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## Some aspects of controlling compliance with regulations regarding processing of personal data in Poland

**Key words:** personal data protection, personal data protection authority in Poland, Inspector General for Personal Data Protection, controlling compliance with regulations regarding processing of personal data in Poland

### Introduction

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<sup>1</sup> has introduced an obligation of each Member State to establish a supervisory authority responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to the Directive<sup>2</sup>. Foundation of such authority and ensuring its status guaranteeing complete independence was seen by the European legislators as ‘an essential component of the protection of individuals with regard to the processing of personal data’<sup>3</sup>.

In Poland, the only authority holding jurisdiction in personal data protection matters is the Inspector General for Personal Data Protection (‘Generalny Inspektor

Ochrony Danych Osobowych’ – abbreviated as GIO-DO). It is a central public administration authority<sup>4</sup>, established by the Act of 29 August 1997 on the Protection of Personal Data (‘Ustawa o ochronie danych osobowych’ – commonly abbreviated as UODO)<sup>5</sup>, which was the first normative act regarding the matter of processing and protection of personal data in Poland<sup>6</sup>. The act entered into force on 30 April 1998, but the provisions regarding GIO-DO preceded them, entering into force on 30 December 1997. This allowed for selection and appointment of the first GIO-DO by the Polish Parliament (technically, GIO-DO is appointed by the Diet of the Republic of Poland with the consent of the

<sup>1</sup> O.J.L. 281, 23.11.1995, p. 31–50.

<sup>2</sup> See also M. Jagielski, *Prawo do ochrony danych osobowych. Standardy europejskie*, Warszawa 2010, p. 165 ff.

<sup>3</sup> Motive 62 of Directive 95/46/EC.

<sup>4</sup> As defined by the Act of 14 June 1960 – Code of Administrative Procedure, J.L. of 1960, no. 30, item 168, as amended.

<sup>5</sup> J.L. of 1997, no. 133, item 883, as amended.

<sup>6</sup> Prior to the Act on the Protection of Personal Data there were only a few norms regarding the matter, scattered over specialized acts, such as the Act of 29 September 1994 on Accounting (J.L. of 1994, no. 121, item 591), which contained several such norms in Chapter 8 (article 71 et seq.).

Senate<sup>7</sup>) on 4 April 1998. After taking the official oath<sup>8</sup> before the Diet, the appointee, Ewa Kulesza, began her first term as GODO<sup>9</sup>.

## GODO

Establishment of GODO was, incidentally, also fulfilment of Poland's obligations under Council of Europe's Treaty no. 108 – the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>10</sup>.

Analysis of the legal norms allows one to define GODO's primary duties as:

- a) supervision over ensuring the compliance of data processing with the provisions on the protection of personal data<sup>11</sup>;
- b) issuing administrative decisions and considering complaints with respect to the enforcement of the provisions on the protection of personal data<sup>12</sup>;
- c) ensuring fulfilment of non-pecuniary legal obligations stemming from GODO's administrative decisions, by the means of enforcement measures foreseen in the Act of 17 June 1966 on enforcement proceedings in administration (Journal of Laws of 2005, no. 229, item 1954 as amended)<sup>13</sup>;
- d) keeping the register of data filing systems and the register of administrators of information security, as

well as providing information on the registered data files and the registered administrators of information security ('Administratorzy Bezpieczeństwa Informacji, abbreviated as ABI)<sup>14</sup>;

- e) requesting from registered ABIs a check regarding compliance of personal data processing with the provisions on the protection of personal data and drawing up a report in this regard<sup>15</sup>;
- f) issuing opinions on bills and regulations with respect to the protection of personal data<sup>16</sup>;
- g) initiating and undertaking activities to improve the protection of personal data<sup>17</sup>;
- h) considering petitions regarding obtaining GODO's consent for transfer of personal data to a third country<sup>18</sup>;
- i) addressing state, territorial self-government authorities, as well as state and municipal organisational units, private entities performing public tasks, natural and legal persons, organisational units without legal personality and other entities in order to ensure efficient protection of personal data<sup>19</sup>;
- j) requesting competent authorities to undertake legislative initiatives and to issue or to amend legal acts in cases relative to personal data protection<sup>20</sup>;
- k) approving binding corporate rules<sup>21</sup>;
- l) informing proper prosecuting bodies of suspicion of a crime in case of learning that an action or lack thereof by of the head of an organizational unit, its employee or any other natural person acting as the controller bears attributes of an offence within the meaning of the Act<sup>22</sup>;
- m) deciding upon the application to reconsider a matter in which an administrative decision has been issued<sup>23</sup>;
- n) submitting, once a year, a report on his/her activities to the Diet, including conclusions with respect to

<sup>7</sup> As described by article 8 section 2 of UODO. Some reservations regarding the procedural aspects of the appointment, debates on the fitness of the candidate to serve as GODO or lack of Senate's consent have been put forth by M. Sakowska-Baryła, *Prawo do ochrony danych osobowych*, Wrocław 2015, p. 381–383.

