
SURVEILLANCE, WHISTLEBLOWING OR IGNORANCE OF THE GDPR?

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KEYWORDS

Ministry of Family and Social Policy, sickness benefit, surveillance, personal data, whistleblower, rights and freedoms, GDPR

ABSTRACT

The article is an attempt to draw attention to the intention of the Ministry of Family and Social Policy to shape its own legal policy with regard to the ability of the officials of the Social Insurance Institution (ZUS) to obtain information about individuals subject to official control. Within the proposed changes to Art. 61a of the Act of 25 June 1999 on cash benefits from social insurance in the event of sickness and maternity (Journal of Laws 1999, 60.636, as amended), the Ministry, not taking into account the requirement to ensure the existence of constitutionally guaranteed rights and freedoms, consciously shapes the law positive for full-range surveillance of every person covered by the interest of ZUS. In such circumstances, after adopting the amendments by the Polish Parliament (Sejm), ZUS will be included in the group of law enforcement authorities, as the scope of powers and possibilities its officials in the field have of obtaining information will be unlimited.

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I.

The Constitution of the Republic of Poland of 1997¹ for almost 25 years has been successfully forcing (at least theoretically) the representatives of the sovereign people, even with extreme political views, to design and amend legal regulations in such a way that the assumed expansion of the legal system by new legal instruments which may affect the limitation of the freedoms and rights of an individual, resulted only from the justified necessity of their existence.

Unfortunately, also during the current activities, at the stage of designing and adopting legal standards, it is hard to see that a thorough prior assessment of the effects of the proposed changes, their possible impacts on the legal system, in particular on the scope of civil rights and freedoms, was carried out. It seems that such an evaluation is part of the obligation to demonstrate the necessity of the changes.

Such an assessment is an obligation of the legislator. It must be executed taking into account the principle of proportionality referred to in Art. 31 sec. 3 of the Polish Constitution.² Moreover, if the changes concern new sources or methods of obtaining information about citizens, the originator is also undeniably obliged to review the intended purpose of the changes through the guidelines provided by the legal acts, which are Art. 42³ and Art. 51⁴ of the Polish Constitution, as well as standards governing the protection of personal data,⁵ especially if some of them result from EU secondary law, which in the context of Art. 9 and Art. 91 paragraph 3 of the Polish Constitution, requires their priority to be taken into account.

It is interesting why the authors of the current legal changes also do not seem to notice a certain dependence, that in a democratic state ruled by law, individual well-being cannot be completely marginalised in the context of implementing the principle of social justice. Unfortunately, on the basis of the case analysed further,

¹ Journal of Laws 1997.78.483 as amended.

² Art. 31 sec. 3 of the Constitution of the Republic of Poland (Journal of Laws 1997.78.483, as amended) states that: 'Restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its security or order public, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These limitations shall not violate the essence of freedoms and rights.'

³ Art. 42 sec. 3 of the Polish Constitution states that: 'Everyone is considered innocent until his guilt is confirmed by a final court judgment.'

⁴ Art. 51 sec. 2 of the Constitution of the Republic of Poland states that: 'Public authorities may not obtain, collect and make available information about citizens other than necessary in a democratic state ruled by law.'

⁵ In particular, taking into account Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general regulation on the protection of personal data) (OJ EU.L.2016.119.1) hereinafter referred to as the GDPR.

it can be shown that the principle of social justice is currently most clearly used by project promoters in terms of slogans, contrary to the factors which determine it.⁶

Currently, however, the actions of the Ministry of Family and Social Policy seem to be consciously avoiding the above-mentioned basic principles of creating good quality law – although perhaps they were not considered important enough or they would *a priori* defeat the goal set by the originator in Art 61a of the Act of June 25, 1999 on cash benefits from social insurance in the event of sickness and maternity.⁷

We can thus, unfortunately, speak of an attempt to consolidate the theoretical trend of compliance with the Constitution of the Republic of Poland. The confirmation of this quite extreme thesis may be, *inter alia*, recent CJEU⁸ or Supreme Court rulings,⁹ extremely critical of recent legislative decisions, as well as the arguments presented below, which are based on the proposed changes in obtaining information about people on sick leave.

II.

