

The right of an entrepreneur running sole proprietorship as a natural person to the protection of personal data

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Abstract

The protection of entrepreneurs' personal data belongs to the problems of contemporary challenges associated with the guarantee of the right to privacy compounded by the development of information and communication technologies. It should be noted that the entrepreneur's data are collected and made available to the public through information and communication systems. The position of the Polish legislator towards the scope of protection of personal data of entities engaged in economic activity has changed over the last few years. Some doubts in this regard were dispelled by the Act of September 25th 2015¹ amending the Act on Freedom of Business Activity. The aim of the article is to define the scope of personal data protection granted to an entrepreneur who is a natural person *de lege lata*, and to comment on the validity of adopted legal solutions. Beyond the scope of the article is the data protection of employees as well as contractors. The paper will use a legal-dogmatic method, involving the analysis and inference from legal acts and the jurisprudence as well as an analytical-synthetic method in respect to representative literature in the field of study.

Keywords: *data protection, entrepreneur, a sole proprietorship.*

Introduction

In accordance with the provisions of the data protection directive 95/46/EC and according to the article 47 of the Constitution of the Republic of Poland everyone has the right to the protection of private and family life, honour and good name and to decide on one's own private life. Personal data are considered as a part of private life and the right to the autonomy of information is one of the manifestations of the right to the privacy (Piechowiak, 2009, p. 39). Autonomy of information,

according to the judicial decisions of the Constitutional Tribunal, is the right to make independent decisions on the disclosure of information regarding one's person to others, as well as the right to exercise control over such information held by other parties (Judgment of Constitutional Tribunal from February 19th 2002). Detailing of the principles contained in the Constitution, on the individual's right to information autonomy is included in the Act of August 29th 1997 on the personal data protection (Journal of Laws 1997 No. 133 item 883). Whereas, the Act setting out the principles and procedures for collection and sharing of information on the nature of personal data in relation to the entrepreneurs who are natural persons is the Act of July 4th 2004 on freedom of economic activity (Journal of Laws 2004 No. 173 item 1807).

Privacy in the doctrine is identified with the right to appoint the realm free from external interference, including unjustified interference by public authority. The law can thereby effectively protect the privacy – including the privacy of an entrepreneur – from violation, only in case of clear definition which data belong to private sphere and which to the public sphere, which in practice turns out to be a difficult task. Contemporary challenges related to the guarantee of the right to privacy are enhanced by the development of information and communication technologies exceeding the barriers of time and space (Chyrowicz, 2009, p. 7). With respect to the privacy protection of entrepreneurs it should be noted, that the information and communications system, which the data of economic operators (entity conducting economic activity) as natural persons are collected and disclosed in, is Central Register and Information on Economic Activity (further CEIDG) operating in Poland since July 1st 2011.

The basic conceptual categories

For the purposes of this discussion, one should take the most common definition of an entrepreneur included in the provisions of the Act of July 2nd 2004 on freedom of economic activity². Under article 4 paragraph 1 of Freedom of Economic Activity Act an entrepreneur is a natural person, a legal person and an organizational unit other than a legal person, which is granted a legal capacity by a separate act – performing an economic activity in its own name. Partners of a civil partnership are also considered as entrepreneurs in

the scope of their economic activity (article 4 paragraph 2 of the Freedom of Economic Activity Act)³. According to article 2 of Freedom of Economic Activity Act business activity is a gainful manufacturing, building, trade and service activity, as well as exploration and exploitation of minerals from deposits, and professional activity carried out in an organized and continuous way. Therefore, it should be noted that the status of an entrepreneur may be eligible to both natural persons and legal persons as well as to organizational units other than a legal person, but which have a legal capacity (i.e. private commercial companies). Further considerations will focus mainly on the entrepreneur as a natural person.

In accordance with article 43² of Civil Code with reference to article 43¹, an entrepreneur operates under a brand. The brand of a natural person is her/his name and surname (article 43⁴ of Civil Code). It is possible to include in the brand designations indicating the object of activity of the entrepreneur and other freely chosen terms. Due to this fact, a brand under which a natural person operates must contain his/her name and surname, whereas this data in certain situations may be strictly personal data, when the same name is enough to identify a natural person (Zajączkowska-Waremczuk and Białek, 2007, p. 25.).

