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Powers of the Personal Data Protection Authority in Europe and Kazakhstan: comparative analysis, recommendations for improving the activities of the Kazakhstani Personal Data Protection Authority

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Abstract: The progressive development of digital technologies has penetrated all spheres of human activity, society, business, and the state. The constant development of digital technologies entails risks and threats to human rights and freedoms, honour and dignity, and well-being. States, as guarantors and defenders of human rights and the right to the protection of personal data, are improving legislation and the activities of executive bodies. European legislation emphasises the vital role of personal data protection authorities (DPA). At the legislative level, the General Data Protection Regulation (GDPR) obliges DPAs to raise public awareness and provide advice and guidance on personal data law and its uniform application.

This article examines the powers of European and Kazakhstani DPAs. We will look at European legislation on the functions of DPA. Next, we will demonstrate the Estonian experience and look at the activities of the Kazakhstani DPA. We conclude that it is necessary to allocate DPA in Kazakhstan to an independent, separately existing executive body specialising exclusively in protecting personal data with highly qualified personnel and empower it with additional functions. Strengthening the role of the Kazakhstan DPA will contribute to more effective and improved protection of the right to personal data protection.

Keywords: data protection authority, supervisory authority, personal data protection, GDPR, DPA, functions of authorised body.

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Introduction

In Kazakhstan, as throughout the world, personal data protection is becoming increasingly important. In implementing the constitutional right to the protection of personal data, a vital role lies within the state and its positive obligations to ensure and implement the right to respect private life and personal data protection. In particular, the state's legislative, executive and judicial bodies play a crucial role in this issue.

The International Covenant on Civil and Political Rights, a part of the UN Universal Declaration of Human Rights 1948, is a testament to the long-standing international obligations. Article 17 establishes the human right not to be subjected to arbitrary or unlawful interference in personal and family life, to the inviolability of home and secrecy of correspondence [1]. The implementation of these obligations in national legislation is not just a matter of choice, but a paramount role in protecting rights and freedoms; 'this is the alpha and omega of human rights' [2]. Despite ratifying the International Covenant in 2005, it has taken almost 20 years for Kazakhstan to implement in national legislation the obligation to ensure the fundamental right to respect private life, including the protection of personal data [3].

Kazakhstan adopted a particular Law, "On Personal Data and Their Protection," on May 25, 2013, and amended it many times [4]. Only in 2020, similar to many countries, did an authorised body for personal data protection appear in Kazakhstan. More precisely, the state has determined which government body will be authorised to protect personal data [5]. The Ministry of Digital Development and Aerospace Industry (the Digital Ministry), which existed at that time, was vested with the functions of an authorised body for the protection of personal data by the Law of the Republic of Kazakhstan dated June 25, 2020, "On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the regulation of digital technologies" [6].

The rapid advancement of information and communication technologies has brought to the forefront the issue of protecting personal data, increasing the legal literacy of individuals, and preventing violations. In this context, the importance of an independent supervisory authority for protecting personal data, with its powers enshrined in legislation, is growing. However, we must ask ourselves, does the Kazakh authorised body for personal data protection, as it currently exists within a multi-sectoral ministry, align with modern pro-European trends in global regulation of personal data protection? Are its powers effective enough to safeguard data subjects effectively?

The authors of this article have already considered the problems of legislative regulation of the protection of personal data, which mainly come down to unclear, incomplete and inconsistent legislation, unclear interpretation of regulations and their ineffective implementation. However, the problems of personal data protection still need to be studied in Kazakh legal science. Moreover, in Kazakhstan, there are practically no studies on the problems of body functioning for the protection of personal data. This article aims to consider the activities and functions of the particular executive body of Kazakhstan, the authorised body for the protection of personal data of the Republic of Kazakhstan, which is the Digital Ministry. The authors will consider the supervisory authority's importance and role in protecting personal data in Europe and compare the competencies of European authorities and the Kazakhstani Digital Ministry.