<sup>8</sup> According to article 9 of UODO, prior to assuming his/her duties, the Inspector General shall take the following oath before the Diet of the Republic of Poland: „Assuming the post of the Inspector General for Personal Data Protection I hereby solemnly swear to observe the provisions of the Constitution of the Republic of Poland, to safeguard the right for personal data protection, and to perform the duties entrusted to me conscientiously and impartially.” The oath may be taken with the words: „So help me, God”.

<sup>9</sup> Ewa Kulesza held the position of GODO for the 1<sup>st</sup> and 2<sup>nd</sup> term office (1998–2006); her successors were Michał Serzycki (3<sup>rd</sup> term, 2006–2010), Wojciech Wiewiórowski (4<sup>th</sup> and 5<sup>th</sup> term, 2010–2014; during the latter he became Assistant European Data Protection Supervisor), and finally, the current GODO, Edyta Bielak-Jomaa (6<sup>th</sup> term, 2015–).

<sup>10</sup> J.L. of 2003, no. 3, item 25.

<sup>11</sup> Article 12, point 1 of UODO.

<sup>12</sup> Article 12, point 2 of UODO.

<sup>13</sup> Article 12, point 3 of UODO.

<sup>14</sup> Article 12, point 4 of UODO.

<sup>15</sup> Article 19b section 1 in accordance with article 36a section 2 point 1 letter a of UODO.

<sup>16</sup> Article 12, point 5 of UODO. The opinions are not binding – we agree that perhaps they should be, as stated by E. Kulesza, *Pozycja i uprawnienia Generalnego Inspektora Ochrony Danych Osobowych w świetle ustawy o ochronie danych osobowych. Uwagi de lege lata i de lege ferenda*, Przegląd Sejmowy 6/1999, p. 20 and 24.

<sup>17</sup> Article 12, point 6 of UODO.

<sup>18</sup> Article 48, section 1 of UODO.

<sup>19</sup> Article 19a, section 1 of UODO.

<sup>20</sup> Article 19a, section 2 of UODO.

<sup>21</sup> Article 48, section 3 of UODO.

<sup>22</sup> Article 19 of UODO.

<sup>23</sup> Article 21, section 1 of UODO.

observance of the provisions on personal data protection<sup>24</sup>;

- o) participating in the work of international organizations and institutions involved in personal data<sup>25</sup>.

The above list stating primary duties of GIODO evolved over time, expanding in the course of subsequent UODO amendments<sup>26</sup>. Additionally, specific acts also establish duties of GIODO – one can easily find examples, such as:

- a) receiving notice of breaches regarding personal data from publicly-available telecommunication service providers<sup>27</sup>;
- b) presenting opinions on management regulations of commercial information bureaus prior to their acceptance by the minister responsible for economy<sup>28</sup>;
- c) controlling the National IT System in order to ensure the processing of data does not violate the rights of the data subjects<sup>29</sup>;
- d) referring matters to the European Data Protection Supervisor for mediation<sup>30</sup>.

One can note that even over the course of twenty years, GIODO has not received a right to initiate legislative proceedings, nor to petition the Constitutional Tribunal (the official name of the Polish Constitutional Court) to declare a legal norm not compliant with the Constitution. Neither can GIODO issue any binding interpretations for controllers regarding any part of the

data protection regulation. We believe that the replacement authority that is expected to be introduced by the future Act on Personal Data Protection that will accompany the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on 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/EC (General Data Protection Regulation) should definitely receive such powers. We would also argue in favor of granting them to GIODO while the authority is still in function, as it has been postulated several times<sup>31</sup>. Such changes would not only strengthen the position of GIODO<sup>32</sup>, but also would greatly help GIODO to fulfil its duties. In effect, the individual rights of the data subjects could be protected better, and implementation of *any* personal data protection laws would be more complete. This notion, despite introduced in regard to the Polish legal system, could also be implemented in any other legal system with a national data protection authority.

