

## *The Conclusive Comment on the Processing of Personal Data for the Purpose of the Assignment of Receivables*

### Streszczenie

Od dłuższego już czasu zagadnienie przetwarzania danych osobowych w związku z przelewem wierzytelności przysługującej wobec konsumenta wywołuje duże kontrowersje. Przyczyną takiego stanu rzeczy jest z jednej strony bardzo duża liczba częściowo sprzecznych ze sobą poglądów doktrynalnych w tym zakresie, z drugiej zaś rozbieżności w orzecznictwie sądów oraz decyzjach GODO. Celem artykułu jest podsumowanie wskazanych poglądów oraz wypracowanie na ich podstawie jednego wzorca należytego postępowania. Omawiane zagadnienie jest szczególnie doniosłe z punktu widzenia usług tzw. e-bankingu, w ramach którego przedsiębiorcy bardzo często posługują się wzorcami umownymi.

### Abstract

An issue concerning the processing of personal data with regard to the transfer of receivables from the consumer has created a lot of controversy for a long time. The purpose of this paper is to summarize the existing jurisprudence and doctrine in this area, and to indicate the proper standards of conduct. The Article puts an emphasis on the use of the

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templates for business-to-consumer relations, which is particularly important from the point of view of e-banking.

An issue concerning the processing of personal data with regard to the transfer of receivables from the consumer has created a lot of controversy for a long time. On the one hand, the reason for this state is a great number of doctrinal opinions concerning this domain that partly contradict each other, and, on the other hand, there are discrepancies in court decisions as well as these of the Inspector General for Personal Data Protection (hereinafter referred to as the “GIODO”). The issue is significant to a great extent due to the fact that, in practice, there is a growing number of vindication companies whom the creditor, who usually is an entrepreneur (a professional), transfers the receivables for remuneration, thus the latter taking over the task to vindicate payment from debtor (consumer). However, the transfer of receivables is inseparably bound up with the necessity for making debtors’ personal data available to vindication companies.

Nevertheless, it must be stated at the very beginning that the activity of vindication companies involves not only purchasing receivables but also undertaking actions for getting remuneration back for the benefit of creditors, without them transferring any receivables.

In this case, the legal interrelation between a vindication company and a creditor possesses an order contract character on the basis of Article 734 of the Civil Code<sup>2</sup>. Thus, the creditor commissions a vindication company to perform vindication activities and, at the same time, to transfer to itself debtors’ personal data that are necessary to perform the commission. However, the rights to receivables remain in the hands of the creditor for the whole period of time. Thus, the creditor is the debtors’ data controller who, on the basis of Article 31 of the Act of 31st August 1997 on the Protection of Personal Data<sup>3</sup> (hereinafter referred to as the “uodo”) discloses these data to vindication company (hereinafter referred to as the “processor”) <sup>4</sup>. On the basis of the cited regulation the disclosure of such data does not require any consent from debtors, and its processing is admissible to the extent explicitly indicated in an agreement between a creditor and vindication company. Such data must be processed only for the data processing purposes of the creditor, and the creditor cannot let such data be processed to the broader extent. Thus, the legality

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<sup>2</sup> Journal of Laws 1964, No. 16, item 93, with later amendments.

<sup>3</sup> Journal of Laws 1997, No. 13, item 883, with later amendments.

<sup>4</sup> GIODO in one of its opinions confirms the admissibility to entrust vindication company with personal data. See. *Whether it is admissible to transfer debtor’s personal data to vindication companies on the basis of regulations stipulated in the Act on the protection of personal data?* Source: [www.giodo.gov.pl](http://www.giodo.gov.pl).

of this action will depend on the creditor, who is the data controller. An agreement with a vindication company fully determines the purpose of thereof in processing debtors' data. Hence, all other activities performed in respect to such data are to be considered as unlawful. The above remarks are also valid whenever a vindication company acts as a plenipotentiary appointed on the basis of Article 95 of the Civil Code.

