a) - (f) of Regulation (EU) 2016/679 must be interpreted as applicable when the publisher uses the user's e-mail address for the purpose of sending a daily information of the type described in question no. 1 point (ii), in compliance with the requirements provided for in art. 13 para. (2) of Directive 2002/58/EC?

3. Article art. 13 para. (1) and para. (2) of Directive 2002/58/EC must be interpreted in the sense that it opposes a national regulation that uses the notion of "commercial communication" provided by art. 2 lit. (f) from Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 regarding certain legal aspects of information society services, especially electronic commerce, on the internal market (Directive on electronic commerce) ("Directive 2000/31 /EC") instead of the notion of "direct marketing" provided by Directive 2002/58/EC? If the answer is negative, an information of the type described in question no. 1 point (ii) represents "commercial communication" within the meaning of art. 2 lit. (f) of Directive 2000/31/EC?

4. If the answers to questions no. 1 lit. (a) and lit. (b) are negative:

a) Represents the transmission by email of a daily information of the type described in question no. 1 point (ii) above, "using [...] electronic mail for direct marketing purposes" in the sense of art. 13 para. (1) of Directive 2002/58/EC? respectively

b) Article 95 of Regulation (EU) 2016/679 in conjunction with Article 15 para. (2) of Directive 2002/58/EC must be interpreted in the sense that, failure to meet the conditions regarding obtaining a valid consent of the user according to art. 13 para. (1) of Directive 2002/58/EC will be sanctioned according to art. 83 of Regulation (EU) 2016/679 or according to the provisions of national law from the transposition act of Directive 2002/58/EC which, in turn, contains specific applicable sanctions?

5. Article 83 para. (2) Regulation (EU) 2016/679 must be interpreted in the sense that, a supervisory authority that takes the decision whether to impose an administrative fine, as well as the decision regarding the amount of the administrative fine in each individual case, has the obligation to analyze and explain in the administrative sanctioning act the impact of each of the criteria provided for in letters (a) - (k) on the decision to impose a fine, respectively on the decision regarding the amount of the applied fine?"

As an evolution, we specify that in this litigation, initially (2020), the Bucharest Court upheld the 9,000 euro fine applied by ANSPDCP and the control report, and then the Bucharest Court of Appeal sent the case for retrial, in 2021 , considering that the trial court did not make any concrete assessment of its own on the grounds of illegality invoked by the plaintiff (Inteligo Media SA), limiting itself to the reproduction of the defenses formulated by the defendant (ANSPDCP).

In the retrial, the Bucharest Court found again (2021) the legality of the ANSPDCP control report and set the fine at 4,500 euros, with the following reasoning:

"As for the amount of the fine, the court considers that it is necessary to reduce its amount (from 9,000 euros to 4,357 euros, equivalent to lei at the BNR exchange rate of 26.09.2019, 4,357 being the number of users (individuals concerned) who did not express their consent through an unequivocal action that constitutes a freely expressed, specific, informed and clear manifestation of the data subject's consent to the processing of his personal data) because, on the one hand, the plaintiff is in the first violation of the RGDP, normative act, relatively newly entered into the legal order at the time of the start of the illegal activity, and, on the other hand, that, following the start of the investigation, it took the measure of suspending the appearance of the disputed field, until the case is resolved. "

The litigation is currently pending before the Bucharest Court of Appeal (file no. 31192/3/2019\*).

In this context, we note that preliminary questions to the CJEU were also sent by the Bucharest Court in the dispute between ANSPDCP and Orange (file 12278/3/2018), and the CJEU's point of view in Case C-61/19 confirmed the given interpretation by ANSPDCP.

And this litigation is currently before the court.

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