PERSONAL DATA PROTECTION IN THE EUROPEAN UNION UNDER THE TREATY OF LISBON

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Abstract

The paper aims at analyzing the present state of personal data protection in the European Union. It presents a general concept of personal data, origin and evolution of legal grounds for their protection, paying special attention to the changes in the provisions which were implemented by the Treaty of Lisbon. Later on it focuses on the activities of the European Data Protection Supervisor – an institution that aims at fulfilling the task of personal data protection in the EU. The paper discusses the appointing and recall procedure of the European Data Protection Supervisor, his legal status, position, duties, as well as the organization and functioning of the institution.

Key words: *personal data protection, the Treaty of Lisbon, the European Union, protection of human rights and freedoms, the right to privacy, the European Parliament.*

Introduction

In a constantly changing, ever more interconnected world, Europe is presently facing the challenges of the 21st century and grappling with some absolutely new issues, such as: globalisation, demographic shifts, climate changes, the need for sustainable energy sources and new security threats. The EU Member States cannot cope with them alone. Acting as one, the unified Europe can deliver results and respond to the concerns of the public. These have become the reasons of the neccesity to modernise Europe, which needs effective, coherent tools in order to function properly and respond to the rapid changes of the world. This also means reconsidering some of the basic rules of European cooperation.

The Treaty of Lisbon (initially known as the Reform Treaty), signed by the heads of state and government of the 27 EU Member States on 13 December 2007 (entered into force on 1 December 2009), ended several years of negotiations about institutional issues. The Treaty was intended to reform the functioning of the European Union following the two waves of its enlargement, which had taken place since 2004 and increased the number of the European Union Member States from 15 to 27. The Treaty of Lisbon was the result of negotiations between the EU Member States at an intergovernmental conference, in which the Commission and Parliament were also involved. It was drafted as a replacement for the Constitutional Treaty, which was rejected by French and Dutch voters in 2005. It amended the *Treaty on the European Union* (more commonly known as the Maastricht Treaty) and the *Treaty Establishing the European Community* (the Treaty of Rome). As a result of this process, the Treaty of Rome was renamed to the *Treaty on the Functioning of*

the European Union (TFEU)[1]. Thus the Treaty of Lisbon amended the current EU and EC Treaties without replacing them. It provides the Union with the legal framework and tools necessary to meet future challenges and to respond to its citizens' demands.

The stated aim of the Treaty of Lisbon was to complete the process started by the Treaty of Amsterdam (1997) and the Treaty of Nice (2001) with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action, although some opponents of the Treaty argued that such reforms would have centralised the EU and weakened democracy by moving power away from national electorates. Nevertheless the EU reforms done by means of the Treaty of Lisbon were supposed to build a more democratic and transparent Europe. Its main objectives were to strengthen the role of the European Parliament and national parliaments, to give more opportunities for the citizens to have their voices heard, to provide a clearer sense of the instituions' competences at the European and national level, to constract a more effective and efficient decision-making process, as well as a more stable and streamlined institutional framework, to improve the life of the Europeans and guarantee them solidarity, security and especially protecting their rights and freedoms, as well as promoting European democratic values.

The Treaty of Lisbon, while preserving the already existing rights, also introduces some new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force. Both the Treaty and the Charter preserve and reinforce the main civil, political, economic and social rights and freedoms of the European citizens. One of the most important among them seems to be the right to privacy.

1. The Origin and the Legal Grounds of Data Protection in the European Union

Modern technologies of personal data collecting and processing show the sphere of individual privacy from the new perspective. The legal protection of personal data became a result of rapid and skipping achievements of informatics technologies, including creation and usage of various personal data registers[2].

Classical civil law instruments of protecting personal good appeared to be not enough. It is worth remembering, that such instruments are started to be used only in case of a threat of one's good. It was necessary to create some provisions of a prevention type, which would aim at not allowing to exist such situations, in which threats of personal good could appear.

From the historical point of view it is a relatively new problem, dating back to the end of 1960-s and the beginning of 1970-s. *General act on personal data protection*, adopted in 1970 in Hesse, was the first law concerning personal data, known in the world. An intensive process of adopting legislature touching upon this problem in other countries took place in 1970-s.

In Sweden, which is considered to be a country of the biggest collection of personal data processed electronically, relating to the population number, and which also

[1] Consolidated versions of the *Treaty on the European Union* and the *Treaty on the Functioning of the European Union* are published in the Official Journal of the European Union C 115 of 9.05.2008.

