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Independence of the President of the Personal Data Protection Office as a Guarantee for the Personal Data Protection System

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Abstract

The purpose of this study is to discuss the guarantees of independence of the national supervisory authority in the light of the provisions of Regulation 2016/679 and national constitutional and statutory provisions. Ensuring the independence of the supervisory authority is recognized as one of the basic European standards for the protection of personal data. Independence manifests itself in the impossibility of issuing guidelines as to the manner of operation, limiting or eliminating the possibility of interfering with pending proceedings, limiting the impact on staffing. It is the independence of the authority that is intended to ensure the effectiveness and credibility of the supervision of compliance with the provisions on the protection of personal data of individuals.

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Streszczenie**Niezależność Prezesa Urzędu Ochrony Danych Osobowych
jako gwarancja dla systemu ochrony danych osobowych**

Celem niniejszego opracowania jest omówienie gwarancji niezależności krajowego organu nadzorczego w świetle przepisów rozporządzenia 2016/679 oraz krajowych przepisów konstytucyjnych i ustawowych. Zapewnienie niezależności organu nadzorczego uznaje się za jeden z podstawowych europejskich standardów ochrony danych osobowych. Niezależność przejawia się m.in. w niemożności wydawania wskazówek co do sposobu działania, ograniczeniu czy wyeliminowaniu możliwości ingerencji w toczące się postępowania, ograniczeniu oddziaływania na obsadę personalną. To właśnie niezależność organu ma zapewnić skuteczność i wiarygodność nadzoru przestrzegania przepisów dotyczących ochrony danych osobowych osób fizycznych.

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I. The Genesis of the Legal Protection of Personal Data

The basis of legal protection of personal data is the right to privacy classified as one of fundamental human rights. The provisions guaranteeing its protection have been included in many normative acts. Technological advances have resulted in the civil protection of privacy become insufficient². The state has become responsible for creation and shaping such a legal system that would enable legally regulated interference in the broadly understood privacy of an individual, while ensuring their right to decide on the manner of using this information. The first national legal regulations on the protection of personal data began to emerge, i.e. the Hessen Act 1970, the Swedish Act of 1973, the Act of 1977 adopted in Germany at the federal level. The issue of personal data protection has also become the subject of legislative initiatives at the international level, which include Resolutions No. 22 and 29 of the Council

² M. Safjan, *Prawo do prywatności i ochrona danych osobowych w społeczeństwie informatycznym*, "Państwo i Prawo" 2002, No. 6, p. 3; A. Bierć, *Ochrona prawna danych osobowych w sferze działalności gospodarczej w Polsce – aspekty cywilnoprawne*, [in:] *Ochrona danych osobowych*, ed. M. Wyrzykowski, Warsaw 1999, p. 111.

of Europe of 1973 and 1974 and Convention No. 108 of the Council of Europe of January 28, 1981. In the 1990s, the EU legislator, recognizing the need to harmonize legal regulations on the protection of personal data, adopted Directive 95/46/EC of the European Parliament and Council of October 24, 1995 on the protection of persons with regard to the processing of personal data and the free movement of such data in the EU. Regulation 2001/45/EC of the European Parliament and Council of December 18, 2000 was also issued, which also regulates the protection of personal data processed by institutions and bodies of the European Union. From May 25, 2018, the basic normative act of the European Union is Regulation (EU) 2016/679 of the 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/EC³ (hereinafter referred to as Regulation 2016/679).

In Poland, the previous political system lacked any legal regulations aimed at the protection of persons in connection with the processing of personal data. Only the political changes and the adoption of the Constitution of the Republic of Poland in 1997 provided the basis for the protection of personal data. At the same time, the Act of August 29, 1997 on the protection of personal data was passed⁴, in which the scope of its application was indicated, the definitions of basic terms were regulated, a supervisory body was established – the General Inspector for Personal Data Protection.