Personal data, on the other hand, within the meaning of the Act of August 29th 1997 (Journal of Laws 1997 no. 133 item 883) on personal data protection in accordance to article 6 paragraph 1 is understood as all information regarding identified or possible to identify natural person. Such definition of data indicates that personal data includes, inter alia, name and surname, PESEL number, eye colour, the appearance, fingerprints, clothing habits provided that on the basis of these data it will be possible to establish unequivocally someone's identity. In practice, direct and indirect identification of personal data may be distinguished. Indirect identification refers to the use of several sets of data, which, when connected correctly, enables the identification of a given natural person, whereas the direct identification uses only one set of data. General Data Protection Supervisor in the decision of June 11th 2012 clearly emphasized, that the definition of personal data refers only to living natural persons.⁴ According to the judgment of NSA (Supreme Administrative Court) of May 19th 2011, information is not considered as possible to define the identity, if its use in

this purpose should require incurring excessive costs, spending too much time or taking too much action.

On the other hand, the concept of data processing is understood, according to article 7 paragraph 2 of Personal Data Protection Act, as any operation performed upon personal data, such as collection, recording, storage, organization, alteration, disclosure and erasure of data, especially those which are performed in computer systems. Therefore, in fact, each action, which personal data were subjected to, will mean processing. It should be noted, that the Act imposes a number of information and rectification obligations on the administrator⁵, as well as defines the rules of data processing. These include, in particular, the principle of purpose, factual correctness and relevance of data processing as well as data retention time.

Entrepreneur's privacy and the principle of reliability of business transactions

The possibility of unambiguous identification of the contractor's identity in business transactions is the basic warrant of reliability of business transactions. *Fajgielski* stressed in this context that economic activity that may entail restrictions on the right to privacy and data protection. Any restrictions on the right to privacy and protection of personal data must however have a statutory basis and be consistent with the principle of proportionality (*Fajgielski*, 2016, p. 82-83). As pointed out by *Markowski* (2013, p. 42) in the realities of business, privacy cannot, mean anonymity. The latter brings forth feelings of responsibility for one's own actions (*Piechowiak*, 2009, p. 56). It was emphasized in the doctrine, that it is important for understanding of privacy whether in a given activity one focuses on own purposes, or whether a reference to the aims of other entities appears in the activity (*Nussbaum*, 2004, p. 300-301). According to *Chyrowicz*, potentially unfair nature of the actions towards others would be limitation of privacy (*Chyrowicz*, p. 11).

It should, therefore, be assumed, that information autonomy, in the context of business activity, is being modified and it gains a certain specific extent. This position was stressed by WSA (Provincial Administrative Court) in Warsaw which stated in the judgment of September 21st 2005 that the right to personal data protection is not an absolute right like most of other

constitutional rights and, in practice, it is reduced due to the public interest or justified interest of others. According to the court, the provisions of the Act on personal data protection cannot be understood in a way that disclosure of personal data of the debtor to recover the debt violates the welfare of the person, because it would be an unjustified privilege. Protection of goods of some cannot take place at the expense of infringing goods of others. It should be reminded that also in the light of the European Convention on Human Rights (article 8 paragraph 2) limitation of the right to privacy cannot be arbitrary and should serve one of the legitimate aims. The catalogue of these purposes is closed. Among mentioned reasons are such values, which are of social nature – public and national safety, economic wellbeing of the country, protection of order and crime prevention, morality and health protection, or of individual nature – rights and freedoms of other people. According to the third condition – a limitation must be necessary. If the set target, i.e. certainty of business transactions may be achieved in other way than by privacy compromise it should be chosen. The necessity is also the proportionality of the measures to the objective, which means that the limitation realizing a given objective should be possibly the smallest.

The disclosure of personal data of a natural person as an entrepreneur in the CEIDG

The disclosure of data of entrepreneurs, including personal data of natural persons running a business, was established in the regulations governing the rules of functioning of public registers of entrepreneurs. The principle of formal openness of CEIDG (Central Register and Information on Economic Activity) means that, according to the content of article 38 paragraph 1 of the Act on the Freedom of Economic Activity, everyone has the right to access to data and information disclosed by CEIDG. The functioning of CEIDG, which is a register proper for natural persons running a business, is regulated by the provisions of chapter III of the Act on Freedom of Economic Activity.

