Directive 95/46/EC and protection of personal data in CBRNE events: Limits and perspectives [*]

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1. The protection of personal data in the legal framework of the EU

The protection of personal data and the right to privacy, private and family life are fundamental rights, provided for in the legal framework of the European Union (EU) and of its Member States. Said rights were explicitly afforded in several programmatic and statutory documents, in particular in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and Article 16 of the Treaty on the Functioning of the European Union (TFEU), which now constitute the legal basis for future policies and legislation within the EU.

The Lisbon Treaty provides a stronger basis for the development of a clear and efficient personal data protection system, while giving new powers to the European Parliament. The Charter of Rights raises the level of protection of personal data to the rank of fundamental rights. This represents a considerable jump, compared to earlier regulations, and reinforces the weight given to such rights in balance with the rights of equal rank in EU policies on security, data communications, freedom, crime prevention and international relations. The protection of individual rights is, however, in constant conflict with the demands of the free market, which often considers policy as a 'commodity' , and with public safety needs, especially in the prevention and reaction to the events of crisis and CBRN events. Moreover, in a global society characterized by rapid technological changes, where information exchange knows no borders, regulation of this field is destined to age rapidly. Therefore, an effective regulatory framework requires constant updates. The escalation of the threats faced by modern society and the development of increasingly sophisticated technological tools to collect, process, and transmit personal data, and place them into public and private databases, makes it particularly difficult to find an acceptable balance between with strengthening security and protecting human rights, including the protection of personal data and privacy.

At the present moment, the most important relevant acts in the European Union regulatory framework are: 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[1], the Directive on e-privacy and electronic communications (amended in 2009)[2], Directive 2006/24/EC on data retention (declared invalid by the Court of Justice of the European Union on 8 April 2014)[3], Regulation (EC) No 45/2001 on the protection of individuals

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1 O.J. (L 281) 23.11.1995, 31.

2 O.J. (L 201), 31.7.2002, 37.

3 O.J. (L 105) 13.4.2006, 54.

Forum di Quaderni Costituzionali

with regard to the processing of personal data[4], and the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[5]. At first sight, this might look like a quite impressive framework. However, experience shows that in recent years this framework has been overtaken by rapid technological developments and needs urgent improvement to provide greater protection for the rights of the people. This is, in fact, an ongoing process involving an overall review of EU legislation. Nevertheless, old rules will remain in force until their substitution with new legislation, mainly the Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), which is explored in the chapter authorized by Asier Urruela.

2. The Directive 95/46/EC and the regulation on data protection

The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was a milestone in the regulation of personal data protection in the EU. Despite subsequent legislation, it remains a major step forward which must be examined in any comparative and evolutionary analysis of EU legislation on personal data processing. This directive established, in fact, the core framework for personal data protection and the rights of the concerned parties, while enforcing independent supervision by national authorities. It is a very flexible regulation, in the formal aspects of its substance, namely the implementation and interpretation of its regulatory content.

The Directive aims to guarantee the protection of the rights and fundamental liberties of the individual, and particularly the right to privacy regarding the processing of personal data. Article 2 identifies and defines the legal meaning of "personal data", "processing of personal data", "personal data filing system", "controller", "processor", "third party", "recipient", and "the data subject's consent", a set of concepts which still constitutes the most relevant legal categories in data protection regulation. Article 3, however, restricts the scope of this discipline to "the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system." Instead, cases relating to activities which fall outside the scope and competence of EU law, such as those related to public safety, defence, national security, and activities of the Member States in criminal matters are specifically excluded from the scope of Directive. In this context, therefore, the choices related to critical situations and exceptional events will be taken by the Council and will not be subject, for express restriction of the Treaties, to the Union's common rules.

4 O.J. (L 008) 12/01/2001, 1.

5 O.J. (L 350) 30/12/2008, 60.

Forum di Quaderni Costituzionali

Beyond these cases, the Directive leaves ample space for national legislation which remains prevalent when the processing of personal data is carried out in the territory of one or more Member States, or in a territory subject to national sovereignty (Art. 4). To this must be added that, according to Art. 5, Member States are empowered to determine the conditions under which the processing of personal data is lawful, even if within the limits of the provisions made by the Directive. Indeed, the Directive merely sets down general rules for the treatment, detection and update of personal data and the objective and subjective conditions of legitimacy under the laws of the Union, by delegating to the State to implement and take effect these conditions (Art. 6). It is inevitable, therefore, that each Member State adopts different approaches to accomplish these objectives, whereby it is difficult – if not impossible – to ensure uniform fulfilment of these procedures, or to conduct a centralized analysis of these data, when they are relevant or become such, to prevent or mitigate dangerous situations.