[2] J. Borecka, *Geneza prawnej ochrony danych osobowych i pojęcie danych osobowych*, „Gubernaculum et Administratio. Historia. Prawo. Administracja" 2006, z. 4, p. 5; G. Sibiga, *Postępowanie w sprawach ochrony danych osobowych*, Warszawa 2003, p. 15; Barta J., Markiewicz R., Fajgielski P., *Ochrona danych osobowych. Komentarz*, Kraków 2007, p. 20.

remains on the top among the states creating legal grounds of protecting such data, the appropriate act of law was adopted in 1973. In Canada such an act was implemented in 1977, in France, Austria, Denmark and Norway – in 1978, in Luxemburg – in 1979. Later almost all the Western European countries did the same. Among the Central European states Hungary implemented *Act on personal data protection and access to public data* in 1992, the Czech Republic and the Slovak Republic adopted the relative Czechoslovak *Act on personal data protection in informatics system* of 29 April 1990, whereas Slovenia put into force *Act on personal data security* on 7 March 1990.

In Poland adopting regulations concerning personal data protection took place later. For the first time such legal grounds were created by means of adopting *Act on personal data protection* on 29 August 1997 (consolidated version published in the official law journal Dziennik Ustaw from 2002, No. 101, pos. 926 with amendments), which established an institution of Inspector General for Personal Data Protection[3]. It was a result of the requirements put by the *Council of Europe Convention No. 108 on protection of personal data processed in informatics systems*, but most of all the *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (Official Journal of the European Communities L 281 of 23.11.1995 with amendments).

The concept of personal data is supposed to be understood as the information concerning individuals, which allow to determine their identity. Therefore the law protects identity of natural, not legal persons, because the latter can be found in commonly accessible, open to public registers, like e.g. the register of commercial law companies[4].

Wrong processing of personal data is treated as violating the right to privacy, understood as the right to remain in peace and the right to personal identity and dignity[5]. The right to privacy protection is usually guaranteed both by internal legal norms, first and foremost by the Constitutions and, among others, by acts of law on personal data protection, as well as – in an increasing scope – by international and supranational legal provisions[6], like e.g. by art. 8 and 9 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950[7] and the European Union law.

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[3] S. Sagan, *Generalny Inspektor Ochrony Danych Osobowych* [in:] *Organy i korporacje ochrony prawa*, red. S. Sagan, V. Serzhanova, Warszawa 2008, p. 116-120.

[4] A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 1999, p. 21 and the next; A. Mednis, *Prawna ochrona danych osobowych*, Warszawa 1995, p. 15; Mednis A., *Prawo do prywatności a interes publiczny*, Kraków 2006; A. G. Harla, *Termin „dane osobowe". Uwagi de lege lata i de lege ferenda na gruncie ustawy z dnia 29 VIII 1997 r. o ochronie danych osobowych*, „Palestra" 2001, nr 1–2, p. 36-39.

[5] J. Borecka, *Geneza prawnej ochrony* …, p. 5; N. Brieskorn, *Ochrona danych osobowych a zagrożenia prywatności*, [in:] *Ochrona danych osobowych*, red. M. Wyrzykowski, Warszawa 1999, p. 208-210; M. T. Tinnefeld, *Dostęp do informacji i jej znaczenie w otwartym społeczeństwie*, „Acta UWr. Przegląd Prawa i Administracji" 1997, nr 37; W. Wygoda, *Polska ustawa o ochronie danych osobowych jako jedna z gwarancji prawa do prywatności*, „Humanistyczne Zeszyty Naukowe. Prawa Człowieka" 1998, z. 5; J. Boć, *Prawo do prywatności i jego ochrona w prawie konstytucyjnym*, [in:] *Przetwarzanie i ochrona danych*, red. G. Szpor, Katowice 1998, p. 1.1-1.2.

[6] S. Sagan, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2001, p. 246.

[7] About human rights protection by the Council of Europe: G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, p. 91 and the next.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data plays here a special role. It stipulates general rules on the lawfulness of personal data processing and rights of the people, whose data are processed (so called "data subjects"). The *Directive* also provides that at least one independent supervisory authority in each Member State shall be responsible for monitoring its implementation.

Another directive was adopted in the EU two years later: a so called *Directive on privacy and electronic communications*. Updated in 2002 as *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (directive on privacy and electronic communications)* (Official Journal of the European Communities L 201 of 31.07.2002). It regulates areas, which were not sufficiently covered by *Directive 95/46/EC*, such as confidentiality, billing and traffic data, rules on spam, etc.

These two directives created a general and technology neutral system of data protection in all the EU Member States. However, protection on the level of the European institutions and bodies at that time was not yet guaranteed.

To remedy this, art. 286 of the *Treaty establishing the European Community* was adopted, which stipulated the obligation of the European institutions and bodies to protect personal data and provided for the establishment of an independent supervisory authority. In accordance with this provision the European Union institutions were obliged to respect a person's right to privacy while processing personal data, enabling to identify him.

