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Access to Public Sector Information in the Perspective of the Constitutional Principle of the Common Good

Keywords: public information, data sharing, common good, Constitution of the Republic of Poland
Słowa kluczowe: informacja publiczna, współdzielenie danych, dobro wspólne, Konstytucja RP

Abstract

The adoption of the UE Directive on Open Data and Re-use of Public Sector Information gives rise to necessity of its implementation by the Member States of the European Union. The process of implementing the Directive in Poland has also a significant constitutional value, because – according to the authors of this article – its content is realization of the principle of the common good (Article 1 of the Constitution of the Republic of Poland: "The Republic of Poland shall be the common good of all its citizens"). This is because data sharing has not only economic value, allowing the entity using access to public information to achieve a financial benefit, but also in other areas, where, in principle, both parties (a person and public authority) benefit from such action. Therefore, the role of public authorities should be to ensure the widest possible access to public sector information in order to implement the constitutional principle of the common good.

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Streszczenie

Dostęp do informacji sektora publicznego w perspektywie konstytucyjnej zasady dobra wspólnego

Przyjęcie Dyrektywy w sprawie otwartych danych i ponownego wykorzystywania informacji sektora publicznego rodzi konieczność jej implementacji przez państwa członkowskie Unii Europejskiej. Proces implementacji Dyrektywy ma w Polsce również doniosły walor ustrojowy, ponieważ – zdaniem autorów niniejszego artykułu – jej treść stanowi realizację zasady dobra wspólnego (art. 1 Konstytucji Rzeczypospolitej Polskiej: Rzeczpospolita Polska jest dobrem wspólnym wszystkich obywateli). Współdzielenie danych ma bowiem nie tylko walor ekonomiczny, pozwalający podmiotowi korzystającemu z dostępu do informacji publicznej na osiągnięcie korzyści finansowej, ale również w innych obszarach, gdzie co do zasady obydwie strony (jednostka i władza publiczna) czerpią korzyść z tego procesu. Dlatego zadaniem rządzących powinno być zapewnianie jak najszerszego szerszego dostępu do informacji sektora publicznego w imię realizacji konstytucyjnej zasady dobra wspólnego.

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I. Introductory Remarks

On June 20, 2019, a Directive 2019/1024 of the European Parliament and of the Council on open data and the re-use of public sector information was adopted[3]. The Directive extended the subjective and objective scope of the re-use of public sector information. It covers scientific institutions and bodies governed by public law[4], as well as new resources: dynamic data, high-value data and research data. The adopted act is a contin-

[3] Official Journal of the European Union, L 172/56; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1024 (7.09.2020); hereinafter referred to as: Directive.

[4] According to Art. 2 point 2 of the Directive, 'bodies governed by public law' means bodies that have all of the following characteristics: (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial

uation of the assumptions of Directive 2003/98/EC[5] (together with Directive 2013/37/EU[6]), except that the EU legislator changed the title of the Directive by adding the term "open data", which emphasizes the assumption of the implementation of the policy of public opening of data and – what is to be demonstrated in this article – their wider sharing. The policy of the European Union, the normative expression of which is the Directive, is part of the development of the knowledge society in which modern information and communication technologies enable the sharing of information.

Considering this observation, the authors of this article acknowledge that the necessity to implement the provisions of the Directive by statute will contribute to the implementation of the principle of the common good[7]. Data sharing occurs not only in economically justified situations, in which, as a rule, both parties benefit from such action, but also in areas where the state must respond to the needs of citizens and initiate activities that bring benefits to society, the environment and the economy by creating new goods and services. Therefore, one should strive to make public data available, and then to allow re-use of a wider and constantly expanded category, i.e. public sector information. The EU legislator systematically extends and improves the model of sharing socially useful data, and the Polish legislator, who is obliged to implement the Directive into the legal system of the Republic of Poland, should implement it guided by the principle of the common good.

