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European Network for the exchange of information between persons and entities responsible for the training of judges and public prosecutors

(LISBON NETWORK)

NINTH PLENARY MEETING

Palais de l'Europe (Room 2), Strasbourg, 10 and 11 (morning) October 2007

Lisbon Network website: www.coe.int/lisbon-network

European co-operation in the field of data protection

Presentation

by

Joaquín BAYO-DELGADO

Deputy European Data Protection Supervisor (EDPS)



How to train judges in Council of Europe instruments and in their implementation

10 October 2007

Sub-theme 2, c) European co-operation in the field of data protection

Presentation by Joaquín BAYO-DELGADO, Deputy European Data Protection Supervisor (EDPS)

1. Data protection as a fundamental right

Article 8 ECHR is the key legal instrument at European level for setting privacy as a fundamental right of citizens. Furthermore the Charter of Fundamental Rights of the EU distinguishes between the right to privacy and the right to data protection as an autonomous fundamental right. The Reform Treaty will have a very positive impact by making it possible for the EU as such to access to the ECHR and to give the Charter a binding character. Thus data protection, as the rest of fundamental rights, will be strongly underlined in the highest legal instruments.

Besides, CoE Convention 108 is the specific legal instrument in the European context, specifically devoted to the right of data protection. Its Amendment of 15 June 1999 makes it possible for the EU to be party to it. Its Additional Protocol adds the existence of an independent supervisory authority as crucial requirement in the European approach to data protection and an adequate level of protection in a third country as condition for transferring data to it.

The EU has incorporated the principles stated in the Convention 108 into Directive 95/46/EC, Directive 2002/58/EC and Regulation 45/2001, plus a number of other provisions in several other legal instruments. Some provisions of the Reform Treaty will impact on the right to data protection, namely those setting the regime in the (until now) second pillar and some specificities in the area of police and judicial cooperation in criminal matters.

Finally, it has to be reminded that data protection aims at protecting “the fundamental rights and freedoms of natural persons, and in particular their right to

privacy with respect to the processing of personal data”, as Article 1(1) of Directive 95/46/EC rightly says. Not only privacy but other rights such as fairness, defence, non discrimination, etc. are to be protected. This vision is specially important in relation to judicial authorities, as in many cases overlaps and complements other principles enshrined in Article 6 of the ECHR.

2. Challenges for national judges applying data protection

National judges apply the principles of data protection in two different ways, which must be distinguished.

A) Judges revise other authorities' decisions: indeed, the rule of law implies that any decision taken by a non-judicial authority is subject to revision before the courts. As the existence of a Data Protection Authority is mandatory according to the Additional Protocol (and Directive 95/46/EC), the revision is normally affecting that authority's decisions. This is an important aspect concerning the judiciary but, normally will only affect specific court(s), usually at the highest level. Its members are, of course, not only aware but also specialists.

B) The second aspect of involvement of judges in data protection is their jurisdictional activities in all areas of law (civil, administrative, criminal, etc.). There, data protection is part of the legal corpus that judges must apply both to the substance and to the procedure of their judgements and resolutions. Here, each area presents its own characteristics and therefore represents different challenges.

Criminal proceedings are of special importance, not only because the rights of individuals are substantially affected but also due to the particular legal framework of the EU. Article 3(2)(2) of Directive 95/46/EC leaves outside its scope, in any case, the activities of EU MSs in the area of criminal law. Many EU Member States have transposed this Directive beyond its scope, including criminal judicial authorities, but in any case all parties of Convention 108 are bound, also in criminal proceedings, to its provisions. Furthermore, Recommendation 87(15), on police processing of personal data, has also impact in the subsequent judicial procedure. Thus, EU and CoE national judges are faced with a heterogeneous regulation of data protection in criminal matters.

This heterogeneous regimen might be crucial when taking decisions in the course of an investigation, be it by a *juge d'instruction* or a judge of guarantees when the investigation is done by the public prosecutor. But it might be decisive for the judge or court that analyses the proofs to draft the sentence.

The challenges are also present in other branches of law. Some examples may be:

- Can a labour judge accept as a cause for termination of a work contract the undue use of the IT system of the enterprise (e-mail, Internet access, etc) based on the monitoring of the employees traffic data and/or content of his/her

communications? Which are the conditions for this interference to be legitimate?

- Can a family judge accept as proof information on one spouse's income obtained by the other spouse from non public sources?
- Which data can a judge obtain for the executions of his/her resolutions? Which data can obtain or exchange from other CoE countries? Is it different from other EU Member States?