Currently, the general basis for the protection of persons with regard to the processing of personal data in our country is the Art. 51 of the Constitution in which contains only basic issues regarding the protection of personal data. It confers the right to decide for themselves on the disclosure of information concerning the individual, while imposing on public authorities a restriction on the collection of data about citizens only when it is necessary in a democratic state ruled by law. In the remaining scope, principles, mode of data collection, their processing, rights of the data subject, rights and obligations of administrators, status, tasks and powers of supervisory authori-

³ Regulation of the European Parliament and of the Council (EU) 2016/679 of 27/04/2016, Journal of UE L 119, pp. 1–88, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.POL&toc=OJ:L:2016:119:FULL (22.09.2020).

⁴ J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona Danych Osobowych, Komentarz*, Warsaw 2015.

ties, etc. regulated in Regulation 2016/679 and the Personal Data Protection Act of 10/05/2018⁵.

As a result of the evolution of legal norms regarding the right to privacy and personal data, it has been assumed in EU legislation that their effective protection cannot be achieved without the appointment of a supervisory authority. The EU legislator decided that it is necessary to establish an independent public authority that will perform a supervisory function, control compliance with the provisions on the protection of personal data, issue decisions and settle disputes.

Regulation 2016/679 regulates the issues related to the status, independence, method of appointment, powers and competences of the supervisory authority and cooperation between supervisory authorities. National regulations supplement and clarify these issues, indicating the name of the body, its structure, status, selection, guarantees of independence, jurisdiction and control procedure. According to the Art. 34 of the Act on the Protection of Personal Data, the supervisory authority competent in matters of personal data protection in Poland is the President of the Personal Data Protection Office (hereinafter referred to as PUODO). This authority replaced the previously operating national supervisory authority – the General Inspector for Personal Data Protection. The domestic legislator amended the provisions through transformation, legal succession and continuation of the tasks of the existing body.

The purpose of this analysis is to present PUODO as a body performing tasks independently, i.e. without any external influence. Independence manifests itself in the impossibility of issuing guidelines as to the manner of operation, limiting or eliminating the possibility of interfering with pending proceedings, limiting the impact on the staffing.

Ensuring the independence of the supervisory authority is recognized as one of the basic European standards for the protection of personal data. Therefore, the guarantees of independence should be considered not only from the point of view of national constitutional and statutory regulations, but also from the point of view of international regulations that are binding on the Republic of Poland.

⁵ The Act of 10 May 2018 on the protection of personal data (Dz.U. item 1000 as amended).

The study was prepared on the basis of the dogmatic and legal method with elements of historical analysis.

II. Independence of the Supervisory Authority Against the Background of the GDPR

The obligation for Member States to establish bodies with institutional supervision over the processing of personal data is one of the foundations of the European data protection system. The provisions of Regulation 2016/679 devote a lot of attention to the national security authority (recitals 117–123 and the provisions of Chapter VI, section I – Articles 51–59).

Article 51 of Regulation 2016/679 requires Member States to establish supervisory authorities with complete independence to perform their tasks and exercise their powers. According to recital 117 of Regulation 2016/679, the basic principle of operation is the appropriate guarantees of independence, it does not matter whether individual states decide to establish one or several such bodies. The regulation does not determine whether it should be a collegiate or monocratic body. The determinant of decisions in this regard should be taking into account the constitutional, organizational and administrative solutions that operate in individual Member States. If there is a model in which more authorities operate, it is important to define the mutual relations between the authorities and the division of competences and powers. These authorities are to cooperate with each other and with the Commission according with the provisions of Chapter VII of Regulation 2016/679.

Regardless of the number of supervisory authorities, however, pursuant to Art. 51 of the General Regulation, their main objectives include: monitoring the application of the provisions of the General Regulation in a Member State, protecting the fundamental rights and freedoms of natural persons with regard to the processing of personal data in the EU, facilitating the free flow of personal data in the EU, contributing to a consistent application of the provisions of the regulation in the EU and cooperation with other national and other supervisory authorities⁶.