Extending the re-use of public sector information is an extremely important manifestation of the right to access public information (Article 61 of the Constitution of the Republic of Poland), as technology has improved and dominated the implementation of access to resources at the disposal of public sector entities. Allowing the possibility of using open

or supervisory board, more than half of which members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

[5] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the Re-use of Public Sector Information (Dz.U. L 345/90).

[6] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information (Dz.U. L 175/1).

[7] Art. 1 of the Constitution of the Republic of Poland (Dz.U. No. 78, item 483): "The Republic of Poland shall be the common good of all its citizens".

data and the re-use of public sector information within the scope covered by the provisions of the Directive should significantly contribute to the development of the knowledge society and thus – according to the authors of this article – to the implementation of the constitutional principle of the common good.

II. Public Sector Information

Public sector information is information held by the obliged entity. It is about any content or part of the information, even if it does not relate to the performance of public tasks or the management of public property. The EU legislator does not introduce any limitation of a subject nature in this respect, and thus the information of the public sector is any information (the entire information resource of the obliged entity), if it meets other conditions indicated in the definition included in the Directive.

If, according with the factual jurisdiction, the obliged entity should be in possession of such information, it is not sufficient to indicate that the addressee of the application does not have the information (does not possess it) to free himself from the obligation to disclose the information. The entity refusing to provide information is obliged to notify the applicant why the authority does not have the requested information and to specify other data that may affect the factual and legal situation of the applicant[8]. In case of such circumstances, the court is responsible for examining the reasons for the impossibility of executing the request in terms of possible inactivity of the entity obliged to provide information. The court assesses the reasons why an entity does not have information, despite the existence of such an obligation under the law, taking into account the scope of the entity's activities and its competences[9].

[8] Judgment of the Supreme Administrative Court of 27 March 2012, I OSK 156/12 (CBOSA).

[9] Cf. judgment of the Supreme Administrative Court of 31 January 2013, I OSK 2571/12 (CBOSA); judgment of the Supreme Administrative Court of 24 November 2009, I OSK 851/09 (CBOSA); and judgment of the Supreme Administrative Court of 21 June 2012, I OSK 752/12 (CBOSA).

Public sector information must be recorded, and the legislator does not close the catalog of ways in which the recording can be made, introducing only an exemplary enumeration. It includes the most common methods of recording, i.e. in paper, electronic, sound, visual or audiovisual form[10]. Public sector information can be expressed in any form and written in any form.

Public sector information includes first of all, high-value datasets. The essence of these data comes down to the need to meet three conditions: having a specific content, disposition by obliged entities and recording. According to the Art. 2 point 10 of the Directive high-value datasets' means documents the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and of the number of potential beneficiaries of the value-added services and applications based on those datasets.

The second category of public sector information is dynamic data. According to the Art. 2 point 8 of the Directive 'dynamic data' means documents in a digital form, subject to frequent or real-time updates, in particular because of their volatility or rapid obsolescence; data generated by sensors are typically considered to be dynamic data.

The last, third category of public sector information, which is 'research data', is the most difficult to define. In the literature on the subject, one of the classifications, in which the author uses the world's leading sources, divides the research data into: observational, experimental, simulation, dependent (compiled) and reference (canonical)[11]. According to the Art. 2 point 9 of the Directive 'research data' means documents in a digital form, other than scientific publications, which are collected or produced in the course of scientific research activities and are used as evidence in the research process, or are commonly accepted in the research community as necessary to validate research findings and results.

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[10] B. Fischer, A. Piskorz-Ryń, M. Sakowska-Baryła, J. Wyporska-Frankiewicz, *Ustawa o ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warsaw 2019, pp. 56–58.

[11] A. Krzemińska, *Zabezpieczenie i ponowne wykorzystanie dokumentacji badań naukowych (tzw. surowych danych) – teoria i praktyka*, [in:] *Archiwa w nauce, nauka w archiwach*, eds. D.K. Rembiszewska, K.K. Szamryk, Białystok 2016, p. 14.