Within GIODO's scope of duties, control powers seem to be at the forefront, at least from the perspective of ensuring compliance, and as B. Pilc notices, they are coupled with a certain *imperium*, which focused mostly in the ability to order the controlled entity to take measures necessary to comply with the regulation through the issue of an administrative decision<sup>33</sup>. Compliance is required (and controlled) not only with the UODO and regulations stemming from it, but also with all and any specific norms present in other legal acts<sup>34</sup>.

GIODO's control interests include actions of data controllers, be they public, private, natural persons or legal entities, or organisational units not being legal persons, but nevertheless recognised under the law – as well

<sup>24</sup> Article 20 of UODO.

<sup>25</sup> Article 12, point 7 of UODO.

<sup>26</sup> Act of 29 October 2010 on the change of the Act on the Protection of Personal Data and some other acts, J.L.of 2010, no. 229, item 1479, the Act on Facilitation of the Pursuit of Economic Activities, J.L.of 2014, item 1662.

<sup>27</sup> Article 174a section 1 of the Act of 16 July 2004 – Telecommunications Law (consolidated text: J.L.of 2016, item 1489).

<sup>28</sup> Article 11 section 2 of the Act on 9 April 2010 on Sharing of Commercial Information and Commercial Data Exchange (consolidated text: J.L.of 2015, item 1015).

<sup>29</sup> Article 8 section 2 in accordance with article 8 section 1 of the Act of 24 August 2007 on the Participation of Republic of Poland in the Schengen Information System and the Visa Information System (consolidated text: J.L.of 2014, item 1203).

<sup>30</sup> Article 34 section 4 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) and article 49 section 4 of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) and article 9 of the Act of 24 August 2007 on the Participation of Republic of Poland in the Schengen Information System and the Visa Information System (consolidated text: J.L.of 2014, item 1203).

<sup>31</sup> E. Kulesza, *Pozycja i uprawnienia Generalnego Inspektora Ochrony Danych Osobowych w świetle ustawy o ochronie danych osobowych. Uwagi de lege lata i de lege ferenda*, Przegląd Sejmowy 6/1999, pp. 20 & 24; M. Sakowska, *Pozycja ustrojowa i zadania Generalnego Inspektora Ochrony Danych Osobowych*, Przegląd Sejmowy 2/2006, p. 88.

<sup>32</sup> However, this would require not only changing the UODO, but also the Constitution of the Republic of Poland (Journal of Laws, no. 78, item 483), specifically its article 191 section 1, addressing the issue of parties allowed to petition the Constitutional Tribunal.

<sup>33</sup> B. Pilc, *ABC zasad kontroli przetwarzania danych osobowych*, Warszawa 2011, p. 6. A similar observation has been made by the Provincial Administrative Court in Warsaw in its judgment on 30 May 2006, case sig. IISA/Wa 1894/05, full text available from: [www.orzeczenia.nsa.gov.pl/doc/5B702CDE84](http://www.orzeczenia.nsa.gov.pl/doc/5B702CDE84).

<sup>34</sup> P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2015, pp. 150 & 152.

as private persons involved in public endeavours – and also, processors – defined as those who are authorized by the controller to carry out the processing of personal data pursuant to a contract concluded in writing<sup>35</sup>. GIODO has control powers regardless of whether the data processed are part of a set (or, as UODO defines it, ‘as a part of a data filing system’), or not; similarly, use of ICT tools (or lack thereof) is legally indifferent in this aspect.

However, natural persons involved in the processing of data solely for personal or domestic purposes, as well as subjects having the seat or residing in a third country (outside of EEA territory), making use of technical means located in the territory of the Republic of Poland exclusively for the transfer of data are outside GIODO’s jurisdiction<sup>36</sup>, and hence, its control powers. Interestingly, even though press journalistic activity (within the meaning of the Act of January 26, 1984 – Press Law<sup>37</sup>) and literary or artistic activity, being very specific, is generally outside of UODO’s interest, in that regard GIODO has retained control powers<sup>38</sup>. Those activities involving data controllers are treated differently, and GIODO only checks whether appropriate technical and organizational measures are applied accordingly with the risks and categories of data being processed<sup>39</sup>. This, of course, involves the right to scrutinise the measures against data being disclosed, taken by an unauthorized party, illegally processed, changed, lost, damaged or destroyed.