Materials and methods

General scientific, general and specific research methods were used to prepare the study. The norms of the Kazakh law on protecting personal data and the European legislation on protecting personal data were studied, compared and analyzed. A functional analysis of the powers of the Kazakh and European authorities to protect personal data was carried out. A regulatory comparison shows differences in the Kazakh and European approaches to the designation and content of the functions of the authorised body for the protection of personal data. The discovered differences in the powers of a special government body indicate insufficient and weak protection of personal data subjects in Kazakhstan, a lack of approaches to increase awareness and legal literacy, and a lack of mechanisms to prevent and counter the arbitrariness of controllers, data operators and third parties. The weak role of the data protection authority creates the preconditions for the use of personal information by unscrupulous persons to the detriment of the individual, his interests and property.

Discussion

The rights protection system includes normative and organizational elements to eliminate or reduce human rights violations [7]. The state function of protecting human rights and freedoms, or the law enforcement function, is implemented 'in the targeted, organizing and regulatory influence of the state' [8]. Theorists are unanimous that the practical activities of the state have an organizing essence and are filled with organizational content expressed in the organization of the state apparatus and its activities.

The government system is structured around three branches, namely the legislative, executive, and judicial. While the legislative body's role in crafting quality laws is paramount, the executive branch's significance in the government system is equally profound. The executive system's actions in implementing and enforcing the law, and its adherence to it, significantly influence the occurrence of rights and interests' violations and the resulting harm. The law enforcement function of executive state bodies is confined to the sectoral sphere of regulation [8]. However, their activities, including the implementation of regulations, prevention of violations, and mitigation of negative consequences for human rights, are a vital state function and task in all domains.

The executive body's functioning is based on the law, which specifies the subject, scope of activity, and range of the state body's powers, rights, and responsibilities. Let us consider the provisions of European and Kazakh legislation on the functions of the authorised government body in personal data protection.

Provisions of European legislation

The legislative regulation of personal data protection in Europe is not a mere suggestion but a mandate. It requires the presence of an authorised body that plays a pivotal role in promoting the application and execution of the law, as well as the implementation and observance of human rights. Since 1981, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) has made this clear by requiring each signatory

state to have such a body in the field of personal data protection [9]. Convention 108 (Article 13) further defined the responsibilities of this body, which include raising public awareness of the rights of data subjects, the responsibilities of data controllers and processors, and advising on legislative and administrative measures for data processing. Article 15 of the Modernised Convention 108+ reiterates the importance of this body by requiring it to ensure compliance with the provisions of the Convention [10].

Convention 108, as a binding international instrument, formed the basis of the European Directive 95/46, which was replaced by the European Regulation 2016 [11, 12]. Directive 95/46 of 1995 and the GDPR that replaced it require each EU member state to have an independent supervisory authority to protect personal data. The presence of such a body was a prerequisite for ensuring adequate protection of personal data in other countries, which is 'essentially equivalent to that guaranteed by the EU legal order' [13]. The absence of a supervisory authority to protect personal data in a third country could hinder international trade with European countries.

The GDPR provides an entire Chapter VI of 9 articles devoted to the issues of creation, security and competence of the supervisory authority [12].

Articles 53 and 54 of the Regulation lay down the guidelines for establishing a supervisory authority, including the general requirements for the procedures for appointing its members. These requirements encompass their qualifications, experience, and skills in the field of personal data protection.

The GDPR provides oversight tasks for authorities, such as monitoring and enforcing compliance with the Regulation, raising public awareness on data protection issues and communications, addressing the data subjects' complaints, and reviewing questions regarding the application of the Regulation. The wide range of the powers to protect personal data 'provides the necessary means to fulfil its duties' [13]. The Regulation classifies the competence of the supervisory authority "into three main groups: investigation powers (e.g. to request and access information on-premises, carry out data protection checks, notify suspected breaches); corrective powers (including issuing warnings and reprimands, ordering adjustments to the data subject's request, imposing restrictions, imposing a ban on negotiations or imposing an administrative fine); as well as authorisation and advisory powers (for example, to issue opinions, issue certificates or take certain decisions)' [14].

