Károli Gáspár University of the Reformed Church in Hungary

Faculty of Doctoral Law School

DOCTORAL DISSERTATION

THESES

Analysis of the level of protection provided by the General Data Protection Regulation of the European Union

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1. Outline the context, the proposed research

The processing of personal data is increasingly affecting the lives of individuals. This has become apparent in many legal relationships in recent decades, as real-life phenomena are increasingly being displayed digitally and real conditions can be influenced through the Internet that we previously only had an impact on in the offline world. However, it can also be observed that the Internet medium is no longer just a reflection and supplement of real life, but events taking place in the online medium are playing an increasingly important role in people's lives. The events of the online world are important social events in themselves. In the light of all this, it is necessary to assess the legal thinking about the means it has to maintain and strengthen protection with regard to the data that create all these possibilities and the processing of which can affect lives, life situations, human relationships. Risks and bad faith must be constantly reckoned with, and protection is ultimately formulated against them.

What was my research focused on? The EU legislator aims for a high level of protection, but does not provide the means to divide the protection it provides into levels. Prior to the research, I assumed that it is possible to determine this level of protection even without specific legal rules.

2. Description of the performed research, examination, analysis, recording of the method, inventory of sources

<u>Description of the performed research</u>

The subject of the research is the Regulation itself, and its legal relations with the European Union and, in some cases, with Hungary. In this sense, the subject of the research is not only the Regulation, but necessarily all the legal norms that must be taken into account in the interpretation of the Regulation.

In the course of the research, we sought to answer the question of whether the level of protection of personal data can be determined by legal means or whether certain levels of protection can be defined. If this question is answered in the affirmative, what are the criteria for making a qualitative difference between the various levels? What is the basis for comparison between

each level? In the light of all this, what opportunities are there to change the level of protection, what legal instruments can be used to improve the quality of protection?

The aim of the dissertation is to have an analysis of the level of protection that occurs in both mass and difficult cases. The analysis carried out in the dissertation is intended not only to serve scientific considerations, but also to facilitate the understanding and interpretation of individual cases, in this sense it was born with regard to practice. The author has a practical attitude, but it must also be recognized in the course of daily official work that in-depth discussion of theoretical issues always contributes to the effectiveness of practical work.

Methods used

In the course of the research, I followed the critical, source analysis method in the field of processing the relevant domestic and foreign sources. I also used the comparative and historical methods to develop and establish the theory of the protection stair.

In determining the desired level of protection, I make suggestions for the development of law, and apply the *de lege ferenda* approach. In determining the current level of protection, I used the descriptive method and, closely related to it, the critical-analytical method.

Given that the dissertation focused significantly on legal interpretation issues, it is necessary to mention the applied interpretation methods. Among them, I used the method of grammatical interpretation, the normative (teleological) interpretation. In some legal interpretation issues, I have also used the tools of European compliant legal interpretation. Given the extensive nature of the processed legal material, the taxonomic approach can be found practically everywhere in the dissertation. I also used the inductive method during the processing of legal cases. During the determination of the different levels and the definition of the individual stages of the protection stair, I also used the comparative method.

Sources

In the course of the research, I researched both domestic and foreign literature. I used the resources of a number of institutions, including documents from foreign data protection supervisory authorities, documents from the Article 29 Working Party, the European Data Protection Board, the European Data Protection Supervisor, and the United Nations. Where relevant, I also researched domestic institutional documents, such as those of the Hungarian Competition Authority and the Hungarian data protection authority. The communications and opinions of the European Commission played a prominent role in the research, as did the court

judgments. In addition to Hungarian judgments, I have processed several judgments of the European Court of Human Rights and the Court of Justice of the European Union.

In addition to all this, of course, the analysis of the relevant Hungarian and foreign EU legislation and international conventions was also the subject of the research. Special mention should be made of the recitals introducing EU law, which have served as an important reference point for the legal approach.

Considering that with regard to the right to privacy, not only the literature, but also the statements of some industry actors should be mentioned in a data protection related dissertation, I also used resources available on the Internet and in the press.