As the initiator claims, as part of the need to organise the current functioning of the social insurance system, The Ministry of Family and Social Policy in the draft act amending the act on the social insurance system and some other acts of January 22, 2021,¹⁰ presented system solutions aimed at obtaining all information about people who are on sick leave. It is about obtaining all information about people on sick leave, controlled by officials of the Social Insurance Institution (ZUS), from natural persons, but also social and business entities.

III.

The construction of the amendment to the provision of Art. 61a of the ACT adds sec. 2 as follows: ‘The Social Insurance Institution (ZUS) may obtain the data and information referred to in para. 1, from the insured, contribution payers, social organisations and other entities and individuals who are in possession of

⁶ Art. 2 of the Constitution of the Republic of Poland states that: ‘The Republic of Poland is a democratic state ruled by law, implementing the principles of social justice.’

⁷ Journal of Laws 1999.60.636 as amended, hereinafter the Act.

⁸ Case C-746/18.

⁹ <https://bip.brpo.gov.pl/content/zakaz-przemieszczania-naruszal-prawo-sn-uwzglednia-kasacje-rpo>.

¹⁰ Draft (rcl.gov.pl) accessed on March 22, 2021.

this data and information, and the mentioned individuals and entities are obliged to make them available at the request of the Social Insurance Institution.’ This indicates that the originator’s goal was to provide ZUS officials with a legal instrument that would give them a *de facto* open scope and subject possibility to obtain any information about people on sick leave – who are under control. The very idea of creating a legal tool to interfere with any freedoms or rights of an individual, with undetermined or even blurred limits of application, raises fundamental constitutional doubts.

IV.

The model structure of obtaining source information from ‘other entities and individuals’, as well as the people on sick leave themselves (remaining under control), as a part of so-called ‘inquiry’, which was presented by the Ministry, is burdened with a legal defect, the scope of which means that the actions taken by the Ministry should be considered unsuccessful, even unprofessional. Marginalisation of the constitutional principles, as mentioned at the beginning of this note, as well as procedural law and the law on protection of personal data, is clearly visible. On the other hand, the draft, after a more in-depth analysis, should be considered as an expression of a meticulously thought-out action, which at the same time reflects the low importance that the Ministry attaches to the rights of natural persons granted in the Constitution of the Republic of Poland.

V.

In the current legal situation, it is difficult to find statutory provisions which, without violating the principle of a democratic state and the principle of proportionality, and at the same time in line with the Constitution of the Republic of Poland, would force natural persons and other social and business entities to disclose information collected by these persons, for instance about ‘neighbours’ and their private life (for purposes other than those expected by the Ministry – also against their will) in the name of the superiority of social justice over individual freedom. We also will not find any regulations that would fail to take into account the possibility of exercising the constitutional right to defense.

VI.

The adoption of law in the proposed shape and scope will undoubtedly result in a drastic limitation of the constitutional rights of people subject to such control.

The effect of limiting the right to defense and not acting to the detriment of relatives will affect both the controlled individuals and other people, including family members of the person who remains under control by ZUS officials.

VII.

The amendment to the provision designed by the Ministry imposes an obligation on the natural person and other social and business entities to provide ZUS officials with information about the citizens subject to control. Therefore, it can be assumed that the scope of the obligation imposed on social and business entities is limited to the scope of the documentation about the controlled person held by these entities. On the other hand, the scope of this obligation for a natural person is unlimited (and this is dangerous), as it may also extend to subjectively perceived facts which ‘happened’ only in the opinion of the person obliged to provide the information.

VIII.

It is also important that with such a legal structure of the draft act, it is difficult to see any possibility of seeking compensation under the Civil Code for infringement of the personal rights of the person subject to control, for instance, as a result of providing ZUS officials with untrue information.

IX.

In the draft amendments and in the justification for the act, one does not find a reference to a possible attempt to exclude the application by ZUS of the General Data Protection Regulation 2016/679 (GDPR). Hence, despite the adoption of the changes, ZUS will still be obliged, in accordance with Art. 13, 14 and 15 of the GDPR¹¹ (obligation to provide information), to inform effectively both the denunciators and the individuals under its control, *inter alia*, about the purpose, scope and source of the personal data obtained. In other words, after receiving, for example, an application under Art. 15 GDPR¹², ZUS will be obliged to indicate to the subject of rights (requesting information) the source of the personal data obtained, and thus the ‘neighbors’ who provided information about the private

¹¹ Information obligations carried out at various stages of the data processing process.

