

**THE OBLIGATION TO NOTIFY THE SUPERVISORY AUTHORITY  
OF THE PROCESSING OF PERSONAL DATA  
UNDER EU LAW AND POLISH LAW**

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ABSTRACT

This article presents an analysis of one of the mechanisms for the protection of personal data - the notification of the supervisory authority of automatic data processing operations. The legal basis for the analysis are: EU law – the Directive 95/46/EC, Polish law – the Polish Data Protection Act and the proposal of EU General Data Protection Regulation. The comparison of legislations allows to draw conclusions about the compatibility of national legislation with EU law, and referencing to the proposal of the new EU Regulation may identify prospects and trends relating to the notification obligation.

**Key words:** data protection law, processing of personal data, notification, supervisory authority.

INTRODUCTION

One of the duties of the controller is to notify the supervisory authority of automatic data processing operations, before carrying out such operations. The notice is intended to enable the supervisory authority to carry

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out prior checking and assess the fulfillment of legal requirements related to data protection conducted by the controller. In the EU law the notification procedure is laid down in Directive 95/46/EC. Legal solutions adopted in the Directive require implementation into national law. In the Polish law, the Act of August 29, 1997 on the Protection of Personal Data, sets out the duty of notification as an obligation to notify a data filing system to registration by the Inspector General for Personal Data Protection. In addition, the amendment of the Act made in 2014 introduces an obligation to notify of the appointment and dismissal of Information Security Administrator to registration by the Inspector General. Significant changes were introduced to the notification envisaged by the proposal of the EU General Regulation on the Protection of Personal Data. The purpose of this article is to analyze and compare the obligation to notify of the processing of personal data under the current EU law and Polish law and under the proposal of the new EU Regulation. The study carried out has to answer the question of whether Polish legal regulation concerning the obligation to notify is in line with EU law. Furthermore, the obligation to notify will be shown in view of the planned changes resulting from the reform of the European data protection law.

#### NOTIFICATION UNDER DIRECTIVE 95/46/EC

Obligation to notify is laid down in article 18 (1) Directive 95/46/EC<sup>1</sup>. According to this article member states shall provide, before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes, that the controller or his representative, if any, notifies the supervisory authority referred to in Article 28. The subject of the obligation to notify is: “carrying out automatic processing operation”. Recital 48 in the

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<sup>1</sup> 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 of 23 November 1995 No L. 281 p. 31.

preamble to the Directive explains that “the procedures for notifying the supervisory authority are designed to ensure disclosure of the purposes and main features of any processing operation for the purpose of verification that the operation is in accordance with the national measures taken under this Directive”. Douve Korf explains that the aim of the system of “notification” and “prior checks” is to allow both the data protection authorities and individuals to have an overview of who processes what kinds of data for which purposes - i.e. to contribute to the essential need for “transparency” in the processing of personal data, without which such data cannot be effectively protected, and without which data subjects cannot exercise their rights<sup>2</sup>.

Article 18 Directive 95/46/EC allows the possibility of simplification of or exemption from notification, only in cases and under the conditions expressly mentioned in this article. Simplifications and exemptions from notification have been introduced in order to avoid unsuitable administrative formalities.

The first case concerns processing that is unlikely to adversely affect the rights and freedoms of data subjects, provided that it is in accordance with measures taken by a member state specifying its limits.

The second possibility of exemption or simplification may similarly be provided by member states, where the controller, in compliance with the national law which governs him, appoints a personal data protection official, who is in particular responsible for: ensuring in an independent manner the internal application of the national provisions taken pursuant to the Directive and keeping the register of processing operations carried out by the controller<sup>3</sup>.

Exemption or simplification could also be provided for in cases of processing operations whose sole purpose is the keeping of a register intended, which according to national law provides information to the public and is open to consultation by the public or any person demonstrating a legitimate interest<sup>4</sup>.

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<sup>2</sup> D. Korf, *EC study on implementation of data protection directive. Comparative summary of national laws*, Cambridge 2002, p. 165.

<sup>3</sup> Article 18 (2) Directive 95/46/EC.

<sup>4</sup> Article 18 (3) Directive 95/46/EC.

