THE EFFECTS OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-201/14 BARA AND OTHERS ON THE EVALUATIONS PERFORMED BY THE NATIONAL INTEGRITY AGENCY – ANI

Tudor CHIUARIU, Lecturer in law PhD, Senior Postdoctoral Research Senior Fellow,

University "Titu Maiorescu" Bucharest

Abstract

The starting point of the article is a recent landmark decision of the Court of Justice of the European Union – Case C-201/14 Bara and Others – on the way the public authorities are handling the personal data. The preliminary ruling concerned the transfer of data from fiscal to the health insurance authorities and found that data subjects must be informed of such transfer or further processing. The article analyses the effects of the said judgment in other area of administrative action, namely the evaluations on wealth, conflicts of interests and incompatibilities of civil servants and public officials performed by the National Integrity Agency – ANI.

1. Introduction

This article starts from the analysis of a preliminary ruling[1] recently passed by the Court of Justice of the European Union (hereinafter referred to as the „Judgment"), at the request of a Romanian Court, with regard to the interpretation of Directive 95/46 on the protection of personal data (hereinafter referred to as the „Directive")[2].

The judgements of the Court are binding for the courts and administrative bodies of Member States, producing effects as of the entry into force of the act it interprets, also with regard to legal relationships arisen before the decision is passed[3].

Therefore the principles established by the Judgment and completed with the analysis of the Opinion of the Advocate General formulated in this case (hereinafter referred to as "the AG Opinion") are applicable to procedures similar to that which was object to the above-mentioned case. We shall analyse in this paper the effects of the Judgment of the Court with regard to the evaluations on wealth, conflicts of interests and incompatibilities of the civil servants and public officials performed by the National Integrity Agency - ANI.

2. The preliminary reference of the Court of Appeal Cluj referred as CJEU Case C-201/14 Bara and Others

The request for a preliminary reference was formulated in a dispute between Mrs Smaranda Bara and others, on the one side, and the president of the National House of Health Insurance (hereinafter referred to as "CNAS") and the National Agency for Fiscal Administration (hereinafter referred to as "ANAF"), on the other side, regarding the processing of personal data.

The claimants in the main dispute are persons obtaining income from independent activities. ANAF sent to CNAS data on their declared incomes. Based on this data, CNAS requested the payment of overdue contributions to the national health insurance system.

The claimants filed with the Court of Appeal a complaint whereby they challenge the legality of the transfer of fiscal data on their incomes, in consideration of the provisions of the Directive. The claimants argue that, based on a simple internal protocol, the mentioned data was transmitted and used for other purposes than those for which it had initially been communicated to ANAF, without their explicit approval and without being notified beforehand.

According to the order for reference, public entities are able, based on Law 95/2006, to transmit personal data to national health insurance funds in order to allow them to ascertain the status of insured persons of the persons in question. The respective data refers to the identification of the persons (name, first name, personal identification number, address), but do not comprise data on the obtained incomes.

The referring court aimed to determine whether the processing of the data by CNAS requires a previous notification of the persons in question with regard to the identity of the operator and the purpose for which such data was transmitted. This court is also called upon to pass a decision with regard to whether the transmission of data based on the 2007 Protocol between ANAF and CNAS is in breach of the provisions of Directive 95/46 which require that any restriction on the rights of persons in question be provided for in the law and accompanied by guarantees, especially when the data is used against such persons.

Therefore, the Court of Appeal Cluj decided to stay proceedings and to refer the following four questions to the Court for a preliminary ruling:

"1) Is a national tax authority, as the body representing the competent ministry of a Member State, a financial institution within the meaning of Article 124 TFEU?

2) Is it possible to make provision, by means of a measure akin to an administrative measure, namely a protocol concluded between the national tax authority and another State institution, for the transfer of the database relating to the income earned by the citizens of a Member State from the national tax authority to another institution of the Member State, without giving rise to a measure establishing privileged access, as defined in Article 124 TFEU?

3) Is the transfer of the database, the purpose of which is to impose an obligation on the citizens of the Member State to pay social security contributions to the Member State institution for whose benefit the transfer is made, covered by the concept of prudential considerations within the meaning of Article 124 TFEU?

4) May personal data be processed by authorities for which such data were not intended where such an operation gives rise, retroactively, to financial loss?"

3. The substance of the CJEU Judgment in Case C-201/14 Bara and the Others

Through Judgment passed on 1 October 2015, the Court stated that the first three preliminary questions regarding the interpretation of article 124 TFEU are inadmissible to the extent that that primary law provision referred has no connection with the object of the dispute in the main proceedings (points 19 and the following of the Decision).

