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The Role of Attorney at Law in Ensuring Compliance of Personal Data Processing with the Data Protection Law

Rola radcy prawnego w zapewnieniu zgodności przetwarzania danych osobowych z przepisami prawa o ochronie danych

ABSTRACT

The article analyses the role of attorney at law in ensuring compliance of personal data processing with EU and national data protection law. The author points out the growing complexity of data protection regulations, particularly arising from the new legal acts, and highlights the challenges faced by attorneys at law in practice. The analysis emphasises that effective legal assistance provided by attorney at law remains crucial for many controllers and processors to be able to comply with their legal obligations. The study identifies typical areas related to the requirements set out in the GDPR where an attorney at law can provide support to controllers and processors. The analysis also covers the question of whether an attorney at law can perform the function of a data protection officer. The author underscores the importance of legislative developments and the need to engage and improve the qualifications of legal professionals to effectively meet new legal requirements in the data protection.

Keywords: attorney at law; GDPR; personal data protection; data protection officer; compliance with regulations

INTRODUCTION

The protection of personal data is a complex matter, combining legal and technical issues. Solving problems in this area often requires knowledge that goes

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beyond basic knowledge of regulations and technologies, specialist knowledge to interpret complex regulations or those relating to the security of ICT systems. The data protection officer plays a pivotal role in ensuring that data processing and protection comply with the regulations. It is essential that the relevant personnel possess the required knowledge, skills and experience to provide support to the controller (or processor) and offer counsel on data protection issues. However, it should be noted that certain controllers are not obligated to appoint a data protection officer.[1] Consequently, many companies do not have a designated person performing this function, and controllers often seek the assistance of attorneys at law in this regard. However, even in cases where a data protection officer has been appointed, they may not possess the necessary knowledge and skills to resolve complex legal issues. In such instances, they may seek the assistance of an attorney at law.

In the available literature on ensuring compliance with the provisions on the processing of personal data, much attention is paid to the functions of the supervisory authority and the data protection officer. Unfortunately, the role of attorneys at law is unappreciated and rarely discussed, despite the fact that data protection lawyers play a crucial role in the data protection world.[2]

The present paper addresses issues pertaining to the role of attorneys at law in supporting controllers (and processors) in their efforts to ensure that personal data is processed and protected in a lawful manner. The initial part refers to typical issues that data protection officers often struggle with and where attorneys at law can be helpful in dispelling doubts and resolving legal problems. The subsequent section addresses the representation of the controller by an attorney at law in proceedings before supervisory authorities and courts. The next section presents analyses of whether an attorney at law can act as a data protection officer. The final section is

[1] In accordance with Article 37 (1) of 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) (OJ L 119/1, 4.5.2016; hereinafter: GDPR), the obligation to appoint a data protection officer shall be incumbent on: 1) public authorities or bodies, except for courts acting in their judicial capacity; 2) controllers and processors whose main activity consists of systematic monitoring of individuals on a large scale; 3) controllers and processors whose main activity consists of processing on a large scale of special categories of personal data or personal data relating to criminal convictions and offences. Article 9 of the Act of 10 May 2018 on the protection of personal data (consolidated text, Journal of Laws 2019, item 1781, as amended, hereinafter: the Personal Data Protection Act) specifies that public authorities and entities required to appoint a data protection officer are understood to mean: 1) public finance sector entities; 2) research institutes; 3) the National Bank of Poland. This means that the obligation to appoint an officer is common in the public sector, while in the private sector only a few entrepreneurs are subject to this obligation.

[2] C. Kuner, *The Role of Private Lawyers in the Data Protection World*, [in:] *Data Protection in a Profiled World*, eds. S. Gutwirth, Y. Poullet, P. de Hert, Dordrecht 2010, p. 265.

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devoted to new legal regulations, in which the attorney at law will also be able to assist the controller in meeting personal data protection requirements.

An attorney at law may also act as a controller when running their own law firm and processing client data. In this case, the attorney's at law role is different, as they determine the purpose and means of processing of personal data, and fulfills most of the obligations related to data protection. However, this type of activity has already been discussed in the literature[3] and will not be analyzed in this paper.

The study uses a dogmatic-legal method consisting in the analysis of normative acts, taking into account the literature on the subject and referring to the practice of applying the legal provisions.

