Spring Conference of European Data Protection Authorities

Session on Privacy and Security

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Data protection in the area of freedom, security and justice in the light of the Lisbon Treaty.

Ladies and Gentlemen, Dear Colleagues,

I would like to begin by thanking for the invitation to participate in the session devoted to privacy protection and security. I would also like to thank our hosts, the Italian Data Protection Authority headed by professor Francesco Pizzetti, for the excellent organisation of this year's conference in Rome.

We have just listened to a very interesting contribution by Mr Jonathan Fall of the European Commission and I believe it is going to inspire a lively discussion. On my part, as the first commentary, I would like to share certain thoughts, and doubts, concerning the legal framework which shall shape the evolution of personal data protection in the area of freedom, security and justice in the years to come. Of course, I am speaking of the potential implications of the Lisbon Treaty which, as it seems, shall come into force according to the plans of its creators, on the first of January 2009.

However, before I proceed to discuss the issues that are to take place in the near future, I need to give at least a brief overview of the present situation. Firstly, as we, data protection commissioners have

so many times underlined, the three-pillar structure of the European Union continues to cause a lack of complex, homogenous regulation of the problems of data protection. Within the internal market, such regulation is assured by the Directive 95/46/EC, which, incidentally, was created to do away with the barriers to the internal market.

The present Third Pillar of the EU still does not possess such regulation, despite the provisions of Article 30(1) b of the EU Treaty, ordering to complement the rules related to data exchange in the Third Pillar with appropriate principles for data protection. So far, the works on a framework decision on data protection in police and judicial matters have not proved successful, the regulations in force have a very limited character, and the Convention 108 of the Council of Europe, which is applicable in this field, no longer responds to the current needs. To complete the image, one also needs to mention the legal uncertainty related to the processing of data at the junction of the First and the Third Pillar, which was fully revealed by the judgement of the European Court of Justice on PNR data transfer to the US, which confirmed that such operations lie outside the scope of the directive 95/46/EC.

Secondly, due to the new threats to public security and to the international situation, we are witnessing a very dynamic evolution of police and judicial coopeation in criminal matters, comprising, among others, various new forms of transborder data exchange. What is worth mentioning at this point are, among others, the principle of

accessibility to which we devoted an important document a year ago, and the initiatives such as the Pruem Treaty or the European PNR.

This gives rise to the question whether the future legal framework at the EU level constitutes an adequate answer to the problems that I have presented just by way of example. To answer it, we need to analyse what changes are to take place.

The principal effect of the Lisbon Treaty, as before of the European Constitution, is the abolition of division of the EU into three pillars. As you know, the Lisbon Treaty after the changes introduced retains two treaties: the Treaty on the European Union and the Treaty on the Functioning of the European Union, created by redrafting the former EC Treaty. The former Third Pillar Issues shall now lie within the scope of Title V of the Treaty on the Functioning of the European Union.

The mode of adopting new legal acts in this field, is also to change and it shall now be consist of ordinary legislative procedure, involving both the Parliament and the Council, and qualified majority voting in the latter institution. It needs to be remembered that the abolition of the three-pillar structure of the EU implicates homogenisation of the protection of fundamental rights and of the system of legal protection itself and therefore – reinforcement of the protection of fundamental rights.

As far as data protection is concerned, the vital issue is the introduction of a separate provision dealing with data protection into the Treaty on the Functioning of the European Union, that is into

primary legislation. Furthermore, this provision, Article 16, is incorporated into Title II of the Treaty, “General Provisions”.

On the one hand, it guarantees the subjective right to data protection, on the other hand it constitutes a clear legal framework for issuing legal acts on the protection of natural persons with regard to the processing of personal data by EU institutions and authorities and by the Member States in the course of implementation of the Community legislation.

It needs to be underlined again that data protection regulations shall be adopted by the European Parliament and Council in the course of ordinary legislative procedure. I would also like to add that this article shall constitute a legal framework for the activities of independent data protection authorities, which is vital at present.

There can be no doubt that Article 16 shall constitute a strong and extensive base for guaranteeing data protection in EU legislation. It is worth noting that the provision was complemented with Article 39 of the Treaty on the European Union, modifying its contents with regard to the actions taken within the framework of the common foreign and security policy by excluding the participation of the European Parliament in legislative procedure in this field.