According to article 18 (4) Directive 95/46/EC, member states may provide for an exemption from the obligation to notify or a simplification of the notification in case the processing is being carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or persons who are in regular contact with it in connection to its purposes and that the data is not disclosed to a third party without the consent of the data subjects.

For non-automatic processing operations involving personal data, member states – according to article 18 (5) Directive – may stipulate, that certain or all such operations shall be notified, or provided for, in order for these processing operations to be subject to simplified notification.

Article 19 Directive sets out the minimum requirements regarding the contents of a notification. According to it member states shall specify the information to be given in the notification. It should include at least: the name and the address of the controller, and the name and the address of his representative, if any; the purpose or purposes of the processing; a description of the category or categories of data subject and of the data or categories of data relating to them; the recipients or categories of recipients to whom the data might be disclosed; proposed transfers of data to third countries; a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure the security of processing. Member states shall specify the procedures under which any change affecting the information must be notified to the supervisory authority.

Prior checking remains in close connection with the notification. According to article 20 Directive 95/46/EC, member states shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof. Such prior checks shall be carried out by the supervisory authority following receipt of a notification from the controller or by the data protection official, who, in cases of doubt, must consult the supervisory authority.

Article 21 Directive 95/46/EC provides for the duty of publicizing of processing operations. The register of processing operations (notified in

accordance with article 18) shall be kept by the supervisory authority. The register shall at least contain the information to be given in the notification, without information on the measures taken to ensure the security of processing. The register may be inspected by any person. In relation to processing operations not subject to notification, member states shall provide, that controllers or another body appointed by the member states make those information available in an appropriate form to any person on his or her request. According to article 21 (3) Directive 95/46/EC member states may provide that the duty of publicizing does not apply to the processing whose sole purpose is the keeping of a register, which according to laws or intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide of a legitimate interest.

#### NOTIFICATION UNDER POLISH ACT ON THE PROTECTION OF PERSONAL DATA

In the Polish law the duty of notification of automatic processing operation to the supervisory authority, is set out in the Act of August 29, 1997 on the Protection of Personal Data (in Polish: ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych – Polish Data Protection Act – PDPA)<sup>5</sup>. Article 40 PDPA imposes the obligation to notify a data filing system to registration by the Inspector General for Personal Data Protection, except for the cases referred to in Article 43 PDPA.

The first difference between the Polish data protection Act and the EU law is the scope of the notification. Not all automatic processing operations are carried out in the data filing systems, so the scope of the notification in Polish law is narrower than the scope laid down in the Directive 95/46/EC. According to article 2 PDPA the Act shall apply to the processing of personal data in computer systems, also in cases where data are processed outside from a data filing system. On the other hand, for over

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<sup>5</sup> Unified text – Journal of Laws (Dz.U.) of 2015, item 2135. English translation of the PDPA is available on the website: [[http://www.giodo.gov.pl/plik/id\\_p/233/j/en/](http://www.giodo.gov.pl/plik/id_p/233/j/en/)].

10 years in Polish law manual data processing operations were covered by the notification<sup>6</sup>.

The second difference is the list of exemptions. The Directive 95/46/EC provides for 5 groups of exemptions only, while Polish law currently contains 17 groups of exemptions<sup>7</sup> and the list is growing, some exemptions to the notification introduced in national law, raise doubts. For example, according to article 43 (1) 5) PDPA, the obligation to register data filing systems shall not apply to the controllers of data which refer to the persons availing themselves of their health care services, notarial or legal advice, patent agent, tax consultant or auditor services. It is difficult to give an equivalent of this exemption in the Directive 95/46/EC, as well as, to some others exemptions defined in the Act.

The contents of notification under Polish law is in line with EU law. Article 44 PDPA contains more information to be given in the notification than required by the article 19 Directive 95/46/EC (information on the ways and means of data collection and disclosure). The controller shall also notify the Inspector General of any change of the notified information, within 30 days of introducing such change in the data filing system.

The notification is made on the standard form, which is set out in Appendix to the Regulation<sup>8</sup>. The notification form can be sent by post or delivered in person at the Bureau of the Inspector General for Personal Data Protection (GIODO). The notification can be also made electronically (either with the use of secure electronic signature or without using electronic signature, and be later provided in paper form). The form allowing to submit a notification online is available on the website of the GIODO<sup>9</sup>.

