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Opinion 6/2006 on the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Adopted on

9 August 2006

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS
WITH REGARD TO THE PROCESSING OF PERSONAL DATA

Set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995,

having regard to Articles 29 and 30 (1)(a) and (3) of that Directive and 15(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002,

having regard to its Rules of Procedure, and in particular Articles 12 and 14 thereof,

has adopted the following Opinion:

I. Background

The Working Party has been made aware of the Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The ambition of the proposal is to eliminate obstacles which prevent the recovery of maintenance within the European Union.

In particular, Chapter VIII of the proposal ("Cooperation") includes a mechanism involving the collection of information about the situation of the creditor and the debtor and its exchange through a network of national central authorities. This raises a number of data protection issues which the Working Party would like to address in the present Opinion.

II. Legal framework for the processing of personal data

In the mechanism envisaged in the current proposal, three major phases can be identified involving collection and processing of personal data.

- Personal data processed by a number of data controllers for different purposes (e.g. by employers, tax or social security authorities or public registers) are accessed by central authorities for the purpose of facilitating the recovery of maintenance obligations.
- The personal data collected by the central authorities are gathered and communicated to the Court dealing with the maintenance claim
- The Court dealing with the maintenance claim processes the data for the purposes of securing implementation of decisions on maintenance obligations.

A number of data protection principles and rules set out in the Data Protection Directive 95/46/EC (henceforth "the Directive) are applicable to the operation involved therein.

As regards the first phase, the collection by central authorities of data processed for a different and not compatible purpose constitutes an exception to the purpose limitation principle set out in Article 6 of the Directive. Such exceptions may only be used if they comply with the requirements set in Article 13 of the Directive. According to that provision, *"Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in a number of Articles of the Directive, including 6 (1), when such a restriction constitutes a necessary measures to safeguard […] the protection of the data subject or of the right and freedom of others"*. The European Court of Justice has made clear, on the other hand, that the

communication of data originally collected for "economic" purposes to third parties "*constitutes an interference within the meaning of Article 8 ECHR*". Further, derogations from the principle of purpose limitation laid down in the Data Protection Directive need to respect Article 13 of that directive, and for that they need to be "*justified from the point of view of Article 8 of the Convention*" (Rechnungshof, C-465/00, §68 ff). According to the Convention, in order for an interference with the right to private life to be justified, it needs to be done "*in accordance with the law*" and be "*necessary in a democratic society*" for a public interest purpose. The Strasbourg jurisprudence has repeatedly reminded that the Law providing for the interference "*must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*[1] ".

As regards the second and third phase, the collection and processing of personal data by the national central authorities and by the courts (or other national authorities in charge of maintenance obligations) falls within the scope of the rules of the Directive pursuant to Article 3 thereof. In fact, personal data are processed in the framework of judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market, as the proposal itself indicates in its explanatory memorandum. This is an area for Community law, and accordingly, the exclusions of the scope of the data protection directive referred to in Article 3.2 thereof do not apply.

This being so, such data processing must comply with the principles and rules laid down in the Directive and in particular the following provisions:

- Article 6, setting out that personal data must be collected for specified, explicit and legitimate purpose and not further processed in a way incompatible with those purposes. Personal data must also be adequate, relevant and not excessive in relation to the pruposes for which they are collected and or further processed; they must be accurate and, where necessary, kept up to data; and kept in a form which permits identification of data subject for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.
- Article 7, requiring that an appropriate ground for making data processing legitimate exist. In particular, data processing may in this case be processed as it is necessary for compliance with a legal obligation to which the controller is subject, or necessary for the performance of a task carried out in the public interest, or in the exercise of official activity, as provided in letter c) thereof.
- Article 8, wherever sensitive data are involved, as may be the case, for example, if data on social benefits deriving from a certain state of health are exchanged. In those cases, the processing of such data may be legitimate in so far as it is necessary for the establishment, exercise or defence of legal claims (Article 8.2 (e)) or subject to the provision of suitable safeguards laid down in national law for reasons of substantial public interest (Article 8.4).
- Articles 10 and 11, imposing the obligation to inform data subjects about the processing of their personal data
- Article 12, granting the data subject the right to access their data and to rectification, erasure or blocking of data the processing of which does not complying with the provisions of the Directive.

[1] Rotaru v. Romania, §55 ff ; Amann v. Switzerland, §76 and §80; Khan v. UK, §26; Valenzuela Contreras v. Spain, §60 and §61; Kopp v. Switzerland, §72 and 75; Funke v. France, § 57; Niemietz v. Germany, § 37; Kruslin v. France, §34 and §35; Malone v. UK, §79 and §80.

