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Case C-80/23: A Quest for Clarity.

The Law Enforcement Directive 2016/680, A Bulgarian Court and Case C-205/21.

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Abstract:

This contribution examines the legal intricacies surrounding law enforcement data collection practices in Bulgaria within the framework of the Law Enforcement Directive 2016/680 (LED) and relevant Court of Justice of the European Union (CJEU) rulings, particularly cases C-205/21 and C-80/23. The analysis underscores challenges in interpreting the concept of "strict necessity" and ensuring compliance with its provisions. Key findings reveal ambiguities in the LED's application, particularly concerning judicial review and the scope of data collection. Moreover, discrepancies in Bulgarian law regarding crime categorization pose significant challenges to enforcement. These insights have broader implications for EU member states, highlighting the need for legislative alignment and the development of best practices to safeguard digital rights and privacy.

1 The issues risen by the Bulgarian court

A long-expected decision on the reference for a preliminary ruling Case 205/21 was made public on 26 January 2023. Less than a month later, on 14 February 2023, a new request, Case 80/23 for a preliminary ruling was filed by the Sofia city court. Both cases are virtually the same as they relate to the same case. In both instances, the national court addresses the Court of Justice of the European Union (CJEU) with questions related to the interpretation of the Law Enforcement Directive 2016/680 (LED) provisions concerning biometric and genetic data collection for the purposes of police record creation.

In essence, what the Bulgarian court inquiries in C-80/23¹ is, from one side, a clarification of the decision C-205/21² concerning the requirement for "strict necessity" under Art. 10 LED, and from the other, a clarification of paragraphs 100-101 and 132-133 of the ruling C-205/21 which concern the potential judicial review of sensitive data collection within the investigation stage a suspected crime.

First, the Bulgarian court considers that there is an ambiguity between the abovementioned paragraphs. On the one hand, in paras. 100-101, the CJEU appears to allow the collection of biometric and genetic data without court review when otherwise such review may turn out

¹ Request for a preliminary ruling of 14 February 2023, VS v Ministerstvo na vatreshnite raboti, C-80/23

² Judgement of 26 January 2023, VS v Ministerstvo na vatreshnite raboti, C-205/21, EU:C:2023:49

to be a hindrance for the conduct of the criminal investigation as long as the national law guarantees effective judicial review afterwards. On the other hand, the CJEU seems to require that the national court carry out a judicial review on the necessity to collect sensitive data from the accused in paras. 132-133. In addition, the national court points out that the CJEU based its rationale on case law that is foreign to Bulgarian law. The national court cannot make this judicial review of the necessity to collect the referred data because they do not have access to the file of the accused at the investigative stage of a potential crime. Therefore, the Bulgarian court cannot conduct the expected checks for the necessity of the data collection. Based on that, in a new reference for a preliminary ruling C-80/23, the Bulgarian court poses the following questions:

1. Is the assessment of "strict necessity" satisfied if it is carried out solely on the basis of the documentation accusing the person and the refusal to have his/her data collected or it is necessary for the court to have all the material in the person's file?
2. In case the latter is confirmed to be the correct interpretation, can the court also assess if there are reasonable grounds to suspect that the accused committed the crime in reality?

In order to provide an interpretation to the posed questions, recent case law, together with relevant national provisions, need to be explored.

2 The C-205/21 together with Bulgarian law

In Case C-205/21, the concept of "strict necessity" is examined with regards to processing sensitive data, in particular, during a police record creation. The interpretation of this requirement involves imposing stringent conditions on the processing of such data.³ According to the Advocate General Pitruzzella's opinion, reflected in the final judgment, only cases involving serious crimes allow the collection and subsequent processing of "special categories" of data.⁴ This suggests that conventional data processing methods may not suffice in addressing challenges stemming from certain crimes, which makes it necessary to collect sensitive data to achieve law enforcement objectives effectively.

³ Case C-205/21, VS v Ministerstvo, para. 117

⁴ Case C-205/21, VS v Ministerstvo, para. 127

While this is the first condition that may lift the ban on sensitive data collection, there is one additional prerequisite. That is, for the processing to be justified, the specific objective must be clearly outlined in national legislation⁵. Consequently, any systematic gathering of sensitive data is deemed to contravene Art. 10 of the Law Enforcement Directive.

Having regard to these requisites, in the next lines, I explore the Bulgarian normative landscape in order to find the corresponding provisions, which may match those conditions.

2.1 Necessity

As far as the necessity precondition is concerned, several documents could be pointed out. Art. 51 of the Bulgarian Data Protection Act (BDPA)⁶ mirrors the original provisions of the LED Directive's Art. 10. The expectation that those provisions would be developed in Art. 25 of the Ministry of Interior Law⁷, turns out not to provide additional clarity on the specific necessity for collecting sensitive data as it simply refers to the BDPA, Art. 51, and the GDPR, Art. 9.

The Order for the Procedure of Conducting and Removing Police Registration⁸ aims to shed more light. According to Article 3(1), police authorities conduct police registration for individuals accused of general premeditated crimes. While this might seem like a restriction on data collection purposes, it actually affirms the broad scope of data collection.

This is because the Bulgarian Criminal Code categorizes criminal cases into general and private categories based on the nature of the crime. Crimes not specifically designated as of private nature are considered general. General crimes are those affecting societal interests and thus requiring public prosecution and encompass a large spectrum of offenses such as theft, tax violations or murder. As a result, police registration is required for nearly all criminal offenses.