GIODO receives signals regarding potential abnormalities in compliance with data protection regulations from many sources. Control proceedings can be triggered by:

- a) information accompanying complaints from data subjects;
- b) information provided by other authorities, such as the Supreme Audit Office or Chief Labour Inspectorate, both of which have signed agreements regulating cooperation with GIODO, as well as other authorities and services tasked with prevention and detection of crimes, such as the Police or the Prosecutor’s Office;

- c) information received in the process of registering personal data files or ABIs<sup>40</sup>;
- d) in the course of a check regarding compliance of personal data processing requested by GIODO from a registered ABI, or a follow-up to such a check<sup>41</sup>;
- e) in the course of different control proceedings;
- f) from publicly-available telecommunication service providers after a receiving notice of breaches<sup>42</sup>.

Control proceedings of course also happen after taking notice of abnormalities during previous control proceedings involving a specific data controller or processor – subsequent control proceedings are carried out in order to ensure that any injunctions or orders that have been introduced by GIODO’s administrative decision have indeed been implemented.

In all those cases, both complex (total) and partial control proceedings are carried out. GIODO’s control proceedings are also sometimes referred to as institutional control<sup>43</sup>.

More importantly, scheduled control, which is itself a form of prevention, can be (and is) also carried out systematically throughout similar enterprises (a ‘sector’). The choice of controlled sector for a yearly schedule is in GIODO’s sole discretion, and is based on categories of data being processed, scale of processing, or risk of infringing personal data protection regulations for the sector. GIODO publicly announces its choice of sectors. To give an example, in 2016 such controls have been scheduled and carried out in:

- 1) the sector of entities authorised to access the Customs Information System (‘System Informacji Celnej’);

<sup>40</sup> Controls initiated by GIODO Bureau’s Department for Registration of Administrators of Information Security and Personal Data Files.

<sup>41</sup> For more information on the topic see P. Kawczyński, *Sprawdzenie i sprawozdanie przygotowane przez administratora bezpieczeństwa informacji na wezwanie Generalnego Inspektora Ochrony Danych Osobowych*, [in:] E. Bielak – Jomaa, D. Lubasz (eds.), *Polska i europejska reforma ochrony danych osobowych*, Warszawa 2016, p. 202 ff.

<sup>42</sup> In 2015, there were 93 such notices submitted to GIODO (source: GIODO’s Official Report for 2015, p. 102 – available online at [www.giodo.gov.pl/data/filemanager\\_pl/sprawozdania/roczne/2015.pdf](http://www.giodo.gov.pl/data/filemanager_pl/sprawozdania/roczne/2015.pdf)).

<sup>43</sup> In opposition to individual control by the data subjects, functional control by the controllers and processors, and additional control by all other authorities. This is covered by P. Fajgielski, *Kontrola przetwarzania i ochrony danych osobowych. Studium teoretyczno-prawne*, Lublin 2008, p. 63 ff. and later briefly invoked by J. Barta, P. Fajgielski, R. Markiewicz in *Ochrona danych osobowych. Komentarz*, Warszawa 2015, p. 357.

<sup>35</sup> Article 31 section 5 in accordance with article 31 section 1 of UODO.

<sup>36</sup> Article 3a section 1 of UODO.

<sup>37</sup> J.L. of 1984, no. 5, item 24, as amended.

<sup>38</sup> Article 3a section 2 of UODO.

<sup>39</sup> Article 36 section 1 in accordance with article 3a section 2 of UODO.



- 2) the sector of authorities authorised to access the Schengen Information System and the Visa Information System;
- 3) the sector of entities with access to European Dactyloscopy System ('Eurodac');
- 4) the sector of legal firms;
- 5) the sector of District Governor Offices<sup>44</sup>.

'Sector' control proceedings usually take place within the scope of partial controls, such as checking if data controllers provide data subjects with relevant information, or in case of processing personal data for marketing purposes. However, control proceedings in full can also be scheduled, and it is also possible to extend the scope of control proceedings once they are initiated.

Due to the recent introduction of GIODO's ability to request checks regarding compliance of personal data processing with the provisions on the protection of personal data from registered ABIs, since 2016 also yearly plans for performing such checks have been published – the first one covered banks, insurance companies and communities<sup>45</sup>.

GIODO performs its duties, including those that are control-related, with the help of its Bureau<sup>46</sup>, organisation of which, as well as rules of operation, have been formulated in its statute granted by the President of the Republic of Poland after having considered the opinion of GIODO<sup>47</sup>. § 5 of GIODO Bureau's statute<sup>48</sup> is the basis for the General Inspector to further regulate the course of action, Bureau's internal organisation and detailed scope of statutory tasks of its organisational units. One of such units, responsible for planning and carrying out control proceedings, is the Inspection Department of the Bureau<sup>49</sup>.