Even Article 7 – which sets down the principles of "legitimacy of data processing" – is open to different interpretations, a circumstance that led to huge variations in its specific implementation at a national level. The general rule of "explicit and unequivocal consent" of the person concerned, as a primary condition legitimizing the processing of personal data, has severe problems. Consequently, it is even possible to wonder whether its protection is not just a smokescreen to justify, on the contrary, the many "exceptions to the rule" endorsed by Directive. Indeed, in the case of major crisis situations, relevant exceptions to the general legal framework can be found in par. 1, lett. d) and e), which justify data processing *even in the absence of consent,* provided that it is necessary to protect the vital interests of the concerned person, or to accomplish a public duty inherent to the performance of a public function, or to perform a task in the public interest or in the exercise of public function that corresponds to the controller (a third party to which the data are disclosed). The exoneration of the individual consent established by this clause seems fully justified with regards to the preservation of a vital interest of the individuals. However, the limits on the exception may be interpreted in diverse ways by national laws, a circumstance that fuels the risk of sacrificing fundamental rights or primary personal interests for reasons difficult to verify. One must consider, in this regard, the considerably diverse meanings that concepts such as "biosecurity" or "public interest" might acquire from Member State to Member State, and the different public programs or measures taken to monitor, prevent, or curb situations of real or presumed danger that might be put into practice.

One of the most remarkable initiatives in the Directive is the ban on processing of particular data categories classified as "sensitive data" (Article 8). These are data concerning health or sexual life, data that can reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership. However, there are some exceptions to this protection. In general, the prohibition is not applicable if the person gives his/her explicit consent to the processing of data, or if he/she has otherwise made them public. There is, however, an exception particularly interesting in the case of a CBRNE incident. The Directive explicitly states in par. 1 letter. c) that protection of sensitive data will not be applicable "if the processing is necessary to

protect the vital interests of the person concerned or of a third party in the event that the subject is physically or legally incapable of giving consent".

The Directive provides (Art. 8.4) another exception to data protection for the prevailing interests of the Member States in high-risk situations. In these cases, the Member States are authorized to allow processing of sensitive personal data, even in the absence of an explicit consent from the concerned person. According to the Recital n. 34, the privileged sectors in which this exception should operate are "Public Health and Social Protection." The objectives which justify this exception are to "ensure the quality and cost-effectiveness of procedures used for settling claims for benefits and services in the health insurance system - scientific research and government statistics." In such cases, it is considered an essential responsibility of the States to provide the appropriate specific safeguards to protect the fundamental rights and the privacy of their citizens. This obligation is not always upheld, so that personal rights are eventually protected in a relative and pliable way. This is particularly relevant since this exception can be implemented either by a legislative measure – that is, with the guarantees of the legal reserve provided for the protection of fundamental rights – or by a decision of the supervisory authority, which does not provide the same guarantees. Therefore, the Directive permits a clear discrepancy in the levels of privacy protection guaranteed to the citizens of different Member States, depending on the choices made by their governments.

Nevertheless, and to be fair to the Directive, one must concede that it attempts to ensure a uniform protection of these rights and to make actionable the right to privacy and control of personal data. Its Articles 10 and 11 list in detail the information that has to be provided to the person concerned if his/her personal data is collected, no matter whether collected directly or through third parties. It states that people involved "must have access to information relating to: a) the identity of the controller, purpose of the data processing, the recipients or categories of recipients, voluntary or otherwise of responses and possible consequences, and the right to access and correct the data". The only exceptions – such as collection for statistical purposes, or for historical or scientific research – are those in which this access could not possibly be provided or would involve a disproportionate effort, apart from the cases in which recording or disclosure was required by law. Under those circumstances, Member States are obliged to provide appropriate safeguards. Furthermore, Article 12 guarantees every concerned person his/her right to access his/her own data, which are to be allowed in a free, intelligible, and full way without restrictions, so that it might be possible to know its origin and request its modification, deletion or blocking (also for third parties).

3. Article 13 and the specific provisions on major crises

The previous points can be summarized in one simple idea: even if the Directive was intended to protect individual privacy, this protection could be limited in exceptional circumstances such as those present in major crises. However, the most significant provision related to emergency or exceptional events, is contained in Article 13. It states that, in cases of emergency, the Member States may adopt legislative measures to

Forum di Quaderni Costituzionali

restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 of the Directive, “when such a restriction constitutes a necessary measures to safeguard: (a) national security; (b) defense; (c) public security; (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions; (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters; (f) a monitoring, inspection or regulation function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e); (g) the protection of the data subject or of the rights and freedoms of others.”

