CONSIDERATIONS ON *EMPLOYEE SHARING* IN THE CONTEXT OF GDPR

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Abstract

At European level, the legal contemporary framework regarding individual employment relations is generally characterized by the proliferation of non-standard forms of employment, which respond equally to both employer and employee's need for flexibility. Today's enterprises face more and more situations that require a non-standard approach, a broader look at the problems and fast, innovative solutions. In an unpredictable business environment, globalization has enabled the European labour market to introduce multiple new forms of employment, which are not yet acknowledged by Romanian legislation. However, Regulation (EU)2016/679 provides a derogation for employee sharing – a new work arrangement which in the juridical context of GDPR would also apply to internal (domestic) law. The general regulations on data protection stipulate that a Data Protection Officer may be shared by several enterprises, a hypothesis in line with the concept on which the employee sharing scheme is based.

Keywords*: new forms of work, employment contract, employee sharing contract, Regulation (EU)2016/679.*

JEL Classification: K31, K33

1. Preliminary considerations

In the realm of individual employment relations, the proliferation of atypical or non-standard work arrangements is certainly one of the greatest challenges of the 20th century. Based on a number of factors identified by the specialized literature[2] (globalization and changes in the political environment; economic changes worldwide; the development of computerized technology; the feminization of the labour force and, implicitly, the increased need for flexibly of the employment contracts; the legislative strategies and policies concerning employment relations), the phenomenon of atypical work arrangements is gaining momentum. In many states of the European Union, flexible work arrangements have become a strategic policy implemented by companies in order to adjust to the realities of economic and technological advancement, and to meet employees' need for flexibility[3], resulting in a new attitude towards the traditional manner of organizing and conducting work[4]. The sphere of flexible work arrangements includes various types of employment, either in the form of non-standard work contracts, already well established and regulated by the internal legislation (the fixed-term employment contract; the part-time work contract; the contract concluded through a temporary work agency; homework and telework), or in the form of new contractual arrangements, which are completely unregulated by internal legislation (voucher-based work; on-call work; job sharing contracts; employee sharing contracts)[5]. In contrast with the general European context which encourages the development of new work arrangements, the domestic legislation of Romania attaches far less importance to the ascending trend of proliferating atypical work arrangements addressed by some European legal systems. Romania is one of the European Union member states which have yet to update their labour legislation by including the flexible work arrangements, and which continue to prefer standard employment contracts as the predilect type of employment. However, 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, repealing Directive 95/46/EC (General Data

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[2] For an analysis of the factors which have resulted in the proliferation of atypical work arrangements on the labour market, see M. E. Marica, *Contracte de muncă atipice*, Ed. Universul Juridic, Bucharest, 2019, p. 42-54.

[3] Surveys indicate that today, the companies which fail to adhere to a flexible work policy, become less and less attractive to prospective employees (https://start-up.ro/romanii-refuza-joburi-daca-angajatorii-nu-ofera-program-flexibil/, accessed 27.05. 2020)

[4] B. Bercusson, *European Labour Law*, Butterworths, 1996, p. 419.

[5] For a discussion of new forms of employment proliferating in European countries over the last years, see R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop & Straton, Bucharest, 2016, p. 124-140.

Protection Regulation, henceforth „GDPR") provides a derogation regarding *employee sharing* – a new type of employment, well-known to European states' labour markets. The aspects tackled by the present study address, on the one hand, one of the important institutions regulated by the GDPR (the Data Protection Officer), and on the other hand, the main features of the new concept of „employee sharing". Considering that the European regulations under discussion can be directly applied internally, exactly like a national law[6], we shall demonstrate that the concept of „several enterprises sharing the Data Protection Officer", matches the typical situation of employee sharing, a type of flexible work which is acknowledged by European legislation, but not yet by the Romanian internal one. According to this hypothesis, the concept of employee sharing has good potential for implementation and development in internal practice, as a complete derogation from internal legislation, as is made possible by the provisions of GDPR[7].

Moreover, the study will offer the possibility to gather information about the employee sharing arrangements. This is particularly relevant, since the present study aims to contribute theoretically to the specialized literature on the perceived implications of this new work arrangement, in view of its implementation into Romanian labour legislation.