Also, the Court stated that with the fourth question, the referring court essentially requests to be established whether articles 10, 11 and 13 of Directive 95/46 are to be interpreted in the sense that they oppose certain national measures like those in question in the main proceedings, allowing a public administrative authority of a Member State to transmit personal data to another public administrative authority as well as to process such data afterwards, without informing the persons in question of such transmission and processing.

The reasoning of the Court with regard to the fourth question is as follows:

3.1. The data transferred by ANAF to CNAS is personal data.

In view of formulating the answer to the fourth question, the Court first stated (point 29 of the Judgment) that the fiscal data transferred by ANAF to CNAS is personal data, in the sense of article 2, letter (a) of the Directive, as we are dealing with "information referring to an identified or identifiable natural person" (Decision Satakunnan Markkinapörssi and Satamedia, C-73/07, EU:C:2008:727, point 35). Both the transmission of such to ANAF, a body responsible with the administration of the database including it, and its ulterior processing by CNAS thus represents "processing of personal data" in the sense of article 2, letter (b) of the same directive (see in this sense particularly Decision Österreichischer Rundfunk and Others, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, point 64, as well as Decision Huber, C-524/06, EU:C:2008:724, point 43).

3.2. There is an obligation to inform the persons in question.

As a consequence, the Court stated that the obligation to correctly process personal data as provided in article 6 of the Directive binds a public administration authority to inform the persons in question on the transmission of such data to another public administration authority in view of processing by the latter as addressee of the mentioned data (point 34).

Then, the Court delimitated the legislative framework applicable to the case, by referring to the obligation to inform by the operator or its representative, the conditions of which, provided for in articles 10 and 11 of

Directive 95/46 vary depending on whether such data is collected from the person in question or not, subject to the derogations admitted based on article 13 of the Directive (point 31).

According to the explanations provided by the referring court, the applicants of the main proceedings were not informed by ANAF on the transmission to CNAS of the personal data referring to them (point 35).

3.3. None of the exceptions to the obligation to inform is applicable.

The Court went on to analyse whether in the factual situation of the main dispute is applicable any of the exceptions to the obligation to inform, exceptions provided for by the Directive, which would have determined the elimination of the obligation to inform:

1. if the person was already informed, based on art. 10 of the Directive;

2. if there is a legislative measure whereby the member state restricted the obligations provided for by the Directive, pursuant to art. 13 of the Directive;

3. if the national legislation explicitly provides for the registration or communication of data which was not obtained from the person in question, pursuant to art. 11, section 2 of the Directive.

It is obvious that the Court performed this analysis both on grounds of art. 10, which refers to the situation when the data was collected from the person in question, as was the case with ANAF, as well as on grounds of art. 11, when the data was not collected from the person in question, which was the case of CNAS.

The Romanian Government defended itself by invoking art. 315 of Law 95/2006, according to which ANAF had the obligation to transmit to the regional health insurance funds the information necessary for the determination by the CNAS as to whether persons earning income through self-employment qualify as insured persons (point 36 of the Judgment).

3.3.1. The analysis of the hypothesis that the person was already informed, based on art. 10 of the Directive

According to art. 10 of the Directive, the operator provides the person from whom it collects data referring to him/her the information mentioned at letters (a)-(c) of this article, except for the case when such person is already informed regarding the respective data. Such information refers to the identity of the operator, the purpose of the processing, as well as any other additional information required to ensure a correct data processing. Among the additional information required to ensure a correct processing of such data, article 10, letter (c) of the same directive explicitly states “the recipients or categories of recipients of the data”, as well as „the existence of the right of access to the data which […] refer to [the mentioned person] and the right to rectify the personal data”.

In his Opinion (point 74), the Advocate General observed that the requirement of informing the persons concerned by the processing of their personal data is all the more important since it is a prerequisite of exertion by these persons of their right to access and rectify processed data, as defined in article 12 of Directive 95/46, and of the right of opposition of such against the processing of such data, as stated in article 14 of the Directive.

According to art. 315 of Law no. 95/2006:

“The data necessary to certify that the person concerned qualifies as an insured person is to be communicated free of charge to the health insurance funds by the authorities, public institutions or other institutions in accordance with a protocol”.

However, the Court stated that, based on the explanations offered by the referring court, the phrasing "the data necessary to certify that the person concerned qualifies as an insured person" contained by the national legislative provision invoked does not include the data on incomes, given that the law acknowledges the capacity of insured persons also in the case of persons without taxable incomes.