TASKS RELATED TO THE REQUIREMENTS OF THE GDPR

The primary function of an attorney at law in ensuring that the processing and protection of personal data complies with the law is to provide legal assistance. This is achieved by offering legal advice and consultations, and by preparing legal opinions.[4] The interpretation of numerous provisions pertaining to personal data protection requires expert legal knowledge. In cases where the clarity of the situation is questionable, or where there is doubt or dispute, the data protection officer frequently seeks the opinion or advice of the attorney at law.

In practice, the following issues are the most frequently the focus:

1. The lawfulness of data processing: firstly, the grounds for such processing, particularly in cases where the provision imposes the obligation to process data; secondly, the decision as to whether, in a given case, the processing should be based on the consent of the data subject or on the so-called legitimate interest clause.
2. The general data processing principles, in particular the principle of data minimisation and the principle of data storage limitation (determining the appropriate data retention period).
3. The rights of data subjects, including the means by which information and correction rights are to be exercised, including "the right to be forgotten" and the application of exceptions in this regard.

[3] X. Konarski, G. Sibiga, D. Nowak, K. Syska, I. Małobęcka-Szwast, K. Barszczewska-Mazur, *Ogólne rozporządzenie o ochronie danych (RODO). Poradnik dla radców prawnych i adwokatów. Wersja zaktualizowana*, 2019, https://www.adwokatura.pl/admin/wgrane_pliki/file-2019-07-01-poradnikkrrpnraaktualizacja-kbm-28006.pdf (access: 12.10.2025).

[4] Article 6 (1) Act of 6 July 1982 on attorneys at law (Journal of Laws 1982, no. 19, item 145, as amended), hereinafter: the Attorneys at Law Act.

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4. The obligations of the controller encompass a number of aspects, including the selection of a processor, cooperation with the supervisory authority, and notification of a personal data breach.
5. The responsibility for the unlawful processing of personal data. This includes the possibility of administrative fines and other sanctions.

Important issues that require assessment and are often problematic in practice include questions about the admissibility of disclosing personal data, the need to anonymise personal data in documents made available, the use of personal data processing entrustment arrangements, and the transfer of data to third countries. Due to the rapid development of technology (including artificial intelligence), requirements relating to profiling and automated decision-making, as well as the consideration of data protection by design and data protection by default, are becoming increasingly important.

Many legal doubts raised by data protection officers to attorneys at law concern numerous specific provisions (e.g. provisions of the Labor Code concerning the processing of employee data, video surveillance and other types of monitoring, sobriety checks of employees, etc.). The large number of provisions (both national and EU) relating to data processing and protection makes it difficult for data protection officers to find and interpret these provisions, which is why the support of attorneys at law is extremely valuable in this area.

The important function of attorney at law in guaranteeing that data processing adheres to regulatory frameworks is further underscored by their examination a preliminary analysis of documentation pertaining to data protection. Most often, attorneys at law are asked to review draft documents containing:

- information clauses on data processing;
- consent clauses for the processing of personal data;
- authorisations for the processing of personal data;
- contracts or administrative agreements regulating the outsourcing of data processing;
- records of processing activities and records of categories of processing activities;
- data protection policies and procedures.

In order for an attorney at law to be able to provide reliable legal assistance in this area, it is necessary not only to analyse the regulations, but also to refer to the body of doctrine[5]

[5] The legal literature on data protection is extensive. It is worth mentioning, e.g., the comments on the GDPR and the Personal Data Protection Act, which contain analyses of many detailed and problematic issues and references to more detailed studies. See P. Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2022; E. Bielak-Jomaa, D. Lubasz (eds.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2018; P. Litwiński (ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Ustawa o ochronie danych osobowych. Wybrane przepisy sektorowe. Komentarz*, Warszawa 2021; M. Sakowska-Baryła

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and case law,[6] as well as the positions and decisions of the supervisory authority.[7] In some cases, it is also helpful to be familiar with the decisions of the European Commission[8] (e.g. on the adequacy of protection in third countries) and the recommendations of the European Data Protection Board.[9] Computer applications dedicated to persons dealing with data protection issues[10] may also be of valuable assistance, providing, among other things, practical guidance and analysis of current issues, online training, and document templates.

In specific matters relating to technical and organisational data security measures, due to the specific nature of these issues, data protection officers do not usually seek assistance from attorneys at law, but rather rely on specialist IT support.