III. Data Sharing and Re-Use as an Expression of the Right to Access Public Information

The implementation of the Directive into the legal system of the Republic of Poland will constitute a significant extension of the right of access to public information, guaranteed to citizens in the Art. 61 of the Constitution[12]. The constitution-maker creates the basis of the so-called information status of a citizen (individual) corresponding to the basic rules of a democratic state ruled by law[13]. As Mariusz Jabłoński points out, the "fundamental guarantee of democracy today is to provide every interested party with the possibility of obtaining information and knowledge about the activities of the state and its organs, which will be connected with the process of defining when and to what extent an individual can become involved alone and together with others in a series of activities accompanying that activity"[14].

Constitutional guarantees of access to public information develop statutory provisions, also in the aspect of the so-called processed information. According to the Act of 25 February 2016 on the re-use of public sector information[15] public (state) entities and the so-called public law persons belong to entities obliged

[12] According to the Art. 61 sec. 1–2 of the Constitution, a citizen shall have the right to obtain information on the activities of organs of public authority, as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.

[13] By statute, the right of access to public information has been extended to include persons who do not have the citizenship of the Republic of Poland. K. Prokop, *Zakres podmiotowy prawa dostępu do informacji publicznej w świetle art. 61 ust. 1 Konstytucji RP*, [in:] *Dostęp do informacji publicznej – wybrane zagadnienia*, ed. W. Koński, Płock 2011, p. 45. The effect of the regulations in force in Poland is the exclusion of the possibility for a foreigner to pursue his or her claims under a constitutional complaint; Decision of the Constitutional Tribunal of 2 December 2015, SK 36/14 (OTK-A 2015, No. 11, item 189).

[14] M. Jabłoński, *Jawność działania władz publicznych jako dobro wspólne*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, No. 1, p. 45; cf. P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2008, p. 17.

[15] Consolidated text: Journal of Laws 2019, item 1446.

to provide information[16]. The catalog of them does not coincide with the catalog of entities obliged to provide public information under the first act of the access system in Poland, i.e. the Act of 6 September 2001 on access to public information[17]. It should be noted that the Directive provides for the extension of the group of entities obliged to provide data to scientific institutions and public enterprises.

Public sector entities, as part of the performance of public tasks, produce a huge, even overwhelming amount of reusable information that they share with users. Re-use not only allows for the creation of new goods and services, but also to obtain feedback for obliged entities, from re-users and end users, which allows these entities to improve the quality of the collected information[18]. It should be emphasized that the public sector entity does not have to be only an obligated entity, but also has the possibility to use the released data as a user as a part of its activities, i.e. to act as a beneficiary, although of course in this case it is not possible to use the right access to public information in the constitutional sense (as a subjective right).

Re-use serves the public opening of data, which – as argued by the authors of this article – is the realization of the common good within the meaning of Art. 1 of the Constitution of the Republic of Poland[19]. "Public access" indicates that everyone has, in principle, free access to information for which, under different conditions, i.e. without this access, they should pay. However, it is only in the concept of 'open access to data' that the secondary use of this information is expressed[20]. Open data is information that can be freely used, reprocessed and disseminated by anyone, subject to any requirement to state the source or to allow further dissemination of processed content on the same terms[21].

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[16] I. Kamińska, M. Rozbicka-Ostrowska, *Ustawa o dostępie do informacji publicznej. Komentarz*, Warsaw 2016, commentary to Art. 23a; P. Szustakiewicz, *Zmiany w ustawie o dostępie do informacji publicznej*, "Prawo i Środowisko" 2011, No. 4, p. 50. A different division of the obliged entities may also be made, i.e. into units of the public finance sector and other obliged entities listed in the Art. 3 points 2–4 of the Act.

[17] Consolidated text: Journal of Laws 2019, item 1429 with changes.

[18] This is also in line with recital 4 of the preamble to Directive 2013/37/EU of the European Parliament and of the Council of 26/06/2013 amending Directive 2003/98/EC on the re-use of public sector information.

[19] See in the remainder, item 4 of this study.

[20] It is also so-called access-based consumption.

