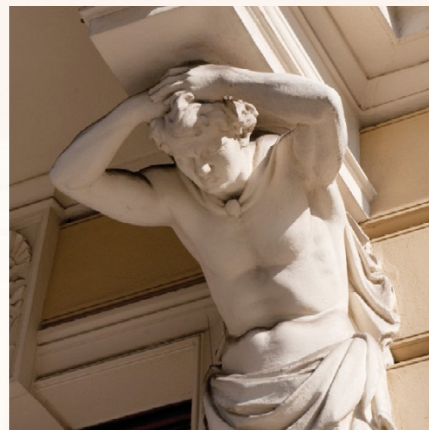


Established in 2004, Wiewiórski Law Firm is one of the largest law firms in Wrocław. We specialise in the provision of legal services to entrepreneurs, primarily large international companies. Our clients include the leading foreign investors in the Wrocław Agglomeration and major Polish enterprises.

newsletter January 2015



CHANGES IN PERSONAL DATA PROTECTION LAWS

■ On 1 January 2015, important amendments came into force regarding the Personal Data Protection Act, which changed the position of the Information Security Administrator (ISA) while at the same time reducing the duties of entrepreneurs processing personal data. In addition, regulations were introduced that facilitate the transfer of personal data to so-called third countries, including simplifying the transfer of data by enterprises within a group of companies.

ISA NEWS

The key change involves a significant reform of the function of the Information Security Administrator (ISA). It should be noted that an Information Security Administrator is not the same thing as a personal data controller. **A personal data controller** is an entity (e.g. a natural person, legal person, or an organisational entity without legal personality) **which processes personal data** as part of for-profit or professional activities, or in order to perform tasks set out in the articles of association, **and makes decisions as to the purposes and means of processing such data**. This means that data controllers include employers in relation to the data of their employees or job candidates, and entrepreneurs in relation to the data of their customers who are natural persons. On the other hand, **an Information Security Administrator is a person appointed by the data controller** to whom the data controller assigns some of its authority and duties.

Under the new legislation, the ISA has gained some independence from the personal data controller, guaranteed, among others, by the fact that the ISA may report directly to the manager of a given unit (e.g. the management board or president of the management board of the company). That independence is also reflected in the new duties of the ISA, which include:

- **monitoring the compliance of data processing with the law** and preparing reports for the personal data controller;
- **supervising** the process of preparing and updating **data processing documentation** (security policy and IT system management instruction);
- ensuring that **persons authorised to process personal data know the applicable laws**.

A new and interesting solution is the possibility for the Inspector General for Personal Data Protection (GIODO)

to request that the Information Security Administrator verify the compliance of data processing with the applicable laws with respect to a given personal data controller. In this situation, the ISA acts at the behest of the GIODO and is tasked with carrying out an inspection with respect to the personal data controller who has appointed the ISA. The ISA is obliged to submit a report from an internal inspection to GIODO via the data controller.

The new powers are accompanied by slightly stricter requirements with respect to individuals performing the function of ISA - at present, the legislation stipulates that this position may be held solely by persons who have never been convicted of an intentional criminal offence and who have the appropriate knowledge regarding personal data protection, although the latter requirement is not verified in any manner. The security administrator may still be either an employee of a given organisation or a person from outside the organisation

An ISA appointed after 1 January 2015 should be **notified by the data controller to the register** maintained by GIODO within 30 days of the date of the appointment. The ISA register is not yet in operation, and it is not possible to register an Information Security Administrator on-line, so the only method available at present is by paper form (an application form may be downloaded from the GIODO website). The notification obligation also refers to ISAs appointed under the previous legal regime, which data controllers must register by 30 June 2015.

The dismissal of an ISA also has to be reported to GIODO. In such an event the data controller should specify provide such information as the cause of the dismissal, but it should be noted that GIODO does not have any instruments to question the dismissal of a security administrator.

IS IT WORTH APPOINTING AN ISA?

The appointment of an ISA is not obligatory but has some advantages. A data controller that decides not to appoint an ISA will be obliged to perform all of the duties assigned by the legislator to the ISA (with the exception of report preparation). In the event that any irregularities with respect to personal data protection are revealed, e.g. in the course of an inspection, the data controller will be liable for those irregularities. In the case of legal persons (e.g. companies) this usually means the liability of members of the executive body (e.g. management board). Thus, when appointing an Information Security Administrator, a personal data controller may, to a certain extent, be exempted from liability for any non-compliant personal data processing (including criminal liability). In addition, data controllers who decide to appoint an ISA will be exempted from the obligation to register data filing systems in the register maintained by the GIODO (more on that further below).

On the other hand, however, for many entrepreneurs it may not be particularly comfortable to have an "internal inspector" who can conduct inspections at the request of GIODO.

THE NEW PRINCIPLES OF REGISTERING DATA FILING SYSTEMS

A data controller who decides to appoint an ISA and notifies GIODO of such will be released from the obligation to register data filing systems in the register maintained by the GIODO. In return, the ISA should maintain an internal register containing solely the data filing systems used by a given controller. That register should be open and available to everyone, but it is not yet clear how it should be maintained in practice, as secondary legislation relating to the new laws has not been issued yet. However, the lack of secondary legislation has no impact on the release from the obligation to register with the GIODO – it is sufficient that the personal data controller has appointed and registered the Information Security Administrator.

Another new solution is the complete exemption from the obligation to register data filing systems processed without the use of IT systems.

The aforementioned exemptions from the obligation to register data filing systems with GIODO do not apply to filing systems containing what is considered sensitive data, e.g. concerning race, political views or religious beliefs.

SOLUTIONS RELATING TO DATA TRANSFER

A problem frequently encountered by employers is the transfer of personal data to so-called third countries, which are understood as countries that are not members of the European Economic Area (EU Member States, except for Croatia, as well as Iceland, Norway and Liechtenstein). To date, the transfer of data outside the EEA has often required the consent of GIODO. Following the amendments to the law, consent from GIODO will no longer be required if the controller ensures appropriate privacy protection. This may be achieved by applying standard contractual clauses concerning data protection approved by the European Commission, or by implementing binding corporate rules within a group of enterprises (not necessarily linked by capital). Although in the latter case the corporate rules must also be approved by GIODO, the benefit from their verification by GIODO is that after upon approval it will not be necessary to obtain consent in each individual case of data transfer to third countries.

However, it should be remembered the absence of the requirement to obtain consent from GIODO does not always mean absolute freedom in transferring data abroad. In some situations the transfer will nevertheless require the consent of the party concerned.



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