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## ***EMPLOYERS AS PERSONAL DATA ADMINISTRATORS – SPECIFICS AND REQUIREMENTS IN THE CONTEXT OF THE INFORMATION SOCIETY***

**Abstract:** The paper explores the specifics of the personal data administrator in the information society and the new European regulations.

On the basis of the correlation between the digitization in the economy and the impact of the process on the labor relation, the basic obligations of the employer as data administrator are analyzed. Finally, conclusions and recommendations on the application of the regulations are made in view of the employer's commitments regarding the employees' personal data.

**Key words:** personal data, personal data administrator, employer, labor law

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## Introduction

Digitization is radically changing our personal and professional lives. The impact of the processes is positive, but at the same time it entails a number of risks. The development of society and the economy in line with these processes inevitably requires adaptability of employment. Employers and workers are faced with the need to show flexibility associated with multiple needs. The future of the labor market worldwide, in Europe and in Bulgaria is associated with many new and non-typical forms of employment: multiple part-time work, multi-performer work, i.e. “crowdworking”, mass employment, voucher-based work, etc.

The said current forms of employment require regulation first at international level, and then regulation within national laws according to the narrow specifics of the particular country. The process of labor market transformation in the context of the information society requires a comprehensive policy at the level of the European Union to cover both issues related to the transformation of traditional into non-typical forms of employment and to provide the necessary safeguards for social protection and security in exercising the right to work. In this regard, one of the important issues to be addressed is the protection of workers’ and employees’ personal data, respectively the employer’s duties as an administrator thereof.

Explaining the term “personal data administrator” on the one hand is essential for the implementation of the Personal Data Protection Act (PDPA) as it will determine which person will be responsible for compliance with the data protection rules. On the other hand, the concept is important for persons whose data is collected, because thus they will be informed and made aware of the scope of the law, what the duties of data administrators are and how they can exercise and defend their rights in cases of unlawful processing of their personal information.

**For the purposes** of this paper, the term “personal data administrator” and the main obligations of the employer in this capacity will be considered in order to ensure the effective implementation and compliance with the PDPA.

The topicality of the researched issues is obvious in view of the implementation of Regulation (EC) 2016/679 of the European Parliament and of the Council dated 27 April 2016 in the EU Member States and the adaptation of national laws to the provisions of community law. Therefore,

the analysis of the subject requires a complex approach on several levels, on the one hand clarification of the conception apparatus related to the administration of the process and, on the other hand, its binding with the specifics of the labor law.

## 1. The concept of personal data administrator

According to Art. 3, para. 1 PDPA, a personal data administrator, hereinafter referred to as “administrator”, is a natural or legal person, or a state authority or local authority, which alone or jointly with another person determines the purposes and means of processing personal data. This definition contains three main elements that are closely related to each other but will be analyzed separately in this paper.

**The first element** is “a natural or legal person, or a state or local authority” and refers to the personal characteristic, i.e. who can be an administrator and therefore be held accountable for the obligations arising from data protection legislation. It is clear from the definition that the legislator has covered all the subjects of law and included them in the definition of the personal data administrator. This follows from the objective of the law to offer the widest possible protection of the personality and privacy of citizens in the processing of their personal data.

In principle, it must be assumed that legal persons and public authorities are always responsible for the processing activities carried out in their sphere of activity even if the natural person they have appointed has not complied with the data protection principles. This is because the respective individual acts on their behalf and is not an administrator. An exception to this rule is when the individual uses the data for his / her own purposes outside the scope and possible control of the activities of the legal entity or government body. In this case, the individual in question will be the administrator of the processing and will be responsible for the use of the personal data as long as the purpose of the processing is not for personal purposes. The original administrator in this case may still retain some responsibility if the new processing was done due to a lack of adequate reliability measures.

**The second element** looks at the possibility of multiple administration. Many legal entities may interact or be interrelated in the processing of personal data. Joint administration occurs when different entities deter-

mine, in relation to particular processing operations, either the purpose or the essential elements of the means which characterize the administrator. However, it is not always a case of joint administrators when different subjects collaborate in the processing. For example, the exchange of data between two parties that do not share the same goals or tools in a common group of transactions should only be considered as a data transfer between individual administrators.