REPRESENTING THE CONTROLLER

Legal assistance provided by an attorney at law may also, pursuant to Article 6 (1) of the Attorneys at Law Act, consist in appearing before authorities and courts as a representative of the controller or processor. In the field of data protection, the basic platform for institutional supervision is the influence of the authority, which in Poland is the President of the Personal Data Protection Office. In the event of a complaint being lodged with the supervisory authority against the controller, as well as in other situations (e.g. when the authority conducts scheduled inspections, receives notification of a data breach, or learns of irregularities related to the processing of data from the media), the supervisory authority takes steps to clarify the matter. Usually, the authority requests the controller to provide information and answer questions. When preparing a response to a letter

(ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*, Warszawa 2018. Foreign commentaries on the GDPR are also noteworthy, e.g. C. Kuner, L.A. Bygrave, C. Docksey (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford 2020; E. Ehmann, M. Selmayr (eds.), *Datenschutz-Grundverordnung*, München 2018.

[6] Administrative court rulings are published in legal information systems. The Central Database of Administrative Court Rulings, available online at https://orzeczenia.nsa.gov.pl, is also a valuable source of case law. Cases concerning data protection are marked in this system with the number 647.

[7] Information provided by the President of the Personal Data Protection Office can be found, i.a., at https://uodo.gov.pl (access: 12.10.2025).

[8] European Commission documents relating to personal data protection can be found online at https://commission.europa.eu/law/law-topic/data-protection/eu-data-protection-rules_pl (access: 12.10.2025).

[9] Documents issued by the European Data Protection Board are available on the Boards website at https://www.edpb.europa.eu/our-work-tools/documents/our-documents_pl (access: 12.10.2025).

[10] An example of this type of specialised software is the LEX Ochrona Danych legal information system module. More information can be found at https://www.lex.pl/produkty/lex-ochrona-danych-osobowych.html (access: 12.10.2025).

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from the supervisory authority, the controller usually consults its content with an attorney at law whose legal knowledge may be helpful in formulating a correct and precise response to the authority. A comprehensive response indicating that the actions taken are lawful may constitute grounds for closing the case without initiating proceedings or taking further action, which is why it is so important that the controller ensures that the response is properly formulated at this stage, and the advice or opinion of an attorney at law may be extremely important in this regard. It is also worth mentioning that cooperation with the supervisory authority is one of the duties of the controller and the data protection officer, and failure to do so, as well as obstructing or preventing inspections, may be subject to liability.[11]

If the supervisory authority finds a violation of personal data protection regulations, it initiates administrative proceedings, which may result in a decision. During these proceedings, an attorney at law may represent the controller, submit evidence and take other actions provided for by law. At this stage, too, the assistance of an attorney at law may prove valuable, as it may protect the controller from the negative consequences that could result from a decision by the supervisory authority, in particular the imposition of an administrative fine. In administrative proceedings before the authority, the attorney at law representing the controller may demonstrate that the controller's actions were lawful, present arguments in support of this thesis, including citing court rulings, which may influence the legal assessment made by the authority and the outcome of the proceedings.

In a situation where the President of the Personal Data Protection Office issues an administrative decision in which he finds the controller's actions to be unlawful, he may order the restoration of the lawful state (e.g. the application of additional safeguards for the data being processed), prohibit the processing of specific data (e.g. if it finds that the processing of specific categories of data is unlawful because the data is excessive and its processing violates the principles of minimisation), and may also impose an administrative fine on the controller. Given that the decisions of the supervisory authority may be burdensome for the controller (not only because of the amount of the administrative fine,[12] but also because, e.g., a ban on the processing of a specific category of data may hinder or even prevent the controller from conducting its business activities), it is important to be able to appeal

[11] See Article 31, Article 39 (1) (d) and Article 83 (4) (a) GDPR, and Article 108 of the Personal Data Protection Act.

[12] Depending on the severity of the violations, the administrative fine may amount to up to EUR 10 or 20 million or up to 2% or 4% of global turnover, while for public entities, according to the Polish law, the maximum fine has been set at PLN 100,000, and for public cultural institutions at PLN 10,000. See Article 83 GDPR and Article 102 of the Personal Data Protection Act.

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against the decision of the supervisory authority to an administrative court in order to assess the legality of such a decision. The decision of the court of first instance may also be appealed to the Supreme Administrative Court. In court proceedings, an attorney at law representing the controller may also play an important role, as a properly drafted complaint or cassation appeal, as well as other actions taken by the legal representative in these proceedings, may result in the court overturning the decision of the supervisory authority.