The essence of the informative function of CEIDG is the disclosure of entrepreneurs' data as natural persons defined in article 25 paragraph 1 of the Act on Freedom of Economic Activity, which means recordable data. Recorded in CEIDG are, inter alia, entrepreneur's company and his PESEL

(General Electronic System for Registration of the Population) number, as long as he has one; date of birth of the entrepreneur; REGON (Register of National Economy) identification number of the entrepreneur, if he has one; tax identification number (NIP); information of Polish nationality of the entrepreneur, if he has it, and other nationalities of the entrepreneur; address of residence of the entrepreneur, address for service of the entrepreneur and addresses, under which economic activity is carried out, including the main address of the business and its branch, if it was created; these data are in accordance with code markings adopted in the national official register of territorial division of the country, as far as it is possible in a given case, contact details of the entrepreneur, especially e-mail address, website, telephone number, if the data were submitted in the application for entry to CEIDG. What is more, CEIDG discloses information on obtaining, withdrawal, loss and expiry of the rights under concession, permit or license, about entry in the register of regulated activity, prohibition of exercise of activities defined in the entry and the removal from the register.

With regard to personal data protection of an entrepreneur it should be noted that according to the new wording of article 37 paragraph 1 sentence 1 of the Act on the Freedom of Economic Activity, CEIDG discloses data on entrepreneurs, except for PESEL number, date of birth, address of residence, as long as it is not the same as the address for service of the entrepreneur and addresses under which economic activity is carried out, including the main address of the business and its branch, if it was created, and contact details of the entrepreneur, such as e-mail address, website, telephone number, when giving them, the holder opposed to making them available in CEIDG. In that way, apart from general explicit exclusion of the application of the Act on Personal Data Protection to data contained in CEIDG the scope of data available in the registry was clarified. The attention is drawn to the fact that the entrepreneur gained an explicit right of objection to the disclosure of data, the general availability of which might cause a significant breach of the right to privacy, including telephone number and e-mail address.

It was emphasized in the literature and case-law in this context that exceeding the limit of privacy can be scarcely perceptible, while the limitation itself runs between what defines the area of our public duties, and the sphere of private life. The consequence of the recognition of disclosure

of personal data of an entrepreneur as a natural person is the necessity of establishment of a moment (instance), the occurrence of which ceases the specified by provisions protection of personal data of natural person, and causes the disclosure of entrepreneur's personal data. In the literature it is usually assumed (Fleszar, 2008, p. 118) that gaining entry to the CEIDG is this moment.

It should be borne in mind that the subject to legal protection will also be the personal data of natural persons who are members of bodies of companies – collected and made available in the National Court Register (KRS). Under Article 35 of the Law on the National Court Register, whenever the Register is a part of a natural person, it should contain the surname and the names and an identifier given in the population register system, hereinafter referred to as “PESEL” number. In this case, under the Act on KRS, the data disclosed in the registry are limited to the name, surname and “PESEL” number. They are, therefore, limited data considered to be closely related to the sphere of economic activity. Apart from the aforementioned, KRS does not provide other, more detailed data about individuals, such as address, which will be treated as protecting the privacy of those individuals. As noted in the judgment of the Administrative Court in Warsaw of April 28th 2014 (II SA/ / Wa 125/14) openness and universal availability of data from the register of the National Court and the goal that the legislature realizes in this way determine the type and scope of personal data of individuals processing.

The scope of application of national law on personal data protection to the entrepreneurs as natural persons

Statutory obligations related to the need to ensure data protection are applied under article 3 paragraph 2 Personal Data Protection Act to natural and legal persons and organizational unit other than a legal person, which are established on or reside on the territory of the Republic of Poland if they process personal data in connection with gainful or professional activities. From the above provision it is clear that every Polish entrepreneur is obliged to apply the provisions of the Act if he processes personal data in connection with the business. In some situations, this may be personal data of other entrepreneurs as natural persons, cooperating with a particular administrator of the data. It must, therefore, be borne in mind, that as a rule each

entrepreneur processing personal data of other natural persons, including those being entrepreneurs, should fulfil, inter alia, their information duties in relation to the data subjects. The data subjects may be, in this context, the employees or contractors of an entrepreneur.