In cases of joint administration, it should also be pointed out that the impossibility of directly fulfilling all the obligations of the administrator, such as providing information, right of access, etc., does not preclude the qualification as an administrator. It is practically possible for these obligations to be easily met by other parties, which are sometimes close to the person for whom data is collected on behalf of the administrator. However, the administrator remains in all cases ultimately responsible for their duties and for any violation thereof<sup>3</sup>.

**The third element** “defines the purposes and means of processing personal data” and constitutes an essential part of the check : which person should determine such purposes and means in order to qualify as an administrator. This element depends on the specific conditions under which processing is performed.

The Personal Data Protection Act stipulates that data must be collected for specific, explicit and legitimate purposes and not further processed in a manner inconsistent with these purposes (Article 2 (2) (2) PDPA). It is therefore the administrator who has to determine which data to process for the intended purpose.

The means relate not only to the technical and organizational issues that can be tackled by the data processors (for example, what software to use) but also to the essential elements that only the administrator can determine such as which data to process, how long to process, who can access them, etc. In this respect, it is quite possible for the technical and organizational tools to be assigned by the administrator to another person who processes the data. At the same time, the purpose of the processing always results in the person being identified as an administrator. In cases where there is a clear definition of objectives but there is little or no indication of technical and organizational means, the means must be a reasonable way to achieve the goal. The person who decides to set the goal is an administrator.

<sup>3</sup> Statement 1/2010 of the Work Group under article 29 concerning the concepts “personal data administrator” and “a person processing data”, (WP 169) dated 16.02.2010, c.25

The quality of administrator is mainly a consequence of the fact that a person or organization has chosen to process personal data for their own purposes. It does not matter whether the decision-maker was legally able to do so or that he was formally authorized under the PDPA procedures. The issue of the lawfulness of personal data processing will remain important, but in cases where the data is being processed illegally, the administrator's identification will help to apply the responsibility for the processing. Administrators are responsible for the processing of personal information of individuals in the context of their duties.

The basic rule of law is that the data administrator should comply with the provision of Art. 2, para. 2 PDPA, concerning the conditions under which the administrator is entitled to process personal data. These conditions relate to the basic principles of data quality - they must be processed lawfully and in good faith. All the provisions defining the conditions for lawful processing are addressed mainly to the administrator, even if this is not always clearly stated.

The provisions of Art. 26, Art. 28a and Art. 34a PDPA on the rights of individuals to information, access, rectification, erasure and blocking, as well as individuals' opposition to the processing of their personal data, are formulated in such a way that they create obligations for administrators. The administrator is also a basic figure in the provisions of Art. 17 and Art. 23 PDPA on the submission of an application for registration before starting the processing of personal data and setting deadlines for periodic reviews of the need for data processing. In principle, the administrator is responsible for all damages resulting from unauthorized processing (Article 39 (2) of the PDPA). This is also **the fundamental role of the term** "administrator", namely to determine the responsibility for complying with data protection rules and how the data holders for whom data are collected can exercise their rights.

The term "administrator" is also an essential element in determining the scope of personal data processing because it clarifies in which cases PDPA applies to data processing. According to Art. 1, para 4 PDPA, the law applies to the processing of personal data when the personal data administrator:

- is established on the territory of the Republic of Bulgaria and processes personal data in connection with its activities;
- is not established on the territory of the Republic of Bulgaria but is obliged to apply the law under the international public law;

- is not established in the territory of an EU Member State or in another EEA Member State but uses for processing purposes funds located on Bulgarian territory, except where such funds are only used for transit purposed. In the latter case the administrator has to indicate a representative established in the territory of the Republic of Bulgaria without thus being exempted from liability.

Lastly, it should be noted that the term ‘administrator’ appears in a large number of different provisions of the PDPA as an element of their scope or of a specific condition the fulfillment of which is required by them. For example, Art. 4 PDPA provides that the processing of personal data may only be carried out if necessary: to fulfill a statutory obligation of the personal data administrator or to fulfill contractual obligations under which the individual whose data is collected is a party, as well as for pre-contractual actions taken at the said individual’s request; in order to protect the life and health of the individual to whom the data relate; for the performance of a task carried out in the public interest or for exercising the powers provided by law to the administrator or to a third party to whom the data are disclosed; for the realization of the legitimate interests of the personal data administrator or of the third party to whom the data are disclosed, unless the interests of the data subject have prevail to such interests; as well as when the individual to whom the data refers has explicitly given his or her consent. The identity of the administrator is also an important part of the information for the person for whom the data are collected, required under Art. 19 and 20 PDPA.