An attorney at law may also act as a representative of the controller or processor before civil courts (in cases concerning compensation or damages) or as a defense lawyer in criminal proceedings concerning unlawful processing of personal data and preventing or hindering the supervision of the authority (i.e. offences regulated in Articles 107 and 108 of the Personal Data Protection Act). However, in practice, there are relatively few such proceedings, and the defense lawyers in these proceedings are most often attorneys.

ATTORNEY AT LAW AS A DATA PROTECTION OFFICER

An interesting and, from a practical point of view, important question is whether an attorney at law may perform the function of a data protection officer. With regard to the practice of the profession of attorney at law and the role of data protection officer, several common features or far-reaching similarities can be identified: persons performing these tasks are to advise the controller (or the processor) on legal issues related to data protection;[13] they may perform their tasks under an employment or on the basis of a service contract;[14] they report directly to the highest management level of the controller;[15] they are guaranteed independence in the performance of their tasks – they are not bound by instructions (guidelines) as to how to perform their tasks (in the case of attorneys at law, this applies to the content of legal opinions);[16] the legislator requires them to avoid conflicts of interest;[17] they are bound by an obligation of confidentiality.[18] The similarities indicated above may be interpreted as supporting the possibility of an attorney at law performing the function of a data protection officer. An

[13] See Article 6 of the Attorneys at Law Act and Article 39 (1) (a) GDPR.

[14] See Article 8 (1) of the Attorneys at Law Act and Article 37 (6) GDPR.

[15] See Article 9 (1) of the Attorneys at Law Act and Article 38 (3) *in fine* GDPR.

[16] See Article 13 (1) of the Attorneys at Law Act and Article 38 (3) GDPR.

[17] See Article 15 of the Attorneys at Law Act and Article 38 (6) GDPR, whereby the attorney at law is required to withdraw from performing professional activities that could give rise to a conflict of interest, while the controller is required to ensure that the other duties of the data protection officer do not give rise to a conflict of interest.

[18] See Article 3 (3) of the Attorneys at Law Act and Article 38 (5) GDPR.

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attorney at law may meet the requirements for data protection officer set out in the regulations concerning professional qualifications, in particular professional knowledge of data protection law and practices, and the ability to perform the tasks of an officer.[19] If all of these requirements are met, an attorney at law may act as a data protection officer.

However, combining employment as an attorney at law with the function of data protection officer in the context of the activities of the same controller does not seem permissible, because it leads to an inevitable conflict of interest, as the data protection officer is required to monitor the activities of persons processing data in the unit of the controller, and this would lead to a situation where the attorney at law, acting as data protection officer, would also have to supervise his own activities relating to data processing.[20] Similar critical position on the combination of the functions in question was also presented by the National Bar Council of Attorneys at Law, which pointed to other arguments, including: combining these functions may increase the risk of spending a significant amount of time performing the functions of a data protection officer, which could be an obstacle to the performance of the primary tasks of a attorneys at law; pursuant to Article 9 (4) of the Attorneys at Law Act, an attorney at law cannot be instructed to perform activities beyond the scope of legal assistance, while the functions of a data protection officer include, among other things, audits, training and other activities that do not fall within the scope of legal assistance.[21]

The function of data protection officer may also be performed by a person who is not employed, but performing activities on the basis of a service contract. In such a case, as a rule, there is no conflict of interest between the profession of attorney at law and that of data protection officer if such assistance is provided to different controllers. In specific cases, however, a conflict of interest may arise (e.g. if an attorney at law acting as a data protection officer represents the interests of the controller and, at the same time, the data subject asks the attorney at law to represent them in a dispute with the controller), in which case the attorney at law should not undertake to handle such a case (represent the data subject). However, the National

[19] See Article 37 (5) GDPR.

[20] For more information on the conflict of interests of the data protection officer, see G. Sibiga, B. Żeromski, *Konsekwencje warunku unikania konfliktu interesów inspektora ochrony danych dla dopuszczalnego zakresu jego zadań w ochronie danych osobowych*, [in:] *Pakiet cyfrowy i inne wyzwania ochrony danych. Aktualne problemy prawnej ochrony danych osobowych 2024*, ed. G. Sibiga, "Monitor Prawniczy" 2024, no. 11, pp. 83–90.

[21] See Ośrodek Badań, Studiów i Legislacji, *Opinia Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych w przedmiocie łączenia wykonywania zawodu radcy prawnego oraz funkcji Inspektora Ochrony Danych (IOD) lub Administratora Bezpieczeństwa Informacji (ABI)*, 28.3.1918, https://obsil.kirp.pl/wp-content/uploads/2018/05/Opinia-z-28.03.2018-r.-IOD.pdf (access: 12.10.2025).