The concept of data processing covers such operations as: collecting information, its recording, storing, retrieving it for consultation, transferring it or making it available to other people, or also blocking, erasing or destroying data. All these operations are governed by the precise rules of procedure. The European Union institutions and authorities are not allowed to process personal data, which reveal one's racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership. Nor may they process data on one's health or sexual orientation, unless the data are needed for health care purposes. Even then, the data must be processed by a health professional or another person sworn to professional secrecy[8].

To implement the real possibility of exercising the obligation of protecting personal data on the EU level the European Parliament and the European Council, by means of a regulation, established in 2001 the European Data Protection Supervisor (EDPS)[9]. The *Regulation of the European Parliament and the Council (EC) No 45/2001 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* (Official Journal of the European Communities L 8 of 12.01.2001) established the EDPS as an independent supervisory authority, determining his basic responsibility to monitor that all the EU institutions and bodies respect the peoples' right to privacy while processing their personal data and act in conformity with the provisions and rules concerning this matter, being in force[10]. Combining the relevant features of *Directives*

[8] *Ibidem*, p. 227.

[9] Peter J. Hustinx – the former Netherlands' Personal Data Supervisor – was the first to be appointed to fulfill these duties on 22 December 2003 (in 2008 reelected for the second term of office). Joaquín Bayo Delgado was appointed the first Assistant Supervisor. In this term of office these duties are exercised by Giovanni Buttarelli.

[10] G. Michałowska, *Ochrona praw człowieka* …, p. 227.

95/46/EC and *2002/58/EC*, the *Regulation (EC) No 45/2001* regroups the rights of the data subjects and the obligations of those responsible for the processing into one legal instrument.

In November 2008 the Council of the European Union adopted the *Framework Decision on the protection of personal data in the field of police and judicial cooperation in criminal matters*. It implemented the first general data protection instrument in the EU third pillar.

At present the legal grounds concerning the appointing of the European Data Protection Supervisor are determined by art. 16 of the *Treaty on the Functioning of the European Union* (the Lisbon Treaty) – ex art. 286 of the *Treaty establishing the European Community*, which guarantees everyone the right to the protection of his personal data, as well as obliges the European Parliament and the Council to lay down the rules relating to the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies, and by the Member States, when carrying out activities, which fall within the scope of the Union law, and the rules relating to the free movement of such data, and moreover to establish an independent Union authority to exercise control over the compliance with theses rules. Detailed regulations concerning the establishing of such an authority, i.e. the European Data Protection Supervisor, as well as its organization and functioning can be found in the *Regulation of the European Parliament and the Council (EC) No 45/2001 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* (with amendments) along with its implementing provisions adopted by the European Parliament – *Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council 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* (Official Journal of the European Union C 308 of 6.12.2005 with amendments), laying down the general principles and rules applicable to all the Union institutions and bodies and obliging them to appoint internal Data Protection Officers in order to enable data subjects to exercise their rights and all persons within the EU institutions and bodies, who are involved in the processing of personal data, to fulfill their obligations in this matter.

2. The Legal Status of the European Data Protection Supervisor

The European Data Protection Supervisor has been appointed as an independent supervisory authority responsible for the protection of individual fundamental rights and freedoms, in particular the right to privacy, which must be respected by the European Union institutions and bodies with regard to processing of personal data. The European Supervisor is in charge of monitoring and ensuring, that the basic rights and freedoms of natural persons with regards to processing their personal data, determined by the European Union standards, rules and provisions are upheld correctly. Moreover his duty is to advise the European Union institutions and bodies on proposals for new legislation and a wide range of other issues with a data protection impact. The purpose of this consultative role is to analyse how policies affect the privacy rights of the citizens in the EU[11]. In addition, the

[11] The EDPS has issued several opinions on legislative proposals, in particular in the field of exchanging and processing personal data for law enforcement purposes (within the EU so-called "third pillar"). Some recent examples are the opinions on data protection in the third pillar and on the initiative to integrate the Prüm Convention into the EU legal framework.

EDPS can intervene in cases before the Court of Justice of the European Union with an impact on data protection.

The European Data Protection Supervisor is appointed by the European Parliament and the Council by common accord for a term of five years, on the basis of a list drawn up by the Commission, following a public call for candidates. A candidate for the position of the European Data Protection Supervisor is chosen among the persons whose independence is beyond any doubt and who are acknowledged as having the experience and skills required to perform the Supervisor's duties (e.g. a candidate who has exercised the position of a supervisory data protection authority in one of the Member States). The European Supervisor is eligible for reappointment for this position. The term of office expires in case of normal replacement, death, as well as in the event of resignation or compulsory retirement, if he no longer fulfils the conditions required for the performance of his duties or becomes guilty of serious misconduct on the basis of the decision of the Court of Justice, made at the request of the European Parliament, the Council or the Commission[12].

