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European Data Governance Act: Essential Problems for Re-Use of Public Sector Information

Abstract

This paper presents problems related to the re-use of public sector information in Poland from the perspective of the Regulation (EU) 2022/868 of the European Parliament and of the Council on European data governance (Data Governance Act). Furthermore, it attempts to answer the question of how much the Polish legal regime's problems related to the application of the Data Governance Act (DGA) are due to the incorrect implementation of the Open Data Directive into national law. The article concludes that the mistake made in the 2011 implementation of Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information of 17 November 2003 has had an impact on the current shape of the re-use of protected data referred to in the DGA. The thesis has been confirmed, the Polish implementation of the Directive contradicts the objectives of that Directive and the DGA. The implementation has also failed to achieve the result intended by the European legislature. This applies to both the objectives of the Directive and the objectives of the DGA. The legislature wanted to create complementary legislation on data re-use. The regulatory environment in which the DGA will operate does not provide a high level of legal certainty, which has implications for the harmonization of European Union law. As the article demonstrates, in Poland there are competing regulations for re-use. This will hinder the achievement of the objectives set for the DGA and the implementation of this Regulation by national obliged entities. It may also affect the actions of those applying for data access. As a consequence of that mistake, there is lack of clear and readable procedures in national law. This should be considered a barrier to the re-use of protected data.

KEYWORDS: re-use of public sector information, public sector information, Data Governance Act, Poland, protected data

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Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act or DGA) took effect on June 23, 2022 and should be applied as of September 2023[1]. The selection of this Regulation as the legal instrument is justified by the predominance of elements that require a uniform application which does not leave the Member States any margin in implementation and creates a fully horizontal framework[2]. Complementary implementation is needed for the application of this Regulation. The Regulation requires the intervention of the national legislature. In Poland, such a law has not yet been enacted[3].

This Regulation governs firstly the conditions for the re-use of certain categories of data held by public sector bodies in the EU, secondly the notification and supervision framework for the provision of data brokerage services, thirdly the framework for the voluntary registration of entities that collect, and process data shared for altruistic purposes, and fourthly the framework for the establishment of the European Data Innovation Board. During the drafting process, the least time was devoted to the issue of re-use. The primary concern at that time was the protection of personal data under the Regulation[4].

The DGA is one of the pillars of the European Strategy for Data. The Strategy[5] includes two major legislative initiatives to achieve its ambitious goals for the European data economy of the future: the Data Act (DA) and the Data Governance Act (DGA). Both Acts aim at enhancing data sharing and re-use of data while safeguarding the privacy and data protection rights of EU citizens[6]. Its purpose is to increase voluntary data sharing that would benefit businesses and citizens, by facilitating the sharing of data

1 Dz.U.UE.L.2022.152.1. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R0868. [accessed: 14.11.2024].

2 Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM(2020) 767 final, p. 4.

3 Draft the Polish Data Governance Act. https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/projekt-ustawy-o-zarzadzaniu-danymi.html. [accessed: 14.11.2024].

4 On the procedure for the adoption of the Regulation see https://openfuture.eu/observatory/data-governance-act/. [accessed:14.11.2024].

5 A European strategy for data, COM(2020) 66 final, (Official Journal L 345, 31/12/2003 P. 0090 – 0096). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0066. [accessed: 14.11.2024].

6 Francesco Vogelezang, *Four questions for the European Strategy for Data*, 12 April 2022. https://openfuture.eu/blog/four-questions-for-the-european-strategy-for-data/. (accessed: 14.11.2024].

in a trusted and secure manner. The Regulation is one of the measures in the proposed strategy that will help to unlock the full potential of data. According to the EU, this will be a powerful drive for innovation and job creation. At the same time, data is a key resource for the development of all organisations, especially start-ups and SMEs. The objective is to establish a single EU data market where data can flow seamlessly across sectors and borders. Beneficiaries should include businesses as well as citizens, private and public organisations. The re-use of protected data is particularly relevant to the use of data for research purposes. Consequently, the DGA's role is to remove barriers to data use.

This article will present significant problems related to the re-use of public sector information in Poland from the perspective of the DGA. I will try to answer the question to what extent in the Polish legal regime the problems related to the application of the Data Governance Regulation are due to the incorrect implementation of the Open Data Directive into national law. The Directive has been implemented by the Act of August 11, 2021, on Open Data and Re-use of Public Sector Information (ODA)[7].

