



BRUSSELS
PRIVACY
HUB
Vrije Universiteit Brussel

Case C-80/23: A Quest for Clarity. Part II, AG's Opinion and Commentary

By Liubomir Nikiforov*

* PhD researcher in Law, Vrije Universiteit Brussel, lyubomir.nikiforov@vub.be

Contents

Abstract:.....	2
1 Background: C-205/21 and Case C-80/23	2
2 The Opinion of AG Richard de la Tour on Case C-80/23	4
3 Commentary	4
4 Conclusion	6

The Brussels Privacy Hub publications are intended to circulate research in progress for comment and discussion. Available at <https://brusselsprivacyhub.com/>. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged.

DISCLAIMER

The opinions expressed in this paper are those of the author/s.

Abstract:

This is a comment and continuation of a previous contribution dated in April 2024.¹ The examination of the C-80/23, which followed C-205/21 underlines the complexities in striking a balance between combating crime and individual rights. Key findings highlight significant alignment between the Advocate General's (AG) opinion and the suggested interpretation on the necessity and scope of judicial review and the roles of competent authorities. Both texts emphasize the need for a thorough assessment of necessity to protect fundamental rights before authorizing intrusive data collection measures. Differences emerge regarding the extent and basis of judicial review, particularly concerning data sufficiency and prerequisites for collection.

1 Background: C-205/21 and Case C-80/23

In April 2024 the Brussels Privacy Hub has published a contribution concerning the request for a preliminary ruling C-80/23.² Two months later, on 13 June 2024, the opinion of Advocate General Richard de la Tour was available on the Court of Justice of the European Union (CJEU) website.³ While following the case and awaiting the final decision, this contribution provides an update on the case taking into account the Advocate General's (AG) opinion.

Before doing that, let us remind the context of the case. On 26 January 2023 a decision on the Case C-205/21 was published. The case is relevant for the application of the Law Enforcement Directive 2016/680 (LED) by national authorities. The stakes in this case revolve around the interpretation of the provisions concerning the transposition of Art. 10 LED as well as an evaluation of the necessity and proportionality of the biometric and genetic data collection for the purpose of police record creation, including where those are collected forcibly.

¹ Liubomir Nikiforov, 'Case C-80/23: A Quest for Clarity. The Law Enforcement Directive 2016/680, A Bulgarian Court and Case C-205/21' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4859884>.

² *ibid.*

³ *Opinion of Advocate General Richard de la Tour delivered on 13 June 2024, VS v Ministerstvo na vatreshnite raboti, C-80/23, ECLI:EU:C:2024:513.*

In C-205/21 the CJEU rules⁴ that if the national legislation has legal provision, which allows “in a sufficiently clear, precise and unequivocal manner” from the interpretation thereof to conclude that the processing of biometric and genetic data at issue falls within the scope of the LED, and not of the GDPR, there is no need to expressly include provisions on special categories of data for the purposes of law enforcement.

Further the Court established that if a person accused of an intentional offence refuses to have his biometric and genetic data collected for the purposes of a record, the national criminal court may authorise an enforcing measure. This could happen without reviewing the severity of the alleged grounds for the prosecution provided that an effective judicial review are guaranteed under national law.

Finally, the national law enforcement authorities should not carry out a systematic collection of biometric and genetic data unless two conditions are met. Those are that the collection of special categories of data is strictly necessary for the specific objectives pursued by the public prosecution and that there are no other means, less intrusive, to achieve the same goal.

Not long after the ruling on C-205/21, on 14 February 2023, a new request, Case C-80/23⁵, for a preliminary ruling was filed by the Sofia city court. The latter is virtually a continuation of the former. What the Bulgarian court inquiries in C-80/23 is, from one side, a clarification of the decision C-205/21 concerning the requirement for “strict necessity” under Art. 10 LED. The national Court inquires if it is sufficient to authorize the biometric and genetic data collection solely on the basis of the accusation and the person’s refusal to have his data collected or the Court needs to have all the material in the file before taking a decision. From the other side, the Bulgarian Court requests 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 of a suspected crime, in particular, whether the national Court may assess the “strict necessity” of the data collection.

⁴ *Judgement of 26 January 2023, VS v Ministerstvo na vatreshnite raboti, C-205/21, EU:C:2023:49* (Court of Justice of the European Union).