The human resources of the department are modest (15 FTE<sup>50</sup>), and therefore the number of control proceedings has remained at similar level in recent years,

despite much greater need, which can easily be identified as one of GIODO's chief weaknesses.

**Table 1. Control proceedings carried out by GIODO (1999–2015)**

Number of control proceedings																
YEAR	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
#	71	102	198	223	184	144	119	132	167	201	220	196	199	165	173	175
																175 <sup>51</sup>

Source: Own summary based on GIODO's Official Reports: Sprawozdanie z działalności GIODO w 2012 r., p. 234; Sprawozdanie z działalności GIODO w 2015 r., p. 20; Sprawozdanie z działalności GIODO w 2014 r., p. 20; Sprawozdanie z działalności GIODO w 2013 r., p. 26, 58; Sprawozdanie z działalności GIODO w 2012 r., p. 17; Sprawozdanie z działalności GIODO w 2011 r., p. 16; Sprawozdanie z działalności GIODO w 2010 r., p. 12; Sprawozdanie z działalności GIODO w 2009 r., p. 11; Sprawozdanie z działalności GIODO w 2002 r., p. 234; Sprawozdanie z działalności GIODO w 2001 r., p. 260; Sprawozdanie z działalności GIODO w 2000 r., p. 199; Sprawozdanie z działalności GIODO w 1999 r., p. 8<sup>52</sup>.

The Jurisdiction, Legislation and Complaints Department is another unit with an important role in the control process – in 2015, 52 out of 81 control proceedings have originated with this department<sup>53</sup>. Its workers are responsible for considering complaints with respect to the enforcement of the provisions on the protection of personal data in the course of proper administrative proceedings<sup>54</sup>. Complaints remain the major trigger in control proceedings, especially that there have been many of them in recent years (as illustrated by table 2). In 2014, the year with the highest number of complaints filed on record, there were only 36 people working in the department<sup>55</sup>. Their work resulted in 547 administrative decisions<sup>56</sup>. Even though in the following year the number of employees rose to 48<sup>57</sup>, it still does not reflect the actual need and its statutory goals, as is the case with every other department of GIODO's Bureau.

<sup>44</sup> Source: [www.giodo.gov.pl/430/id\\_art/9280/j/pl/](http://www.giodo.gov.pl/430/id_art/9280/j/pl/)

<sup>45</sup> The latter in the sense of local government units.

<sup>46</sup> Article 13 section 1 of UODO.

<sup>47</sup> Article 13 section 3 of UODO.

<sup>48</sup> Appendix to Regulation by the President of the Republic of Poland of October 10, 2011 as regards granting the statutes to the Bureau of the Inspector General for Personal Data Protection (J.L. of 2011, no. 225, item 1350).

<sup>49</sup> A detailed list of duties the Inspection Department performs is provided in section 22 of GIODO Bureau's Organisational Regulation (appendix to GIODO's regulation no. 5/2016 from 30 March 2016 on introduction of GIODO Bureau's Organisational Regulation – as amended introduced by GIODO's regulations no. 25/2016, 29/2016, 31/2016, 35/2016 and 44/2016).

<sup>50</sup> GIODO's Official Report for 2015, p. 15.

<sup>51</sup> 13 of which were checks requested from registered ABIs.

<sup>52</sup> Source reports available at: [www.giodo.gov.pl/138/id\\_art/2685/j/pl/](http://www.giodo.gov.pl/138/id_art/2685/j/pl/).

<sup>53</sup> GIODO's Official Report for 2015, p. 257.

<sup>54</sup> Section 20 point 6 of GIODO Bureau's Organisational Regulation.

<sup>55</sup> GIODO's Official Report for 2014, p. 15.

<sup>56</sup> *Ibidem*, p. 310.

<sup>57</sup> GIODO's Official Report for 2015, p. 15.

Table 2. Number of complaints filed with GIODO (1999–2015)

Number of complaints filed with GIDO		
#	YEAR	
479	1999	
761	2000	
795	2001	
830	2002	
753	2003	
1024	2004	
979	2005	
712	2006	
796	2007	
986	2008	
1049	2009	
1114	2010	
1271	2011	
1596	2012	
1879	2013	
2481	2014	
2256	2015	

Source Own summary based on GIODO's Official Reports: Sprawozdanie z działalności GIODO w 1999 r., p. 8; Sprawozdanie z działalności GIODO w 2000 r., p. 6; Sprawozdanie z działalności GIODO w 2001 r., p. 5; Sprawozdanie z działalności GIODO w 2002 r., p. 7; Sprawozdanie z działalności GIODO w 2013 r., p. 72; Sprawozdanie z działalności GIODO z 2008 r., p. 18; Sprawozdanie z działalności GIODO z 2005 r., p. 21; Sprawozdanie z działalności GIODO z 2014 r., p. 68; Sprawozdanie z działalności GIODO z 2015 r., p. 77<sup>58</sup>.