1 Implementation mistake and its consequences

The Regulation establishes the framework for the re-use of certain categories of data[8] held by public sector bodies within the EU [9]. The concept of re-use is understood in the DGA as in the Directive, with some modifications. It means the natural or legal persons' use of documents/data held by the bodies referred to in these acts. The scope of re-use in the DGA refers to data and in the Directive, it refers to documents. According to Article 2 (1) DGA, *data* means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording. The Open Data Directive employs the concept of a document. According to Article 2 (6), „document" means any content whatever its medium (paper or electronic

7 Journal of Laws of 2023, item 1524, consolidated text

8 In other respects, the concepts overlap in principle. The DGA regulates the concept of re-use in Article 2 (2) DGA and public sector bodies in Article 2 (17) DGA.

9 Article 1(1)(a) DGA.

form or as a sound, visual or audiovisual recording); or any part of such content. Polish law uses the concept of PSI (public sector information)[10]. Both a document and PSI can be in non-digital form. Data is in digital form only. The catalogue of entities concerned is also partly different. In the Directive, it covers public sector bodies and public undertakings, while in the DGA it concerns data held (lit. *possessed*) by public sector bodies[11]. The term „possession" in the Polish translation is unfortunate. It is similar to the German version of the Regulation. The English version is better in this context: „data held by public sector bodies". This concept must be interpreted autonomously under EU law in the sense of technical and/or factual control over the data[12]. The physical location of their storage is irrelevant.

Of particular importance here is Section 3 (1), whereby protected data is protected on the grounds of commercial confidentiality, including business, professional and company secrets; statistical confidentiality; the protection of intellectual property rights of third parties; or the protection of personal data, insofar as such data fall outside the scope of Directive (EU) 2019/1024. This way, the European legislature indirectly defines the scope of re-use regulated by the DGA. Confidential business data includes data that is protected by trade secrets, protected know-how, and any other information that would adversely affect the market position or financial health of an undertaking if disclosed. This Regulation should apply to personal data that does not fall within the scope of Directive (EU) 2019/1024 insofar as the access regime excludes or restricts access to such data for reasons of data protection, privacy and integrity of the individual, in particular in accordance with data protection legislation[13].

This means that the material scope of the Regulation overlaps, as far as its Chapter 2 is concerned, with the data excluded from the Open Data Directive by Article 1(2). Recital 10 of DGA reads: „The categories of data held by

10 Article 2 (8) the Open Data and Re-use of Public Sector Information Act (ODA). According to the provision indicated, public sector information – any content or part thereof, irrespective of the means of fixation, in particular in paper, electronic, audio, visual or audiovisual form, which is in the possession of the obliged entity.

11 Article 2 (17) DGA and Article 2 (1), Article 2 (3) Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) Dz.U.UE.L L 172/56. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1024. [accessed: 14.11.2024].

12 „Erläuterung zu Artikel 1 DGA pt. 23", [in:] *Datenschutzrecht, DS-GVO, DA, DGA, BDSG. Datenschutz und Datennutzung*, ed. Heinrich Amadeus Wolff, Stefan Brink, Antje v. Ungern-Sternberg (München: C.H. Beck, 2024).

13 Recital 10 of DGA.

public sector bodies that should be subject to re-use under this Regulation go beyond the scope of Directive (EU) 2019/1024, which excludes data not accessible for reasons of commercial and statistical confidentiality and data contained in works or other objects to which third parties have intellectual property rights". When assessing this solution on the European level, it should be considered as fully correct. The DGA regulation is complementary to the Open Data Directive. The DGA complements the gap left open by the Open Data Directive, which addresses only the re-use of public data and does not address protected data. The solution of excluding a certain range of cases became the basis for regulating re-use in Directive 2003/98/EC of the European Parliament and of the Council of November 17, 2003 on the re-use of public sector information[14]. A similar approach was taken in the Open Data Directive, which is one of the material implementation requirements.

To understand the problem that has arisen in the Polish legal regime, it is necessary to go back to the time of the implementation of Directive 2003/98/EC. The Polish authorities decided that the Act on Access to Public Information, the Administrative Procedure Code and the Constitution of the Republic of Poland were sufficient to transpose the Directive into the national law. Later, the Freedom of Economic Activity Act was added to this list[15]. As a result, the European Commission issued a letter of formal notice to the Republic of Poland and later lodged a complaint with the European Court of Justice. In its judgment of October 27, 2011 (C-362/10), the Court found that Poland had failed to fulfill its obligations as a Member State[16]. This led to the drafting of the Act on re-use of public sector information[17]. However, this draft was met with criticism. Therefore, it was decided to regulate the principles of re-use of information in the Act on Access to Public

14 Dz.U.UE.L.2003.345. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0098. [accessed: 14.11. 2024].

15 Bogdan Fischer *et al.*, *Ustawa o ponownym wykorzystywaniu informacji sektora publicznego. Komentarz* (Warszawa: Wolters Kluwer, 2019|), 24-32.