⁵ *Request for a preliminary ruling of 14 February 2023, VS v Ministerstvo na vatreshnite raboti, C-80/23* (Court of Justice of the European Union).

2 The Opinion of AG Richard de la Tour on Case C-80/23

In a previous contribution, I suggested a potential interpretation of the questions posed in Case C-80/23.⁶ To the first question, I asserted that the national court needs all the information about the accused to allow forced collection of special categories of data. This is so because any succinct judicial review of a person's refusal to be subjected to forced collection of data and subsequent approval of the collection may lead to an undue interference with fundamental rights. To the second question concerning the potential judicial assessment of the grounds of the accusation of the suspected criminal, I concluded that it should be answered negatively. This is so because judicial review is meant 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.

On 13 June 2024 the AG Richard de la Tour's Opinion on Case-80/23 was made public.⁷ The AG suggests that the assessment of the police record creation is "strictly necessary" for the purposes aimed with its creation must be carried out by the respective competent authorities for the creation of the record before requesting a court authorization. Therefore, it is not sufficient that this assessment is done for the first time by the court only when the accused refuses to consent, and only based on one purpose stated in the national law supporting this collection.

On the second question, the AG proposes that the preliminary ruling should establish that the review by the national court of the strict necessity does not require a review of the material grounds for the accusation, that is to say whether it is well-founded. In addition, a full disclosure of the case file is not necessary if the judicial review can be done based on the decision designating the person as accused.

3 Commentary

Reading the AG Richard de la Tour conclusions it could be established a strong alignment on key points regarding the necessity and scope of judicial review and the roles of competent

⁶ Nikiforov (n 2).

⁷ *Opinion of Advocate General Richard de la Tour delivered on 13 June 2024, VS v Ministerstvo na vatrešnite raboti, C-80/23, ECLI:EU:C:2024:513* (n 4).

authorities and the court. The AG proposal as well as the suggested interpretation in the contribution in April emphasize on the protection of fundamental rights and the need for a thorough assessment of necessity before intrusive data collection measures are authorized. The differences lie in the nuanced expressions of the roles and the specifics of data sufficiency and legal prerequisites, but the overarching principles remain consistent.

On the first question, the AG's opinion and the proposed interpretation assert the necessity of a comprehensive review before the collection of sensitive data. While the proposed interpretation affirms that the court needs all relevant information about the accused to allow the forced collection of special categories of data, the AG states that the assessment must be carried out first by the competent authorities seeking the creation of a record before requesting court authorization. The AG's emphasis on prior assessment by competent authorities resonates with the concern about succinct reviews potentially interfering with fundamental rights and it is implicitly supported by the Court's requirement for a thorough and prior assessment by the respective authorities.

In addition, both texts underline the potential for undue interference with fundamental rights if the judicial review process is inadequate. The proposed interpretation warns that a succinct review could lead to such interference. Similarly, the AG highlights that the assessment of necessity must not be performed solely when the accused refuses consent.

On the second question, both interpretations agree that the national court's role is not to evaluate the foundation of the accusation but to assess the necessity of data collection. The AG clarifies that the court's review of whether the collection of biometric and genetic data is "strictly necessary" does not require assessing the accusation's validity, aligning with the proposed interpretation's assertion that the national court should not determine if there are reasonable grounds to suspect the accused.

However, a divergence emerges regarding the extent and basis of judicial review. The AG notes that full disclosure of the case file is not required for the court to assess necessity, provided the review is based effectively on the decision designating the person as an accused. In contrast, the proposed interpretation suggests that existing data should restrict the need for further data collection if sufficient to sustain an accusation.

4 Conclusion

Despite the minor divergence stated above, the AG's suggested interpretation matches the earlier interpretation provided in April. As stated in the latter, the requests for preliminary ruling examined here reveal the delicate balance between data collection for law enforcement purposes and individual rights and freedoms, in particular, where stands the line between excessive interference in person's private sphere and the fight against crimes.

It would be interesting to follow the Case in order to see if the EU Court would uphold the AG's conclusion. While the final decision on Case C-80/23 is still pending, I hope this contribution serves as a material for the debate around data collection and processing for the purposes of law enforcement.