2. General information on the Data Protection Officer in light of GDPR regulations

The General Data Protection Regulation stipulates that the Data Protection Officer may be shared among several enterprises, a situation which – as we shall demonstrate – matches the concept underlying the employee sharing scheme, widely used by other states due to the multiple advantages it offers to both employers and workers. Thus, GDPR article 37 paragraphs (2) and (3) outlines the situation regarding the Data Protection Officer (DPO) as follows: „***A group of undertakings*** *may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment". (3) Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size."* By examining these stipulations, we note that a single Data Protection Officer may be appointed by a group of undertakings (enterprises, or companies) while the only requirement imposed by the regulations concerns the accessibility of the Data Protection Officer by each of the member companies of the group. Also, the Regulations indicate that a single Data Protection Officer can be appointed when the controller or the processor is a public authority or body, based on the same principle of sharing the DPO among several public authorities or bodies, taking into consideration their organisational structure and their size. Obviously, in the latter situation which involves public authority, there will be an employment relationship[8] specific to the activities conducted by the public institutions, observing the norms stipulated by the law regulating this domain, respectively Law 188/1999 on the Status of public servants, with the subsequent amendments and additions[9]. Regarding the manner of

[6] Regarding the juridical regime, „European regulations are sets of norms with general mandatory character, as are the national laws. They are immediately and directly applicable in the member states, without any special intervention from the national authorities, and without need to be previously transposed into internal law". See Dima L. *Dreptul muncii. Curs universitar*, C.H. Beck, Bucharest, 2017, p. 15.

[7] Although the present paper does not aim to provide a detailed analysis of GDPR no. 2016/679, specialized literature offers numerous commentaries on this. For example, I. Alexe, *Responsabilul cu protecția datelor (DPO) – funcționar public sau personal contractual?,* in „Revista română de dreptul muncii" [Romanian Labour Law Review], no. 2/2018, pp. 53-65; I. Alexe, C.M Banu, *De la directivă la regulament în reglementarea protecției datelor cu caracter personal la nivelul Uniunii Europene, p. 14-40*, in I. Alexe, N. D Ploeșteanu, D. M Șandru (eds.), *Protecția datelor cu caracter personal, Impactul protecției datelor personale asupra mediului de afaceri. Evaluări ale experiențelor românești și noile provocări ale Regulamentului (UE) 2016/679,* Ed. Universitară, Bucharest, 2017*;* D. M Șandru, *Regimul juridic al protecției datelor cu caracter personal este în proces de regândire,* in I. Alexe, N. D Ploeșteanu, D. M Șandru (eds.), *op. cit.*, pp. 272-278*;* N.D Ploeșteanu, A. Mariș, *Viziunea Regulamentului general privind protecția datelor personale 679/2016 (RGDP) într-o societate digitală,* in I. Alexe, N. D Ploeșteanu, D. M Șandru (eds.), *op. cit.*, pp. 77-127; A. M Brezniceanu, *Data Protection Officer – a new proffesion in public administration ?,* in „Revista de Științe Politice" no. 55/2017, pp. 79-88.

[8] Different in juridical nature from the individual employment contract and from the contract for professional services.

[9] Published in the Official Gazette no. 365 of 29 May 2007, with subsequent amendments and additions.

appointing the Data Protection Officer, internal juridical literature[10] has identified at least three possible ways of appointment, with distinct juridical regimes. The DPO can work under an employment contract (either by holding concurrent positions, or by concluding a new employment contract); based on an employment relationship, if the DPO holds a public office; or under a service contract[11].

By correlating the text of art. 37 paragraph (3) in GDPR with the *Guidelines of Data Protection Officers*[12], studies have put forth the hypothesis that the DPO can be the head of a specialized structure[13]. This hypothesis is based on the recommendations of the working party, stating that *depending on the size and structure of an organization, a DPO team may become necessary* (one DPO and his/her staff). According to the model set by the Ministry of Internal Affairs, a structure specializing in data protection can be set up[14], and placed under the authority of an official with special status, reporting to the Ministry, and leading a specialized team which ensures that the legal stipulations in this matter (data protection) are observed both by the central structure of the Ministry and by the structures subordinated to it.

Irrespective of the manner of appointing a Data Protection Officer, (which has already been addressed by various studies available in the body of internal juridical literature), we find it opportune to dwell on the GDPR stipulations on the Data Protection Officer and the possibility that several companies share his/her services. Our aim is to propose a special interpretation of the Regulation stipulations, which is centered on the fact that the European legislation allowing a DPO to be shared among several companies corresponds to the terms of the *employee sharing* work arrangement, with which internal Romanian legislation is not familiar yet. To defend this opinion, we shall undertake a brief analysis of the main elements involved by the notion of „employee sharing", also comparing it with the part-time (workload fraction) work contract. This is because Romanian legislation, taking into account the specific provisions of internal regulations, interpretes the stipulations of GDPR in relation with those regulations applicable to part-time contracts, which however have different contents and juridical regime than the „employee sharing" contractual arrangements.