[21] Open Knowledge Foundation. Open Data Handbook; https://opendatahandbook.org/guide/en (10.03.2020).

Directive in its Art. 5 (2) points to the need for Member States to encourage public sector bodies and public enterprises to produce and make available (and not store in inaccessible or hard to reach places) documents falling within its scope, in line with the principle of 'open by design' and 'open by default'. Apart from the technical aspect, i.e. comprehensibility for communicating machines, and the economic one, i.e. free of charge, the third aspect, consisting in eliminating unnecessary legal restrictions, is of fundamental importance for opening new resources. National access systems serve these purposes. The European Union encourages the development and, consequently, sharing of these data in the Directive and the accompanying soft law acts.

The Act on the re-use of public sector information defines the material scope of the right to re-use, including not only public information (any information on public matters[22]), but also documents held by libraries (including scientific ones), museums and archives, i.e. the resources of these entities that are not public information. The next step is to extend the material scope of re-use by the Directive to the mentioned high-value data, dynamic data and research data.

IV. The Right to Public Sector Information as an Expression of the Implementation of the Constitutional Principle of the Common Good

As it results from the considerations consisted in this paper, the implementation of the right to public sector information, as defined in the Directive, constitutes a very significant extension of the right to public information within the meaning of the Art. 61 of the Constitution of the Republic of Poland. However, constitutional meaning of the Directive is much wider. It should be emphasized that there is a close relationship between the right to public information and the principle of the common good, noticed, established and demonstrated by the doctrine of constitutional law and the jurisprudence of the Constitutional Tribunal already in the first years of the application of the

[22] According to the Art. 1 sec. 1 of the Act of 6 September 2001 on access to public information: information about public matters is public information; in particular those referred to in Art. 6 of this Act; see, for example, the judgment of the Provincial Administrative Court in Warsaw of 16 November 2007, II SAB/Wa 68/07.

Constitution of 1997[23]. Particular importance should be attached to the position of the Constitutional Tribunal expressed in the judgment of 20 March 2006[24]. As indicated in this ruling by the Constitutional Tribunal, the principle of the common good "undoubtedly creates a significant axiological justification for the introduction of guarantees related to access to information about the activities of public authorities, because it is the common good that is involved in the proper functioning of public life institutions, the basic condition of which is the transparency of activities undertaken in public sphere".

The exercise of the civic right to public information is therefore a condition for compliance with the order of transparency in the functioning of public authorities, without which it is impossible to realize the common good of all citizens. "This is because only a conscious citizen is able to make a substantive and rational decision, the effects of which are important not only in terms of creating the composition of specific bodies, including, in particular, representative bodies, but above all in the field of initiating various types of verification procedures aimed at examining the correct functioning of all institutions and mechanisms within a democratic state of law"[25].

Although the normative meaning of Article 1 of the Constitution as a constitutional principle does not raise any doubts[26], determining the consequences resulting from its content may be debatable, given the ambiguity of the concept of "common good", which allows it to be assigned various meanings[27]. Undoubtedly, Article 1 of the Constitution follows a solidarity vision of the state[28], which requires that priority be given to the common good in case of

[23] J. Trzciński, *Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli*, [in:] *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*, eds. J. Góral, R. Hauser, J. Trzciński, Warsaw 2005, p. 457.

[24] K 17/05 (OTK-A 2006, No. 3, item 30).

[25] M. Jabłoński, op.cit., p. 40.

[26] W. Brzozowski, *Konstytucyjna zasada dobra wspólnego*, "Państwo i Prawo" 2006, No. 11, p. 18.

[27] A. Młynarska-Sobaczewska, *Państwo jako dobro wspólne – czy obywatele muszą być altruistami?*, [in:] *W służbie dobru wspólnemu. Księga jubileuszowa dedykowana Profesorowi Januszowi Trzcińskiemu*, eds. R. Balicki, M. Masternak-Kubiak, Warsaw 2012, p. 130 et seq.; cf. M. Zdyb, *Dobro wspólne w perspektywie artykułu 1 Konstytucji Rzeczypospolitej Polskiej*, [in:] *Trybunał Konstytucyjny. Księga XV-lecia*, eds. F. Rymarz, A. Jankiewicz, Warsaw 2001, p. 190.

