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General Data Protection Regulation (GDPR) – The EU Law Strengthening the Information Society in Poland

Abstract: The purpose of this paper is to illustrate how the General Data Protection Regulation (GDPR), now implemented in the Polish legal system, strengthens protection in the collection, processing, storage and transfer of digitised personal data. This undoubtedly represents a step forward in the further development of the way sensitive data is handled while at the same time providing a better understanding of the functioning of the information society, both throughout the EU in general and in Poland specifically.
Keywords: GDPR, information society, Poland

1. Introduction

The General Data Protection Regulation 2016/679 (GDPR), in Polish *Rozporządzenie o ochronie danych osobowych (RODO),* of the European Parliament and of the Council of 27 April 2016, repealing Directive 95/46/EC [*95/46/WE*],[1] entered into force in Poland on 25 May 2018. The purpose of this normative act is to harmonise the protection of fundamental rights and freedoms of natural persons with regard to the processing of their personal data, while at the same time ensuring the safe free flow of such data between Member States. As grounds for adoption of the Regulation, the legislator cited the following: first, economic and social integration resulting from the functioning of the internal EU market has led to a substantial

1 Regulation (EU) 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, and repealing Directive 95/46/EC [95/46/WE] (The Official Journal of the European Union L.2016.119.1).

increase in the cross-border flow of personal data; second, the exchange of personal data between public and private bodies, including natural persons, associations and undertakings across the Union has increased; third, national authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.[2]

Simultaneously, the European legislator pointed to the fact that technological development and, as a natural consequence globalisation, have brought new challenges to the fore in the protection of personal data. The advances in information technology that have occurred in recent years and upon which the information society is built, has reached a point where the scale of collection and sharing of personal data has increased significantly. Thus, technology allows both private companies and public authorities to make extensive use of personal data in order to respectively pursue their commercial and civic activities. Furthermore, natural persons (of their own free-will) increasingly make sensitive personal information available publicly and globally, which is clearly visible in the social media.

Undoubtedly, the development of information technology has transformed both the economy and social life, having facilitated the flow of information and that has led to a new dimension in commerce, namely in the provision of online services of every and all kind. Such developments have increased the flow of personal data to an unprecedented level, which led the legislator to the conclusion that: "those developments [affecting economic, social and private life, etc.] require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced".[3] It is difficult not to agree with the outlined recitals.

It should raise no doubts, that the architects of GDPR intended to create a comprehensive tool for protecting personal data within the area of the European Union, the misuse or abuse of which can result in catastrophic consequences not least to the economy.And that leads to the purpose of this paper which is to illustrate how the introduction of GDPR, now implemented in the Polish legal system, strengthens protection in the way personal data is collected and processed, which, undoubtedly represents a step forward in the ongoing development of the so-called information society in Poland.

2 Vide recital 5 of GDPR [RODO].
3 Vide recital 7 of GDPR [RODO].

However, before attempting to support the above, let me briefly outline the notion of "information society" and how the tools for personal data protection regulated by the GDPR are to be applied in Poland under RODO.

Since this paper is of an "indicatory" nature only (i.e. introductory to further specific research) the approach herein is solely dogmatic and analytical.

2. The definition of "information society"

The notion of "information society" has already been defined many times in the literature. C. Jonscher, linked "society" and its development with "information", as fast flowing "data" and generally available "knowledge", acquired through IT networks connecting a number of computers.[4] P. Levinston, also pinpointed fast information flow via the Internet as a very important factor of societal development.[5] In many instances, the notion of information society is linked to the idea of A. Toffler's "Third Wave Society". This author wrote that the First Wave had relied on so-called necessary inventions and skills relating to agriculture, but also on the popularisation of immobility and settlement within communities. The Second Wave, i.e. the industrial wave, Toffler correlated with the invention and introduction of printing, steam engines, electricity, mechanised industrial technologies and advanced forms of travel, whereas the Third Wave, the present one, is associated with new technologies enabling limitless communication through the development of services with a shift away from economic production.[6] The definition worded by M. Goliński, is also worthy of attention. This author, in part echoing the words of H. Kubick, wrote that "the notion of information society means socio-economic formation, in which productive use of information as a resource and know-how of intensive production play a dominant role". At the same time, the author pointed out that "the information society term is used to describe a society, in which individuals as consumers or employees use information intensely".[7]