3. The definition of „employee sharing work arrangement"

Broadly speaking, „employee sharing"[15] means that a single empoyment contract is concluded between a worker and a „Group of employers" as a legal entity, which becomes the formal employer. More precisely, the employment contract is concluded by the Group of Employers with one or several workers, which results in the joint hiring of the workers by the members of the Group of employers. In addition to this employment contract, another separate contract is signed by the Group members, stipulating the way in which each participant will use the labour of the jointly shared employee, and specifying the contribution of each employer, member of the Group, to the payment of the jointly employed workers. Comparative law studies reveal that states such as France, Germany, Belgium, Austria, Luxembourg, which in practice acknowledge this type of contracts, assimilate them conceptually to regular employment contracts. Usually, a main employer is identified[16] as representative of the „Group of Employers" and takes responsibility for the payment of salaries and for the observance of protection rules for the persons working in this regime.

[10] See I. Alexe, *op. cit.* (2018), pp. 53-65.
[11] Based on the stipulations of art. 37 paragraph (6) of GDPR: „The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract".
[12] Statement of „Article 29" Working Party on data protection adopted on 13 December 2016, revised on 5 April 2107 (https://www.dataprotection.ro/?page=Ghiduri_finale_ale_Grupului_de_Lucru_Art_29&lang=ro, accessed on 31.08. 2020).
[13] See I. Alexe, *op. cit.* (2018), pp. 53-65.
[14] Within the Ministry of Internal Affairs, it is titled DPO's Office [Oficiul Responsabilului cu Protecția Datelor Personale]. For further details, see I. Alexe, *op. cit.* (2018), pp. 53-65.
[15] For a discussion of the „employee sharing" concept in Romania, see R. Dimitriu, *op. cit.* (2016), pp. 136-137; M. E. Marica, *op. cit.* (2019), pp. 354-359; I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic, Bucharest, 2017, p. 609.
[16] I. T. Ștefănescu, *op. cit.*, p. 609.

3.1. The specific elements of the employee sharing relationship

The above definition of the „employee sharing" concept implies a number of characteristic elements:

(a) A single employment contract is concluded: The first and probably most important defining element of labor relations under an „employee sharing" arrangement is the conclusion of a single individual contract between the worker and the „Group of Employers" as a single legal entity, instead of concluding separate contracts with each employer which is a member of the respective group[17]. Hence the different juridical regime from the situation of a person holding concurrent positions – an institution which is regulated by our Romanian legislation[18], and which presupposes that one person concludes two or several individual employment contracts with different employers, receiving the payment due for every one of these part-time positions.

(b) Reciprocity of commitments: As with any other employment contract, the contractual relationship based on the employee sharing arrangement between the „Group of Employers" and the worker, results in a reciprocity (mutuality) of commitments accepted by contract. Thus, the Group of Employers pays the salary in exchange for the work carried out by the employee (payment is their joint juridical responsibility), and the „Group of Employers" sees that the shared employees work constantly and are distributed among the companies included in the group. From the workers' standpoint, they must conduct work as demanded by the „Group of Employers".

(c) Salary (remuneration): Another important element entailed by the specific employment relationship in an *employee sharing* arrangement, is the salary (wages) paid to shared workers in exchange for their work conducted for the participant companies. Unlike the situation of concurrent positions – when a person holds part-time contracts (for workload fractions) whereby the respective remuneration is paid separately by each of the employers, for the workload fraction carried out under the respective contract –, in the case of *employee sharing* contracts, the salary and the other social levies are paid by the Group of Employers, not by each employer separately, because there is a single individual employment contract. In other words, juridical responsibility for the payment of shared workers lies with the Group, whose members may choose and delegate a main employer to pay the remunerations; the contribution of each employer in the Group is indicated in a separate contract concluded by the representatives of member companies.

(d) Economic subordination: As with any individual employment contract, the shared workers' dependency on their wages results in their economic subordination to their employer, respectively the Group of Employers. The employment thus secured by shared (jointly hired) workers is usually the only or most important source of income for the workers, as they conclude a full-time, permanent individual employment contract.

(e) Job stability and income security: One of the remarkable advantages generated by the employee sharing arrangements is job stability, and implicitly income security. Job stability derives from the full-time work contract, as the workload corresponding to a full-time position is carried out for the benefit of each member of the Group of Employers, in turn. Since those workers who join an *employee sharing* arrangement conclude a contract for a permanent position, this type of employment also involves lower risks for the workers with regard to their job security.[19]

4. Conclusions

The above-mentioned elements allow us to draw the following conclusions. The contents of

[17] See the Eurofound report, (2016) *New forms of employment: Developing the potential of strategic employee sharing*, p. 5.

[18] Art. 35 in the Labour Code, paragraph (1), stipulates that „Any worker has the right to work for different employers or for the same employer, based on individual employment contracts, and receiving the salary due for each of these contracts".

[19] See M. E. Marica, *Employee sharing: a new type of employment, opportune in a globalized context*. Contribution to „The 14th International Conference on Business Excellence Business Revolution in the Digital Era", Bucharest, 11-12 June 2020, organized by the Bucharest University of Economic Studies.