3. Challenges for judicial training institutions to introduce data protection awareness

Awareness is, therefore, a challenge in itself and the best way to address it is by introducing data protection in the training programs, both for initial and on-going training. This is happening already and, hopefully, will be more intense in the future.

Some weeks ago, hosted by the Council of Europe and organized by the University of Castilla-La Mancha, the Data Protection Officer of Eurojust and the EDPS, a workshop was held to discuss among judges, public prosecutors and law professors the impact of data protection in criminal judicial proceedings. As it can be seen from the programme (see attachment) both the legal instruments of the Council of Europe and the European Union were analysed, an study case was developed all through the workshop and all aspects of data protection in criminal proceedings were discussed.

The assessment of the workshop was very positive and both the steering committee, and trainers and rapporteurs, are ready to repeat and adapt, where necessary, the workshop. I will be happy to give you further details during the general discussion. See attached proposal for a workshop in October 2008.

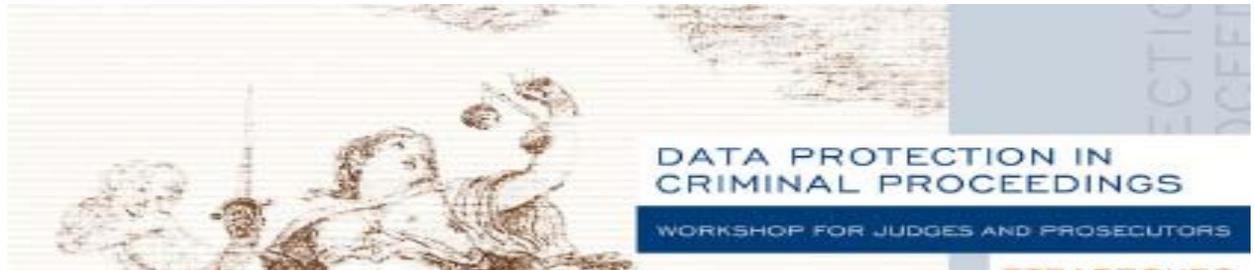
Of course, similar seminars or workshops could and should be introduced in other main areas of law.

4. Concluding remarks

Data protection, as all fundamental rights, is at the core of the state of law. Judges (and public prosecutors) must be aware of it in all areas of law and must apply its rules to the activities of others, but also to their own jurisdictional. Data protection is part of the good administration of justice and goes hand in hand with other fundamental rights.

Appendix I

Appendix II



PROGRAMME OF THE WORKSHOP 2008

Dates: 22 -24 October 2008

Languages: English, Spanish, French. Simultaneous translation

OBJECTIVES:

The workshop will provide a theoretical and practical information about:

- Information systems and judicial and police criminal data-bases, setting up by International and European institutions, Member States of the European Union and of the Council of Europe.
Special consideration will be paid to the national legislation and practical cases in some Member States.
- Principles and guarantees to be observed for an adequate access, processing and transfer of personal data.
- Scope of the fundamental right of personal data protection and its limits in the framework of criminal investigations.

TARGET GROUP:

Judges, Prosecutors and Members of the Police appointed by the Member States of the EU and of the CoE as contact points of the European Network on Data Protection in Criminal Proceedings.

PROGRAMME:

Wednesday 22 October

9,00 – 9,30

ACREDITATIONS

9,30 – 10,30
WORKSHOP

OFFICIAL OPENING AND FIRST REMARKS OF THE

9,30 – Official opening
Margaret KILLERBY
Head of the Law Reform Department
Directorate General of Human Rights and Legal Affairs

Topics
and speakers:

9,50 – Purpose and focus of the workshop
Joaquín BAYO DELGADO
Deputy Supervisor. European Data Protection Supervisor
10,10 – The case-study of the course
Ulco VAN DE POL
Ombudsman of Amsterdam
Special member of the Dutch Data Protection Authority

10,30 – 11,00

Coffee – break

11,00 – 12,30

THREE NATIONAL POINTS OF VIEW

Topics
and speakers:

11,00 – Representative of country 1

11,30 – Representative of country 2

12,00 – Representative of country 3

12,30 – 14,30

Lunch break

14,30 – 16,00

LEGAL INSTRUMENTS OF THE COUNCIL OF EUROPE and OF THE EUROPEAN UNION

Topics
speakers:

14,30 – The European Convention on Human Rights. The 108 Council of Europe
Convention and other instruments of the Council of Europe
Sophie MEUDAL-LEENDERS
Legal Reform Department. Council of Europe

15,15 – Legal instruments of the European Union. Information Systems in the
Liberty, Security and Justice Area of the European Union
Joaquín BAYO DELGADO
Deputy Supervisor. European Data Protection Supervisor

16,00 – 16,30

Coffee-break

16,30 – 17,30

AVAILABILITY PRINCIPLE

Peter MICHAEL
Data Protection Secretary. Council of European Union

Thursday 23 October

9,00 – 10,30

CRIMINAL INVESTIGATIONS

Topics
and speakers

9,00 – Data protection as a requirement for successful investigation.
The Europol example
Daniel DREWER
Head of Information Integrity Unit
9,45 – Criminal investigations with processing of personal data
Ángeles GUTIERREZ ZARZA
University Professor of Procedural Law

10,30 – 11,00

Coffee-break

11,00 – Criminal investigations with processing of personal data (2)
Francisco Javier FRAUCA AZCONA
Senior Judge. Criminal Court of San Sebastián

11,45 – 12,30

JUDICIAL COOPERATION IN CRIMINAL MATTERS

Topic
and speaker:

11,45 – Exchange of personal data and judicial cooperation in criminal
matters in European Union
Angelika MÖHLIG
Legal Officer of Eurojust

12,30 – 14,30

Lunch break

14,30 – 16,00

**THE ROLE OF JUDGES AND PROSECUTORS in the FIELD OF THE
BASIC PRINCIPLES ON DATA PROTECTION**

Topics:

Legal grounds and basis for processing
Fairness and proportionality
Content and quality issues

Finality principle
Time limits
Control mechanisms

Moderator:

Diana ALONSO BLAS
Data Protection Officer in Eurojust

Speakers:

Carlos LESMES and IÑAKI VICUÑA
Senior Judge. Administrative Chamber of the Audiencia Nacional
Director of the Data Protection Agency of the Vasque Country
Ulco VAN DE POL
Ombudsman of Amsterdam
Special Member of the Dutch Data Protection Authority
David SMITH
Information Commissioner of United Kingdom

16,00 – 16,30	<i>Coffee-break</i>
16,30 – 18,00	Who are the data subjects? Right of access, rectification, blocking and deletion. Is there a right to opposition? Exceptions Practical consequences for legal proceedings Information to the data subject and right to defence Special categories of data Confidentiality and security
Moderator:	Diana ALONSO BLAS <i>Data Protection Officer in Eurojust</i>
Speakers:	Carlos LESMES and IÑAKI VICUÑA <i>Senior Judge. Administrative Chamber of the Audiencia Nacional</i> <i>Director of the Data Protection Agency of the Vasque Country</i> Ulco VAN DE POL <i>Ombudsman of Amsterdam</i> Special Member of the Dutch Data Protection Authority David SMITH <i>Information Commissioner of United Kingdom</i>

Friday 24 October

9,00 – 9,45	EXCHANGE OF PERSONAL DATA WITH THIRD COUNTRIES AND ORGANIZATIONS
Speakers:	Elena DOMÍNGUEZ <i>Prosecutor. Collaborator of the Spanish Data Protection Agency</i>
9,45 – 10,30	CONSEQUENCES OF THE UNAUTHORISED OR INCORRECT PROCESSING OF PERSONAL DATA
Topics and speakers:	9,45 – Right to an effective remedy. Right to receive a compensation. Extraordinary remedy for violation of fundamental rights? Consequences in the trial Marc CARRILLO <i>University Professor of Constitutional Law. Pompeu Fabra University</i>
10,30 – 11,00	<i>Coffee-break</i>
11,00 – 11,45	THE PRÜM CONVENTION
Speaker:	Peter HUSTINX <i>Supervisor. European Data Protection Supervisor</i>

11,45 – 13,15

**FINAL REMARKS. PERSPECTIVES FOR THE FUTURE. CLOSING
REMARKS**

Topics
and speakers:

11,45 – The case study of the course – final remarks

Ulco VAN DE POL

Special Member of the Dutch Data Protection Agency

Peter MICHAEL

Data Protection Secretary. Council of European Union

12,30 – Perspective for the future. Closing remarks

Joaquín BAYO DELGADO

Deputy Supervisor. European Data Protection Supervisor