Formally, control proceedings can be carried out also by GIODO or its deputy, but typically it is the duty of the inspectors, who are employees of GIODO's Bureau, carrying individual permits to perform control proceedings<sup>59</sup>. In practice, control teams consist of inspectors, two of which are lawyers and one an IT specialist<sup>60</sup>. The scope of their duties and limits to the control proceedings have been set in Article 14. According to it, the inspectors are authorised to enter, from 6 a.m. to 10 p.m., upon presentation of a document of personal authorization and service identity card<sup>61</sup>, any premises where the data filing systems are being kept and premises where data are processed outside from the data filing system. They are also authorised to perform necessary examination or other inspection activities to assess the compliance of the data processing activities with the Act. The

personal authorisation contains information regarding the estimated date of the end of control proceedings, but the inspectors are not bound by the estimate in any way. The authorisation also contains information for the data controller (processor), such as the listing of his rights and duties in the course of the control proceedings. The representative of the data controller (processor) should be presented with the authorisation, and after readings its contents, confirms having been properly notified with his signature.

The inspectors have also the authority to demand written or oral explanations, and to summon and question any person within the scope necessary to determine the facts of the case<sup>62</sup>. They can also consult any documents and data directly related to the subject of the inspection, and are permitted to make a copy of these documents<sup>63</sup>, as well as perform inspection of any devices, data carriers, and computer systems used for data processing<sup>64</sup>. All these powers are commonly cited as typical inspection powers and a classic example of controlling authority's proceedings – which is correct<sup>65</sup>. The final power listed in Article 14 – the ability to commission preparation of expert expertise and opinions<sup>66</sup> – is different, and its use is usually limited to unique cases, in which such extra expertise is required to assess the case.

However, GIODO inspectors' control powers listed above are not without their limitations. Some of them have been set forth by UODO itself in regard to some data categories that:

- 1) contain classified information,
- 2) relate to the members of churches or other religious unions with an established legal status, being processed for the purposes of these churches or religious unions,
- 3) were collected and are processed as a result of inquiry procedures held by officers of the Internal Security Agency, Intelligence Agency, Counterintelligence Agency, Military Intelligence and the Central Anticorruption Bureau<sup>67</sup>.

<sup>58</sup> Source reports available at: [www.giodo.gov.pl/138/id\\_art/2685/j/pl/](http://www.giodo.gov.pl/138/id_art/2685/j/pl/).

<sup>59</sup> Article 14 of UODO.

<sup>60</sup> See B. Pilc, *ABC zasad kontroli przetwarzania danych osobowych*, Warszawa 2011, p. 6.

<sup>61</sup> Which, specifically the service identity cards, have to be compliant with the Regulation of 22 April 2004 by the Minister of Internal Affairs and Administration as regards specimen of personal authorizations and service identity cards of the inspectors employed in the Bureau of the Inspector General for Personal Data Protection (J.L.of 2004, no. 94, item 923), and the Regulation of 11 May 2011 by the Minister of Internal Affairs and Administration as regards to changing the regulation as regards specimen of personal authorizations and service identity cards of the inspectors employed in the Bureau of the Inspector General for Personal Data Protection (J.L.of 2011, no. 103, item 601), the latter of which updated the requirements for the personal authorization.

<sup>62</sup> Article 14 point 2 of UODO.

<sup>63</sup> Article 14 point 3 of UODO.

<sup>64</sup> Article 14 point 4 of UODO.

<sup>65</sup> See J. Jagielski, *Kontrola administracji publicznej*, Warszawa 1999, p. 24, and following him, G. Sibiga, *Postępowanie w sprawach ochrony danych osobowych*, Warszawa 2003, p. 146 and J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz*, Warszawa 2015, p. 372.

<sup>66</sup> Article 14 point 5 of UODO.

<sup>67</sup> Article 43 section 2 of UODO.

If data falling under one of these categories are under control, the inspectors are not allowed to enter the premises, or to consult any documents and data directly related to the subject of the inspection, nor to make a copy of these documents. They also cannot commission preparation of expert expertise and opinions. They are only allowed to examine data sets and filing systems solely through a liaison officer – as the Act puts it, ‘by means of a duly authorized representative of the unit under inspection’<sup>68</sup> – to whom they submit proper requests in that regard.

