Op-Ed

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"AG Pikamäe's Opinion in *OT*: Transparency Meets Data Protection"

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Suggested citation: Alberto Miglio, "AG Pikamäe's Opinion in *OT*: Transparency Meets Data Protection", *EU Law Live*, 15 December 2021

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In his recent Opinion in *OT v Vyriausioji tarnybinės etikos komisija* (C-184/20), Advocate General (AG) Pikamäe addressed the impact of EU data protection legislation on laws prescribing transparency requirements for public administrations. The Opinion is an important reminder to national lawmakers that the public disclosure of personal data must meet a stringent proportionality test and contains valuable policy advice on the balancing of transparency and data protection.

Background to the case

By its reference for a preliminary ruling, the Regional Administrative Court of Vilnius had asked the Court of Justice to rule on the compatibility with Regulation 2016/679 (the General Data Protection Regulation, ‘GDPR’) of a Lithuanian law on conflicts of interests imposing disclosure requirements on holders of political mandates, public servants and various categories of individuals whose activity is somehow connected to the operation of public entities. They are obliged to file a declaration including a large amount of data concerning their (and their spouse or partner’s) income and professional activity, as well as the identity of persons close to them and any other known information liable to give rise to conflicts of interests. The Principal Commission for the prevention of conflicts of interests, an administrative authority, collects the data and publishes them on its website with few exceptions. Should a person omit to communicate relevant information, the Commission is entitled to carry out an investigation and issue a decision imposing disclosure. In the context of the review of one such decision, the referring court submitted two questions for preliminary ruling concerning the compatibility of the Lithuanian legislation with, respectively, Article 6(1) and Article 9(1) GDPR.

The Opinion of AG Pikamäe

Preliminarily, the AG addressed the applicability of the Regulation. He convincingly argued that the case does not fall within any of the exceptions

to the scope of the GDPR. Notably, while transparency may be instrumental in fighting corruption, the Principal Commission is not a 'competent authority' processing personal data for purposes of criminal law enforcement. Thus, the exception set forth in Article 2(2)(d) GDPR does not apply. Concerning the law applicable *ratione temporis*, the Advocate General noted that the case most likely fell within the scope of Directive 95/46, but that the applicability of the GDPR could not be excluded. Since the relevant provisions are essentially identical in the Directive and in the Regulation, he proceeded in his analysis taking into account both pieces of legislation.

As regards the first question, the Advocate General suggested that the lawfulness of the publication requirement be assessed on the basis of the whole set of principles regulating the processing of personal data, including Articles 8(2) and 52(1) of the Charter of Fundamental Rights concerning the legitimacy of fundamental rights restrictions. He correctly identified the legal basis for processing in the existence of a legal obligation upon the controller (Article 6(1)(c) GDPR) rather than in the broader public interest clause (Article 6(1)(e)) as suggested by the referring court. While the objectives pursued by the legislation in question, namely the preservation of the public interest and the prevention of conflicts of interests and the risk of corruption, are undoubtedly legitimate, in the Advocate General's view the Lithuanian law does not meet the requirement of foreseeability. In particular, the combination of a general rule imposing publication and some vaguely worded exception makes it difficult for the data subject to assess in advance what data will be made publicly available on the Internet. In addition, the list of data to be declared and disclosed is problematic in itself, insofar as it requires the person concerned to foresee what relations and circumstances could possibly give rise to a conflict of interests.

According to AG Pikamäe, the online publication of the data also fails the proportionality test. The Opinion draws a distinction between the collection of data for the purpose of revealing conflicts of interests, on the one hand, and their publication on the Internet, on the other hand. Since the legislation at issue has a preventive aim, the obligation to provide information potentially indicative of a conflict and the power of a public authority to verify the reliability of the data submitted are sufficient to achieve the aims pursued, as long as that authority is endowed with adequate resources and personnel to perform the necessary checks. By contrast, the publication of the data on the web is unlikely to be suitable or necessary for the attainment of those objectives. Better ways to reconcile the data subject's right to the protection of personal data with the principle of transparency are the publication of regular reports by the competent authority and granting access to the relevant data on request, as permitted by Article 86 GDPR on public access to official documents.

Although he suggested that it should ultimately be for the referring court to assess whether the publication is necessary, the AG added the public disclosure of certain types of data, such as the names of individuals other than the person submitting the declaration, and details concerning donations and financial activities, should in any case be deemed disproportionate. The inclusion

of directors of associations or entities receiving public funding in the list of persons obliged to submit a declaration is also disproportionate, since they are not exposed to risks of conflicts of interests or corruption as much as public servants.

Finally, the AG argued that the rule providing for public disclosure, even if it were deemed suitable and necessary to achieve the aim of preventing conflicts of interests and corruption, would fail to meet the proportionality test insofar as it does not correctly weigh transparency, on the one hand, and the rights to privacy and data protection, on the other. In the case at stake, the benefit in terms of transparency is not such as to justify the scale of data collected, which could include the identity of whole families and their activities, and their disclosure to just any Internet user.

The second question concerns the scope of the 'special categories' of data under Article 9 GDPR, which according to the Lithuanian legislation are not subject to public disclosure. In line with existing case law (*Lindqvist*, C-101/01), the Opinion advocates for a broad interpretation of 'data concerning health or [a] person's sex life or sexual orientation'. As the AG noted, both textual and teleological arguments suggest that this notion includes not only data directly relating to the health status, sexual life or sexual orientation of an individual, but also data from which these can be inferred. For instance, the information that a person is someone's spouse or partner is sensitive data as it may disclose the data subject's sexual life or sexual orientation.

Assessment

The Opinion confirms that EU law imposes constraints on the processing of data by public authorities as much as it affects the activity of private companies, and that national laws and policies should always pay attention to data protection considerations. The references to cases such as *Privacy International* (C-623/17) and the *EU-Canada PNR Opinion* (Opinion 1/15) are indicative of an effort on the part of AG Pikamäe to construe a coherent legal framework for data processing mandated by public law.

Furthermore, and consistently with the Court's case law, the Opinion suggests that the publication of personal data on the Internet is intrinsically much more intrusive than their mere collection and storage. The Court might articulate the proportionality test differently or more concisely, but it is likely to follow this approach. In that case, sweeping requirements of public disclosure, as existing under several Member State legislations, would have to be revised. Yet this should not be seen as a setback for transparency or the fight against corruption. As the AG pointed out, less indiscriminate publicity does not imply lower vigilance over conflicts of interests.

Finally – and here is perhaps its most important contribution – the Opinion gives lawmakers valuable suggestions on the balancing of transparency with the protection of privacy and personal data. Before imposing public disclosure of personal data, they should consider whether alternative means, such as the possibility of requesting access to official documents and the publication of official reports on conflicts of

interests, could equally or better enhance transparency and the integrity of the public administration. In any event, at least the data subject to publication should be clearly listed and pseudonymization used to mitigate the impact of disclosure on the privacy of the individuals concerned.

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ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

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