Investigative and corrective powers are inherent in most government bodies. However, against their background, the advisory powers of the DPA stand out, which are aimed at the correct interpretation and implementation of legislation on protecting personal data and preventing violations. In particular, in European countries, the DPA issues guidelines and clarifications for operators and controllers on the uniform and consistent interpretation and application of regulations protecting personal data. Western scholars note that DPAs are 'at the forefront of monitoring compliance and enforcement of legislation; their guidance and explanations [of legislation] are most relevant for companies seeking to ensure compliance with legal requirements' [15]. As part of their advisory function, the authorised bodies for the protection of personal data raise public awareness about the protection of personal data. Some European DPAs conduct training, including special training for specific audiences or areas, such

as researchers [16]. DPAs are also authorised to approve and agree on the rules of conduct of associations and the rules for the cross-border transfer of personal data of controllers and data operators. Indonesian authors consider the role of the DPA in raising awareness and consultation to be “critical” and characterise the DPA as ‘an auditor, a consultant, a teacher, a political adviser and a negotiator’ [17]. In addition, European legislation pays special attention to the communicative (linking) function of the authorised data protection authority - the legislation directly provides for the powers and actions of the national data protection authority for interaction with other national data protection authorities, with the European Personal Data Protection Board, with data protection officers protection of personal data of organisations (contact persons in organisations for the supervisory authority and data subjects).

Estonian experience

The provisions of the Regulation are implemented in the national legislation of EU member states. For example, in Estonia, there is a Personal Data Protection Act, which provides essential concepts, basic principles, rights and obligations of data subjects, controllers, operators and government bodies, powers of the state data protection authority, measures to respond to violations in the field of personal data protection [18]. The Estonian state portal, <https://www.eesti.ee>, provides information for individuals on the protection of personal data, which also refers to the website of the authorised body for the protection of personal data (<https://www.eesti.ee/en/security-and-defense/safety-and-security/protection-of-personal-data-and-privacy>). The Estonian authorised body for personal data protection, the Data Protection Inspectorate, has been established as a separate, independent body with clear and specific powers. The Inspectorate has a transparent internal structure of 5 departments - Technology Department, Cooperation Department, Legal Department, International Law Department, and Supervision Department (<https://www.aki.ee/en/contact>). It is noteworthy that according to the Inspectorate's website, of the 29 employees, 23 are lawyers. A European study shows that the Estonian supervisory authority is the most active in issuing clarifications and recommendations on issues of personal data protection [16]. The website of the Estonian Inspectorate contains clear and specific sections and subsections that allow data subjects, controllers and data processors to obtain detailed information about their rights and obligations and to exercise them. Data subjects are provided with simple and detailed instructions on how, where and in what cases they can seek help and clarification. Also, the page of the Estonian Data Protection Inspectorate contains application templates - a request for intervention, a request for clarification, a request for information and others (<https://www.aki.ee/ru/svyazhites-s-inspekciey>). It is important to note that the obligation to appoint a data protection officer in Estonia has a more significant enforcement effect because the obligation to appoint such an officer rests with data controllers and processors and is carried out through the electronic portal the e-Business Register (<https://www.rik.ee/en/e-business-register>).

Current situation in Kazakhstan

Unlike European independent bodies for personal data protection, the Kazakh Ministry of Digital Development, Innovation and Aerospace Industry (Digital Ministry) is multi-sectoral; from the ministry's name, it provides ‘leadership’ in several industries. The Law of the Republic of Kazakhstan “On Personal Data and Their Protection” establishes the competence of the Digital

Ministry, which mainly includes regulatory, investigative and corrective powers. Regulatory powers include establishing rules for collecting and processing personal data, the procedure for implementing measures to protect personal data, rules for integration with the state service for controlling access to personal data and other by-laws. However, in most cases, by-laws duplicate the provisions of laws, copy them, and poorly disclose their interpretation, content, and application. Corrective and investigative powers include

- requesting information,
- notification of violations and potential threats to the security of personal data,
- conducting inspections and state control over compliance with legislation on the protection of personal data,
- issuing an inspection report with identified violations with a requirement to eliminate them,
- bringing to administrative responsibility for identified violations.