- Article 15, granting the data subject the right not to be subject to automated individual decisions.
- Article 16 and 17, imposing the obligation of confidentiality of those involved in data processing, as well as the obligation to implement appropriate security measures.
- Articles 22, 23 and 24, providing for remedies, compensation of damages and sanctions for unlawful processing operations
- Article 25 and 26, whenever personal data are transferred to countries outside the European Economic Area.

III. Data protection safeguards already in place

The Working Party notes with satisfaction that the present proposal already contains a number of elements aimed at ensuring compliance of the data processing operations with the data protection principles and rules mentioned above. In particular, the following provisions can be mentioned.

- ***Different sorts of personal information are to be accessible at different stages of the maintenance obligation procedure.***

In line with Article 6 of the Directive, some of the personal data necessary to locate the debtor (such as his address) can be requested and disclosed at the beginning of the proceedings and at the request of someone who only claims to be entitled to maintenance. On the other hand, other data necessary to evaluate the debtor's capacity to pay maintenance and to effectively implement a debt (such as bank accounts, salary, etc) should only be requested and disclosed once the existence of the maintenance debt has been duly declared in a contradictory procedure.

- ***A judicial filter exists to trigger the mechanism for exchange of information***

According to the proposal, a creditor may file a request of information with the central authority through a court. The intervention of a court constitutes an appropriate control mechanism to make sure prima facie that the maintenance request is well founded and that the data are necessary.

- ***The creation of combined files is prohibited***

The current proposal imposes on Member States the obligation to organise the access to information on the debtor and the creditor, which will itself be contained in a number of separate registers. The creation of consolidated registers containing all the different categories of information originally contained in separate registers, with a view to facilitating the search for information, would entail very considerable risks for data subjects. Accordingly, the proposal explicitly forbids the creation of consolidated registers bringing together that information.

- ***Guarantees exist concerning the data disclosed***

The proposal provides that the information which is communicated may be used only to facilitate the recovery of maintenance claims, in line with the purpose limitation principle of the Directive. Given the extent of the information communicated and the risks involved in its processing, further safeguards are specified. In particular, the proposal includes the following elements:

– The information should only be communicated by the requested authority to the requesting authority. The requesting authority may then communicate the information only to the court

or authority dealing with the maintenance claim. The information may not be communicated to the creditor or to a third party.

– Once the requested or the requesting authority has communicated the information, they are obliged to erase it. The information may only be stored by the court dealing with the maintenance claim and only for as long as it is necessary to facilitate the recovery of a maintenance claim, with an absolute limit of one year. On this latter point, the Working Party has a specific comment below.

– The requested central authority has to provide the debtor with information about the processing, in line with Articles 10 and 11 of the Directive.

IV. Specific comments

The Working Party has identified other points where additional data protection safeguards should be built into the system of exchange of personal data, in order to ensure full compliance with the principles and rules of the directive. With this regard, the Working Party would like to make the following comments on different provisions of the proposal.

- The proposal should contain provision for appropriate technical and organisational measures to guarantee the security of the data, in line with the requirements of Article 17 of the Directive, as well as the appropriate duty of confidentiality. This is particularly relevant for transfers of personal data, such as those envisaged under Article 46

- Article 41 makes a general description of the tasks of central authorities when cooperating on specific cases. As far as the exchange of personal data, especially on the debtor, is involved, it would be necessary to avoid misunderstandings and to make clear that such collection and exchange should only take place under the data protection safeguards specified later on in the text. For that purpose, it would be necessary to replace in Article 41.1 a) i) the words "making use in particular of Articles 44 to 47" with the more precise expression "under the conditions laid down in Articles 44 to 47". As far as the exchange of data on the creditor is concerned, the proposal should specify the purpose justifying such exchange and the conditions applicable to it, as it happens now for information on the debtor.

- Article 44.1 refers in broad terms to the provision by central authorities of information with the general objective to facilitate the recovery of maintenance claims, and lists specific objectives in letters a) to d). This provision is too broad in its current form. The principle of purpose limitation and proportionality impose that a number of amendments be introduced; in particular:

  – a limitative list of data elements should be specified;

  – the purposes should actually be limited to 1) locate the debtor and 2) to identify and evaluate his assets. In fact, the identification of the debtor's employer or his bank accounts may only be relevant insofar as salary and bank account are themselves very significant elements of the debtor's assets. If those elements are specifically mentioned, they should be included under the heading "to evaluate the debtor's assets".