The European Data Protection Supervisor is assisted in fulfilling his duties by an Assistant Supervisor, appointed in accordance with the same procedure and for the same term of office as the Supervisor. He assists the Supervisor in all his activities and acts as a replacement, when the Supervisor is absent or prevented from attending to his responsibilities. They are both supported by a Secretariat consisting of officials and other personell appointed by the Supervisor.

The European Data Protection Supervisor acts in complete independence in the performance of his duties, which means that he can neither seek nor take instructions from anybody. He has the right to use all the privileges and immunities guaranteed to the European Union officials. During his term of office he is obliged to preserve *incompatibilitas* principle, making him refrain from any action incompatible with his duties and banning him to engage in any other occupation, whether gainful or not. He is also obliged to behave with integrity and discretion as regards the acceptance of appointments and benefits after the expiration of his term of office, as well as subject (along with his staff) to a duty of professional secrecy with regard to any confidential information which has come to his knowledge in the course of the performance of his official duties, both during and after his term of office.

EDPS assumes a cooperative role in working closely with other data protection authorities in all the Union instituions and bodies, as well as with national supervisory authorities, in particular by means of exchanging useful information, requesting such authority or body to exercise its powers or responding to a request from such authority or body. The purpose of this is to promote consistent data protection throughout Europe. For an increasing number of European databases, supervision is shared between different data protection authorities (such as the Eurodac database).

3. The Duties of the European Data Protection Supervisor

The European Data Protection Supervisor's duties include monitoring and ensuring the application of the Union provisions relating to the protection of natural persons with regard to the processing of their personal data by the EU institutions and bodies, with the exception of the Court of Justice of the European Union, as well as advising all those institutions and bodies, either on his own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up

[12] V. Serzhanova, *Europejski Inspektor Ochrony Danych* [in:] *Organy i korporacje* …, s. 218-221.

internal rules relating to the protection of fundamental rights and freedoms with regard to this matter. Moreover, the Supervisor monitors the development of information and communication technologies insofar as they have an impact on the protection of personal data. The Supervisor participates in the activities of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, as well as keeps notified to him registers presenting the risk of: processing operations of data relating to health, suspected offences, offences, criminal convictions, security measures; processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct; processing operations allowing linkages not provided for pursuant to national or Union legislation between data processed for different purposes; processing operations for the purpose of excluding individuals from a right, benefit or contract. Besides, the Supervisor provides means of access to the registers kept by Data Protection Officers, determines conditions, gives reasons for and makes public the exemptions, safeguards and authorisations of personal data, as well as carries out prior checks of processing them.

Every person, whose personal data are processed by a European institution or body and who feels that his data protection rights have been violated can lodge a complaint directly with the European Supervisor[13]. In this case the Supervisor hears the data subject and investigates the complaint, informs the complainant within a reasonable period, whether he takes it up or not and then gives advice to the data subject in the exercise of his rights. The Supervisor conducts inquiries either on the basis of a complaint or on his own initiative. In this case he has the power to obtain from a controller, Union institution or body access to all personal data and to all information necessary for his enquiry, and when there are reasonable grounds – to any premises in which they carry on their activities. In case the Supervisor states the violation of the provisions relating to personal data protection, he may warn or admonish the controller, as well as order to implement some legal means to liquidate the incorrectness and improve the quality of the subjects' data protection. He may order rectification, blocking, erasure or destruction of all data, when they have been processed in breach of the provisions governing the processing of personal data, and the notification of such actions to third parties to whom the data have been disclosed. Besides he may impose a temporary or definitive ban on processing the data. If these activities do not bring satisfactory results to the complainant the Supervisor is empowered to refer the matter to the relative Union institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission. Both the Supervisor and the complainant have the right to refer the matter to the Court of Justice of the European Union and the Supervisor may also intervene in actions already brought before the Court.

The European Data Protection Supervisor submits an annual report on his activities to the European Parliament, the Council and the Commission and at the same time makes it public.

Conclusion

Creating a fully-fledged system of personal data protection in the context of the right to privacy seems to remain one of the most important questions with regard to the general problem of effectiveness in protecting fundamental rights and freedoms in the European Union. It does not only require the establishment of rights for data subjects and obligations for those who process personal data, but also appropriate sanctions for offenders and monitoring by an independent supervisory body. Therefore the EU

[13] G. Michałowska, *Ochrona praw człowieka* …, p. 228.

established an institution of the European Data Protection Supervisor to exercise these tasks, being responsible for monitoring the application of such Union acts to the EU institutions and bodies. This legal solution appeared to be necessary to provide an individual with legally enforceable rights, to specify the data processing obligations of the controllers within the Union institutions and bodies, and to create an independent, real possibility of monitoring the processing of personal data by the EU institutions and bodies. Together with the Court of Justice of the European Union procedures the activity of the European Data Protection Supervisor seems to create a rather effective system of protecting an individual's right to privacy with regard to the protection of his personal data.

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