The provisions of the Act on personal data protection at the same time do not contain any clear guidance to the scope of personal data protection of natural persons independently performing an economic activity. A provision of article 1 paragraph 2, according to which personal data processing may take place because of public good, good of a person, whom the data concern or the welfare of third parties, in the extent and manner specified by the Act in this context is too general and imprecise (Zajączkowska-Waremczuk and Białek, 2007, p. 22). Also the analysis of the content of the data protection directive 95/46/EC leads to the conclusion that the issues of data protection of sole traders is not at all addressed in the legal act. Another problem is the issue how data collected in the public register associated with the legalization of business – CEiDG (Central Register and Information on Economic Activity) are personal data in the understanding of Personal Data Protection Act. On the basis of article 7a paragraph 2 of Act of November 19th 1999 – Economic Activity Law, applicable until December 31st 2011 it was assumed that “Registration of a business is open and the personal data contained therein are not subject to the provisions of the Act of August 29th 1997 on Personal Data Protection”. Adjustment of article 7a paragraph 2 was repealed on December 31st 2011, which resulted in the fact that since January 1st 2012 the provisions of the Act on personal data protection have been also concerned with information disclosed in CEIDG (Central Register and Information on Economic Activity). This caused many practical difficulties. Among other things, providers of business information without the proper consent of the entrepreneur collected personal data of entrepreneurs registered in CEIDG into their own database, where they were processed and then disclosed to other entities in the form of reports on a particular entrepreneur. Providers did not inform entrepreneurs neither about the rules of processing of their data, nor about their rights. ⁶

Taking into account the realities of business transactions, proposals taken to article 39b of the Act on the amendment of the Act on the Freedom of Economic Activity of September 25th 2015 should be recognized as more

adequate in this scope⁷. They assume that the provisions of the Act of August 29th 1997 on Personal Data Protection, apart from provisions of article 14-19a and article 21-22a and chapter 5 of this Act, are not applied to non-confidential data and to information disclosed by CEIDG. Therefore, the amendment of the Act in the wording enabled less rigorous treatment of data disclosed in CEIDG, which means without the necessity to apply to them all the provisions of the Act on Personal Data Protection, but only those referring to control operations and protection of personal data.

New developments in the realm of data protection on the European level

When discussing the issues of personal data protection of a natural person as an entrepreneur the attention should be paid to the fact that on May 24th the new general data protection regulation 2016/679 entered into force. It shall apply from May 25th 2018 and will replace the provisions of the directive 95/46/EC. In point 4 of the preamble of the regulation it has been stated that “the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not to be regarded as an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.” The Regulation does not contain any provisions directly related to the processing or protection of entrepreneurs’ data. The possibility of conducting public registers for the purposes of the fairness of business transactions can be derived from subparagraph 73 of the preamble. In this respect, limits to the application of the general rules of data processing, such as the right to object, are acceptable.

General data protection regulation 2016/679 is vague in subparagraph 14 of the preamble about the fact that protection guaranteed in this act should be applied to natural persons – regardless of their nationality or place of residence – in connection to the processing of their personal data. The regulation also does not apply to the processing of personal data relating to legal persons, especially in companies that are legal persons, including data about the company and legal form and contact details of the legal person. According to the European legislator, the processing of personal data for archiving purposes in the public interest or statistical purposes should also

be a subject to appropriate safeguards for the rights and freedoms of the data subject (subparagraph 156 of the preamble). It has also been clarified that Member States should be authorised to provide specifications and derogations with regard to the information requirements and the rights to rectification, to erasure, to be forgotten, to the restriction of processing, data portability and to object when processing personal data for archiving purposes in the public interest. The conditions and safeguards in question may, according to subparagraph 156 of the regulation, “entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in accordance to the proportionality and necessity principles”. From the general nature of subparagraphs 73 and 156 of the preamble one may, therefore, conclude that the detailed manner, in which the entrepreneurs’ data protection shall be granted and exercised, will largely stay within the discretion of national legislator.

