HELLENIC REPUBLIC

GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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Disclosure of personal data concerning criminal prosecutions and convictions

I. Introduction

Law 3625/2007 modified Law 2472/1997 (Protection of Individuals with regard to the Processing of Personal Data) providing for the disclosure of personal data concerning criminal prosecution and convictions. The disclosure of such data was the exception under previous legislation. The legislator invoked the need to protect the society and to facilitate the punishment of criminal offences.

Restrictions imposed on the protection of personal data interfere with constitutionally protected rights such as private life and the presumption of innocence in conjunction with the respect of human dignity. The disclosure restricts the private sphere and may lead to the individual's public defamation by the mass media. Extensive publicity may affect the right to a fair trial. On the other hand, the protection of vulnerable groups is taken onto account; consequently, the disclosure of personal data is considered to contribute to the prevention of crimes committed against them.

II. The amendment in the context of the legal framework in force

Law 3625/2007 ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child

pornography (CRC-OPSC) and introduced modifications to the criminal law and the law of criminal procedure.

Article 8, para 3, in conjunction with para 1 of Law 3625/2007 provides for the disclosure by the prosecutor of the data concerning prosecution or convictions related to crimes, felonies or offences of intent, in particular against life, sexual liberty, financial exploitation of sexual life, personal freedom, property, rights related to property, violations of the legislation related to drugs, conspiracy against public order as well as offences committed against minors.

A) The amendment in the light of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

According to the Protocol all States Parties are obliged to prohibit (article 1). Furthermore, they are obliged to ensure that, as a minimum, the acts and activities aiming to the sale of children, child prostitution and child pornography are fully covered under their criminal law, whether such offences are committed domestically or transnationally or on an individual or organized basis. Acts and activities such as, offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation, transfer of organs of the child for profit, etc (article 3).

It is evident that the list of crimes for which the disclosure of data is permitted is quite broader and is not restricted to the crimes provided for by article 3 of the Protocol.

Article 8 of the Protocol provides for the adoption of appropriate measures in order to protect the rights and interests of child victims at all stages of the criminal procedure. According to article 8, para 1 (e) of the Protocol, "States Parties should protect, as appropriate, the privacy and identity of child victims and take measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims." Given that the amended

provision does not stipulate clearly enough the data to be disclosed, it is probable for the disclosure to lead to information related to the minor. Therefore, the disclosure cannot be considered the most appropriate measure to protect the rights and interests of child victims.

Moreover, it should be mentioned that according to para 6 of article 8 of the Protocol, "nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial." Whereas the interests of the child are prioritized at all stages of the criminal procedure, it is expressly provided that all guarantees of fair trial should be fully respected.

B) The amendment in the light of the European legislation for the protection of personal data

Greece has ratified the Convention for the Protection with regard to Automatic Processing of Personal Data (Council of Europe, No. 108). According to article 6, personal data relating to criminal convictions may not be processed automatically unless domestic law provides for appropriate safeguards. Moreover, Recommendation No.R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector stipulates in Principle 5.2.ii that "communication to other public bodies is exceptionally permissible if, (a) the communication is undoubtedly in the interest of the data subject and either the data subject has consented or circumstances are such as to allow a. clear presumption of such consent, or if (b) the communication is necessary so as to prevent **a serious and imminent danger**."

The Explanatory Memorandum of the aforementioned Recommendation clarifies that "(…) the danger referred to in b must be both serious and imminent. It was thought appropriate to qualify the danger in this way given that Principle 5.2.ii is only concerned with exceptional cases justifying communication. Where a serious but non

imminent danger exists, communication could take place in accordance with the provisions of Principle 5.2.ii.a".

The amendment does not require the "serious and imminent danger" condition. Both the object and aim of the disclosure are formulated in such general terms that their compatibility with the European provisions is seriously doubted. In addition, the broad list of crimes for which the disclosure is permitted leaves an important margin of appreciation to the competent Prosecutor.

Furthermore, the amended provision does not seem to satisfy the condition set by article 8, para 5 of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, according to which, "processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards".

It is doubtful whether the prosecutor, given his role in the criminal procedure and the lack of any other review of his decision concerning the disclosure, is sufficiently fair and objective.

III. The amendment and the protection of human rights

A) Restrictions on the right to privacy

Article 9 of the Constitution provides for the inviolability of private life. The protection of private life is closely related to human dignity and personal freedom. The disclosure of personal data related to prosecutions or convictions affects in most of cases in a negative way professional and social life of the person involved.

In a democratic society, a balance should be stricken between the protection of privacy and the freedom of information (article 14 of the Constitution) taking into consideration particular elements and facts of

each case. As difficult as it may be to formulate a general rule about the conflict between privacy and freedom of the press, nonetheless restrictions upon privacy by the disclosure – especially in the case that would lead to the public defamation and pillorying of the person involved– would not be acceptable in every case.