The above situation will be presented differently: when receivables were transferred to the vindication company. In such a case, it is the vindication company that becomes the creditor, and the hitherto creditor loses this status at the moment of the assignment. In accordance with Article 7, point 4 of the uodo, the data controller shall be a party that determines the purpose and means of the processing of personal data. However, once the assignment of receivables has been performed, the vindication company will solely determine the purposes of using the debtors' data – therefore becoming the controller. For example, on the basis of Article 23, paragraph 1, point 5 in accordance with paragraph 4, a vindication company may, without debtors' consent, send to them commercial information concerning its activity by means of traditional channels. When taking the assignment under consideration, entrusting debtor's data processing to a party becomes necessary, since, by doing so, the party becomes only a Processor and cannot determine the purpose of the processing of personal data at its own discretion. However, there is no precise definition of making data available either in the uodo regulations, or in other legal files. This activity was mentioned only in Article 7 of the Act in question as an example of an action performed on personal data and was categorized as the processing of thereof. But, an idea that the act of making data available takes place whenever such data is transferred to a data recipient acting as the controller of thereof, permeates the literature concerning this subject matter<sup>5</sup>. Thus, if a recipient takes data into possession becoming its controller, then this is the event when the data is made available<sup>6</sup>. In contrast to the institution of the above-mentioned data entrusting, making data available was not a subject of any specific rules concerning data processing determined in the uodo and, as such, comes under general rules, including those stated in Article 23 of the cited Act. Thus, making data available shall be admissible, in particular, in the situation when a debtor gives his/her consent to do so (or the agreement with the debtor will require it); when this is essential

<sup>5</sup> P. Litwiński, 'Udostępnianie danych osobowych na potrzeby postępowań cywilnych' (Personal data disclosure for the purpose of conducting civil proceedings), *ICT Law Review* 2013, no 1, p. 26. On the disclosure of personal data, see: M. Sakowska-Baryła, 'Udostępnianie danych osobowych na gruncie ustawy o ochronie danych osobowych' [in:] *Ochrona danych osobowych w Polsce z perspektywy dziesięciolecia*, P. Fajgielski (edit.), Lublin 2008, p. 103–126.

<sup>6</sup> A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, Warsaw 2001, p. 28.

to exercise the right or obligation caused by a legal regulation; or when this is necessary for the completion of a justified goal of a data controller<sup>7</sup>.

However, it is unavoidable to indicate that, on the basis of Article 509 of the Civil Code, the transfer of receivables can be performed by a creditor without a debtor giving his/her consent. The debtor's consent is not needed to the sealing the contract of assignment unless a possibility of the transfer of such receivables to a third party was excluded<sup>8</sup> in the agreement between the debtor and the creditor. Hence, the transfer of data should be simply allowed on the basis of Article 23, paragraph 1, point 3 as essential for the creditor to exercise his/her right coming from the Article 509 of the Civil Code previously cited. Taking into account the subject of this paper, special attention must be given to Article 3853§1 of the Civil Code, in the light of which, offering a consumer a resolution that allows "the consumer's contracting party to transfer rights and obligations arising from the agreement without a consent being given by the consumer" is prohibited when using templates (contractual patterns). This issue is significant to a large extent due to the continuous development of new technologies, which more often involve the use of such templates when addressing consumers, e.g. e-banking.

The GIODO, in his first decision about assessing the admissibility to make data available in accordance with assignment of receivables, recognized that, due to the wording of the cited Article 3853 of the Civil Code, such transfer of receivables is unacceptable unless an explicit consent was obtained from the consumer<sup>9</sup>. Furthermore, GIODO pointed out that such an assignment without consent from the consumer meets all general conditions of an unlawful covenant. As a matter of fact, this decision was upheld by the Provincial Administrative Court (PAC). However, as far as this subject matter is concerned, in literature an entirely opposite view is supported. It is stated there that the regulation of Article 3853 of the Civil Code points out that an unlawful covenant is the one that allows the consumer's contractor to transfer rights and obligations arising from the contract without a consent from the consumer, but does not apply to the cases where there is no such resolution made in the contract<sup>10</sup>. Even if a clause regarding the transfer of receivables is included in the contract with a consumer, it could not be judged as defective in the light of Article 3853, point 5 of the Civil Code. Additionally, it must be brought to attention that the civil law, in

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<sup>7</sup> It is difficult, however, to visualize that a disclosure of data could be justified by a task performance for the public interest described in Article 23, paragraph 1, point 4 of the uodo, when it comes to the assignment of receivables.

<sup>8</sup> A. Ohanowicz, *Zobowiązania. Część szczegółowa*, Warsaw 1965, p. 236.

<sup>9</sup> Decision of GIODO of 13<sup>th</sup> February 2004, mark: GI-DEC-DS36/04.

