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# The canary in the data mine<sup>☆</sup>

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## ABSTRACT

The present article aims at portraying the type of profile best required to fulfil the function of a Data Protection Officer (DPO) within the EU public sector. The article proposes the idiom of the “canary in a coal mine” as best positioned to describe the multidisciplinary role of DPOs. Due to the particularity and sensitivity of their function, Data Protection Officers act as early indicators of data protection incompliance within their respective area of expertise. Only when being functionally independent, Data Protection Officers could master the role of “canaries in the data mine” thus preventing possible data protection breaches and violations.

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The etymology of the “canary in a coal mine” has its origin in 20th century British mining tradition. It is an allusion to caged canaries that miners would carry down into the mine tunnels with them. If dangerous gases such as carbon monoxide collected in the mine, the gases would kill the canary before killing the miners, thus providing a warning to exit the tunnels immediately. Ever since, the phrase is used as an idiom to indicate something which sensitivity to adverse conditions makes it a useful early indicator of such conditions.

This idiom of the “canary in a coal mine” can be used to describe the position of Data Protection Officers (DPOs) in the EU public sector. DPOs are the professionals, who, due to the sensitivity and particularity of their function, act as

early warning indicators of possible adverse conditions when data processing takes place. In that respect, this article examines in-depth the main characteristics of the role of DPOs that come into practice when indicating (imminent) data protection compliance risks to organisations. The aim of the article is to emphasise the rising importance and role of Data Protection Officers. The objective is to draw a common benchmark portraying the type of profile best required by DPOs to tackle organisational data protection challenges. The article looks at best practices, formal (established in law) and informal (established in practice) requirements, as well as ethical standards in order to delineate the main characteristics necessary for the successful fulfilment of this multidisciplinary role.

<sup>☆</sup> Disclaimer: The views expressed in the present article are the personal opinions of the authors. They do not necessarily represent those of the organisation they work for.

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The main frameworks of consideration are the EU Commission's proposal for a Revised Regulation 45/2001<sup>1</sup> as well as Regulation 45/2001<sup>2</sup> in its current state. Additionally, a comparative analysis of the DPO's role will be made with respect to the General Data Protection Regulation (GDPR),<sup>3</sup> the Police Directive,<sup>4</sup> as well as more operationally specific frameworks such as the Europol,<sup>5</sup> Eurojust,<sup>6</sup> EU-LISA<sup>7</sup> and Frontex<sup>8</sup> Regulations. The main rationale behind the selection of Regulation 45/2001 as the baseline legal framework for the present article is the fact that EU institutions and bodies have a great advantage over public authorities and private entities. While having a Data Protection Officer has merely been considered good practice for national entities prior to the GDPR, it has been a

legal requirement for all EU institutions and bodies regardless of their size and core activities for over fifteen years.

Moreover, it is interesting to observe how Regulation 45/2001 has influenced not only the general EU data protection reform package,<sup>9</sup> but also the operational legal frameworks of Europol,<sup>10</sup> Eurojust,<sup>11</sup> EU-LISA<sup>12</sup> and Frontex.<sup>13</sup> Whereas in Europol, Regulation 45/2001 applies only to administrative personal data processing operations,<sup>14</sup> in Eurojust, EU-LISA and Frontex the situation differs. For instance, EU-LISA and Frontex process any personal data collected according to the provisions of Regulation 45/2001. In contrast, the Eurojust Regulation particularises and complements Regulation 45/2001 as far as operational personal data are concerned, respecting the specificity of judicial cooperation activities while taking into account the need for consistency and compatibility with the relevant data protection principles.<sup>15</sup> Thus, Regulation 45/2001 does apply to the general processing of personal data by Eurojust and the Eurojust Regulation adds up to that regime by specifically addressing the operational needs of the agency.<sup>16</sup>

Altogether, the statutory creation of the position of a Data Protection Officer is said to be “the most important regulatory choice for institutionalising data protection.”<sup>17</sup> Data protection officers are seen as “a kind of self-organisation – not self-regulation, but self-organisation,”<sup>18</sup> delineating “how far data protection should be integrated into daily practices of [the regulated] entities, and under the responsibility of such entities.”<sup>19</sup> That notion of “self-organisation” implies not only the importance of the role of Data Protection Officers, but also

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (10 January 2017), *hereinafter referred as* Revised Regulation 45/2001 or REV Regulation 45/2001. The final text might be subject to changes as the legislative process is still ongoing at the time of finalising the article.

<sup>2</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12 January 2001), *hereinafter referred as* Regulation 45/2001.

<sup>3</sup> 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 (OJ L 119, 4 May 2016), *hereinafter referred as* GDPR.

<sup>4</sup> 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 prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119/89, 4 May 2016), *hereinafter referred as* Police Directive.

<sup>5</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24 May 2016), *hereinafter referred as* Europol Regulation.

<sup>6</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) (COM(2013) 535 final, 2013/0256 (COD), 17 July 2013), *hereinafter referred as* Eurojust Regulation. The final text might be subject to changes as the legislative process is still ongoing at the time of finalising the article.

<sup>7</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and amending Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011 (COM(2017) 352 final, 2017/0145 (COD), 29 June 2017), *hereinafter referred as* EU-LISA Regulation.

<sup>8</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251/1, 14 September 2016), *hereinafter referred as* Frontex Regulation.

<sup>9</sup> The data protection reform package which entered into force in May 2016 and will be applicable as of May 2018 includes the General Data Protection Regulation and the Data Protection Directive for the police and criminal justice sector. See also, European Commission, Data protection in the EU, available at: [https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en) (accessed on 10 April 2018).

<sup>10</sup> Europol is the European Union Agency for Law Enforcement Cooperation; See generally, Europol website: <https://www.europol.europa.eu/about-europol> (accessed on 11 April 2018).

<sup>11</sup> Eurojust is the European Union Agency for Criminal Justice Cooperation; See generally, Eurojust website: <http://eurojust.europa.eu/about/background/Pages/History.aspx> (accessed on 11 April 2018).

<sup>12</sup> EU-LISA is the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice; See generally, EU-LISA website: <https://www.eulisa.europa.eu/AboutUs/Pages/default.aspx> (accessed on 11 April 2018).

<sup>13</sup> Frontex is the European Border and Coast Guard Agency; See generally, Frontex website: <https://frontex.europa.eu/about-frontex/mission-tasks/> (accessed on 17 April 2018).

<sup>14</sup> Europol Regulation, art. 46.

<sup>15</sup> Proposal for Eurojust Regulation, p. 5.

<sup>16</sup> Eurojust Regulation, art. 27(5).

<sup>17</sup> Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in United States and Europe* (The MIT Press, Cambridge, Massachusetts 2015), p. 204.

<sup>18</sup> Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in United States and Europe* (The MIT Press, Cambridge, Massachusetts 2015), p. 204.

<sup>19</sup> Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in United States and Europe* (The MIT Press, Cambridge, Massachusetts 2015), p. 204.

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