Therefore, this concrete clause questions the entire regulatory framework of the Directive regarding the rights protected, putting in the hands of the Member States the effectiveness of the right to privacy and the effective control over personal data. On this basis, Member States are, in fact, the only entities entitled to evaluate the occurrence of actual or perceived danger conditions which might trigger the so-called "exceptional regime", that legitimizes the compression of those rights and the corresponding warranty obligations, especially in cases of safeguarding "State security", "defence", or "public security". As a consequence, Member States exercise an almost absolute power, strengthened by the unquestionableness of the policy choices made by governments in cases of, for example, terrorist attacks, natural disasters or exceptional events that threat the lives of people. The only legal limits enforceable in such cases are those embedded in the principles of proportionality and respect for fundamental rights, as codified by national Constitutions, EU law, the European Convention on Human Rights and International Treaties.

The unavoidable consequence of the existence of so many “exceptional regimes” in different Member States in emergency situations – and particularly during CRBNE crises – is clear: no common EU legal framework ensures an adequate conciliation between the rights of citizens and the third parties involved. Thus, it must be concluded that the coexistence of different national regulations and different interpretations resulted in an unsatisfactory situations for all parties involved.

The situation changed after the entry into force of the Lisbon Treaty and the recognition of a common citizenship, which needed to be reflected in the efficient guarantee of the rights established in the Charter and in the EU treaties. It then became necessary and indefectible to introduce a common binding regulation to assure all European citizens a univocal level of protection for privacy and clear limits to the availability of their personal data to the Member State or third parties, especially in those cases where the rights enforced by the Charter and the EU treaties were functional or relating to the protection of other fundamental rights. This is precisely the scenario that arises in crisis situations and exceptional circumstances, such as CBRNE events, when protection needs emerge with urgency. Of course, this protection cannot be limited to the EU sovereign territory. Indeed, it would not be realistic at all to think that in our globalized world, where personal data runs on the international “information highway” and are commonly handled by multinational companies or other private and public entities outside the EU, that one can continue to adhere to the territoriality principle.

In was precisely with international movement of data in mind that Article 25 of the Directive establishes, as a general rule, that the transfer of personal data to third countries can only take place if the Country in question afforded “an adequate level of protection”, giving particular attention to the nature of the data, the purpose and duration of the proposed processing operation or operations, the Country of origin and Country of final destination, the rules of law (both general and sectorial) in force in the third Country in question and the professional rules and security measures which exist in that Country. However, the determination of the “adequate level of protection” is left – also in this case – to the Member States, even if the norm establishes a form of agreement between the Member States and the Commission, which should gather and act together when, in their opinion, a third Country does not guarantee an adequate level of protection. However, this proceeding situation occurs only *ex post*, so it is unable to prevent the public disclosure of the information provided by a Member State, based on a undetailed evaluation, which could result in a leak of information and data that would be very difficult to recover. The remedy provided by par. 5 – the opening of negotiations by the Commission with the third country in question – is clearly unhelpful, due to its delayed and inadequate application, especially in the case of exceptional events or crises requiring quick decisions and immediate protection measures.

The general rule in Art. 25 is also subject to numerous exceptions which, once again, feds the doubt – if not the certainty – that Directive 95/46 was conceived more to legitimize the exception than to protect rights. The peculiarity of these exceptions is the transfer of the burden of data protection from the public to the private level. In fact, par. 2 allows data transfer to Countries that do not ensure an adequate standard of protection, provided that the controller gives sufficient guarantees for the protection of privacy, rights and fundamental freedoms of the concerned people, as well as for the exercise of the rights involved. The replacement of public institutions by private ones implies a lowering of the general level of the protection of personal rights, precisely in circumstances in which the underlying rights deserve more protection, that is, in emergency and crisis situations, such as CBRNE events. Even the planned opposition procedure against the authorizations granted in derogation are late and ineffective. Both internal security, and the rights of concerned people, could only be effectively protected *ex ante* and before their endangerment or violation. The reinstatement and any *ex post* compensations must be considered, especially in this matter, remissive instruments of the law, which come into play when the safety standard has failed, and neither security nor rights are adequately protected.

4. The Jurisprudence of the European Court of Justice

Beyond this 'static' analysis, a critical analysis of the personal data legal framework set by Directive 95/46 easily reveals challenging issues in its 'dynamic’ application. It is indeed in judicial rulings where all the limitations of the data protection regulation emerged. We provide a concise list here. To begin with, it makes sense to remember the judgment of the European Court of Justice, Case C-553/07 of 7 May 2009, regarding access to personal data, in relation to Art. 12 lett. a), which sanctioned the asymmetry between the duration and the exercise of people’s right of access to their

Forum di Quaderni Costituzionali

own data and the obligation entrusted to the controller to retain them for an extended period of time.