⁵ Opinion in C-205/21, AG Pitruzzella, para. 58, "... ne sont autorisés qu'en cas de stricte nécessité pour la poursuite d'objectifs liés à la criminalité grave, que le droit national doit clairement identifier ..." and "À cet égard, le droit national doit se conformer à l'une des finalités poursuivies par la directive 2016/680. Il doit également indiquer quels sont les objectifs concrets poursuivis susceptibles de contribuer à la réalisation de cette finalité. Doivent également être précisées de manière concrète les raisons pour lesquelles, en dépit du fait qu'il s'agisse d'une ingérence grave, le traitement de ces données, et en particulier des données génétiques, apparaît strictement nécessaire à cette fin."

⁶ Закон за защита на личните данни, Обн. ДВ. бр.1 от 4 Януари 2002 г., изм. и доп. ДВ. бр.17 от 26 февруари 2019г

⁷ Закон за Министерството на вътрешните работи, Обн. ДВ. бр.53 от 27 Юни 2014 г., изм. и доп. ДВ. бр.19 от 5 Март 2024г.

⁸ Наредба за реда за извършване и снемане на полицейска регистрация, обн. ДВ. бр. 90 от 31 октомври 2014г., изм. ДВ. бр.57 от 28 юли 2015г

Furthermore, there is no differentiation between categories of crimes or their severity, as indicated in Case 205/21⁹.

2.2 Outlined in law

While the general objectives for data processing are outlined in the BDPA, specific personal data collected, and their purposes remain unspecified. Delving into related legislation fails to provide clarity. Sectoral laws are not more illuminating. Conversely, Art. 26(3) of the Ministry of Interior Law allows the police authority to process "all necessary categories of data" without specifying purposes. Advocate General Pitruzzella, in his Opinion on C-205/21, arrives at a similar conclusion in para. 61.

Moreover, the police registration process in Bulgaria includes the collection of biometric and genetic data, such as fingerprints and oral DNA profiles¹⁰. Consequently, some of the data collected during a police registration falls within the realm of special categories of data under the Bulgarian data protection act, which mirrors the GDPR definitions for genetic and biometric data. This entails that the same procedure and data categories are collected each time an individual is accused of an intentional crime of a general nature, irrespective of any prior registrations.

This approach is problematic for the following reasons. First, the majority of crimes under the Bulgarian Criminal Code are of general nature. As highlighted in paragraph 130 of the C-205/21 judgment, the mere accusation of an intentional criminal offense subject to public prosecution does not inherently justify the collection of biometric and genetic data. Second, Bulgarian identification documents already contain biometric data, including facial images, fingerprints, and signatures. Hence, law enforcement agencies already possess biometric data, albeit not specifically for law enforcement purposes.

Therefore, it could not be concluded that the relevant national law meets the requirements established in LED and developed in case law.

⁹ C-205/21, para. 127

¹⁰ The Order for the Procedure of Conducting and Removing Police Registration

3 Suggested interpretation of C-80/23

Based on the previous, it is sensible to give the following answers to the questions posed by the Bulgarian court:

1. To the first question, whether the court needs all the information about the accused in order to allow the forced collection of special categories of data, it should be answered in the affirmative.

Paras. 100-101 indeed provide grounds for the national court to approve the collection of sensitive data without a thorough judicial review, however, this is so as long as all the other legal prerequisites are in place such as legislation that correctly transposes the relevant LED provisions. Thus, the answer to the question of the Bulgarian court could be better looked for in the paras. 130-132 of the C-205/21. In addition, Bulgarian authorities already possess the same data, which they request in the police registration procedure. The repeated collection of personal data together with the above analysis on the Bulgarian law suggest that any succinct review of a persons' refusal to be subjected to forced collection of data and subsequent approval of the collection may lead to an undue interference with fundamental rights, guaranteed by Art. 7 and 8 of the EU Charter.

2. To the second question, whether the national court can also assess if there are reasonable grounds to suspect that the accused committed the crime, it should be answered negatively.

As it was stated in judgement C-205/21, para. 134, if the national law fails to ensure a review of the measure involving the collection of biometric and genetic data, it is the referring court to uphold the full effect of Art. 10 LED. The reason for the judicial review is not to provide a judgement on the case but to assess the necessity of an intervention with a person's fundamental rights, aiming to ascertain that persons' role in a crime in order to provide a judgement afterwards. The referred in para. 131 "serious grounds" suggests that the construction of the accusation should count with sufficient valid and incriminating proofs, which lead to incrimination of the person. From the same, it could be concluded that in such a context the collection of special categories of data would be never necessary, as law enforcement authorities would already have sufficient data in order to sustain an accusation. However, there may be cases where the link between the voluntary conscious nature of the act and the materialization of the same in the reality may not be clearly established. Those

cases should be clearly defined and in case the reality defies the normative hypothesis, then a judge would need to determine the necessity of the sensitive data collection.

4 Conclusion

The examination of Bulgarian court references to the Court of Justice of the European Union reveals complexities in law enforcement data collection practices within the EU. Cases like C-205/21 and C-80/23 highlight challenges in interpreting the concept of "strict necessity" and ensuring compliance with the Law Enforcement Directive 2016/680 (LED).

Key takeaways include the need for clarity in interpreting the LED's provisions, particularly regarding judicial review and data collection scope. Bulgarian law's alignment with EU directives poses further challenges.

These legal interpretations have implications beyond Bulgaria, serving as a reference for other EU states. Future research should focus on amending national legislation to align with EU directives and developing best practices for law enforcement data collection.