⁶ E. Bielak-Jomaa, D. Lubasz (eds.), *RODO Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*, Warsaw 2018, pp. 906–909.

The independence of supervisory authorities is a guarantee for the protection of the rights and freedoms of the data subject and serves to ensure the coherence, functionality and effectiveness of the personal data protection system at the national level. The requirement of the independence of the supervisory authority is not a new solution, as it was applied in Convention 108 of the Council of Europe, Directive 95/46/EC and in the Fundamental Rights Convention (Art. 8 (3)) and in the Treaty on the Functioning of the European Union (Art. 16 (2))⁷. Pursuant to the provisions of Directive 95/46/EC, the issue of the independence of supervisory authorities was not interpreted in the same way by the Member States, which meant that individual problems were the subject of the jurisprudence of the Court of Justice of the European Union. Although the cases were considered under Directive 95/46 and not Regulation 2016/679, the theses contained in the rulings are still valid and may serve as an interpretation in the discussion on the principles and limits of independence of supervisory authorities⁸.

In the judgment of *Commission v. Austria* of October 16, 2012, the Court interpreted the “complete independence” of supervisory authorities. It indicated that the supervisory authorities in the field of personal data protection should enjoy independence that allows them to perform their tasks without external influence. This means that subjecting both the authorities and employees of the body to any external evaluation, including those related to membership in the corps of administration officials, leads to a violation of the principle of not being subject to external influence⁹.

In the judgment of 8 April 2014, the *Commission v. Hungary*, which concerned a case in which Hungary shortened the authority’s term of office as a result of the adoption of constitutional changes introducing a new organization of supervision over the area of data protection, the Tribunal stated that the principle of complete independence implies the obligation of a member state to respect the term of office authority “until the originally scheduled completion¹⁰”.

⁷ Treaty on the Functioning of the European Union, 2012/C 326/01, <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex%3A12012E%2FTXT> (24.09.2020).

⁸ P. Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warsaw 2018, pp. 528–529.

⁹ Judgment of the CJEU of October 16, 2012 in the case of *Commission v. Austria*, ref. No. C-614/10, Lex No. 1219469.

¹⁰ CJEU judgment of 8 April 2014, c-288/12, ECLI: EU: C: 2014: 237, <http://curia.europa.eu/juris/documents.jsf?num=C-288/12> (24.09.2020).

This means that Member States cannot adopt solutions that would weaken the independence of the supervisory authority, which would lead to making it dependent on political pressure or ad hoc interests¹¹.

According to the Art. 52 of Regulation 2016/679, the EU legislator defined the independence of the supervisory authority as functional, organizational, personnel, financial and budgetary independence, as well as independence resulting from the term of office. This means that it is incumbent on the Member State to guarantee the members of the supervisory authority the conditions which will allow them to function without any direct or indirect external influence. It is also necessary to guarantee the supervisory authority financial resources in the form of a separate budget within the state budget allowing for the effective fulfilment of tasks, property and personnel resources, and the creation of appropriate infrastructure for the effective performance of tasks at the national level and tasks related to mutual assistance and cooperation with other supervisory authorities from all over the world. (Recital 122 of the preamble to Regulation 2016/679 and Art. 52 (4) of Regulation 2016/679) and to ensure appropriate prerogatives that will allow the national authority to exercise the powers and perform the tasks entrusted to it by Regulation 2016/679.

The provisions of Regulation 2016/679 also indicate that the independence of the supervisory authority is also guaranteed by the incompatibilitas principle in relation to the person(s) acting as the supervisory authority (see Art. 52 (3) of Regulation 2016/679).

Article 53 and recital 121 of Regulation 2016/679 indicate that each Member State should have regulations which will include general conditions for performing the function of a supervisory authority member.