Inspectors, following control proceedings, may demand that disciplinary proceedings or any other action provided for by law be instituted against persons guilty of the negligence and that they be notified, within the prescribed time, about the outcomes of such proceedings and the appropriate actions taken<sup>69</sup>. Use of this power is not permitted in case of the data categories listed above. In effect, effective control in such cases is merely an illusion, as inspectors can only demand written or oral explanations, and to summon and question any person within the scope necessary to determine the facts of the case. Moreover, in regard to those data categories, GIODO is not authorised to issue administrative decisions and considering complaints with respect to the enforcement of the provisions on the protection of personal data at all<sup>70</sup>.

Some other restrictions apply because of the Act of Freedom of Business Activity of 2 July 2004<sup>71</sup> (AFBA). Generally the inspectors have to notify entrepreneurs at least 7 days prior to commencing control proceedings, and failing to notify on time results in an obligation to postpone the proceedings until due notification has been made<sup>72</sup>. Also, as a result of the *single control* rule, compliant with article 83 section 1 of AFBA, controlling authorities – including GIODO – are under an obligation not to carry out control proceedings during the time of another control by any other authority<sup>73</sup>. Generally, any control proceedings by the same authority the entrepreneur is subject to are limited to up to 48 days in a calendar year<sup>74</sup>.

Controlled subjects have the obligation to allow the inspectors perform the control proceedings<sup>75</sup>. Preventing or hindering performance of these is punishable by fine and restriction or deprivation of liberty for up to 2 years<sup>76</sup>. The authorities have an obligation to prosecute this offence *ex officio*, without need for a motion<sup>77</sup>, and amenability to issue punishment for the offence ceases if 5 or more years have passed since the commission of the offence<sup>78</sup>. The offence itself has been introduced as late as 2011<sup>79</sup>, even though E. Kulesza postulated its introduction in 1999<sup>80</sup>.

Control proceedings are documented by official protocols, encompassing all actions taken by the inspectors, all of which are attachments to the final control protocol (‘report’), made in two identical copies (one copy is then handed to the controlled party with receipt)<sup>81</sup>. This document is signed both by the inspector and the controlled party, the latter of which can submit his official objections and comments to be included in the document<sup>82</sup>. Should the controlled party refuse to sign the official protocol, the inspector notes such refusal in the document; this allows the controlled party to submit, in writing, his official position regarding the protocol to GIODO within next 7 days<sup>83</sup>.

Statistics for 2015 demonstrated that control proceedings often result in detection of abnormalities in compliance with data protection regulations – one could guess that about a third of control proceedings that year ended without detecting *any*<sup>84</sup>. Detecting such abnormalities trigger a number of proceedings (admin-

<sup>75</sup> Article 15 section 1 of UODO.

<sup>76</sup> Article 54a of UODO.

<sup>77</sup> This is a general rule. See articles 9 and 10 of Act of 6 June 1997 – Code of Criminal Procedure (J.L. of 1997, no. 89, item 555, as amended).

<sup>78</sup> Article 101 section 1 of Act of 6 June 1997 – Criminal Code (J.L. of 1997, no. 88, item 553, as amended).

<sup>79</sup> By the Act of 29 October 2010 on the change of Act on the Protection of Personal Data and some other acts (J.L. of 2010, no. 229, item 1497).

<sup>80</sup> E. Kulesza, *Pozycja i uprawnienia Generalnego Inspektora Ochrony Danych Osobowych w świetle ustawy o ochronie danych osobowych. Uwagi de lege lata i de lege ferenda*, Przegląd Sejmowy 6/1999, p. 15 and 24.

<sup>81</sup> Article 16 section 1 of UODO.

<sup>82</sup> Article 16 section 2 of UODO.

<sup>83</sup> Article 16 section 3 of UODO.

<sup>84</sup> See GIODO’s Official Report for 2015, pp. 318–327: no abnormalities have been detected in 55 of 175 control proceedings (31.4%), although one has to take note that in 39 cases the proceedings have not been concluded prior to the publication of the report and therefore no precise statistical conclusions can be drawn upon the data.

<sup>68</sup> Article 15 section 2 of UODO.

<sup>69</sup> Article 17 section 2 of UODO.

<sup>70</sup> Article 43 section 2.

<sup>71</sup> J.L. of 2004, no. 173, item 1807, as amended. There are also limitations on application of those norms, described in article 84a et seq. of AFBA.

<sup>72</sup> Article 79 section 4 of AFBA.