¹² The right to access data.

life of the person on sick leave. This may lead, *inter alia*, to tightening of good neighborly relations. Certainly, a remedy would be to cover this information with a permanent secrecy protected by law – which, however, does not seem to be included in the existing regulations or in the planned ones.

X.

The inevitable obligation to implement the directive on whistleblowers forces the Polish legislator to define a new form of possible protection for people who, in the name of the public interest, will report violations of the law. In the case of such a scenario, it becomes possible that the authors of the act implementing the directive recognise ‘other entities and natural persons’ providing information to ZUS officials about people on sick leave, as so-called whistleblowers whose anonymity should be guaranteed. Then it may turn out that not until the case is brought to trial will the person on sick leave meet their denunciator.

XI.

Thus, if the designed model of obtaining information was adopted by ZUS officials, this change could equip ZUS with a tool that even law enforcement agencies could envy – it is commonly known that they carry out most of their tasks implicitly, without the consent and knowledge of people interested personally. In other words, the draft act amending the act on the social insurance system and some other acts of January 22, 2021, with regard to the proposed changes to the content of Art. 61a of the Act of June 25, 1999 on cash benefits from social insurance in the event of sickness and maternity,¹³ may significantly weaken the functioning, constitutional right to defense/presumption of innocence, and thus undermine the standards developed in the criminal legal system, and *de facto* expand the circle of law enforcement authorities referred to in the Act of 28 January 2016 Law on Public Prosecutors,¹⁴ including a non-uniformed institution.

XII.

As part of an additional analysis of the act, it becomes reasonable to ask about the convergence of the assumed changes with the content of the application

¹³ Journal of Laws 1999. 60.636 as amended.

¹⁴ Journal of Laws 2016.177 as amended.

submitted to the Constitutional Tribunal for a declaration of non-compliance of the provision of Article 168b of the Code of Criminal Procedure¹⁵ limiting the scope of possible surveillance by the Police.¹⁶ However, it should be known that the applicant (the Prosecutor General) is aware of the resolution of 7 judges of the Supreme Court of 28 June 2018¹⁷ emphasising that the scope of operational control that may be carried out by the Police is defined in Art. 19 paragraph 1 of the Act of April 6, 1990 on the Police.¹⁸ In other words, each activity beyond the scope of possible control should be analysed in terms of the possibility of committing a crime by a Police officer. The problem, however, is that the scope of such activities is not covered by the obligation to inform citizens. Therefore, this lack of transparency and further actions aimed at narrowing it down,¹⁹ as well as the lack of an obligation to inform the person subject to such control, leave room to abuse both in terms of the protection of privacy and (under Article 51 of the Constitution of the Republic of Poland) of the subjective right to protect data about a natural person, an Everyman.

¹⁵ Article of 168b of the Act of 6 June 1997 Code of Criminal Procedure (c.t. Journal of Laws 2021.534 as amended) states: "If, as a result of an operational control ordered by a competent authority in accordance with special regulations, evidence was obtained that a person, against whom the control was ordered, had committed an offence prosecuted ex officio or a fiscal offence other than the offence, against which the control was directed, or that such offence was committed by another person, the public prosecutor decides whether this evidence will be used in criminal proceedings.

¹⁶ See more: Application of 31/07/2018 of the Public Prosecutor General for a declaration of non-compliance of the provision of Art. 168b of the Act of June 6, 1997 - Code of Criminal Procedure (c.t. Journal of Laws of 2017, item 1904, as amended), understood in the way that the wording used therein is 'another offense prosecuted ex officio or a tax offense other than a crime covered by an operational control order' covers only those crimes for which the court may consent to an operational control order with: expressed in Art. 1 of the Constitution, the principle of the common good, as derived from Art. 2 of the Constitution, the principles of trust in the state and the law it enacts, as well as social justice in connection with the Preamble to the Constitution, Art. 5 of the Constitution, expressed in art. 7 of the Constitution as the principle of legalism, Art. 31 sec. 1 and 2 sentence 1, art. 45 sec. 1, art. 82 1 Art. 83 of the Constitution of the Republic of Poland. See more: PK VIII TK 45.2018 mark.