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Bar Council of Attorneys at Law, in the above-mentioned opinion presented at the request of the supervisory authority (at that time, the Inspector General for Personal Data Protection), considered that the performance of the tasks of a data protection officer cannot be classified as a subcategory of legal assistance, although these areas have certain common areas, but due to the fact that the performance of the tasks of a data protection officer is not the same as the provision of legal assistance, it cannot be carried out within the profession of an attorney at law (in particular in the form of a Law Firm of Attorney at Law or a company referred to in Article 8 (1) of the Attorneys at Law Act). The opinion pointed out that the concept of legal assistance does not include, e.g., advising the controller (the processor) on technical and organisational issues related to personal data security, auditing IT systems, advising on "non-legal" issues related to data protection impact assessments (DPIA).[22] In the cited opinion it was also indicated that attorneys at law, as professionals in the field of legal assistance, may, after obtaining the additional qualifications required to perform the tasks of a data protection officer, undertake this function as part of a business activity other than legal activity.[23]

In practice, there is a growing interest among attorneys at law in performing the function of a data protection officer, as well as a specialisation in the activities of entrepreneurs providing services to controllers in the area of personal data protection, including the outsourcing of the function of a data protection officer. It can be assumed that this trend will continue, especially in large urban areas, where there is a high demand for data protection officers and relatively few people who can perform this function.

CHALLENGES RELATED TO NEW REGULATIONS

Technological development triggers a response from legislators in the form of new legal regulations, including those related to data protection. The multitude, complexity and novelty of these regulations mean that controllers and data protection officers are often unable to meet the requirements of these regulations on their own and need professional support from an attorney at law.

Legal regulations of significant importance in the field of technology and with multiple links to data processing and protection are adopted in both EU and national legislation. When it comes to EU law, examples include the Data Markets Act,[24]

[22] *Ibidem*.

[23] *Ibidem*.

[24] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (OJ L 26/15, 3.6.2022).

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the Digital Services Act,[25] the Data Act,[26] or the Artificial Intelligence Act.[27] EU regulations are sometimes formulated in an unclear manner, and translations of these acts are often imprecise, which means that interpreting the provisions contained therein may not be straightforward and may require expert legal knowledge.

National legislators are also creating regulations that play an important role in data protection. Examples of such new regulations are the Whistleblower Protection Act[28] and the Electronic Communications Law.[29] The interpretation of the provisions contained in these acts raises many doubts, which data protection officers usually have problems with. Not only knowledge of the regulations and the ability to interpret them, but also familiarity with the case law of courts and decisions of the supervisory authority means that the support of a professional lawyer can be very helpful for data controllers, processors and data protection officers.

The ever-increasing number of regulations on data processing means that the role of attorney at law in ensuring compliance with data protection will remain crucial. This applies in particular to cases where a data protection officer has not been designated, but the assistance of an attorney at law may also be valuable for data protection officers. The awareness of new regulations, cases, and decisions requires the constant improvement of the knowledge of attorneys at law. It is to be hoped that attorneys at law will rise to this challenge and continue to provide effective legal assistance to controllers and processors.

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[26] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (OJ L 2023/2854, 22.12.2023).

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ABSTRAKT

W artykule dokonano analizy roli radcy prawnego w zapewnianiu zgodności przetwarzania danych osobowych z unijnym i krajowym prawem ochrony danych. Autor wskazuje rosnącą złożoność przepisów dotyczących ochrony danych, wynikającą w szczególności z nowych aktów prawnych, a także zwraca uwagę na wyzwania, przed którymi stają radcowie prawni w praktyce. Podkreślono, że skuteczna pomoc prawna świadczona przez radców prawnych pozostaje kluczowa dla wielu administratorów i podmiotów w celu wypełnienia obowiązujących wymogów prawnych. W opracowaniu wskazane zostały typowe obszary dotyczące wymogów określonych w RODO, w których radca prawny może służyć wsparciem. Przedmiotem analiz jest też kwestia tego, czy radca prawny może wykonywać funkcję inspektora ochrony danych. Wskazano również na znaczenie zmian legislacyjnych oraz podkreślono konieczność zaangażowania i podnoszenia kwalifikacji prawników, aby mogli oni skutecznie sprostać nowym wymogom prawnym w zakresie ochrony danych.

Słowa kluczowe: radca prawny; RODO; ochrona danych osobowych; inspektor ochrony danych; zgodność z przepisami

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