<sup>10</sup> M. Rogalski, 'Glosa do wyroku SN z dnia 6 czerwca 2005r. Cesja wierzytelności konsumenckich', Lex 2012.

principle, recognizes a debt takeover admissible under the condition that both the debtor and the creditor give their consent to it. The cited Article 3853, point 5 does not impede the takeover of a debt; it may lead to the situation that the debt takeover might be connected with a covenantal assignment of receivables<sup>11</sup>. Such a situation concerns the Article 3853, point 5 of the Civil Code. In case of consumer's contract, the consumer – as the creditor – would have to give his/her consent by virtue of Article 519 of the Civil Code. Differently, on the side of his/her debtor (the entrepreneur), if the contract concluded with the consumer foresees that he/she gives his/her consent in advance, the court would be obliged to judge it unlawful<sup>12</sup>. Thus, on the basis of the regulations in force, there is no reason to deem that the assignment of a consumer's receivables is unlawful. In that situation the obligation-based relation between the consumer and the seller of receivables is divided into two other relations, i.e. the consumer becomes the cessionary's debtor and, at the same time, holds the right to claim receivables from the assignor (until the – a creditor)<sup>13</sup>. It has been also highlighted throughout literature that from the substance of the misleading clauses listed in Article 3853, point 5 of the Civil Code, a conclusion can be drawn "that they cannot modify general rules governing civil law, e.g. the rule to transfer receivables"<sup>14</sup>.

The stance that, in accordance with the view expressed hereinbefore, Article 3853, point 5 of the Civil Code, does not coerce the creditor into obtaining the consent to transfer consumer's receivables, forces us to consider a principle that concedes the disclosure of debtor's personal data to the purchaser of receivables.

Since Article 3853, point 5 of the Civil Code does not impede the consumer's receivables assignment without the creditor's consent being granted, so the legal basis for such an assignment is the above-mentioned Article 519 of the Civil Code. In that case, Article 23, paragraph 1, point 2 of the uodo is the basis for data disclosure, i.e. if the data transfer is necessary to exercise the right arising from provisions of law. Indeed, it has been pointed out in the literature covering the subject that a regulation should explicitly give right to the disclosure of such data. In the already mentioned Article 519, there is no such allowance, but this is only restricted to public administration bodies<sup>15</sup>. Only they are forced to act strictly in accordance with specified bounds of law (Article 6 of the Code of Administrative Procedure).

<sup>11</sup> J. Mojak, *Komentarz do art. 519 k.c. [in:] Kodeks cywilny. Zobowiązania*, t. I. Komentarz, K. Pietrzykowski (edit.), Warsaw 2003, p. 1100.

<sup>12</sup> A. Młynarska-Sobaczewska, M. Sakowska, 'Przetwarzanie danych osobowych a przelew wierzytelności', *Państwo i Prawo* 2005, no 11, p. 37.

<sup>13</sup> *Ibidem*, p. 38.

<sup>14</sup> P. Sobolewski, 'Glosa do wyroku NSA z dnia 6 czerwca 2005 r.', *Lex* 2012, No. 53324.

<sup>15</sup> P. Litwiński, 'Przelew wierzytelności konsumenckiej a udostępnienie danych osobowych konsumenta', *Glosa* 2005, no 15, p. 19.

When it comes to other institutions, it is sufficient if data disclosure was obligatory to exercise the right arising from the provisions of law. J. Barta, R. Markiewicz and P. Fajgielski share the same opinion in one of their publications. The authors notice that, when using the described premise, it must be always assessed if the processing of data is essential to exercise the right or meet the obligation arising from the provisions of law. In other words, it must be established if it is possible to exercise the right or meet the obligation without the processing of data. If it is possible to give a positive answer to the question about the indispensability of the data processing, then the processing, in accordance with the regulation commented on, must be declared admissible<sup>16</sup>.