  – the provision should make clear that the different sorts of data disclosed for the purposes mentioned should only be collected and disclosed in so far as this information is necessary and relevant for the recovery of such claims, which may not be the case in all Member States and in all circumstances;

- the text should refer to the principle that the processing of sensitive data should be avoided

- Article 44.2 imposes that the collection of data includes at least the information contained in a number of records. Again, for the sake of purpose limitation and proportionality,
  - the minimal limit as regards the sources of information should be eliminated;
  - a clear link between the information requested and the purposes should be laid down; in particular, the provision should ensure that only information that is necessary and relevant for the intended purpose is collected.
  - Under letter b), information on the social security contributions of employers does not seem to be relevant for the purposes mentioned in Article 44.1. In fact, if this provision refers to the debtor as an employer, it should be noted that his legal obligations towards his employees should not be affected by maintenance claims against himself. If it refers to the contributions that the debtor's employer pays for the debtor as his employee, most probably such contributions will be imposed by a similar legal obligation and should not be affected either by such maintenance claims. Therefore, it is suggested that the expression "*including the social security contributions of employers*" should be deleted.

- Article 44.3 prohibits the creation of new records in a Member State. With the same aim, and for the sake of comprehensiveness, the provision should refer instead in broader terms to "*new types of processing of personal data, including the creation of new records*." Specific types of data processing involving particular risks, such as the processing of biometric data, should also be explicitly prohibited.

- Article 45.1, incorporating a judicial filter to process applications, refers generically to "the court". The determination of the body within the courts competent to decide on the interference with the right to privacy is essential for compliance with the conditions of Article 8 of the ECHR. Accordingly, the second sentence of this provision should instead read "*the competent body or authority within that court, as determined by national law, shall send the application...*"

- In Article 45.4 there seems to be a typing error. The mention should be to the *form referred to in paragraph 2* of Article 45, and not in paragraph 1.

- Article 45.5, second paragraph, contains the obligation on the Commission to make "this information" available to the public. This refers to the indication by Member States on whether translation of the supplementary documents is required, as mentioned in the first paragraph. However, the term "this information" may lead to confusion, as it might be understood as referring to the personal information on the debtor and creditor. Therefore, it would be preferable to amend the current wording to read "*The Commission shall inform publicly on the requirements for translations by Member States*" or an equivalent sentence.

- Article 46 provides that the requesting central authority shall erase the information after having forwarded it to the court. The text should indicate that this erasure should take place "*immediately*" after having forwarded it.

- Article 46.3 imposes a maximum period of storage of one year. This is intended to be a data protection safeguard, and the Working Party appreciates the intention of the Commission. However, the Working Party is also aware that this period may prove too short or too long for the purpose envisaged in the processing. To take account of practical needs, it would be more appropriate to specify that judicial authorities should be allowed to process the data

only for as long as it is necessary to facilitate the recovery of the relevant maintenance claim.

- Article 47 establishes the obligation of the central authority to notify the debtor about the disclosure of his or her data. This provision should make clear that this notification should take place immediately upon disclosure. Further, information about the purpose of the processing should be included. Accordingly letter c) should be worded "*of the purpose of the disclosure and of the conditions...*[rest unchanged]". On the other hand, the contact details of the supervisory authority referred to in letter e) does not seem necessary.
- A specific reference to the applicability of Directive 95/46/EC should be contained in the body of the Regulation, in line with the statement of Recital 21. Article 48 on relations with other Community instruments seems the appropriate place for such a reference. Therefore, it is suggested that a 4th paragraph be added to Article 48, reading "*4. The collection and processing of personal data undertaken according to the present Regulation, in particular in the framework of the exchange of information envisaged in Article 44 to 47, should be conducted in full compliance with national legislation adopted pursuant to Directive 95/46/EC*", or a similar sentence.
- In Articles 22, 24 and 35 the intervention of an authority other than the national central authority is foreseen. In those cases, the obligation to inform the data subject should be provided in terms similar to those of Article 47.
- Annex III contains a model for an information note of the debtor against which an order for monthly direct payment has been issued. The proposal should make sure that the information contained there is in line with the requirements of Article 11 of the Directive for information to be provided to the data subject, including the specific mention to the existence of the right of access to and the right to rectify the data concerning him.
- Annex V contains a model for an application for the transmission of information. Point 4.1.3 refers to "other useful information", listing a number of elements. The proposal should make clear that this refers to information that is provided by the requesting party in order to facilitate the research for the information requested, but that it is not itself information requested. Furthermore, the Regulation should contain provisions specifying the conditions for use of these ancillary data, including their purpose, amount of data and period of storage, in accordance with the data protection principles mentioned in this document. Also in accordance with previous comments on Article 47, the design of the last two cases on information to the debtor should be modified. The information to the debtor is the rule, and as such the default option, not needing a specific case to be ticked. It is the restriction to that information that constitutes the exception, only for that a case should be ticked, and a due justification should appear on the request.

The Working Party is confident that the considerations made in its Opinion will be taken into due account.

Done at Brussels, on 9 August 2006

For the Working Party

The Chairman
Peter Schaar