GDPR, upon examination, can be described to have reasonable regulations (by using not very restrictive terminology such as „a group of undertakings *may* appoint a single data protection officer"). This is only natural, since the European regulation apply immediately and directly for the member states, so that they can be easily adapted to the internal legislative context of all member states. In other words, with regard to the general European Regulation on data protection no. 2016/679, there is no internal legislation to translate and transpose its contents, by adapting it to the internal context. However, the European Regulation under discussion applies internally exactly like a national law, becoming integral part of the internal legislation. However, the interpretation of GDPR stipulations on data protection in light of the Romanian internal legislative context calls for certain remarks. Thus, with reference to the „data protection officer", who can be shared among several companies, GDPR has in view the work arrangement based on employee sharing, an atypical one, already well-known to many European law systems, but yet unregulated by Romanian internal legislation. Romanian law only stipulates the possibility that a person hold concurrent workload fractions with more than one company, which together cannot exceed the maximum number of working hours (12 hours/day); however, this situation has a different juridical regime than the *employee sharing* arrangement. To put it in agreement with the legal tools made available by Romanian internal legislation, we might say that sharing the data protection officer among several enterprises is tantamount to holding a workload fraction with each of these enterprises. In such context, the situation of part-time employment and holding concurrent part-time positions acquires increased juridical complexity and is subject to the regulations governing part-time employment contracts. Here, an important point is that internal Romanian legislation imposes significant restrictions on this labour market sector, by requiring very strictly and clearly defined working hours for part-time workers and prohibiting extra hours or even declaring the overtime to be illegal work, if the number of hours indicated by the contract is exceeded. Therefore, because the European Regulation on data protection provides a derogation situation in the case of employee sharing, we find it opportune for the Romanian internal legislation to be amended and adjusted, by including this type of work arrangement into the sphere of contractual regulations provided by labour law – especially since the existing stipulations on part-time contracts are very restrictive, and the need for diversified and flexible arrangements is increasing.

However, is still necessary to undertake serious research into work arrangements such as *employee sharing,* in order to identify their practical implications for both parties engaging in a contractual employment relationship, and to define the applicable regulations based on comparative law studies and feasibility studies, for both employers and employees.

Bibliography

1. Alexe I., Banu C.M, *De la directivă la regulament în reglementarea protecției datelor cu caracter personal la nivelul Uniunii Europene,* in Alexe I., Ploeșteanu N. D, Șandru D. M (eds.), *Protecția datelor cu caracter personal, Impactul protecției datelor personale asupra mediului de afaceri. Evaluări ale experienței românești și noile provocări ale Regulamentului (UE) 2016/679,* Ed. Universitară, Bucharest, 2017, pp. 14-40.
2. Alexe I., *Responsabilul cu protecția datelor (DPO) – funcționar public sau personal contractual?,* in „Revista română de dreptul muncii" no. 2/2018, pp. 53-65.
3. Bercusson, B. *European Labour Law*, Butterworths, 1996.
4. Brezniceanu, A. M. *Data Protection Officer – a new proffesion in public administration?,* in „Revista de Științe Politice" no. 55/2017, pp. 79-88.
5. Dima L., *Dreptul muncii. Curs universitar*, C.H. Beck, Bucharest, 2017.
6. Dimitriu, R. *Dreptul muncii. Anxietăți ale prezentului*, Rentrop & Straton, Bucharest, 2016.
7. Eurofound, (2016). *New forms of employment: Developing the potential of strategic employee sharing*. Publications Office of the European Union.
8. Marica, M.E. *Contracte de muncă atipice,* Ed. Universul Juridic, Bucharest, 2019.
9. Ploeșteanu, N.D, Mariș, A., *Viziunea Regulamentului general privind protecția datelor personale 679/2016 (RGDP) într-o societate digitală,* in Alexe I., Ploeșteanu N. D, Șandru D. M (eds.), *Protecția datelor cu caracter personal, Impactul protecției datelor personale asupra mediului de afaceri. Evaluări ale experienței românești și noile provocări ale Regulamentului (UE) 2016/679,* Ed. Universitară, Bucharest, 2017, pp. 77-127.

10. Șandru, D. M., *Regimul juridic al protecției datelor cu caracter personal este în proces de regândire,* in Alexe, I., Ploeșteanu, N. D, Șandru D. M (eds.), *Protecția datelor cu caracter personal, Impactul protecției datelor personale asupra mediului de afaceri. Evaluări ale experienței românești și noile provocări ale Regulamentului (UE) 2016/679*, Ed. Universitară, Bucharest, 2017, pp. 272-278.
11. Ștefănescu, I.T. *Tratat teoretic și practic de drept al muncii*, Ed. Universul Juridic, Bucharest, 2017.