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<sup>6</sup> The amendment of PDPA of 2014 introduced an exemption from the notification when data are processed without the use of IT systems (manually).

<sup>7</sup> Exceptions are indicated in article 43 PDPA.

<sup>8</sup> The Regulation of 11 December 2008 by the Minister of Internal Affairs and Administration on specimen of a notification of a data filing system to registration by the Inspector General for Personal Data Protection (Dz. U. Nr 229, item 1536). English translation of the Regulation is available on the website: [[http://www.giodo.gov.pl/plik/id\\_p/116/t/pdf/j/en/](http://www.giodo.gov.pl/plik/id_p/116/t/pdf/j/en/)].

<sup>9</sup> [[https://egiodo.giodo.gov.pl/personal\\_data\\_register.dhtml](https://egiodo.giodo.gov.pl/personal_data_register.dhtml)].

According to article 42 PDPA the Inspector General keeps a national, open national, register of personal data filing systems. The register contains information from notification forms, without information on the measures taken to ensure the security of processing. The register may be inspected by any person – it is available on the same website as the notification form. However, in practice, the information contained in the register kept by the supervisory authority is often incomplete and obsolete, since many data controllers do not report their data filing systems to registration and often do not inform the supervisory authority of the changes.

The controller may start the processing of data in the data filing system after notification of the system to the Inspector General. However, in cases in which sensitive data are processed in the data filing system, the controller may start the processing of these data after the registration of the filing system. The Inspector General shall, by means of an administrative decision, refuse to register the data filing system if the requirements laid down in the PDPA have not been fulfilled.

One of the exemptions from the notification introduced to the Polish data protection law in 2014, is the exemption associated with the appointment of data protection officials. According to article 43 (1a) PDPA, the controller who has appointed a information security administrator (in Polish: *administrator bezpieczeństwa informacji* – ABI) and notified the latter to registration by the Inspector General shall not be subject to the obligation of personal data files registration, except for the files containing sensitive data. The appointment of the ABI is not mandatory, but the amendment of the PDPA made in 2014 introduced obligation to notify of the appointment and dismissal of ABI to registration by the Inspector General.

The notification to registration of the fact of appointing an information security administrator shall contain: information of the controller and the address of its seat or place of residence, including identification number from the National Official Business Register, if such a number was granted; data of the information security administrator (name and surname, personal identification number or if such number has not been granted name and number of document stating identity, address of correspondence, if other than the address of the controller); date of appointment and the controller's statement on fulfilling by the ABI of the require-

ments set out in article 36a PDPA. The notification of the fact of appointing and dismissing of ABI is made on standard forms, which are set out in Appendixes to the Regulation<sup>10</sup>.

According to article 46c PDPA the Inspector General keeps a national, open register of data security administrators. The register contains information from notification forms, without personal identification numbers, and names and numbers of identity documents. The standard forms allowing to submit an online notification and ABI's register are available on the GIODO's website<sup>11</sup>.

The procedure of ABI registration adopted in Polish law, is not provided in EU law. In the opinion of the Inspector General such approach is intended as a preparation to the proposed EU regulation. Legal solutions adopted as a result of the PDPA amendments were critically assessed, in particular the powers of the Inspector General to request an ABI to carry out a check and to submit a report to the Inspector General, provided for in Article 19b PDPA and an ABI registration duty<sup>12</sup>.

#### PROPOSAL OF EU GENERAL REGULATION

For several years, work on the reform of European data protection law is underway. In January 2012, the European Commission presented a 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 and on the free movement of such data (General Data Protection

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<sup>10</sup> The Regulation of 10 December 2014 by the Minister of Administration and Digitization on the standard forms to appointment and dismissal of the information security administrator (Dz. U. 2014 item 1943).

<sup>11</sup> [[https://egiodo.giodo.gov.pl/abi\\_register.dhtml](https://egiodo.giodo.gov.pl/abi_register.dhtml)].

<sup>12</sup> See: P. Fajgielski, *Pozycja prawna i zadania administratora bezpieczeństwa informacji po nowelizacji ustawy o ochronie danych osobowych* [w:] G. Sibiga (ed.), *Aktualne problemy prawnej ochrony danych osobowych 2015*, Dodatek specjalny do Monitora Prawniczego 2015, nr 6, s. 3-7.