Each Member State is obliged to ensure a transparent appointment procedure, i.e. the selection criteria known to the candidate and the public should be clearly defined (Art. 53 (1) of the GDPR) and it should indicate which national authorities are competent to appoint the supervisory authority. However, the European legislator specified entities which, under national law, may

¹¹ M. Jabłoński, *Rola i znaczenie RODO w procesie definiowania gwarancji niezależności i spójności krajowego systemu ochrony danych*, [in:] *Obowiązki i stosowanie postanowień ogólnego rozporządzenia o ochronie danych osobowych w polskim porządku prawnym*, eds. M. Jabłoński, D. Kornobis-Romanowska, K. Wygoda, Wrocław 2017, p. 76.

perform a creative function toward the supervisory authority. These may be legislative bodies or executive authorities (president, government), provided that the nomination is made at the request of the government, member of the government, parliament or chamber of parliament, or another independent body entrusted with this task by the law of a Member State (Art. 53 (1) of the GDPR, recital 121 of the preamble to the GDPR)¹².

The provisions of Regulation 2016/679 do not define detailed requirements to be met by a person acting as a supervisory authority. They only indicate that such a person must have the qualifications, experience and skills – in particular in the field of personal data protection – necessary to fulfil his obligations and exercise his powers (Art. 53 (2) of Regulation 2016/679)¹³.

An important guarantee of the independence of the supervisory authority contained in the provisions of Regulation 2016/679 is the limitation of the possibility of dismissal of a person holding the function of the authority by indicating that the dismissal is admissible only if he or she has been found guilty of serious misconduct or no longer meets the conditions necessary to perform the duties¹⁴.

Article 54 of Regulation 2016/679 also requires to define a Member State to specify the principles of establishing and operating a supervisory authority in the provisions of the national law. Areas that should be regulated in the law of each Member State were indicated. They include:

- the obligation to establish a supervisory authority,
- setting out the requirements for the person who may be appointed,
- specifying the procedure for appointing a member or members of each supervisory authority,
- determination of the term of office of the member or members of each supervisory authority which is no shorter than four years, except for the first term of office after May 24, 2016, which may be partially shorter, if it is necessary to protect the independence of the supervisory authority through the procedure of gradual replacement of members,
- a decision on whether the member or members of each supervisory authority may be reappointed and, if so, for how many terms,

¹² *RODO Ogólne rozporządzenie o ochronie...*, pp. 918–920.

¹³ P. Fajgielski, *op.cit.*, pp. 530–531.

¹⁴ *RODO Ogólne rozporządzenie o ochronie...*, pp. 920–921.

- rules governing the duties of the member or members and staff of each supervisory authority, a prohibition on engaging in activities, activities or profits, during and after their term of office, contrary to these obligations, and rules governing termination of employment,
- principles of protection and respect for professional secrecy.

Considering these elements, it should be noted that Regulation 2016/679 includes provisions that are addressed to supervisory authorities and can be directly applied. They indicate the basic conditions that must be met in order to ensure the independence of the supervisory authorities responsible for the protection of personal data, which may lead to a reduction in the principle of institutional autonomy of the Member States. The EU legislator also included provisions addressed to the Member States, which grant a certain amount of freedom in the organization of their supervisory authorities. It is a solution that allows Member States to make certain choices related to the final status of data protection supervisory authorities. Such freedom, on the one hand, may result in slightly different legal solutions in individual countries, but on the other hand, may contribute to the fact that the Member States have honestly and loyally approached the constitutional aspect of the protection of fundamental rights.

III. The Political Position of the President of the Personal Data Protection Office – Guarantees of Independence

In the Polish legal system, the President of the Office for Personal Data Protection acts as a supervisory authority within the meaning of Regulation 2016/679, Directive of the European Parliament and the EU Council of 27/04/2016, Regulation of the European Parliament, and the EU Council 2016/794 of 11/05/2016¹⁵. It is a central body of state administration, which is located outside the system of government administration bodies and is independent of it¹⁶.

