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The Implementation of the European Directive 95/46/EC in Greece and Medical/Genetic Data

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1. The European Directive and L. 2472/1997

Medical and especially genetic data have become a number one legislative importance in many European countries and in the Unites States. This new legal domain is 'fashionable', à la mode; at least in Greece, new faculty positions open in the Law Schools with data protection as the main theme of the courses they relate to, and a number of articles on data protection in the major Greek law reviews has been published. People fear more than ever that their personal data may flow from one computer to another and that what their personal private doctor knows about them may very well now be in the hands of an insurance company, a security fund-wherever.

But it is not true, strictly speaking, that the question of data protection first arose in Greece after the European Directive 95/46/EC, or that Greece provided no legal defense for impermissible data violations before the directive. Quite the contrary: Greece had ratified the Council of Europe Convention of 1981 (28.1.1981) for the Protection of Individuals with Regard to Automatic Processing of Personal Data (L. 2068/1992-it is true, though, that Greece did not, at the time, proceed with specific rules on the matter). The general clause of the protection of personality, Art. 57 of the Civil Code, an article notably absent in many European Civil Codes, could serve as grounds of liability for any impermissible processing of personal data. All the indications from our jurisprudence are clear, that the Greek courts were ready to interpret the clause for the protection of personality as a proper foundation of a cause of action aiming at the prescription of the illegal processing of personal data and, most importantly, at an award for damages for moral harm (non-pecuniary losses) independent from any physical or generally, tangible, injury. Art. 57CC has been applied widely enough as to permit such a statement and this fundamental provision has 'saved' us from a number of,

impossible to foresee at the time of the Civil Code's drafting, cases. Personal data could be one of them. Apart from this, a series of draft bills were introduced in the Greek Parliament for discussion and voting (in 1989, in 1990, in 1991 and in 1992), none of which managed to reach a meaningful discussion, let alone a decent vote. A relevant bill proposal in 1992 was rejected. A last draft bill in 1994 also followed its predecessors' fortune.

Upon this background, it came as no surprise that Greece played a major role in the formation of the European Directive 95/46/EC (Greece was also the Head of the European Commission at the time). The Directive is a detailed and very fundamental instrument, no doubt, but it called for specific legislation for its' true implementation. This specific statute for Greece was L. 2472/1997, 'On the Processing of Personal Data'. For the first time, among other novelties, the victim of an illegal processing of personal data was offered a remedy, damages for both economic and non-economic losses.

L. 2472/97 and medical data. Medical (and of course, genetic) data belong in the statute's list of 'sensitive' data (Art. 7, sec. 1). The European Directive listed medical data in 'special categories of data' (Art. 8, sec. 1). The Greek legislator preferred the word 'sensitive' as an indicator of something more than 'special'. Medical data, therefore, come as similar in nature with data revealing ethnic or racial origin, data on sex life, on one's criminal record, political and religious opinions etc. The processing of all sensitive data, medical data too, is only allowed under the following conditions (Art. 7 sec. 2): a. The data subject has given explicit written consent to the processing of those data (consent is, though, invalid, if given against the principles of good morals or if consent is prohibited by law) b. Processing is necessary to safeguard vital interests of a data subject legally or physically incompetent to give a valid consent c. Processing is necessary for the data subject's defense in a court of law d. Processing is necessary to protect the data subject's interests in health and it is carried out by a health care provider under the obligation of confidence e. Processing is necessary to further national security interests and needs of the state's criminal or correctional policies and f. Processing is related to personal data of public persons connected to the exercise of their public duties and this processing is a part of the exercise of a journalist's duties. Consent of the person related to the medical data is legal only if it is clear and explicit, and only if it was given after this person has been fully informed on the purpose of processing, the nature of data to be given, the recipients or categories of recipients of the data and the filing system controller. In any case, this controller is obliged to file for a license to process sensitive data to the Greek Authority of Data Protection, which was also instituted by the statute.