It should also be borne in mind that with regard to police and judicial cooperation in criminal matters, Title VII of Protocol 10 of the Lisbon Treaty introduces certain transitory provisions. The legal acts adopted so far in this field shall remain in force for 5 years unless they are repealed or modified. The competencies of the European Court of

Justice in relation to such provisions are also restricted. Such provisions give rise to many questions, for example whether the transitory provisions shall also apply to the acts regulating data protection issues within the framework of the current Third Pillar of the EU, based on Article 16.

It seems that they shall not, which means that the competencies of the European Court of Justice in this field shall be wider. At the same time, a question needs to be asked on the status of the framework decision on personal data protection in the Third Pillar, if it shall come into force before the end of the year. If the framework decision does not come into force before the Lisbon Treaty, we shall find ourselves back at the starting point. On the one hand, there shall be the question of widening the scope of Directive 95/46, without forgetting the exemptions specified in Article 13 and Declaration 21 of the Treaties, according to which "specific principles concerning the protection of personal data and the free flow of such data within the framework of police and judicial cooperation in criminal matters may prove necessary due to the specific nature of these fields", which may indicate a need to adopt separate legal acts.

What needs to be remembered at this point is the increase of the role of the European Parliament in the legislative procedure and the introduction of qualified majority voting in the Council which may prevent e.g. the bad practice which we experienced in relation to the works on the framework decision, involving the adoption of the lowest commonly accepted level of guarantees of data protection or on

total deletion of provisions not accepted by certain countries. As a result, Article 16 may help ensure more coherent principles of data protection within the EU.

On the other hand, we cannot forget the works on various legal acts on the use of personal data that are currently under way. Obviously, the entities involved in the process will be interested in finishing it before the entry into force of the Lisbon Treaty. This gives rise to the next question: how shall we act in the given situation?

In the context of personal data protection, it is vital that the Lisbon Treaty gives the EU Charter of Fundamental Rights a legally binding character and allows the European Union to accede to the European Convention on Human Rights. At the same time Chapter VII of the Charter contains provisions designed to ensure that the introduction of the catalogue of fundamental rights shall not imply widening the scope of competencies of the EU without the consent of the Member States.

Moreover, the Charter confirms the rights included in the European Convention on Human Rights and the rights based on the constitutional tradition of the Member States. Article 8 of the Charter, guaranteeing the right to the protection of personal data, may have direct effect, although in practice it will probably be used to control the lawfulness of legislation and to interpret it.

I shall conclude by referring to the impact of the Polish and British Protocol on the Charter of Fundamental Rights, including Article 8. Many Polish specialists in European law draw attention to

the unclear nature of the protocol itself, and of its real effects and underline that the content of the Protocol largely overlaps with the content of chapter VII of the Charter and of Article 6 of the Treaty on the European Union. I do not want to enter into disputes on this matter, but it can be said beyond a doubt that this protocol does not exempt the fundamental right to data protection in Poland as this right is also guaranteed in Article 16 of the Treaty on the Functioning of the European Union and, perhaps more importantly, in Article 51 of the Polish Constitution, which guarantees a separate and autonomous right to the protection of personal data.

I also need to add a few words on the increase of the role of national parliaments in the EU decision process, which is to be achieved, among others, by reinforcing the control competencies in the area of freedom, security and justice. Thus, national parliaments shall be entitled, among other things, to use the procedure of monitoring the principle of subsidiarity or evaluating the activity of Eurojust and Europol.

To sum up, I would like to draw your attention to the fact that the legal framework for the protection of personal data has a considerable potential. However, we need to ask ourselves how it shall be used.

In the new circumstances, we shall deal with a new balance of power, created by increasing the role of the European Parliament and national parliaments, also with regard to the principles of personal data protection in the area of freedom, security and justice.

On the other hand, the provisions of the Treaty allow for an increase in the transborder flow of data and for more extensive use of such data.

In the light of the possibilities and the challenges presented by the provisions of the treaty, data protection authorities need to reconsider their *modus operandi*.