<sup>73</sup> Article 83 section 2 of AFBA.

<sup>74</sup> The limit is from 12 to 48 days, depending on the size of the enterprise. See art. 83 of AFBA for details.

of the victim in the proceedings ('injured person'), and therefore cannot be the subsidiary prosecutor.

**Table 3. Number of notifications by GIODO (1999–2015)**

- | Number of notifications of authorities by GIODO |      |
|---|------|
| #   | YEAR |
| 18  | 1999 |
| 46  | 2000 |
| 53  | 2001 |
| 61  | 2002 |
| 74  | 2003 |
| 82  | 2004 |
| 52  | 2005 |
| 15  | 2006 |
| 18  | 2007 |
| 31  | 2008 |
| 27  | 2009 |
| 23  | 2010 |
| 10  | 2011 |
| 12  | 2012 |
| 16  | 2013 |
| 10  | 2014 |
| 24  | 2015 |

*Source: Own summary based on GIODO's Official Reports: Sprawozdanie z działalności GIODO w roku 2015, p. 75; Sprawozdanie z działalności GIODO w roku 2013, p. 71; Sprawozdanie z działalności GIODO w roku 2008 r.; Sprawozdanie z działalności GIODO w roku 2006, p. 20; Sprawozdanie z działalności GIODO w roku 2005, p. 14; Sprawozdanie z działalności GIODO w roku 2002, p. 413.*

The power to demand that disciplinary proceedings or any other action provided for by law be instituted against persons guilty of the negligence, however, has been left to the discretion of the inspectors<sup>90</sup>.

Administrative proceedings ending with GIODO's decision are subject to the Code of Administrative Procedure, and therefore, after the decision is issued, any party may apply to the Inspector General for reconsidering its case. GIODO's decision on the application to reconsider the case may be appealed against with the administrative court<sup>91</sup> within 30 days of delivery of the final decision<sup>92</sup>. There is also a possibility of lodging a cassation appeal from the judgement of the administrative court with the Supreme Administrative Court<sup>93</sup>.

Matters of compensation in case of infringement of personal interests (to which a right to privacy belongs<sup>94</sup>) or damage due to infringement of personal data protection regulations have not been regulated in UODO or

<sup>90</sup> Article 17 section 2 of UODO.

<sup>91</sup> In this case, the Provincial Administrative Court in Warsaw.

<sup>92</sup> Article 21 section 2 of UODO in regard to art. 53 section 1 of the Act of 30 August 2002 – the Law on Proceedings before Administrative Courts (PPSA; consolidated text: J.L. of 2016, item 718).

<sup>93</sup> Article 171 section 1 of PPSA.

<sup>94</sup> Article 23 of the Act of 23 April 1964 – Civil Code (consolidated text: J.L. of 2017, item 459) contains a catalogue of legally protected personal interests, such as, in particular, health, freedom, dignity, freedom of conscience, freedom of name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement; both the courts and scholars have expanded on that catalogue, identifying additional personal interests, such as the right to privacy.



any other specific act, and therefore such matters are dealt with by the common courts<sup>95</sup>.

Under the current regulation, GIODO cannot impose administrative fines on data controllers or processors for lack of compliance with the regulation or violating individual rights of data subjects<sup>96</sup>. With the introduction of GDPR, of course, this will change, as the new regulation explicitly allows for such measures.

## Conclusions

During the past 20 years, the Inspector General for Personal Data Protection has managed to fulfil an important role in the system, not only controlling compliance with personal data protection regulations, but establishing a knowledge and experience base, as well as expert authority on the subject. As one can point out, the authority is not without its problems, some of which are the result of being underbudgeted and understaffed, and this is particularly visible if one examines the number and completion time of the control proceedings alone. Regardless of whether the replacement authority that will be introduced under the future Act on Personal Data Protection that will accompany the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on 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/EC (General Data Protection Regulation) continues as a direct successor of GIODO, or is built upon a different model, those two concerns should be addressed in order to adequately protect the interests of all stakeholders under the GDPR. In time, if possible, the new authority should also be vested with the ability to initiate legislative proceedings, and to submit petitions to the courts, including the Constitutional Tribunal.

<sup>95</sup> Article 177 of the Constitution of the Republic of Poland.

<sup>96</sup> However, data controllers and processors can be fined for avoiding execution of GIODO's administrative decisions, based on article 2 § 1 point 12 of Act of 17 June 1966 on Enforcement Proceedings in Administration (J.L. of 2005, no. 229, item 1954 as amended).

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