Article 23, paragraph 1, point 5 of the uodo, which allows the processing of personal data where it is substantiated by the data controller's justified interest, is an alternative legal basis to the aforementioned regulation. The Supreme Administrative Court (SAC) decided that "establishing if the data controller acts in a legitimate manner cannot determine that this data shall be disclosed to other party without a consent from the person involved in such an action. It is, therefore, vital to assess if this is necessary for the safeguarding the interests, and, first of all, balance the interest of the data controller and the person who concerned by doing so, simultaneously bearing in mind the purpose of the Act on the Protection of Personal Data, which is the protection of privacy"<sup>17</sup>. Thus, the mentioned principle can be applied only in the case where the transfer of data becomes indispensable for accomplishing the goal. Since, in the case discussed, there is always a conflict of interests between the data subject and the processor, whereas interests of both parties must be assessed. In the situation when a consumer evades paying and from the entrepreneur's perspective it is the only and the best option for him/her to sell receivables, so that the purchaser claimed the receivables as a result, then the entrepreneur cannot be deprived of the right to sell such receivables<sup>18</sup>. As it is aptly indicated in appropriate literature, the cited premise cannot, in contrast to Article 23, paragraph 1, point 2 of the uodo, constitute the sole premise of disclosing data for the sake of the assignment of receivables. Therefore, if a particular provision of law did not allow such a possibility, then the debtor would be entitled to exercise the right to object to the processing of his/her personal data on the basis of the interest legitimate clause and that would make the act of transfer ineffective<sup>19</sup>. However, it seems that this problem is unnoticed by courts that acknowledge that the fundamental premise for the processing of debtors' data for the

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<sup>16</sup> J. Barta, P. Fajgielski, R. Markiewicz, 'Ochrona danych osobowych. Komentarz', *Lex* 2011, No. 106659.

<sup>17</sup> Judgement of SAC of 6<sup>th</sup> June 2005, I OPS 2/05, ONSA i WSA 2006, No. 2, item 38.

<sup>18</sup> M. Rogalski, *op.cit.*

<sup>19</sup> X. Konatrski, G. Sibiga, 'Nierozzerwalny związek', *Rzeczpospolita* 3206/2004, and also P. Litwiński, *op.cit.*



assignment of receivables is the data controller's legitimate interest. In the judgement of 30th November 2004<sup>20</sup> PAC concurred with the opinion that the premise of a legitimate interest (Article 23, paragraph 1, point 5 of the uodo) may justify the processing of debtors' personal data – they being consumers for the purposes of the assignment of receivables. However, the SAC's judgement of 6th June 2005 cited previously must be regarded as the conclusive opinion in this debate. In its judgement SAC explicitly indicated that the assignment of consumer's receivables as well as disclosing debtor's personal data to their purchaser can be done without debtor's consent, but the grounds for such action may only be the data controller's legitimate interest. One must also keep in mind that in all presented adjudications administrative courts reversed decisions made by GIODO that had been appealed against, and did not concur with its statements that excluded consumer's assignment of receivables without the consumer's explicit consent.

To sum the above dissertation up, it must be indicated that, on the basis of both the doctrine and opinions of the judiciary, the assignment of consumer's receivables and the disclosure of the consumer's personal data connected with the former have to be recognized as admissible without the consumer's consent. The only problematic issue is the legal basis that allows the disclosure of the debtor's personal data. Following the ruling of courts in this matter, GIODO consistently refuses to consider the complaining consumers' applications, who contest the legality of disclosing their data for the purposes of receivables assignment, and also claim that this is admissible on the basis of the data controller's legitimate interest<sup>21</sup>. After some deliberations, however, it fails to acknowledge the problem of admissibility that was appeal against, as indicated hereinbefore. Without any doubt one must agree with A. Młynarska-Sobczewska and M. Sakowska that "the legislator himself did not sufficiently specify the criteria that allow to distinguish between the two premises of the admissibility to process personal data that undergo scrutiny, and that provokes a possibility to misinterpret it, and, in consequence, creates differences in practice"<sup>22</sup>.

To conclude, it is worth stressing that the inseparable connection of the presented deliberations and the term of a consumer as such arose only due to the introduction of the described Article 3853, point 5 into the Civil Code. If such a regulation did not exist, there would be no need to refer to the term of a consumer, because it is personal data of every data subject, and not the consumer, that is protected under the uodo regulations.

<sup>20</sup> Judgement of PAC of 30<sup>th</sup> November 2004, II SA/WA 1057/04, *LEX* 2012, No. 236506.

<sup>21</sup> See. Decision of GIODO of 15<sup>th</sup> December 2011, DOLIS/DEC-1056/11 DOT.

<sup>22</sup> A. Młynarska-Sobaczewska, M. Sakowska, 'Glosa do wyroku NSA z dnia 6 czerwca 2005 r.', *Lex* 2012, No. 54134.