Summary

In Poland, subject to the legal protection are personal data relating to individuals, including the self-employed. Data protection in general does not apply to legal persons. In some cases, it is sometimes however difficult to differentiate between the data of the individual and data of a small enterprise. The right to privacy and personal data protection is not an absolute right – this is due to the Data Protection Act as well as the judgment of the Supreme Administrative Court – the participants of business transactions in order to ensure its reliability must agree to limit their sphere of privacy. The certainty of business transactions requires the openness of some of entrepreneur’s data in relations between traders as well as traders and consumers. Therefore, the solution when personal data of natural persons conducting an economic activity are not subject to the rigour of the Personal Data Protection Act should be considered as correct. As it was noticed in the doctrine (Fajgielski, p. 82) and in case-law, otherwise legal certainty and transparency of business transactions would be impossible to achieve.

On the basis of the provisions of the Act on Freedom of Economic Activity, by March 19th 2016 there was no regulation which would plainly exclude the

application of the Act on Personal Data Protection towards the data collected in CEIDG (Central Register and Information on Economic Activity). From the point of view of the clarity of legal system, the adopted range of limits connected with the protection of personal data of the entrepreneurs as natural persons disclosed by CEIDG should be positively assessed. It should be mentioned that the application of general rules of data processing in relation data disclosed by CEIDG would guarantee their protection only in an illusive way. Certain doubts are however raised by the upheld obligation of the Ministry of Commerce as to safeguard entrepreneurs personal data, collected in the CEIDG. This obligation requires, among others, to keep records of the buildings in which entrepreneurs' data are processed. Due to the size of the register it is basically impracticable. However, as adopted by Polish legislator – in case when a given natural person conducting a recorded economic activity does not act on behalf of this activity, but in his own name, the general rules of personal data protection will be applied admittedly. It should also be borne in mind, that the protection of entrepreneur's data, except for the provisions of the Act on Personal Data Protection, is applied additionally on the principles typical to personal goods defined in article 23 and 24 of the Civil Code and as an indication of the company is the subject to the protection set by the provisions of the Act of April 16th 1993 on The Suppression of Unfair Competition.

It remains however unclear why the Polish legislator distinguishes between the type and scope of data disclosed in CEIDG and these provided in KRS. As analysed the last provides e.g. the entrepreneur's PESEL number, which is not the case of CEIDG. New European data protection regulation does not provide much clearance in this context as the details concerning the functioning of public registers stay beyond the scope of the regulation.

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Endnotes

- ¹ The Act of September 25th 2015 amending the Act on Freedom of Business Activity entered into force on March 19th 2016.
- ² Around the uneven concepts of Polish law a number of concerns has accumulated. More on this subject S. Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Wyd. Uczelnia Łazarskiego, Warszawa 2013, p. 114.
- ³ In relation to the currently applicable definition of an entrepreneur contained in the Civil Code it should be borne in mind that this term is close to the term from the Freedom of Economic Activity Act. In the light of article 43¹ of the Civil Code, an entrepreneur is a natural person, a legal person and an organizational unit, other than a legal person which is granted a legal capacity by an act, performing an economic activity in its own name. It is also worth mentioning that next to the Civil Code and Freedom of Economic Activity Act, the term of entrepreneur is also defined in at least three other legal acts, whereas the definition in the Freedom of Economic Activity Act and the definition contained in the Civil Code are of fundamental importance.
- ⁴ http://www.giodo.gov.pl/301/id_art/5809/j/pl/, [01.06.2016]
- ⁵ This means that in case when the data administrator collects personal data not directly from a person they concern, he is obliged to inform that person, directly after recording collected data on:
 - 1) the address of the head office and the full name, and in case when the data administrator is a natural person – the place of his residence and name and surname
 - 2) the purpose and the range of data collection, especially the data recipients or the categories of the data recipients; 3) the source of the data; 4) the right of access to their personal data and the right to correct them; 5) right to object to the processing

of data for marketing purposes or to forwarding them to other parties; 6) the right to request to stop the data processing because of the particular situation of the person whose data are processed.

⁶ Exhaustively on the former regulation of the entrepreneurs' data protection and existing legal problems Fajgielski in: *Jawność obrotu gospodarczego a prywatność przedsiębiorcy będącego osobą fizyczną – aspekty prawne*, (in:) A. Mednis (ed.), *Prywatność a jawność. Bilans 25-lecia i perspektywy na przyszłość*, p. 83-89.

⁷ [http://orka.sejm.gov.pl/opinie7.nsf/nazwa/3761_u/\\$file/3761_u.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/3761_u/$file/3761_u.pdf), [30.05.2016].