Regulation - GDPR)<sup>13</sup>. The new data protection rules will scrap all present notification obligations. One of the reasons for this change is the high cost of notification (it is estimated that the annual costs for businesses amounts to € 130 million)<sup>14</sup>. The Proposal of Regulation uses a risk-based approach: new rules will avoid a burdensome one-size-fits-all obligation and rather tailor them to the respective risks. Article 28 GDPR introduces the obligation for controllers and processors to maintain documentation of the processing operations under their responsibility, instead of a general notification of automatic processing operation to the supervisory authority required by Directive 95/46/EC.

The proposal of GDPR sets out some new duties of the controller. First new obligation is set out in article 23 GDPR and concerns implementation of principles of data protection by design and data protection by default. Article 33 GDPR introduces the obligation of controllers and processors to carry out a data protection impact assessment prior to risky processing operations, and article 34 GDPR specifies the cases where authorization by, and consultation of, the supervisory authority is mandatory prior to the processing (equivalent to prior checking in article 20 of Directive 95/46/EC). The proposal of GDPR provides the new obligation to notify of personal data breaches to the supervisory authority (articles 31 and 32 GDPR). Personal data breach notification is not provided for by Directive 95/46/EC, however, it was established in article 4(2) of the e-privacy Directive 2002/58/EC<sup>15</sup> and concerns only the providers of a publicly available electronic communication services. The GDPR extends this duty to all data controllers.

The proposal of General Regulation introduces significant changes to the internal supervision of processing data. Article 35 GDPR introduces a data protection officer (DPO) mandatory for the public sector, and, in the

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<sup>13</sup> COM(2012) 11 final, text available on the website: [<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52012PC0011>].

<sup>14</sup> *Agreement on Commission's EU data protection reform will boost Digital Single Market* [[http://ec.europa.eu/justice/newsroom/data-protection/news/151216\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/151216_en.htm)].

<sup>15</sup> *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 L 201, 31/07/2002, p. 0037 – 0047.

private sector, for large enterprises or where the core activities of the controller or processor consist of processing operations which require regular and systematic monitoring. This is based on the possibility to appoint a data protection official, present in the Directive 95/46/EC, but GDPR introduces the duty to designate a data protection officer in some cases and sets out the position of the data protection officer and provides his core tasks.

## CONCLUSION

The obligation to notify the supervisory authority of the processing of personal data was introduced into EU law over 20 years ago and it currently appears to be ineffective. Furthermore, the need to implement the EU regulation into national law results in important differences between data protection law in EU countries and doubts concerning its compatibility with EU law. For this reasons, the provisions of data protection law will be changed to ensure the effective protection of the data subjects. The proposed changes relating to notification are to facilitate the removal of bureaucratic barriers, generating additional costs and facilitate the activities of data controllers. Replacement of the notification by other obligations seems to be the right direction, because the notification does not provide the supervisory authority with real possibilities of control. If the GDPR provision comes into force, it will prove whether new solutions contribute to improving the effectiveness of legal regulation of personal data protection.

The adoption of General Data Protection Regulation will mean significant changes for EU member states. The EU Regulation does not require implementation, it allows to achieve a uniform level of protection and to remove the differences between the national law of member states. In Poland, the entry of the new EU rules into force will need, inter alia: the Inspector General to terminate the task of registering of data filing systems, of keeping register of such systems and register of information security administrators. It shall also mean changes for ABI, changes in tasks as well as in name, from information security administrator to data protection officer (in Polish: *inspektor ochrony danych*).

## REFERENCES

- Agreement on Commission's EU data protection reform will boost Digital Single Market* [[http://ec.europa.eu/justice/newsroom/data-protection/news/151216\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/151216_en.htm)].
- Fajgielski P., *Pozycja prawna i zadania administratora bezpieczeństwa informacji po nowelizacji ustawy o ochronie danych osobowych* [w:] G. Sibiga (ed.), *Aktualne problemy prawnej ochrony danych osobowych 2015*, Dodatek specjalny do Monitora Prawniczego 2015, nr 6, s. 3-7.
- Korf D., *EC study on implementation of data protection directive. Comparative summary of national laws*, Cambridge 2002, p. 165.