Digital Ministry has a division that deals with the protection of personal data, the Information Security Committee (ISB). According to the ISB Regulations, the constituent document of the committee, the ISB carries out 'regulatory, implementation and control functions in the field of personal data and their protection' [19]. The ISB Regulations list five tasks, 24 rights and obligations, and 79 functions, of which only 13 relate to protecting personal data. The six functions are to develop and adopt regulations that the Digital Ministry has already implemented. Among the powers of the ISB, there are no advisory functions for the authorised body in personal data protection. ISB Regulations contain the function of considering requests from the subject of personal data regarding compliance with the content of personal data and methods of processing with the purposes of their processing and making an appropriate decision. However, an analysis of the available responses to appeals indicates the incomplete, non-specific content of the responses and the predominant citation of legal provisions without a comprehensive and detailed explanation of how the legal provisions should be interpreted and applied. Meaningless quoting of laws, expressed in copy/paste of articles of laws, indicates a weak implementation of the principles of a responsive and professional state [20]. The Concept for developing public administration in the Republic of Kazakhstan until 2030 sets the task for the government body to provide information promptly, but not its completeness and correctness [20]. The authorised body responds to requests and appeals promptly but does not understand the issues in question and does not respond professionally enough to requests and complaints of data subjects, controllers and data operators; otherwise, the ISB would provide a prompt and comprehensive answer. The problems that existed five years ago in qualified civil servants and professionals in their field remain. The Concept noted the insufficient professional competence and number of civil servants as one of the critical problems in the current public service system due to the low level of the personnel selection and assessment system, the lack of a high-quality system for advanced training, and the shortage of workers with the relevant speciality [20]. On the other hand, the European authors note the expertise of the DPA's explanations and consultations in personal data protection [16]. In comparison with the requirements of the European Regulation for qualifications, experience and skills in the field of personal data protection for employees of a European authorised body, Kazakhstan focuses on the servicing

approach of governmental service, the qualification of a civil servant as an employee of the state apparatus, qualified in the field of organisational, procedural and administrative activities of a state body, rather than meaningful experience and skills in the regulatory industry, not in knowledge of the regulated area itself.

Results

The EU Court noted that personal data protection authorities 'are primarily the guardians of fundamental human rights and freedoms and an essential component of the protection of personal data of individuals' [21]. Regulatory analysis showed that European countries have comprehensive and detailed regulation of personal data protection, and establish in law more specific and broader functions of authorised data protection authorities. Among the functions of the supervisory authority, an important place is occupied by the functions of raising awareness of society, data subjects, controllers and operators of personal data, adopting guidelines and opinions on the interpretation and implementation of legislation in the field of personal data protection.

The protective function of the state does not consist only in control, supervision and sanctions, which have recently received more attention from the Kazakh Parliament and Government within the framework of the law-making process. The state's activities to protect rights and freedoms also include preventing violations, conducting explanatory work with society, business, and public authorities. Information literacy of society is a product of the explanatory work of a government agency; it concerns, first of all, the work of the state not only with citizens, but also with operators and data controllers. The explanatory and advisory functions of the authorised body are not established in Kazakhstan legislation. The authorised body itself cannot perform functions that are not provided for by law. Accordingly, the broader protective function of the relevant body requires enshrinement in law.