16 Judgment of the Court (Sixth Chamber) of 27 October 2011. European Commission v Republic of Poland
Case C-362/10. https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-362%252F10&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=pl&lg=&page=1&cid=6644980. [accessed: 14.11. 2024].

17 See Agnieszka Piskorz-Ryń, *Ponowne wykorzystanie informacji sektora publicznego. Zagadnienia administracyjnoprawne* (Warszawa: Wolters Kluwer, 2016), 91-92.

Information, where Chapter 2a, entitled Re-use of Public Information, was added[18]. At that time, the subject of re-use consisted of public information, and this determined how the regulations were adopted. The general exclusion in Article 1(2) of Directive 2003/98/EC was not applied at that time („The Directive shall not apply to: documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by law or by other binding rules in the Member State, or in the absence of such rules as defined in line with common administrative practice in the Member State in question; documents for which third parties hold intellectual property rights; documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of: – the protection of national security (i.e. State security), defence, or public security, – statistical or commercial confidentiality"[19]).

No right to re-use was granted, only the principles of re-use were established. According to Article 23a(2), the Act introduced a separate procedure for making public information available for re-use. Article 23g (8)(1) provides that the obligated body shall refuse the re-use public information if access to the public information is subject to restrictions under Article 5 or provisions of separate laws. As a result, the matters excluded from the application of the Directive were subject to national rules. Chapter 2a applied to the information referred to in Article 1(2) of Directive 2003/98/EC. However, the re-use of this information was restricted under the provisions of Article 5, which pertains to the limitations on the re-use of public information.

The next piece of legislation regulating the re-use of public sector information was the Act of February 25, 2016[20]. In this Act, the national legislature applied a similar mechanism to that provided by the earlier Act. It covered all public sector information (PSI) and applied the exemption only in the context of entities. According to Article 4, the provisions

18 Journal of Laws No. 204, item 1195 as amended.

19 Article 1(2)(a)(b)(c) Directive 2003/98/EC.

20 Journal of Laws of 2019, item 1446 t.j. See more Dominik Sybilski, *Wpływ ogólnego rozporządzenia o ochronie danych na otwarte dane i ponowne wykorzystywanie informacji sektora publicznego* (Warszawa: Instytut Nauk Prawnych PAN, 2021); Fischer et al., *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego*; Łukasz Nosarzewski, *Prawne ograniczenia ponownego wykorzystywania informacji sektora publicznego* (Warszawa: Uczelnia Łazarskiego, 2022). https://open.icm.edu.pl/items/ec90606b-d880-4026-8e64-6c52a4930209. [accessed: 14.11. 2024].

of the Act do not apply to PSI held by certain groups of entities. However, the material exclusion referred to in the Directive, in accordance with Article 6 of the Act, has become the basis for limiting the right to re-use PSI under the Polish legal regime. A similar regulation was adopted in the Act on Open Data and Re-use of Public Sector Information. This law only applies the material exception[21]. It also introduces a list of reasons for refusing the right to re-use PSI[22].

The implementation of the Directive in Poland did not result in any adverse consequences until the adoption of the DGA. However, this does not mean that in this case the Directive has been correctly transposed into national law. A Directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves it to the national authorities to choose the form and the methods[23]. This is because the most important thing is to act in a way that "corresponds to the essence of the directive itself and is adapted to its purpose"[24]. Implementation is not complete when a directive is transposed word for word into a law or regulation, but rather when the application of national standards achieves the result expected by the EU law[25]. At this point, a question arises as to whether the method of implementation chosen by Poland achieves the result intended by the European legislature. The legislature intended for documents to be available without the need for a need assessment. This is because the purpose of the Directive is to facilitate the re-use of documents and to harmonise the rules of their re-use. This, however, is an instrumental goal. The Directive has fundamental objectives, including harmonizing the existing rules and practices in the Member States concerning the use of PSI. This contributes to the establishment of an internal market and a system ensuring undistorted competition in the internal market[26]. Given the solution adopted and that harmonization is one of the Directive's

21 Article 4 the 2021 Act.

22 Article 6 the 2021 Act.

23 Article 288 Consolidated version of the Treaty on The Functioning of the European Union, *Official Journal C 326, 26/10/2012 P. 0001–0390*. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF. [accessed: 14.11. 2024].

24 Monika Szwarc, „Warunki poprawnej implementacji dyrektyw w porządkach prawnych państw członkowskich w świetle prawa wspólnotowego" *Przegląd Prawa Europejskiego*, No. 1 (2001): 5.