Sanctions. The sanctions for the impermissible processing of medical (and

other) data are diverse: civil sanctions, penal sanctions and administrative sanctions. The civil sanctions include a minimum of damages payable to the victim of the illegal processing of data for non-economic loss (an impressive step for a State traditionally hostile to any damages for moral harm). These damages, as a satisfaction for moral harm, may never fall below the limit of € 5.869, unless the offense was negligent, or the plaintiff claimed a lesser amount. This monetary satisfaction is awarded independently of any other compensation for economic loss. The procedure implemented to resolve the relevant disputes is the quick summary procedure under Art. 664, 676 CCivPr. The State may also bear civil liability, for acts or omissions of its organs, under the general provisions of IntrCC 105-106. Penal sanctions are threatened for two classes of offenses: for certain acts or omissions as the breach of the obligation to notify of the existence of a file, the function of a file with sensitive data without a license etc, and also, for the non-execution of a decision issued by the Authority of Personal Data Protection.

Criminal sanctions start from a jailing penalty of up to three years and reache the penalty of up to ten years incarceration, for anyone who breached certain provisions of the statute with the purpose of acquiring or giving to a third party an illegal pecuniary benefit to harm another one. This grave penalty is also coupled with a possible pecuniary penalty from € 5.869 up to € 29.347.

Administrative sanctions. The Authority for the Protection of Personal Data, has the power to impose grave administrative sanctions upon any file controllers and their agents, starting from a simple warning setting a time limit for compliance, a fine from 880Euro up to 14,735Euro, a temporary revocation of license to operate and also, an order to destroy all files or to cease any processing and extinguish all relevant data.

Authority for the Protection of Personal Data specifically. The Authority is responsible for the control of all legal or natural persons and entities that possess and use files of personal data. The Authority supervises the implementation of L. 2472/97 in Greece, the formation and the operation of all personal data files. In particular, the selection and the processing of data by a certain company has to be linked to the objectives of the company; also, the processing of those data is allowed only as long as it is necessary and according to a legitimate purpose. The Authority of Personal Data Protection is an independent administrative agency and it enjoys independent funding and Secretariat. The actions by this independent Authority are not, in principle, subject to any control by the executive power. The Authority consists of five members (a Supreme Court justice as head, a law professor etc) who may change every four years (half of them change every two years). Only the head of the Authority is appointed by the Ministers Council. A

number of legal safeguards restricting the eligibility for membership in the Authority secure the Authority's independence. This Authority has extensive competencies. It may contribute in the drafting of codes of ethics by associations and organizations, may conduct administrative controls, may impose sanctions, may issue legislative texts, may announce at the Parliament the breaches of the statute, may submit annually a Report at the President of the Parliament on the Authority's actions and the condition of data protection in Greece. The Head of the Authority may also act immediately, whenever needed, and edit a temporary order restricting or prescribing the processing of certain data or the function of a file. This order is in effect until the Authority reaches a final decision in plenary session. The Authority has its own records and Art. 4 regulates access to these records. All public authorities are obliged to offer any contribution and help necessary for the Authority's function.

2. Genetic data and national legislation

Genetic data are seen today as a special class of medical data, in need for also special protection. A large body of legal theorists sustain that genetic information is 'unique' and legislators have followed this view (the United States, for example, have issued, among others, the federal Genetic Privacy Act drafted in 1995). A series of States afterwards followed with a great number of bills on genetic privacy. Writers discuss a 'genetic privacy right', and even more than that 'personal data'; genetic data are today more than ever in the center of attention.

a. The 2001 constitutional revision and genetic data

In Greece, the 2001 revision of the Constitution offered the chance for the inclusion of a specific mention of genetic data. It is true that Greece had ratified the (Oviedo, 4.IV.1997) Convention of the Council of Europe on human rights and biomedicine (L. 2619/1998). The statute prescribed, as an internal law, any discrimination against a person because of her genetic inherited material and allowed a medical examination searching for genetic information only for medical reasons or for research related to medical reasons, and always under the necessary genetic counseling (Art. 11 and 12). The truth is, though, that the ratification of the convention was a general instrument, a lex imperfecta, as it did not contain any sanctions for the breach of the above rules of law. The articles on genetic data which were added to the Constitution in 2001, as part of the work of the Z Revisionary Greek Parliament, were also general. A section 5 was added to Art. 5 of the