¹⁷ See more: Ref. no. I KZP 4/18.

¹⁸ C.t. Journal of Laws 2017.2067 as amended.

¹⁹ See more: Application of the First President of the Supreme Court No. BSA IV-4111-1 / 21 of February 16, 2021 to the Court of Justice to review the compliance of certain provisions of the Act of September 6, 2001 on access to public information (i.e. Journal of Laws 2020.2176 as amended) with the Constitution of the Republic of Poland, incl. due to the possibility of violating the fundamental principles of criminal law expressed in the *paremia nullum crimen sine lege* and *nullum crimen sine lege certa*.

XIII.

Without, *inter alia*, specification of the subjective circle of people obliged to provide information about a person subject to inspection (or excluded from this obligation), it is difficult to conclude that the scope of amendments to the act proposed by the Ministry is consistent with the Constitution of the Republic of Poland. The draft in its present scope clearly violates the principles of: *nullum crimen sine lege* and *nullum crimen sine lege certa*, as well as *in dubio pro tributario*, which are basic measures of human rights protection and models of maintaining standards in the state of law, guaranteed, among others in Art. 42 sec. 3 of the Polish Constitution, as well as firmly embedded in the principle of a democratic state ruled by law.²⁰

XIV.

The wide public discussion²¹ concerning the planned scope of supervision over ZUS proteges probably contributed to the fact that the Ministry in the next edition of the proposed changes to Art. 61a of the ACT departed, perhaps only for a moment, from such far-reaching interference with the rights and freedoms of people.²² Therefore, it should be assumed that the originator did not realize the violation of the balance between burdens imposed by him and the public interest, which results in the possibility of excessive severity concerning the need to protect the public interest. This is not only a clear violation of the principle of proportionality in the strict sense, which was repeatedly pointed out by the Constitutional Tribunal, but it is also an excessive interference in the information autonomy of an individual, and a violation of the provisions of the GDPR.²³

XV.

The final wording of Art. 61a of the ACT,²⁴ which gives ZUS the right to process data and information necessary to determine the right to benefits, their

²⁰ Cf the judgment of the Constitutional Tribunal of May 25, 2004, file ref. no. SK.

²¹ <https://serwisy.gazetaprawna.pl/emerytura-i-renty/artykuly/8122059,zus-dane-osobowe-ustalenie-prawa-do-zasilku.html>.

²² Print number 1188 (sejm.gov.pl) accessed on May 7, 2021.

²³ OJ EU.L.2016.119.1.

²⁴ C.t. Journal of Laws 2021. 1133, 1621, 1834.

amount, calculation basis, and their payment confirms the thesis stated above. This thesis is also proved by the fact that from January 2022, the scope of ZUS surveillance will be additionally extended to the possibility of obtaining data and information to the extent necessary in its opinion to determine the right to benefits, their amount, calculation basis, and to their payments from all insured and payers, who are obliged to make them available free of charge.²⁵

References

Constitution of the Republic of Poland of April 2, 1997, Journal of Laws 1997.78.483 as amended.

The draft act amending the act on the social insurance system and certain other acts of January 22, 2021

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) (Text with EEA relevance).

Act of June 25, 1999 on cash benefits from social insurance in the event of sickness and maternity, Journal of Laws 1999, 60.636 as amended.

Act of 28 January 2016 Law on the public prosecutor's office, Journal of Laws 2016.177 as amended.

The Act of June 6, 1997 Code of Criminal Procedure, Journal of Laws 2021. as amended.

Application of the 1st President of the Supreme Court of February 16, 2021, No.BSA IV-4111-1 / 21

Application of 31/07/2018 of the Prosecutor General, No. PK VIII TK 45.2018

Resolution of the 7 judges of the Supreme Court of 28 June 2018, file ref. no. I KZP 4/18

The judgment of the Constitutional Tribunal of May 25, 2004, file ref. no. SK 44/03

Judgment of CT z of 3 October 2000, K. 33/99

Judgment of CT of 17 November 2008, SK 62/06

²⁵ Journal of Laws 2021.1621.