## **2. Specific requirements for the employer concerning the administration of workers’ and employees’ personal data.**

The protection of personal data provided in the framework of the employment relationship is one aspect of the overall protection of individuals’ data in the digital society. The issue is indisputably important for the labor law and this is witnessed by the interest of a number of authors who have worked either on individual issues in this area (Genova Y., 2011, p. 128, Alexandrov, A., 2009, Alexandrov, A., 2013, pp. 68-86, Aleksandrov, A., 2015) or have considered the issue comprehensively (Alexandrov, A., 2016). The research of the issue in this aspect, which is bound up with the employer’s labor-law engagement, reveals a number of specifics which will only be outlined in the paper, in view of the limited volume allowed.

We can outline several key stages that are part of the process of establishing, existence and respectively terminating the employment relationship. At each stage the parties provide and handle personal data respectively and, accordingly, obligations for their protection arise for the employer. **The first stage concerns pre-contractual relations** between the parties on the occasion of the occurrence of the employment relationship. This stage determines the lawful occurrence of the future legal relationship and, in view of this, requires a certain set of personal data relating to the employee's personality<sup>4</sup>. For the sake of maximum correctness and at the same time protection of the rights of both parties to the legal relationship, it is advisable to provide a mandatory consent from the data holder, i.e. the worker or employee.

**The second stage is the essence. It concerns the active legal connection, related to the occurrence, development and change of the labor relations.** It is precisely in relation to these manifestations in the process of labour provision that we can say that the data collection is "staged" in view of the natural course in the development of the legal relationship. It is normal for the employee to have provided only the minimum required data and to supplement them subsequently.

In view of the life cycle of the employment relationship, **the moment of its termination is the last stage.** It is of utmost importance, both legally and socially. With regard to the protection of personal data, the employer's obligation is the last in the series and, at the same time, it is of a special nature since it relates to a commitment on a legal relationship already concluded. Personal data provided under an employment relationship, which no longer exists, are processed. The need for data protection is related to the needs of other proceedings: pension arrangements, litigation, etc. Engaged subjects at this stage are the former employer and, respectively, the former employee.

These stages are indisputable, both from the point of view of their interrelation with the transformation of the employment relationship and in view of the general obligations of the employer to manage the overall process. In the context of the protection of personal data and the forthcoming implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with

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<sup>4</sup> In our national law they are regulated by Ordinance 4 of 1993 concerning the documents necessary to enter into an employment contract, in accordance with the position applied for.

regard to the processing of personal data and on the free movement of such data, a number of issues emerge for which national labor law does not contain specific provisions. In this connection, it is necessary that the process of data protection and the control related to this should be organized by each employer through the development of internal documents and supplementation through the Collective Employment Contract. The Bulgarian labor legislation has normative traditions regarding the regulation of the necessary data related to the employment relationship. In this regard, there is no need for a change to adapt the norms to the operation of the Regulation. However, in technical terms, control issues should be perfected by the employer. The information society and the digitization process provide many modern control options, respectively, to ensure data security. In this respect, however, there is a risk of excessive invasion of the employee's privacy, respectively exceeding the limits of the employer's obligations.

## **Conclusion**

The administrator's role is crucial and especially important when it comes to determining responsibilities and imposing penalties. Therefore, the straightforward identification of the person guilty of violating the data protection laws is undoubtedly a main prerequisite for the effective application of PDPA.

In view of the above, a conclusion can be drawn as to the need for a better awareness on the part of employers of the rules concerning the personal data protection and their appropriate implementation. The process is bound both to the worker and employee's employment relations, i.e. concerning the individual labour-law relation, and to the collective employment contracts. The main responsibility for data protection is borne by the economically and organisationally more powerful party – the employer, however in practice this is also the obligation of the individual person - worker or employee, as well as of the trade unions and the employers' organisations, in view of their opportunities to impact the parties' rights protection within the employment relations, and in particular, the personal data protection. Therefore, the persons in charge of the lawful processing of personal data have to be sufficiently encouraged by legal and other means to undertake all measures necessary for the practical personal data protection. In order to ensure the effective application of such encouragement

means, it is necessary to foresee not only the administrator's liability, but also that of the citizens. The aim is to guarantee that any damage shall be compensated and that adequate measures shall be undertaken to correct any errors and violations.

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