¹⁵ Art. 34 of the Act of 10 May 2018 on the protection of personal data (Dz.U. item 1000 as amended).

¹⁶ P. Litwiński, *Komentarz do art. 34 uwaga 5*, [in:] *Ustawa o ochronie danych osobowych. Komentarz*, eds. P. Litwiński, P. Barta, D. Dörre-Kolasa, Warsaw 2018, p. 109.

The position of PUODO can be compared to the position of state control and law protection bodies listed in the Chapter IX of the Polish Constitution, with the reservation that it is not a constitutional body and the basis for its operation are the provisions of Regulation 2016/679 and the Act of May 10, 2018 on the protection of personal data.

The independence of PUODO results directly from the provisions of the Personal Data Protection Act, in particular Art. 34 containing guarantees, which include the procedure of appointment and dismissal, terms of office, granting of immunity, prohibition of membership in political parties, principle of incompatibility of positions. Of fundamental importance in this regard will be the principle according to which PUODO is subject only to the act in the performance of its tasks, which means that no state authority may influence the performance of its tasks in any form. In this respect, the independence of the President of the Office can be compared to the independence of the court¹⁷.

A person who is a Polish citizen, has a higher education, is distinguished by legal knowledge and experience in the field of personal data protection, enjoys full public rights, has not been convicted by a final judgment for an intentional crime or an intentional tax offense, has an unblemished criminal record, may be appointed to the position of PUODO. opinion. All the mentioned requirements should be met jointly, which guarantees that the selected person will be substantially prepared to perform the function of the supervisory body and will be able to perform it independently.

The provisions of the statutory rank also result in the procedure for appointing and dismissing PUODO, as well as 4-year term of office, which counts from the date of taking the oath, however, after the expiry of the term of office, the President performs his duties until the new President of the Office takes the position. The Act also introduces a restriction that prevents the same person from holding the President's Office for more than two terms, but these terms do not have to be consecutive¹⁸.

¹⁷ K. Jabłonka-Jankowska, *Komentarz do art. 34 uwaga 6*, [in:] *Ustawa o ochronie danych osobowych. Komentarz*, eds. M. Kawecki, M. Czerniawski, Warsaw 2019, p. 186.

¹⁸ W. Chomiczewski, *Komentarz do art. 34 uwaga 6–8*, [in:] *Ustawa o ochronie danych osobowych. Komentarz*, ed. D. Lubasz, Warsaw 2019, pp. 244–251.

The position of PUODO is strengthened by a closed catalogue of reasons justifying his dismissal and the expiry of his term of office. The President of the Office may be dismissed in case of: resignation from office, permanent inability to perform the duties due to illness, failure to take an oath or conviction by a final court judgment for committing a crime and depriving him of public rights (Art. 34 (5) of the Personal Data Act. In turn, the term of office expires due to: death, dismissal or loss of citizenship (Art. 34 (8) of the Personal Data Act).

The Act regulates the issues of immunity and inviolability of PUODO in a manner consistent with classical standards¹⁹. They are intended to protect the supervisory authority against actions of other persons that could prevent the performance of the supervisory authority's tasks. This means that he may not be detained or arrested, with the exception of being caught red-handed and if his detention is necessary to ensure the proper course of the proceedings, about which the Marshal of the Sejm is immediately notified, who may order the immediate release of the detained. Additionally, the President of the Office may not be held criminally responsible or deprived of liberty without prior consent of the Sejm.

Another guarantee of independence is the precise formulation of the principle of incompatibility of positions, which is aimed at securing the proper performance of the entrusted tasks. PUODO may not occupy other positions or perform other professional activities, except for teaching, research and teaching-research positions at a university. Neither may he belong to a political party, trade union or perform public activity incompatible with the dignity of his office. It is a guarantee of performing the function without succumbing to any political influence, impartiality and high authority of the office.