3. Thesis-like summary of new scientific results

Analysis of the level of protection afforded by the General Data Protection Regulation of the European Union in the light of the case law of the European Court of Human Rights

In this dissertation, I have examined the case law of the European Court of Human Rights through a number of decisions. This is relevant to our subject because, according to the EU Charter of Fundamental Rights, the content and scope of the rights guaranteed in the Charter must be considered the same as those enshrined in the Convention. In this sense, Strasbourg case law can be interpreted as a minimum protection. The elements of this have been taken into account and the aspects of protection determined by the Strasbourg judiciary have been analyzed on the basis of case law showing a sporadic picture. This can be considered an important result in the analytical work.

The theory of the protection stair

Erosion or evolution of the level of data protection does not necessarily result from large and spectacular measures. It is precisely this legal analysis that aims to identify the points where protection indicators can be found. Some components of protection are more static, such as data protection regulations until the next amendment, or the existence of authorities or the institution of data protection officers. The creation of these is necessarily part of the structure of protection, they say a lot about the quality of protection in themselves. Protection does not consist of assembling static elements following an ideal structure, but rather of creating a system that can

dynamically adapt to privacy risks. The protection stair already offers a much more complex analysis in this approach: it provides a basis for finding components that may not be significant in some details of the larger image, but their modification or obsolescence still affects the level of protection.

The idea of the stair offers the possibility that the road leads up and down it. New legislation does not necessarily mean progress on the stair in all cases, but it is easy to see it as a step back in some of its elements.

In my view, it is not necessary to identify many levels on the protection stair. In stair theory, of course, we envision an upwardly infinite, linear staircase that represents an inexhaustible opportunity for protection improvement and adaptation in the future. Exactly, neither the downward nor the upward degrees can be determined in large numbers. There is no need for this either, but it is essential to define three levels for the analysis. One is the degree to which the level of protection can currently be grasped. The other is the one from which the protection has moved up or just down to the current level. The third level is the desired stage of protection. It does not matter how much the difference between the levels is, even a small quality improvement can be identified as a new level. It is necessary to be able to clearly distinguish between the two. In addition, it is secondary that progress between levels of protection is the result of an organic development or, for example, the establishment of a completely new institution.

What is the difference in quality between two grades? There are a number of factors that can be considered in this regard. An indicator of quality improvement can be the expansion of the data subject's rights or the improvement of the possibility of enforcement even with the unchanged catalogue of rights. When the range of information available to the data subject expands or the regulation sets clearer requirements in this regard, it also results in a quality improvement.

Progress is characterized by the fact that the responsibilities of data controllers in relation to data management are evolving in the light of the technology used and business models. The emergence of dedicated data protection expertise and the strengthening of control mechanisms within the data management organization are also qualitative changes.

The room for manoeuvre, tasks and powers of data protection authorities are also a qualitative feature of the protection stair. Qualitative progress can also be seen in the effectiveness of the

law. As discussed, the legal measure of the effectiveness of data protection law is that the protection of privacy is strengthened and developed. If this happens, progress will be made on the protection stair.

An important measure of quality development is whether the given change is able to contribute to the formation and development of a data protection culture. A privacy culture is seen as a "medium" in which privacy standards naturally lead to higher privacy compared to a medium that displays a lower privacy culture.

Utilization of protection stair theory

Perhaps the most important result of the dissertation is that it allows the level of protection behind GDPR to be determined using a theory that offers comparison. We can hope that there will be more reflection in the literature on this and thus launch a debate on the measurability of protection levels.

De lege ferenda suggestions

In the dissertation, I also looked for the answer to how the protection created by the Decree can be made more effective in the future, given the conditions we currently know. This, of course, also states that the Regulation does not provide the highest level of protection available. A system of norms and institutions that can be used to protect privacy more effectively can also be established. This is the practical significance of the theory of the protection stair, so that answers to these questions can be formulated with its help.

The level of data protection does not only depend on the regulation, but also on a series of decisions concerning data processing within the data controller's organization, or even on official and court decisions. This is why it is particularly important to outline for the future a situation where protection is stronger than what is currently being experienced. In any case, this is the third degree to which it is worth moving on, where the law serves the legislative purpose more effectively, the protection of privacy within our subject.

Conclusions and recommendations on the role of data protection officers

As far as the institution of data protection officers is concerned, I suggest that it needs to be further strengthened, professionalized and placed in a much more cohesive order within the data management organization.