The European Court of Human Rights recognizes the importance of personal data's protection in the context of private and family life and reviews strictly the conditions under which their processing takes place. In cases of disclosure without the person's consent, the Court attributes great importance to the procedural guarantees. The Court does not exclude the possibility for the protection of confidentiality to be outweighed by the interest in investigation and prosecution of a crime, but it requires that domestic law affords appropriate safeguards.

Furthermore, the European Court of Justice in its recent case-law recognizes that at the stage of the application in individual cases of the legislation implementing Directive 95/46 -at national level-, a balance must be found between the rights and interests involved.

In view of the above analysis, each ordinance issued by the competent Prosecutor permitting the disclosure of personal data concerning prosecutions or convictions should include without any exception a specific and thorough justification. Should the European Court of Human Rights examine a relevant case, it will review this condition in order to decide whether domestic guarantees are effective.

B) The presumption of innocence and the freedom of information

According to the ECHR case-law, all State authorities are bound to respect the presumption of innocence. Despite the personal and functional independence guarantees provided for the Prosecutor or any prosecuting authority, it is possible for the latter to violate the presumption of innocence, given especially that they have the absolute procedural control

over the preliminary criminal proceedings. The Court requires that in cases of information presented to the public by State authorities, any statement that would lead to the presumption that the person concerned is guilty should be avoided.

The disclosure of personal data by the competent prosecuting carries a particular burden in the eyes of the public and the accused does not have the means to respond to that in an effective way. Moreover, in the case of serious crimes, derogations from the presumption of innocence should be strictly examined, given the important risk for the accused.

Although it is difficult to find the balance between the right to information and the rights of the accused, it should be noted that the legislation must always take into consideration the evident advantageous position of the mass media. The close link between the presumption of innocence and the influence of mass media on public opinion is reflected on the special legislation that provides for limitations and rules with regard to the process of information and the image of the accused by the mass media in the context of criminal procedure. Despite the legal framework and the role of the Greek National Council for Radio and Television, it should be noted that sanctions do not manage to protect the person involved from being stigmatized as guilty. The burden of proof is *de facto* shifted to the accused because of the publicity, as it would be unrealistic to allege that the judges and the jury remain unaffected by the information presented without caution and discretion.

C) The lack of remedy against the disclosure of personal data

The Prosecutor enjoys a wide margin of appreciation regarding the aim of the disclosure as well as the data to be disclosed. Furthermore, during the period between the closure of the investigation and the issuing of court's judgment, the accused has no remedy against the disclosure. As the person involved is in the unfavourable position of being accused and cannot by any means defend his/her interests and rights restricted by the

disclosure, one cannot but consider that the question of access to justice is raised.

IV. Issues related to the principles of proportionality and legality

A) The disclosure of prosecutions: a necessary measure?

We need to distinguish between two cases depending on the time the disclosure takes place: a) when the accused has already been arrested, and b) when the individual concerned is still wanted. In the former case, both the protection of the society and the completion of the criminal procedure are fulfilled if his/her provisional detention is ordered, in accordance with conditions set by the law. Thus, the measure of disclosure constitutes a repressive measure additional to the one of deprivation of liberty.

On the other hand, if the person in question is not yet arrested, it could be argued that the disclosure of his/her date would protect the society from the fugitive and facilitate the criminal procedure. Nonetheless, taking into consideration the aforementioned reservations concerning the general wording of the provision providing for the disclosure, the prosecutor should always implement strictly the principle of proportionality with regard to the disclosure as such, the timing and its reasoning.

B) The disclosure of data related to convictions: additional punishment?

The protection of data related to convictions reflects the effort to minimise the unpleasant consequences of the conviction itself. It also reflects the faith of a democratic society in its own system of criminal justice that has been attributed the necessary guarantees to impose the

sanction and to pursue the normalization of the convicted person's life via the serving of the sentence.

The constitutionally protected publicity of the courts' sittings operates as a balancing factor between the legislative, executive and judicial function of the State and constitutes a manifestation of citizens' participation in a democratic society. However, the publicity of trials may be limited on the basis of the protection of moral principles, the private and family life of the parties, in the interest of the proper administration of justice, the best interest of the child; thus, giving priority to privacy.

The consequences of the disclosure for the convicted person depend on the interest of the public opinion re the specific case. In practice, the negative consequences of the disclosure are added to the ones of the sentence; they could amount to an additional sanction that is not prescribed by law and is not imposed by a judge.

V. Concluding remarks

The National Commission for Human Rights (NCHR) takes the view that the disclosure of personal data as it is provided for by Law 3625/2007 is not in conformity with the Constitution and the European Convention for Human Rights.

The NCHR considers that the broad scope and wording of the provision in question, in view of the relevant provisions of the Optional Protocol to the Convention on the Rights of the Child, because of its non compliance with the obligation of specificity, adequacy and absolute necessity of restrictions on rights in a democratic society, the lack of the requirement for a serious and imminent risk for the processing of personal data -according to European law-, and mainly because of the doubtful necessity and effectiveness of the measure with regard to the aims pursued, render the provision unconstitutional and contrary to European law of human rights.

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