As a conclusion, the Court considered that art. 315 of Law no. 95/2006 does not refer to data on incomes, and thus cannot constitute in the sense of article 10 of Directive 95/46 a preliminary information likely to allow the exemption of the operator from the obligation to inform the persons from whom it collects data on their incomes about the recipients of such data. As a consequence, it cannot be considered that this transmission was performed with the observance of the provisions of article 10 of Directive 95/46 (point 38 of the Judgment).

3.3.2. The analysis of the hypothesis according to which the Member State restricted the obligations provided for by the Directive through a legislative measure, pursuant to art. 13 of the Directive

According to article 13 of the Directive, Member States may restrict the scope of obligations and rights provided for by art. 10, if such a restriction constitutes a necessary measure to "safeguard the economic or financial well-being of a Member State [...], including in the monetary, budget and fiscal fields", as well as "a function of monitoring, inspection or regulation related, even occasionally, to exerting the public authority in the cases mentioned at letters (c), (d) and (e)". Notwithstanding, the same article 13 explicitly requires that such limitations be adopted by means of legislative measures.

The Court stated that art. 315 of Law no. 95/2006 does nothing more than refers basically to the transmission of such personal data held by authorities, by public institutions and other institutions, while, as results from the referral decision, the definition of transmissible information, as well as the means of performing the transmission of such information were elaborated not by means of a legislative measures but by means of Protocol of 2007 signed between ANAF and CNAS, which was not subject to an official publishing.

As conclusion, the alleged derogation was not undertaken by means of a legislative measure, and thus the conditions are not met as stated in article 13 of Directive 95/46 in order for a Member State to deviate from the rights and obligations entailed by article 10 of the Directive (point 41).

3.3.3. The analysis of the hypothesis in which the national legislation explicitly provides for the registration or communication of data which was not obtained from the person in question, pursuant to article 11, paragraph 2 of the Directive.

Article 11, paragraph 1 of the Directive provides for the obligation of the operator processing the data which was not collected from the person in question to communicate to such person the information stated in letters (a)-(c). Such information refers to the identity of the operator, the purpose of the processing, as well as any other additional information required to ensure a correct data processing. Among such additional information, article 11, paragraph (1), letter (c) explicitly mentions "the categories of data in question", as well as the "existence of the right to access the data referring to him and to rectify personal data".

As a consequence, the Court stated that, as per article 11, paragraph (1), letters (b) and (c) of Directive 95/46, in the circumstances in the main proceedings, the processing by CNAS of the data transmitted by ANAF entailed the information of the persons referred to by this data in connection to the purposes of this processing, as well as the categories of data in question.

But, the explanations given by the referring court state that CNAS did not provide the applicants in the main proceedings the information stated in article 11, paragraph (1), letters (a)-(c) of the Directive.

Regarding the exception stated by art. 11, section (2), according to which the provisions of article 11, paragraph (1) do not apply when, among others, the registration or communication of the data is provided by the law, requiring that the Member States ensure in this case appropriate safeguards, the Court considered that such does is not applicable in this case, for the same reasons invoked in the case of the exception stated by article 13, namely that the definition of transmissible information, as well as the means to perform the transmission of such information was elaborated not by means of a legislative measure, but by Protocol of 2007 signed between ANAF and CNAS (points 40-1 of the Decision).

Subsequently, the Court decided that the provisions of Law no 95/2006 invoked by the Romanian Government and Protocol of 2007 cannot be grounds for the derogation instated by article 11, paragraph (2), nor for the derogation resulting from article 13 of the Directive.

Considering all aspects above, the response of the Court to the preliminary question was that articles 10, 11 and 13 of Directive 95/46 must be interpreted as precluding national measures like those in question in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing.

4. The national legislative framework on the integrity evaluations performed by ANI

The purpose of the National Integrity Agency - ANI is to ensure integrity when exerting public positions and to prevent institutional corruption, by performing evaluations of the declarations of assets, data and information on wealth and assets, as well as the occurred financial modifications, the incompatibilities and potential conflicts of interests in which persons may be found while exerting public positions. In fulfilling this purpose, the Agency may develop relations of collaboration by concluding protocols with domestic or foreign bodies (article 8 of Law no 176/2010).

The activity of evaluation performed by the integrity inspectors within the Agency unfolds with reference to the situation of the wealth and assets existing while exerting the public positions, of conflicts of interests and of incompatibilities of persons occupying public positions.

On the basis of article 15 of Law 176/2010, while evaluating the wealth and assets, the integrity inspector may request all public institutions and authorities, other public or private law legal entities, as well as natural persons, documents and information required to performing the activity of evaluation, subject to the obligation of confidentiality.