25 Bartłomiej Kurcz, *Dyrektywy i ich implementacja do prawa krajowego* (Warszawa: Wolters Kluwer, 2004, Lex), Chapter 3.3, pt 69.

26 Recital 10 of Directive (EU) 2019/1024.

fundamental objectives, the regulation adopted must therefore be judged negatively. Article 1(2) of the Directive was intended to ensure uniform rules for the re-use of documents. The aim is to ensure that the documents to which the Directive applies are made available in a uniform manner throughout the European Union. Therefore, the material scope is set so that any further rules are uniform throughout the EU and only documents that are not protected under EU and national law are subject to re-use. The European legislature also decided that no need assessment was to be required to make the information available in relation to documents, and documents for which such an assessment is necessary were excluded from the application of the Directive. The purpose of this procedure was to facilitate re-use of documents. The failure to implement Article 1(2) of the Directive into the Polish law has an impact on the final product of the implementation process, which is clear and precise regulations that ensure a high level of legal certainty[27]. The assessment should consider the situation that has arisen since the DGA became applicable. This has an impact on the harmonization of EU law. The system adopted at the EU level is not consistent. At the national level, there is some overlap between the scope of the DGA and the ODA. Thus, the DGA does not complement the ODA as intended by the European legislature.

2 Re-use of certain categories of data

DGA does not grant the right to re-use protected data. This stands in contrast to Article 5 of the ODA, which establishes a public material right to re-use the PSI[28]. The Regulation does not introduce „positive obligations" for public sector bodies. The DGA does not impose any obligation on public sector bodies to permit the re-use of data, nor does it release public sector bodies from their confidentiality obligations under the EU or national law[29]. It is „neutral" in terms of data law, i.e. it does not affect

27 Kurcz, *Dyrektywy i ich implementacja do prawa krajowego*, Chapter 3.3, pt 67.

28 See Fischer et al., *Ustawa o ponownym wykorzystywaniu informacji sektora* publicznego, 91 et seq; Agnieszka Piskorz-Ryń, *Ponowne wykorzystanie informacji sektora publicznego. Zagadnienia administracyjnoprawne* (Warszawa: Wolters Kluwer, 2018), 254.

29 Article 1(2) DGA.

the substantive legal provisions on access to, and further use of data[30]. The use of the phrase „except for the exchange of data between public sector bodies purely in pursuit of their public tasks" in the definition of re-use in the DGA is assessed negatively in this context. The definition of re-use in the DGA has already been mentioned. It should be noted here that this phrase is completely superfluous. The DGA does not address the exchange of data between public sector bodies, nor does it grant a right of re-use, making the use of this phrase inappropriate. If the European legislature had adopted the same meaning of the re-use as is set out in the Directive, this would have been justified. However, it has modified the definition therein. It should therefore make the necessary changes in this respect as well.

The discussed Regulation should not create an obligation to permit the re-use of data held by public sector bodies. In particular, each Member State should be able to decide whether it makes the data accessible for re-use and to define the purposes and extent of such access[31]. The solution adopted in the DGA returns to the original wording of Directive 2003/98/EC, which indicated that it contained „no obligation to allow re-use of documents"[32].

The Regulation therefore implies that the conditions laid down in the DGA apply only to protected data intended for re-use by Member States or public sector bodies. Under the rules set out in the DGA, only the indicated data will be subject to re-use. It is therefore up to each Member State to decide whether or not to transmit the data for re-use. It also determines the purposes and extent of access to the data. The DGA only applies in instances where a positive decision is made to transfer the data for re-use. However, this decision must be made in compliance with EU and national law. Therefore, as far as the re-use of protected data is concerned, the DGA only determines the conditions under which the data can be re-used and indicates the tasks of the Member States in this respect. It also defines the tasks of the EU as regards the European Data Innovation Board.

However, certain categories of data, such as commercially confidential data, data that are subject to statistical confidentiality and data protected by the intellectual property rights of third parties, including trade secrets

30 „Erläuterung zu Artikel 1 DGA pt. 23", [in:] *Datenschutzrecht, DS-GVO, DA, DGA, BDSG. Datenschutz und Datennutzung*, ed. Heinrich Amadeus Wolff, Stefan Brink, Antje v. Ungern-Sternberg (München: C.H. Beck, 2024).