The range of data controllers subject to the appointment obligation can be extended through a quasi-implementing regulation to be installed in the European Data Protection Board. The strengthening of protection can be expected if its personal, institutional and procedural conditions are in place.

As far as the conditions of employment are concerned, I do not consider the official's qualifications to be subject to prior examination, but prescribing an EU-accredited examination could be an important guarantee. In addition to the exam, I also consider some kind of chamber membership to be mandatory. Personal availability can be strengthened through the required exam and chamber membership. I consider this necessary in order to ensure that the responsibility for the work of officials does not become spattered.

I consider the regime for the employment protection of data protection officers in the European Union to be to be followed, namely that an official can only be dismissed prematurely if it is also approved by the data protection supervisory authority.

I suggest that if a data management organization employing an official wishes to introduce a new data processing and the official objects, this should be notified to the data protection authority. This would mean a depth of scrutiny that data protection authorities would not be able to do under the current model.

A new role for officials is needed to offset the described protection deficit. The lack of transparency on the part of data controllers needs to be remedied, and the obligation to report conflicts would be an effective tool for this.

This new regime would result in a significant change in the cooperation between the controller and the official. The official is designed to offset the protection deficit, and accordingly his position will need to be vigorously reformed in the near future. A possible model for this is outlined in the dissertation.

Conclusions on the performance of the tasks of the supervisory authorities

In connection with the efficient performance of tasks, I recommend a strategy to prevent complaints. If the authority does not follow a strategy following complaints, but a strategy that precedes complaints, there will be a much greater emphasis on the latter tasks.

With focused data management and a focus on legal situations involving many conflict situations, it would be advisable for authorities to launch programs aimed at putting compliance tools in the hands of the controller. In this way, the data controllers and the associations and

interest representation bodies of data controllers could shape their data management, regulations and internal procedures in partnership with the authority. Arguments that go beyond privacy considerations can be made in favor of this model, as it is much more economical to maintain such a system at the societal level. This would be a more efficient model than at present, with measurable benefits at the protection stair.

On the side of data subjects, this model promises that data controllers are more likely to act not only in a law-abiding but also in an informed manner on legal issues. A more professional data processing procedure and the enforcement of data subjects' rights are inseparable. On the data controller's side, legal certainty is strengthened and the model would be easier for the authorities by reducing the number of complaints in a predictable way. Simply because, in typical conflict situations, data controllers could provide reassuring answers to both their employees and other stakeholders.

The positive effect of the new model can also be measured in the reduction of costs, as well as in the reduction of the number of infringements regarding privacy. This proposal represents a demonstrable advantage at the level of protection through more effective enforcement.

Conclusions and recommendations on the competences of data protection supervisory authorities

Based on the protection stair, I conclude in the dissertation that the fact that the powers of data protection authorities are broadened brings an extra room for manoeuvre, which I evaluate as a qualitative step forward from the point of view of protection. Compared to the provisions of the Directive, the qualitative improvement can be seen in the fact that the Regulation provides the authorities with the possibility to intervene in practically all life situations that may affect the protection of privacy through the new powers.

In the light of the protection stair theory, I consider it a qualitative improvement that the possibility of enforcement improves through the expanding powers of the authorities. It is also a qualitative step forward in terms of competences that the expansion of the room for manoeuvre of the authorities results in a clearer regulatory environment, thus making it clear on the side of the data controllers in which cases official intervention can take place. The new rules of competence of the Regulation should be assessed as a qualitative step forward on the protection stair, a comparison with the Directive and a comparison with the quality characteristics required by the protection stair.

In my view, regular review and maintenance of competencies will necessarily at least maintain the current level of protection, or preserve it in a way that does not result in another level change.

The existing differences between Member States' administrative procedural rules raise a number of issues. I consider it a shortcoming of the Regulation that, in addition to the substantive rules, there are very few harmonized procedural requirements. It entrusts the effective enforcement of the Regulation to the legislation of the Member States when it does not incorporate minimum procedural rules into the system of enforcement rules.