The European legislation pays particular attention to the independence of the supervisory body for the protection of personal data, which must act objectively and impartially and remain free from any external influence, including direct or indirect influence of the state [21]. The Kazakhstani authority for protecting personal data, represented by the Digital Ministry, is a separate government body with some independence. However, the presence of an extensive range of regulated areas and functions hurts the autonomous and influential activities of the authority in the field of personal data protection. The authorised body should have greater autonomy, be an independent separate body, not part of the structure of a multi-sectoral ministry, and be free from unnecessary functions. Foreign scientists note that the multiple functions of a government body most often lead to 'additional work without the provision of adequate resources' [17]. The independence of the supervisor allows for a better focus 'on the interpretation and application of legislation, ensuring its good understanding and increasing awareness in the community' [17].

The need for more personnel with the necessary qualifications in the field of personal data protection also improves the effective functioning of the supervisory authority. Research by foreign authors has indicated that at least 50% of the DPA staff should have experience or

significant knowledge in the field of ICT [22]. The high-quality reliability of DPA personnel is crucial for the effective implementation of functions to protect personal data [22]. Following the European model, Kazakhstan should prioritise the substantive, expert qualifications of civil servants in the field of personal data protection.

Regrettably, the planned changes in legislation, particularly the draft Digital Code, need to address the issues with the authorised body for personal data protection [23]. It is unclear whether this body will be separate, independent, or remain within the structure of a multi-sectoral ministry. Furthermore, the draft Digital Code does not grant the authorised body new advisory functions similar to those in Europe, nor does it set requirements for the qualifications of its members. This suggests that the secondary status of the right to personal data protection in Kazakhstan and the vulnerable position of Kazakh data subjects may persist.

Conclusion

Ensuring the rights and freedoms of citizens is the primary function of a modern democratic developed state [24]. Individual rights are, first of all, the responsibilities of the state to ensure their implementation and protection [2]. The state guarantees the protection of personal data, which is carried out comprehensively at the legislative level and at the implementation and monitoring of compliance with legislation on protecting personal data. The state function of protecting the rights and freedoms of man and citizen is implemented exclusively by state bodies. However, implementing the state function of protecting personal data in Kazakhstan has several problems in the activities of the authorised body to protect personal data. Firstly, the functions and tasks of the state body for the protection of personal data are 'entangled' in many other tasks and functions of the diversified ministry, Digital Ministry. Legislation should provide for a separate ministry in personal data protection and give it advisory functions, following the example of European countries. Secondly, members of the authorised body do not have sufficient competence and qualifications, specifically in personal data protection and have to cope with many other tasks and functions of one diversified ministry.

The requirement for adequate protection of personal data for EU residents outside Europe and the presence of a special supervisory authority has influenced the desire of most countries to harmonise national regulation on the protection of personal data with the European Regulation. Kazakhstan is moving very slowly towards such harmonisation. Taking into account the multi-functionality and multi-sectoral nature of DPA in Kazakhstan, it is necessary to provide for a separate state body, specify in legislation its powers and functionality for effective law enforcement, create organisational and regulatory tools to clarify the legislation, ensure its uniform implementation by data controllers and operators, and exercise the rights of data subjects. The Concept of improving public administration in the Republic of Kazakhstan until 2030 provides as one of the tasks the formation of an optimal and effective state apparatus that is implemented through rethinking the role and functions of the state and the structure and size of the entire state apparatus [20]. It is evident that reforming the Digital Ministry and creating a separate and independent government body that will professionally, at an expert level, deal exclusively with issues related to personal data protection will meet the Concept's objectives. In general, following the example of the GDPR, to improve the protection of personal data and minimise harm to the rights and interests of data subjects, the new Kazakhstan Digital Code should establish comprehensive and complete rules about the advisory and information

functions of a separate authorised body for the protection of personal data, about qualification of its members.

The contribution of the authors

Akhmetova S. collected materials on the research topic, including international experience in regulating the activities of authorised bodies to protect personal data, analysed the problem, and summarised the study's results.

Tursynkulova D. defined the goals and objectives that formed the central part of the study.