Thus, at the justified request of the integrity inspector, natural persons and legal entities, heads of authorities, institutions or public or private companies, as well as those of autonomous state companies are obliged to communicate to such, within 30 days, the data, writs, information and documents requested, as per the provisions of paragraph (1), regardless of the supporting media, as well as data, information or documents they hold, which could lead to solving the case.

Such provisions also apply correspondingly in the case of evaluating conflicts of interests or incompatibilities (art. 20, paragraph 5 of Law 176/2010).

5. Observing EU law on protection of personal data in the activity carried out by ANI

The data communicated by authorities and public institutions to ANI is personal data, in the sense of the Directive, as it is information referring to an identified or identifiable natural person.

Therefore, the correct processing of such data imposes an obligation to inform the person in question.

With regard to the incidence of an exception from the obligation to inform, the issue is first discussed on the ground of article 10 of the Directive, whether article 15 of Law 176/2010 may constitute a prior information, in the sense of the Directive.

Article 15 of Law 176/2010 does not refer to the categories of data in question, so it cannot constitute a prior information, in the sense of art. 10 of the Directive (in the same sense, the Conclusions of the AG, point 79).

Secondly, with regard to the applicability of the exception from the obligation to inform as stated by article 13 of the Directive, we see that the Directive allows Member States to adopt legislative measures in order to restrict the scope of obligations and rights as stated in article 10 and article 11 in order to safeguard:

(a) state security;

(b) defence;

(c) public safety;

(d) prevention, criminal investigation, detection and prosecution of crimes or of breaches of ethics in the 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 regulatory 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.

From regulation of article 13 of the Directive, we conclude that, in order to achieve the standard of protection imposed by the EU instrument, an exception or a restriction from the rights in terms of personal data must meet the following conditions[4]:

1. refer to one of the mentioned scopes of general interest;

2. be adopted by means of a legislative measure;

3. be necessary and proportional.

We will continue by analysing to what extent the evaluation activity carried out by ANI meets these conditions.

With regard to the first condition, the analysis is all the more welcomed since the Court did not find necessary to perform it in the Bara Case, since it concluded that the second condition was not met.

First of all, it is obvious that we are not in any of the exceptions stated at letters (a), (b), (c), (e) and (g), the evaluation of assets, of incompatibilities and conflicts of interests is not a matter pertaining to state security, public safety, an important economic or financial interest of a Member State of the European Union, the protection of the data subject or of the rights and freedoms of others.

So, it remains to discuss the exceptions mentioned at letters (d) and (f).

Letter (d) instates an exception in terms of the prevention, criminal investigation, detection and prosecution of crimes or of breaches of ethics in the regulated professions.

So, under this exception, the activity of personal data processing must be in connection with one of the two domains: crimes, respectively breaches of professional ethics, in the case of regulated professions. The second has nothing to do with ANI's scope of activity.

In the case of the first domain, one can appreciate that there are characteristics of the integrity system as developed by the Romanian legislation that intersects with the exception from the EU system of protection of data related to crimes.

The problem that arises is whether the evaluation and control activities are covered by the activities of "prevention" or "detection" of crimes.

On the one hand, it is without a doubt that the public authorities in this domain are not criminal prosecution bodies and have no powers that would be specific to such.

On the other hand, the legislation on public integrity has an outspoken preventive purpose. Still, since these are cases of exception in terms of fundamental rights, all these must be interpreted restrictively. From this point of view, we do not consider that the teleological method, which considers the purpose of the regulation, is adequate.

Even if we applied the teleological method, we can distinguish between a main purpose, that is carrying out administrative verifications, and a derivative or complementary purpose through which the first extends over to the criminal domain, by notifying the criminal prosecution bodies, in case when, within administrative verifications, indications are found regarding the committing of crimes.

An element limiting the interpretation in this sense is the Decision of the Constitutional Court no 415/2010[5], which considered the legislative solution whereby integrity inspectors had attributions similar to criminal prosecution bodies as outside of the constitutional framework.

As a conclusion, in our opinion, ANI's evaluation activity is not covered by the exception stated by letter (d).

But it qualifies for the exception stated at letter (f), with reference to letter (d):

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);"

ANI exerts a monitoring or inspection function connected to the exercise of public authority in the cases mentioned in letter (d), namely the prevention and detection of crimes.

Regarding the second conditions stated by article 13 of the Directive, namely that the exception be adopted by means of a legislative measure, the situation of ANI's evaluations is similar to the situation of the applicable legislation considered as contrary to the EU law by the CJEU in the Bara Case.