On the protection stair, progress will be made if the exercise of powers is also carried out in accordance with a common set of rules defined by the Member States. The Regulation should be supplemented by an administrative code or at least a minimum system of procedural guarantees. Without this, we have to reckon with an efficiency deficit that makes the degree of protection achieved extremely fragile, threatened by a constant slippage. It must also be borne in mind that EU legislation is significantly slower than national legislation, so that upward 'gravity' at the protection stair cannot compensate for this shortcoming in such a way that it does not lead to a real loss of protection.

In this context, I have proposed that the authorities decide on cross-border cases in a closer, common mechanism, closer to a one-stop shop. An imaginary EU data protection authority could act in all cases involving cross-border data processing. Decision-making could be prepared by a legal service attached to the Board, in a traceable and transparent manner, of course, for all Member State authorities that wish to express their views at this stage. The decision-making could take place before the Board, in accordance with the rules otherwise governing dispute resolution. This proposal could also fill some of the shortcomings in the procedural rules.

Conclusions and recommendations on data protection fines

In order to ensure a high level of protection for individuals, it has unified the rules and powers of the Member States' authorities, including in the area of fines. This innovation of the Regulation is seen as a step forward in the light of the protection stair, as the obligations evolve in the light of the technology used and the business models. Through fines, public authorities can assess new business solutions and their impact on the privacy. The financial sanction also has a positive effect on several quality indicators of the protection stair. The chances of enforcement are improving, and financial risk is a clear incentive to comply with the law. The

high amount of fines also introduced by the Regulation can be seen as an efficiency-enhancing incentive.

Based on the protection stair, I also formulate *de lege ferenda* proposals, so in my opinion it would be a step forward if the fine that could be imposed could extend not only to a theoretical ceiling, but to the extent of the damage. It is not acceptable for an unlawful processing of data to enrich the data controller. The possibility of this is not ruled out by the current regulations. In addition, the measures taken to mitigate the damage must be given due weight.

It is also recommended that not only the persons actually involved be taken into account when setting the fine, but also all those targeted by the offense. Part of this is the proposal to reverse the rules on transparency vis-à-vis the authority. It is not an attenuating circumstance to inform an authority of a practice that appears to be infringing, but an aggravating circumstance to fail to do so. The Data Protection Officer also has a role to play in this, as it is also discussed in the dissertation.

In the light of the protection stair, it is proposed that the legislator expand the range of persons subject to fines, so that failure to comply with its obligations relating to transparency in the new role of the Data Protection Officer should be punishable by a fine. In the field of fining public authorities, I suggested that the head of the body should also be sanctioned in cases where the organization could be expected to be liable for the damage suffered. In this case, too, the aim is to strengthen personal responsibility, as a counterbalance to the fact that responsibility is often blurred in connection with infringements.

In the field of fines, in order to avoid the phenomenon of forum shopping, I also consider it essential that Member State authorities impose similar fines in similar cases. Without this condition, equality of protection between Member States will not be achieved and protection will erode, which will inevitably lead to the fragmentation of the system established by the Regulation.

In the field of data protection fines, therefore, the three levels I propose to identify are emerging, namely the fragmentation and lower level of protection inherent in the Directive, the protection provided by the Regulation, which offers higher protection through its uniform and strict rules. and finally, the next higher level of protection, taking into account the amendments I propose. The conclusion of the dissertation is that a higher level of protection is in tangible proximity to us in vain, when through forum shopping the possibility of slipping back towards fragmentation and a lower level of protection is also conceivable.

Closing remarks

The stronger and more complex the challenges we face, the more important it is to know the strengths and weaknesses of our own system so that we can preserve our common achievements and not only maintain but also increase the level of protection in the future. The theory of the protection stair provides a basis for the critical analysis of this level and its facilitation of its practical application.

4. Full list of publication of the candidate

A szerző témához fűződő publikációi– időrendi sorrendben	
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7.	Szabó, Endre Győző; Révész, Balázs Adatvédelmi jogi ismeretek In: Christián, László (szerk.) Az információs társadalom jogi vetületei: Alkalmazott jogi informatika Budapest, Magyarország: Pázmány Press, (2014) pp. 141-180., 40 p. Közlemény:3401183 Jóváhagyott Forrás Könyvrészlet (Könyvfejezet)

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