

**CRIMINAL LIABILITY FOR IMPERMISSIBLE
OR UNAUTHORISED PROCESSING OF PERSONAL DATA
ON THE GROUNDS OF THE POLISH ACT OF 10 MAY 2018
ON THE PROTECTION OF PERSONAL DATA**

The purpose of this article is to discuss the basic issues related to the offence of impermissible or unauthorised processing of personal data, which is defined in Article 107 of the Polish Act of 10 May 2018 on the Protection of Personal Data (hereinafter: UODO) [1].

Personal data means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person (Article 4 Point 1 of 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) – hereinafter: GDPR) [2]. A similar definition is contained in Article 2(10) of the Law of Ukraine on Protection of Personal Data of 1 June 2010 (Закон України «Про захист персональних даних» – hereinafter: З.У.П.Д.). A distinction is made between ordinary and sensitive data. Sensitive data ('special categories of personal data') are information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic and biometric data processed for the purpose of uniquely identifying a natural person, as well as data concerning health or data concerning a natural person's sex life or sexual orientation (Article 9(1) GDPR) [3]. Ordinary data are information constituting personal data that are not indicated in Article 9(1) GDPR, including information on criminal convictions and offences or related security measures (Article 10 GDPR). In Ukraine, information on criminal convictions, as it used to be in Poland, constitutes sensitive data. Processing of personal data means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (Article 4 Point 2 GDPR) [4].

Pursuant to Article 107(1) UODO, any person who processes personal data,

although processing thereof is not permitted, or is not authorized to process them, shall be subject to a fine, restriction of personal liberty or imprisonment for up to two years. Paragraph 2 of Article 107 UODO specifies the qualified type of this offence. If the act specified in paragraph 1 concerns sensitive data, the perpetrator shall be subject to a fine, restriction of personal liberty or imprisonment for up to three years.

According to the principle of lawfulness expressed in Article 5(1)(a) GDPR, personal data shall be processed lawfully. Impermissible processing will be when this principle is violated, i.e. in particular when:

1) neither of the grounds for legalising the processing of personal data indicated in Article 6(1) GDPR (concerning ordinary data) or Article 9(2) GDPR (concerning sensitive data – equivalent to Article 7 Part 2 3.У.П.Д.);

2) personal data are processed for a purpose that is not legitimated (e.g. to blackmail the data subject);

3) personal data are processed in a manner that is incompatible with the purposes for which they were collected (violation of the principle of ‘purpose limitation’ – equivalent to Article 6 Part 1 Paragraph 3 3.У.П.Д.);

4) personal data are not adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (breach of the principle of ‘data minimisation’ – equivalent to Article 6 Part 3 3.У.П.Д.);

5) personal data are kept in a form which permits identification of the data subject for a longer period than is necessary for the purposes for which the data are processed (violation of the principle of ‘storage limitation’ – equivalent to Article 6 Part 8 3.У.П.Д.);

6) the data subject has objected under Article 21(1) GDPR to the processing of his/her data and there are no overriding legitimate grounds for the processing or the data subject has objected under Article 21(2) to the processing of his/her data for direct marketing purposes;

7) personal data will be transferred to a third country or an international organisation contrary to Chapter V of the GDPR.

The second variant of the act of commissioning indicated in Article 107 UODO, i.e. the processing of personal data by an unauthorised person, may be realised in the case when the processing of data in a particular situation is itself permissible, however, the person who processes the data was not authorised to process the data at all or processes the data in the scope or in the manner which goes beyond the authorisation granted to him/her. The subjects authorised to process data shall be the controller, the processor and the persons processing the data under the authority of the controller or the processor [5]. An example of the processing of personal data by an unauthorised person shall be a situation in which a person generally authorised by the controller to process the data processes them without his instruction [6].

It should be mentioned that the offence in question is of a formal nature; its constituent elements do not include any effect. In particular, the person, whose

personal data were unlawfully processed, does not have to suffer any damage in connection with this fact. It shall be noted, however, that pursuant to Article 1 § 2 of the Polish Penal Code [7], a prohibited act of negligible social harmfulness does not constitute a crime. A minor violation of the provisions on personal data protection would therefore not necessarily involve bringing the perpetrator to criminal liability, in particular if he/she has fulfilled by his/her act the elements set out in Article 107(1) UODO (basic type of the discussed crime). An offence under Art. 107 UODO may only be committed with intent. Direct intent (the offender wants to commit a prohibited act), but also – as it seems – *dolus eventualis* (the offender, foreseeing the possibility of committing a prohibited act, agrees to it) is possible. The perpetrator of such a prohibited act – as far as the impermissible processing of personal data is concerned – can be any person, and as far as the processing of data by an unauthorised person is concerned – any person, except, of course, for the person who is authorised to process the data in a specific case. The offence in question is prosecuted *ex officio*. It is worth noting that committing a crime under Art. 107 UODO does not bring about the liability of a collective entity referred to in the Act of 28 October 2002 on Liability of Collective Entities for Criminal Acts (Article 16 of that Act does not mention the offence in question) [8].

Literature

1. Unified text Journal of Laws of the Republic of Poland of 2019, item 1781.
2. Official Journal of the European Union, L 119, 4.5.2016, p. 1-88.
3. A similar definition is contained in Article 7(1) 3.У.П.Д.
4. A similar definition is contained in Article 2(8) 3.У.П.Д.
5. Błachnio-Parzych A. *Przepisy karne w ustawie z 10.5.2018 r. o ochronie danych osobowych*, Monitor Prawniczy 2018/22, p. 20. See also M. Zimna, *Odpowiedzialność karna za naruszenie ochrony danych osobowych*, Prokuratura i Prawo 2020/1, p. 64. ‘Controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data (Article 4 Point 7 GDPR). ‘Processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller (Article 4 Point 8 GDPR).
6. In accordance with Article 29 GDPR the processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law.
7. Act of 7 June 1997 – Penal Code, unified text Journal of Laws of the Republic of Poland of 2020, item 1444, as amended.
8. Unified text Journal of Laws of the Republic of Poland of 2020, item 358.