[28] The common good should be considered from a broad perspective, including not only the obligations of an individual toward the state, but also toward other members of the political

a conflict with any particular interest[29]. The conflict may be very acute in extreme situations, which excludes the possibility of granting primacy to the individual interest, but it is also possible that the implementation of the individual good will not exclude the possibility of taking into account the common good, and may even identify with it[30]. This remark is important in the context of exercising the right of access to public sector information, because the content of this information may be of a diversified nature, not necessarily economic, and carried out precisely for the sake of achieving the common good.

In the context of the exercise of the right to public sector information, it should be emphasized that the common good within the meaning of the Art. 1 of the Constitution is primarily the state (the Republic of Poland), which, following the constitution-maker, should be understood as a "democratically organized community of empowered citizens, and not only the state apparatus, even if understood most broadly, as the entirety (system) of organs, offices and institutions acting on behalf of and under the authority of the supreme state authority"[31]. Therefore, a public sector entity obliged to provide information and evading the fulfillment of its obligation cannot effectively rely on the argument of the common good only because it acts as a public authority, which in itself constitutes a value protected by the provisions of Art. 1 of the Constitution.

The normative value of the Art. 1 of the Constitution cannot be limited to the good of the state[32]. The use of access to information in the form defined by the Directive is a part of the concept of the common good not only in the

community; cf. M. Piechowiak, *Solidarność – w poszukiwaniu ideowej tradycji interpretacyjnej tej kategorii konstytucyjnej*, [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warsaw 2012, p. 145.

[29] P. Winczorek, op.cit., p. 17.

[30] M. Zubik, W. Sokolewicz, *Commentary to Article 1*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, eds. L. Garlicki, M. Zubik, Warsaw 2016, note 17; M. Lewaszkiewicz-Petrykowska, *Dobro wspólne versus konstytucyjne prawa i wolności jednostki*, "Studia i Materiały Trybunału Konstytucyjnego" 2003, vol. XVII, pp. 76–77.

[31] M. Zubik, W. Sokolewicz, op.cit., note 18.

[32] Cf.M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, Warsaw 2012, pp. 261–266; M. Zubik, *Refleksje nad „dobrem wspólnym" jako pojęciem konstytucyjnym*, [in:] *Prawo a polityka*, ed. M. Zubik, Warsaw 2007, p. 404. According to Anna Młynarska-Sobaczewska the principle of the common good defines "the limits of the operation of authority and justification of imperative actions, carried out precisely for the common good, defined as a set of conditions and circumstances serving the development and life of

statist dimension, which is the common good of the state – the Republic of Poland, but also in personal terms, in which the interest of other citizens benefiting from the release of data being at the disposal of a public sector entity.

V. Final Remarks

The adoption of the Directive, the provisions of which result in the imposition of extended obligations on the Member States of the European Union regarding the disclosure of public sector information, imposes on the Republic of Poland the obligation to pass an act implementing the provisions of this act. It is important for the legislator to try to include the new regulations in a broader systemic perspective, which shows that the exercise by an individual of the right to access information may constitute the implementation of the constitutional principle of the common good.

The enactment of the Directive should also be seen in the context of the wider process of "opening up" the administration, which is accompanied by emphasizing the role and importance of public data as a resource owned by public authorities, which can share it with the general public and which resource can serve everyone. Access to data, regardless of the fact that it may be of economic importance in practice, is primarily characterized by a significant systemic value, as it involves the sharing of common good (data) by public authorities in a democratic state in the name of the general interest of the entire society (Nation). The benefits of data release are therefore both economic and non-economic[33].

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[33] B. Fischer, A. Piskorz-Ryń, M. Sakowska-Baryła, J. Wyporska-Frankiewicz, op.cit., p. 21.

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