The additional guarantee of the independence of PUODO is the ability to independently appoint up to three deputies. In the current legal situation, the legislator resigned from the earlier model of appointing the deputy General Inspector of Data Protection, which, pursuant to the Art. 12a of the Personal Data Protection Act of 1997²⁰ was appointed by the Marshal of the Sejm at the request of the Inspector General. At present, the provisions which empowered other

¹⁹ W. Szydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2013.

²⁰ Personal Data Protection Act of 29 August 1997 (Dz.U. No. 133 item 883).

authorities to appoint (and dismiss) deputies of the President of the Office have been fully abandoned. This guarantees the performance of tasks by the President of the Office without any external influence. This solution is in line with the provisions of Regulation 2016/679 (Art. 52 (5), recital 121), which requires Member States to allow the supervisory authority to appoint their own staff²¹.

PUODO performs his tasks with the help of the Office for Personal Data Protection. Pursuant to the Personal Data Protection Act in force, the statute of the office is granted by an order of the President of the Office. Its purpose is to create optimal organizational conditions for the proper performance of tasks. This solution reflects the independence and independence of the President of the Office. It allows the President of the Office for greater independence and flexibility in shaping the organizational structure of the Office. At the same time, the Art. 52 (5) of Regulation 2016/679, according to which each Member State shall ensure that the supervisory authority independently selects and has its own staff, acting exclusively under the direction of a member of the supervisory authority.

This means that the President of the Office has the competence to shape organizational, functional, staffing and budgetary independence, assuming that still according with the Art. 34 sec. 5 of the Personal Data Protection Act remains subject to the law²².

IV. Conclusions

Considering the experience of applying the provisions on personal data in Poland, it should be concluded that the functioning of a single supervisory authority, which operates independently, is part of the Polish constitutional and administrative system and corresponds to the unitary character of our state.

Pursuant to the provisions of Regulation 2016/679, the purpose of the personal data protection supervisory authority is to protect the funda-

²¹ M. Jabłoński, *Specyfika systemowych gwarancji niezależności funkcjonowania organów na przykładzie krajowego organu ochrony danych osobowych w Polsce*, [in:] *Specyfika organizacji i funkcjonowania organów władzy publicznej. Analiza porządków prawnych państw współczesnych*, eds. M. Abu-Ghohleh, M. Jabłoński, Wrocław 2019, p. 146.

²² K. Jabłonka-Jankowska, *op.cit.*, pp. 198–199.

mental rights and freedoms of natural persons in relation to the processing of personal data and to enable the free flow of data in the EU Member States. The legal guarantees of independence should be used to enable the body to assess the achievement of the set goals in the context of specific facts that it will encounter during its activities without external pressure from other bodies.

In order to ensure the independence of the body, the national legislator has formulated provisions that will guarantee its independence. Specified the selection and appeal procedure, indicated independence in selecting collaborators, clarified the incompatibilitas principle and granted immunity to the national supervisory authority.

It is the guarantees of the independence of PUODO that are intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on the protection of personal data of natural persons. The existence of any outside influence cannot be reconciled with the guarantees of the authority's independence. The supervisor should act without any suspicion of bias which could result, for instance, from the existence of political influence of other authorities. Such a situation could create obedience on the part of the personal data protection authority, which could result in a lack of independence in carrying out control proceedings and in making decisions. This means that the functional independence of the organ, i.e. the lack of any instructions regarding the functions performed, is a necessary condition. The prohibition of being bound by instructions is intended to emphasize that data protection authorities cannot be subordinated to and supervised by other state authorities. They may not be related in any way with other authorities in an organizational or competence manner. An important element is financial independence, the primary purpose of which is to ensure independence in the performance of entrusted tasks. Only a supervisory authority that has a separate, independent budget is guaranteed independence. National regulations provide the President of the Office with independence in organizing his activities, which is manifested in independent employment of staff and expenditure of entrusted tasks. Independence is not intended to make the supervisory authority and its staff specific, but to strengthen the protection of the persons whose personal data are processed.

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