T. Goban-Klas and P. Sienkiewicz, created a definition referring to elements of economics. They stated that the information society was a society which made technologically developed means of information processing and communication available to create a national income base, which, in consequence, led to providing a livelihood for the majority of the society.[8]

4 C. Jonscher, Wired life: Who are we in the digital age, Warszawa 2001, pp. 57-72, 193.

5 P. Levinson, Soft edge, Warszawa 1999, p. 199.

6 A. Toffler., The third wave, Warszawa 1997.

7 M. Goliński, Information society – definition and measurement problems, p. 47, publ. http://www.di.univ.rzeszow.pl/tom%201.pdf#page=43 1 (access 8.03.2018).

8 P. Goban-Klas, P. Sienkiewicz, Information socjety. Chances, risks, challenges. Kraków 1999, p. 134.

K. Krzysztofek and M. Szczepański, in turn stated that the information society was characterized by a condition within the area of which information had widely applied in everyday social, cultural, economic and political life. In their view, such a society is well equipped with a highly developed means of communication and information processing as a prevailing base of national income and provider of most people's livelihood.[9]

According to G. Niedbalska, attention should also be paid to the IBM Community Development Foundation report, in which the notion of information society is framed as following: "*information society is a society characterised by a high level of information intensity in the everyday life of most citizens, in most organisations and workplaces; by the use of common or compatible technology for a wide range of personal, social, educational and business activities; and by the ability to transmit and receive digital data rapidly between places irrespective of distance.*"[10] In my view, this latter definition deserves particular consideration.

3. The legal nature of GDPR

In line with the wording of Article 288 of the Treaty on the Functioning of the European Union[11], to exercise the Union's competences, the institutions adopt regulations, directives, decisions, recommendations and opinions. Regulations have general application. They are binding in their entirety and directly applicable to all Member States. Directives, in turn are binding, as to the result to be achieved, upon each Member State to which it is addressed, but they leave to the national authorities the choice of form and method. Decisions are binding in their entirety, but a decision which specifies those to whom it is addressed is binding only on them. Recommendations and opinions have no binding force.

In the light of the above, the EU Regulation is binding in its entirety and is directly applicable in every Member State. To gain such binding force, there is no need to implement the regulation into national law nor to announce it – under the rules of individual Member States. Sufficient, and as well necessary, is its official publication in respective EU journals.

The European Court of Justice states that there is no possibility to impose (on certain bodies – not only Member States, but also natural and legal persons, and unincorporated entities) obligations contained in Community legislation which has

9 K. Krzysztofek, M. Szczepański, Understanding development. From traditional to information societies, Katowice 2002, p. 170.

10 G. Niedbalska, OECD Blue Sky Research, The concept of knowledge in the knowledge society in light of the Nico Stehr theory, "Nauka i Szkolnictwo Wyższe" 2009, no. 1, p. 145 and next.

11 Treaty on the Functioning of the European Union of October 26, 2012 (Official Journal of the European Union No. 326, p. 47).

not been published in the Official Journal of the European Union in the language of the Member State to which it applies, even if those persons concerned could have learned of the legislation by other means.[12]

Simultaneously, the Polish Constitutional Tribunal confirms the status of the EU regulation as a commonly and directly applicable legal act in Poland. For example, in the judgment Ref. No. SK 45/09, particularly in its statement of reason, the Tribunal clarified that "a normative act within the meaning of Article 79(1) of the Constitution may not only be a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns acts of EU law, enacted by the institutions of that organisation. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of the individual".[13]

It is worth noting that Articles 94 and 99 of GDPR in conjunction with the principle of "sincere cooperation" (pursuant to which the Member States are obliged to transpose Union law into their national laws) point to the reasonable conclusion that the moment GDPR enters into force, the Directive 95/46/EC (95/46/WE) shall be repealed. The aforementioned Article 94 of GDPR confirms not only the repeal of Directive 95/46/EC (95/46/WE) with effect from 25 May 2018, but also, as stated in 94(2), that references to the repealed Directive are to be construed as references to this Regulation. Whereas, from Article 99 it should be inferred that since GDPR is binding in its entirety and directly applicable in all Member States, the other acts of national law on relevant issues concerning protection of personal data, including the applicable provisions of the Polish act on protection of personal data are to be repealed as well. All normative acts of the Union law and of national laws of Member States on protection of personal data are undergoing an analogical combination of circumstances from the day of 25 May 2018, when GDPR (in the form of RODO) became enforceable.