The argument stated by the Court regarding article 315 of Law 95/2006, in the sense that it only refers basically to the transmission of such personal data held by the authorities, by public institutions and other institutions,

while the definition of transmissible information, as well as the means of performing the transmission of such information were elaborated not by means of a legislative measure, but by means of Protocol of 2007 signed between ANAF and CNAS which is not subject to official publishing, is valid, *mutatis mutandis*, in the field of the legislation on the integrity evaluations, with regard to the provisions of article 15 of Law 176/2010.

The transmission of such information to ANI is done also based on collaboration protocols, some of which are found on ANI's website (www.integritate.eu), at internet address https://www.integritate.eu/Cooperare/Cooperare-naţională.aspx, as those concluded with Agenţia Naţională a Funcţionarilor Publici – ANFP (National Agency of Civil Servants), Agenţia Naţională de Administrare Fiscală – ANAF (National Agency for Fiscal Administration), Oficiul Naţional al Registrului Comerţului – ONRC (National Trade Register Office), Ministerul Internelor şi Reformei Administrative – MIRA (the Ministry of the Interior and the Administrative Reform). Other protocols, although appearing in official documents, such as ANI's Draft Budget for 2012[6], do not appear on ANI's website and, at least in appearance, are not public, like those concluded with the National Office for the Prevention and Control of Money Laundering, National Agency for Regulating and Monitoring Public Procurement, National Agency of Land *Registration*.

This type of protocols, as stated in the AG Opinion *"is not at all akin to a legislative measure of general scope, duly published and enforceable in relation to those persons who are the subjects of the transmission of the data at issue"* (point 85).

The third exception from the obligation to inform, as stated by art. 11, section 2 of the Directive, consists in that the registration or communication is provided by the law, with the correlative instating of proper guarantees. We consider that the considerations of the Court in the Bara Case can be applied in the field of integrity evaluations, in the sense that the definition of transmissible information, as well as the means to get this information were not elaborated by means of a legislative measure, but by administrative protocols. If we move further, we can't find the instating of any proper guarantees. Also, an additional argument can be the one stated in the AG Opinion, albeit on the ground of article 13, but which maintains its validity also in the context of article 11, paragraph 2, namely that the national legislation does not contains legislative provisions that would exempt the ANAF and/or the CNAS clearly and explicitly from their obligations to provide information (point 83).

6. Conclusions

As a conclusion, the answer of the Court in Bara Case, applied *mutatis mutandis* on ANI's integrity evaluations, reads as follows: are contrary to EU law on the protection of personal data the national measures that allow public administrative bodies to transmit personal data to ANI, as well as the process such afterwards, without informing the data subjects on this transmission or on this processing.

The CJEU Judgment in the Bara Case shall remain referential for the manner in which public authorities, bodies and institutions relate to the observance of the EU standards in terms of personal data protection and shall find its applicability in other administrative procedures which entail various forms of data processing.

The example given in this article is just one of the cases in which the processing of personal data is performed without the proper information of the data subject.

It remains to be seen whether the various national measures in breach of the applicable EU law shall be rendered ineffective by means of legislative amendments, by being declared inapplicable by national courts or pursuant to quasi-repetitive requests for preliminary rulings.

References

[1] Judgment of the Court (Third Chamber) of 1 October 2015, C-201/14 Smaranda Bara and Others v Președintele Casei Naționale de Asigurări de Sănătate and Others, ECLI:EU:C:2015:638.

[2] 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(JO L 281, p. 31, Special edition, 13/vol. 17, p. 10).

[3] CJEU, C-453/2000 Kűhne, point 21 and the following.

[4] Along the same line goes the opinion of the European Commission, quoted in the Opinion of the Advocate General Pedro Cruz Villalón, presented on 9 July 2015, points 45 and 47, http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62014CC0201&qid=1446502756544&from=EN.

[5] Decision no. 415/2010 referring to the unconstitutionality exception of the provisions of chap. I General provisions (art. 1-9), of art. 11 let. e), f) and g), of art. 12 para. (2), of art. 13, of art. 14 let. c), d), e) and f), of art. 17, of art. 38 para. (2) let. f), g) and h), of art. 42 para. (2), (3) and (4), of chap. VI The verification of wealth and assets, of conflicts of interest and incompatibilities (art. 45-50) and of art. 57 of Law no. 144/2007 on the set-up, organization and operation of the National Integrity Agency, published in the Official Journal, Part I, no. 294 of 05.05.2010.

[6] Referenced at the following internet address, on 3.11.2015: http://discutii.mfinante.ro/static/10/Mfp/proiect_buget2012/Agentia_Nationala_Integritate.pdf

"This work was funded by the POSDRU/159/1.5/S/141699 contract, strategic project ID 141699, co-funded by European Social Fund through the Sectoral Operational Programme Human Resources Development 2007-2013"