31 Recital 11 of DGA.

32 Grzegorz Sibiga, „Gwarancje ochrony danych osobowych w ponownym wykorzystywaniu chronionych danych na podstawie Aktu w sprawie zarządzania danymi – wybrane zagadnienia" *Monitor Prawniczy. Dodatek*, No. 11 (2023): 80.

and personal data, while present in public databases, are often not made available, not even for research or innovative activities in the public interest. This is despite the fact that such availability is possible in accordance with the applicable EU law, in particular Regulation (EU) 2016/679 and Directives 2002/58/EC and (EU) 2016/680[33]. Although some Member States are establishing structures, procedures or legislation to facilitate that type of re-use, these actions are not being taken across all the EU. Clear conditions of access to, and use of such data are needed to facilitate the use of data by private and public actors for the purposes of European academic research and innovation.

Member States should encourage public sector bodies to create and share data according to the „open by design and open by default" principle. These principles are based on Article 5(2) of Directive (EU) 2019/1024. A proactive approach makes it possible to re-use data while ensuring the protection of personal and confidential data and speeding up the process of making such data available for re-use[34]. Member States should encourage public sector bodies to promote the creation and collection of data in formats and structures that facilitate anonymization[35].

Returning to the main line of discussion, the problem of incorrect implementation exists. According to the principle of the primacy of Community law, in the event of a conflict between a national provision (irrespective of its rank) and a regulation of Community law, the latter has absolute precedence. This principle applies both to the provisions of the founding treaties and to secondary legislation, including regulations[36]. This is because the Regulations are subject to the requirement of uniform application throughout the territory of all Member States, the fulfilment of which ensures the uniformity of the EU legal space. The problem described in this article has not been addressed in the draft Data Governance Act and the need to amend the Open Data Act has not been identified. This means that instead of a complementary solution, we have a competing solution. Under the ODA, the obliged entity refuses to release protected data constituting

33 Recital 6 of DGA.

34 See Piotr Drobek, *„Ryzyka dla ochrony danych osobowych w związku z ponownym wykorzystywaniem informacji sektora publicznego"*, [in:] *Jawność i jej ograniczenia. Dostęp i wykorzystywanie*, ed. Agnieszka Piskorz-Ryń, Vol. V (Warszawa: Wolters Kluwer, 2016), 258 et seq.

35 Recital 9 of DGA.

36 Adam Łazowski, „Rozporządzenie jako źródło prawa Wspólnot Europejskich" *Europejski Przegląd Sądowy*, No. 3 (2007): 15.

PSI by issuing an administrative decision[37]. The obligated entity does not have a choice – it must A1 (deny access to protected information). Under the DGA, the obligated entity does not mandate the release of protected information that constitutes PSI. Under this Act, access to data may be granted or denied. This means that under the DGA it is possible to provide protected information while respecting its protected nature. The obligated party denies access to protected information (A1) or grants such access (A2). contradiction in content between the DGA and the ODA is possible, though not inevitable. It depends on the decision on DGA grounds as to whether to provide/not provide protected data. The ODA contains a prohibitive standard in Article 6 (A1 – refuses protected data), but there is a partially permissive standard in Article 9 of the DGA (A1 – refuses access to protected data or A2 – grants access to protected data, but performs actions required to preserve its protected nature). The standard contained in the DGA is therefore not a typical prescriptive standard. Thus, it cannot be considered to be a case of subsumption. There are therefore no grounds to consider that the DGA is a special provision in relation to the ODA. This could have been the case if the DGA regulated access to protected data, which it does not. Thus, we are dealing with the description of two competing procedures in the Polish legal regime. The legal regulations do not clearly define what the relationship between these acts is. Is it the will of the applicant that decides? Can the applicant immediately initiate the procedure described in the DGA by referring to this legal act, indicating that he/she demands access to data with preservation of their protected nature? These questions are difficult to answer unequivocally at least in theory at this point. In practice, the determination will be made by the applicant's clearly articulated intentions in the application letter, where the nature of the request is precisely defined. The application procedure under the DGA will also help identify the application regime, as Article 8 stipulates that the application is submitted through a single information point. If the application is received by the relevant entity, it will be processed in accordance with the ODA. If it is received by the single information point, it will be processed in accordance with the DGA.

37 The catalogue of obliged entities is not the same, but parts of it are identical.

3 Closing remarks

The Polish implementation of the Directive contradicts the objectives of the Directive. It also fails to achieve the result intended by the European legislature. This applies to both the objectives of the Directive and the objectives of the DGA. The legislature wanted to create complementary legislation on data re-use. The regulatory environment in which the DGA will operate does not provide a high level of legal certainty, which has implications for the harmonisation of European Union law. As this paper demonstrates, there are competing regulations on the re-use in Poland. This will hinder the achievement of the objectives set for the DGA and the implementation of this Regulation by national obliged entities. It may also affect the actions of applicants. As a consequence of this mistake, there is no clear and transparent procedures in national law. This constitutes a barrier to the re-use of protected data.

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