Further attention should be drawn to the fact that the "removal" of Article 5 from the Polish Act on Protection of Personal Data – which foresees that should the provisions of any separate laws on the processing of data provide for more effective protection of the data than the provisions hereof, the provisions of those laws shall apply – is a simultaneous consequence of the repeal of this act. Here the GDPR lacks a comparable regulation and takes precedence over any Polish separate rules regardless of whether they included provision for more effective protection than provided by the regulation. P. Litwiński has worded a similar opinion to the above, stating that: "the aforementioned article relates then to the lex specialis derogate legi

12 Vide Judgment of CJEU (Grand Chamber) December 11, 2007 Case C-161/06.

13 Judgment of the Constitutional Tribunal, 16 November 2011, Ref. No. SK 45/09, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20112541530/T/D20111530TK.pdf (access 8.03.2018).

generali principle, except that legis specialis apply when they foresee more effective protection. RODO lacks analogical rule which indicates precedence of its provisions over those of national law, but also over regulations concerning protection of personal data foreseen in EU law."[14]

4. Selected data protection instruments strengthening the flow of digitised information

In drawing up the notion of "instruments" characteristic of the information society, I thought of and referred to provisions on the ability to quickly acquire and exchange information. From my perspective, these are regulations specifically concerning the digital computerisation of data. Having this in mind, I find it important to identify the "instruments" GDPR provides in order to enable fast flowing information on processed and protected personal data to be achieved.

In my opinion, regulations supporting the flow of information concerning personal data protection are noticeable in many areas. Thus, there are several exemplary regulations in GDPR that govern the use of electronic means to gather and process personal data that are worth mentioning.

The first is the regulation on how and when the information is to be or can be gathered. To effectively exercise one's own rights, including those referring to personal data protection, one needs to be able to clearly understand what those rights are. A person whose data may be processed, should have access to understandable and coherent information, and GDPR regulates this in Article 12, where it states that the "controller" (the entity responsible for collecting the data for processing) shall take appropriate measures to provide any information in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including where appropriate, by electronic means.

Similarly, a very important and supportive factor in strengthening these rights is to set a time limit for providing information requested by the "data Subject" (a natural person, legal person or other entity), which is covered by Article 12(3), which states that the Controller, without undue delay and in any event within one month of receipt of the request, shall provide information on the action taken in response to the request. The period may be extended by two further months where necessary (taking into account the complexity and number of requests). The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes such

14 P. Litwiński, Regulation (EU) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Commentary, Legalis On-line 2018.

request in electronic form, the information shall be provided in a commonly used electronic form where possible, unless an alternative method of communication has otherwise been asked for. This demonstrates that the legislator links the speed of response closely with digital communication (i.e. the Internet).

Secondly, attention is worth focusing on the issue of enabling the data subject to access information on sources of personal data used by the entity holding it. According to Article 15 of GDPR, a data subject has the right to obtain from the controller confirmation as to whether or not personal data concerning them has been collected and processed, and, where that is the case, to have access to such data. The controller, in keeping with the doctrine, cannot abrogate the obligation to provide information on the source of the data, even though the information may be subject to professional secrecy or the like.[15] The above applies analogically to actions by electronic means. In accordance with Article 15(3) of the GDPR, the controller shall provide a copy of the personal data undergoing processing. Where the data subject makes the request by electronic means (unless requested otherwise), the information shall be provided in a commonly used electronic form as before.

A third example worthy of mention is that pursuant to Article 21(1) of the GDPR, wherein it states that every data subject shall have the right to object (on grounds relating to their particular situation) at any time to the processing of personal data concerning them. The controller shall, on receipt of the objection, cease to process the personal data unless (exceptionally) the controller demonstrates compelling legitimate grounds for the continuation of processing which override the interests, rights and freedoms of the data subject, or for the establishment and exercise or defence of legal claims, or where it is in the public interest to do so. In the context of Article 21(5), the data subject may exercise their right to object by automated means. Regarding such objection the legislator, albeit indirectly, enables the data subject concerned to obtain information by electronic means. In line with Article 21(4) of the GDPR, by the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information. Thus, in a situation where the first communication with the data subject takes place through an electronic network, the data subject should be informed of the right to object through the same network.