Ibraev N. determined the research methodology and participated in preparing a literature review, introduction, and conclusion on the research topic.

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Еуропа мен Қазақстандағы дербес деректерді қорғау жөніндегі мемлекеттік органның өкілеттіктері: салыстырмалы талдау, дербес деректерді қорғау жөніндегі Қазақстандағы мемлекеттік органның қызметін жетілдіру жөніндегі ұсыныстар

Аңдатпа: Цифрлық технологиялардың прогрессивті дамуы адам, қоғам, бизнес және мемлекет қызметінің барлық салаларына еніп кетті. Цифрлық технологиялардың тұрақты дамуы адамның құқықтары мен бостандықтарына, ар-намысы мен қадір-қасиетіне, әл-ауқатына қауіп-қатерлер мен қатерлерді тудырады. Мемлекет адам құқықтары мен дербес деректерді қорғау құқығының кепілі және қорғаушысы ретінде атқарушы билік органдарының заңнамасы мен қызметін жетілдіреді. Еуропалық заңнама жеке деректерді қорғау органдарының (DPA) маңызды рөлін атап көрсетеді. Заңнамалық деңгейде Деректерді Қорғаудың Жалпы Ережесі (GDPR) DPA-ны жұртшылықтың хабар болуын арттыруға және жеке деректер туралы Заңға және оның біркелкі қолданылуына қатысты кеңестер мен ұсыныстар беруге міндеттейді. Бұл мақалада еуропалық және қазақстандық DPA өкілеттігі қарастырылады. Біз еуропалық заңнама функциялары туралы қадағалау органдарын қарастырамыз. Бұдан әрі біз эстондық тәжірибе мен қазақстандық DPA қызметін қарастырамыз. DPA Қазақстанда тәуелсіз, жеке қолданыстағы атқарушы билік органы бейімделген тек дербес деректерді қорғау, жоғары білікті мамандарының қосымша функцияларын қорытындылаймыз. Қазақстандық DPA рөлін нығайту дербес деректерді қорғау құқығын неғұрлым тиімді және жан-жақты қорғауға ықпал ететін болады.

Түйін сөздер: деректерді қорғау органы, дербес деректерді қорғау органы, қадағалау органы, дербес деректерді қорғау, GDPR, DPA, уәкілетті органның функциялары.

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Полномочия государственного органа по защите персональных данных в Европе и Казахстане: сравнительный анализ, рекомендации по совершенствованию деятельности казахстанского государственного органа по защите персональных данных

Аннотация: Прогрессивное развитие цифровых технологий проникло во все сферы деятельности человека, общества, бизнеса и государства. Постоянное развитие цифровых технологий влечет за собой риски и угрозы правам и свободам человека, чести и достоинству, благополучию. Государства как гаранты и защитники прав человека и права на защиту персональных данных совершенствуют законодательство и деятельность органов

исполнительной власти. Европейское законодательство подчеркивает жизненно важную роль органов по защите персональных данных (DPA). На законодательном уровне Общий регламент по защите данных (GDPR) обязывает DPA повышать осведомленность общественности и предоставлять консультации и рекомендации по закону о персональных данных и его единообразному применению.

В данной статье рассматриваются полномочия европейских и казахстанских DPA. Мы рассмотрим европейское законодательство о функциях надзорных органов. Далее мы продемонстрируем эстонский опыт и рассмотрим деятельность казахстанского DPA. Сделаем вывод, что необходимо выделить DPA в Казахстане в независимый, отдельно существующий орган исполнительной власти, специализирующийся исключительно на защите персональных данных, с высококвалифицированным персоналом и наделить его дополнительными функциями. Укрепление роли казахстанского DPA будет способствовать более эффективной и улучшенной защите права на защиту персональных данных.

Ключевые слова: орган по защите персональных данных, орган по защите данных, надзорный орган, защита персональных данных, GDPR, DPA, функции уполномоченного органа.

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