In the same sense, the decision of the Court of Justice (Joined Cases C-293/12 and C-594/12), dated 8 April 2014 – the so-called "*data retention*" ruling – in relation to the safety and protection of data stored by the service providers of electronic communications of public access and the public telecommunication networks, established that Directive 95/46/CE "entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary *(...)* in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down"[6]. Even worse, the Court stated that "*the* directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured"[7]. Based on these and other reasons, Directive 2006/24/EC of the European Parliament and of the Council dated 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications networks or public communications and amending Directive 2002/58/EC, was declared invalid. This left a loophole in the legal framework of the EU, which needs more updated and coherent regulations based on the levels of protection recognized by the Charter and the Treaties.

Lastly, the decision of the Court of Justice, dated 13 May 2014 (the so-called "*Google case*" – C131/12), which extended a case regarding the processing of personal data to the results of the search engines, and provided an "authentic interpretation" of the rights afforded by Directive 95/46/CE, widened the rights of the concerned parties regarding the availability of their data, recognizing a true "*right to be forgotten*". According to the ruling, search engines must guarantee this right, deleting, at the request of the affected person, the results of a search and the links that would take them to the personal data related to his private life, affording the protection of his right to privacy and the fundamental rights connected to it. Among those rights must be highlighted Articles 7 and 8 of the Charter of Fundamental Rights, which, according to the Court, must initially prevail over the economic interest of the operator of the search engine, and over the interest of the public in having access to that information, unless the public profile of the affected person justifies a balance between his/her rights and the public interests at stake.

5. Conclusions and perspectives for a new regulation of data protection

In conclusion, the Directive of the EU of 1995 marked an important step in the history of data protection. Its objectives – "*to ensure the flow of data and the effective protection of the rights and liberties of the individuals*" – are still valuable, but they need to be

6 N. 65 and 66 of the Ruling.

7 N. 68 of the Ruling.

adapted to current times. In a globalized and digital world, that has made "speed" its most distinguishing trait, the present regulation in force does not afford the necessary degree of harmonization between the national statutory laws and the European rules that apply to such scenarios. Moreover, several issues weaken the internal coherence of a regulatory system that really seeks to balance the effective protection of personal data with the demands of security and the needs of the market. First, a complex system of exceptions exists at different levels. Second, the fact that the guarantors for many of the granted rights of individuals are private companies is a circumstance that hinders adequate control of the level of protection effectively granted. Last, but not least, it must be highlighted that the specific problems of processing personal data, especially about bio-security, terrorist attacks and exceptional situations of crisis, are not sufficiently integrated into the EU Action Strategy on CBRN[8].

The disappearance of the "institutional pillar structure" of the European Union following the introduction of the Lisbon Treaty, aside from providing a stronger foundation for the system of data protection, created the conditions for a more uniform and efficient regulation. Furthermore, the Commission, as well as the Council and the Parliament, identified, as a key goal, better protection of personal data within the European Union. The main results of this new scenario already have been realized. On 25 January 2012, the European Commission introduced a comprehensive new regulation to update the existing legal framework of the EU on data protection. This proposed discussion on: a) a proposal for a General Data Protection Regulation, which replaces the Directive 95/46 setting up a general European framework on data protection; b) a proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

After a long debate, the official texts of the Regulation and the Directive were published in the EU Official Journal on 4 May 2016[9]. The Regulation entered into force on 24 May 2016 and will be applied from 25 May 2018. The Directive came into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018. This new legal framework aims to strengthen citizens' control over their personal data and – at the same time – to simplify the regulatory environment for business and improve access to the digital economy. In this way, it will become an important guarantee for the fundamental rights there recognized and an embankment to their violation, even in crisis situations, as the chapter written by Professor Asier Urruela Mora shows. However, its clauses will have to be integrated with the decisions of the Council on exceptional crisis events and with international agreements on the exchange of personal data and information, especially in the areas of global counter-terrorism and major criminal threats[10].

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8 "*Communication from the Commission to the European Parliament and the Council of 24 June 2009 on Strengthening Chemical, Biological, Radiological and Nuclear Security in the European Union*" (http://ec.europa.eu/justice_home/news/sumary/docs/com_2009_0273_en.pdf).

9 Official Journal of the European Union, L 119, 4 May 2016.

10 For the analysis of the new regulatory framework see, in this volume, A. URRUELA MORA, *The current legal framework on data protection in crisis CBRNE. A general exposition.*

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