Another aspect requiring consideration might be the fact that, according to GDPR provisions each controller and processor maintains a record of processing activities under its responsibility. That record contains all of the following information: the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer; the purposes of the processing; a description of the categories of data subjects and of the categories of

15 P. Litwiński, Regulation (EU) on the protection of natural persons… *op. cit*.

personal data; the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations; where applicable, transfers of personal data to a third country or an international organisation; the envisaged time limits for erasure of the different categories of data; and a general description of the technical and organisational security measures. These records may, as stated in Article 30(3) of GDPR, be maintained in electronic form. However, Article 30(4) states that the controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request. This leads to the conclusion that the legislator provided for the obligation to inform about the record also via electronic means. Notwithstanding, in Practical terms it would be wholly unrealistic to imagine that such information might be provided in hard copy form or delivered orally.

Furthermore, it should be noted that each Member State is obliged to provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order "to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union"[16]. In Poland, such authority is the President of the Office for Personal Data Protection, in Polish *Urzędu Ochrony Danych Osobowych (UODO)*. The supervisory authority should be competent to handle complaints lodged by a data subject (to whom the data concerns), including bodies, organisations or associations, and to conduct investigations to the extent of the subject matter of a complaint. The EU legislator has foreseen the digitalisation of information flow as well, for under Article 57(2) of the GDPR, the supervisory authority is obliged to facilitate the submission of complaints by measures such as a complaint submission form which can also be completed electronically.

At the same time, it is essential to draw attention to the fact that during the complaint proceedings there may arise the necessity to cooperate with other authorities or bodies competent in matters concerning personal data protection (particularly within the scope of sharing information on the progress and outcome of investigations, and the sharing of documentation and the like) this Regulation imposes an obligation on the authorities to mutually communicate (share and supply information to each other) by electronic means. The above solution only confirms the already existing in Polish administrative law (Article 39^2 of the Polish Code of Administrative Proceedings) obligation of lodging and service of procedural document via electronic means if a public body (i.e. performing its public tasks) being a party or other participant to the proceedings is obliged to make accessible and use the electronic inbox.[17] Taking the fact that GDPR has foreseen the autonomy

16 Vide Article 51 of GDPR [RODO].

17 The obligation is a consequence of assumption by the legislator that computerization of administration in Poland might significantly accelerate only when the obligation of using (by

of Member States in extra EU procedural regulations into consideration (on condition that the adopted solutions do not interfere with the effective performance of obligations under EU law), the obligation of mutual communication between supervisory authorities should not raise any doubt.

5. Conclusion

To Summarise. From the foregoing it is clearly visible that, in line with the introductory thesis presented in this paper, GDPR, now under the auspices of RODO, serves to strengthen the foundation upon which Poland's information society is structured. There are regulations that govern when and how personal data can be gathered, how it can or cannot be processed, how it can or cannot be shared, how it should or should not be stored and the period over which it can be retained. Similarly, there are regulations that govern the privacy of private data, the rights of those persons natural or legal to whom that data belongs, the degree of transparency required from entities gathering the data, and the way in which those same entities must provide information using concise clear and plain language that people from all levels of society can understand. In addition, it regulates how communications may be conducted between the parties relating to requests for information and in response to complaints. GDPR also introduces penalties (not previously addressed in this article) for the abuse, misuse and misplacement of personal data, whether by accident or design, as well as for failure to provide adequate systems to ensure its safekeeping. The aforementioned regulations should be evaluated positively since the previous Polish data protection law lacked many of the binding provisions that GDPR now provides. Indeed, it is that very lack of specific provisions that dissuaded many entities (particularly in the public sector) from embracing IT to its fullest extent. Hopefully, with RODO now in place in the Polish legal system, this might "encourage" a rethink and perhaps also tempt the Polish legislator to promote the use of modern IT systems and tools in other fields governed by applicable laws.

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competent authorities and auxiliary bodies) information technology was due to the applicable law and not left the authorities at their free disposal.

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