



EUROPEAN COMMISSION
Employment, Social Affairs and Inclusion DG

The Director-General

Brussels,
DG EMPL (2013)

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Subject: Request for formal opinion on the exchange of personal data to combat fraud and error in the field of cross border social security coordination under Regulations (EC) Nos 883/2004 and 987/2009

Dear Mr Hustinx,

I write to ask for the opinion of the European Data Protection Supervisor on a proposal under consideration to amend Regulations (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ("the basic Regulation") and its implementing Regulation, Regulation (EC) No 987/2009 ("the implementing Regulation"), to establish a clear legal ground providing for processing personal data to combat fraud and error in the context of cross-border co-ordination of social security between Member States.

The European Data Protection Supervisor gave a formal opinion on 6 March 2007 published in OJ C091, 26/04/07, p. 15/23, on the implementing Regulation, and in conjunction on the basic Regulation, whilst the former was still at proposal stage. In this opinion it welcomed the proposal in that it aimed to facilitate the free movement of citizens and recognised that co-ordination of social security could not exist without the transmission of different kinds of personal data¹. The opinion recognised the existing protection in the then proposed Regulation in respect of the processing of personal data² and welcomed the provision in the proposal which explicitly stated that personal data processed by virtue of the Regulation should be transmitted in accordance with Community provisions on protection of personal data.

The opinion highlighted the desirability for the proposal to clearly lay down specific legal grounds for competent bodies and employers to process personal data, to the extent that each proposed mechanism for processing and transmission of personal data would be clearly based on a specific legal obligation directly laid down by the Proposal, or on other legitimate grounds for processing pursuant to Articles 7 and of Directive 95/46/EC of the European

¹ See paragraphs 6 and 7 of the Opinion.

² Contained in Article 77 of the proposal and in Article 77 of the implementing Regulation now in force.

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 (The Directive)³.

The potential amendment to the Regulations which the Commission is in the process of considering would ensure legal clarity in that regard, as set out below.

Context of the discussion of Fraud and Error in the field of cross border social security co-ordination

The creation and improvement of procedures to control cross-border social security fraud has assumed considerable importance in the EU in recent years. On 18th March 2010, the Administrative Commission for the Coordination of Social Security Systems (which oversees the application of the EU Social Security Coordination Regulations) adopted Decision H5 concerning cooperation on combating fraud and error within the framework of the Regulations. The decision underlines that action to combat fraud and error is part of the proper implementation of the EU Regulations and that better use of the duty of administrative cooperation contained in the Regulations is a key factor in taking action to combat fraud and error. The Decision also established a network of National Contact Points (NCPs) in Member States to whom either risks of fraud and abuse, or systematic difficulties which cause delays and error could be reported by competent authorities.

In a recent drive to reinvigorate that network a poll of the current NCPs established that they mainly used the network to exchange personal data in order to identify fraud and error, including data-matching, but that there were a number of technical and legal problems associated with data-matching between Member States.

The Administrative Commission therefore established an ad-hoc group to identify what Member States' views were on the need to amend the Regulations to create a specific legal ground to facilitate the exchange of data, including data-matching, in the field of fraud and error. That group will report to the Administrative Commission in December 2013, on the basis of which the Commission will consider the need to propose amendments to the current legislative regime. The opinion of the European Data Protection Supervisor will form a key part of the information required to reach a decision on whether to proceed with any amendment.

Issues with data matching in identifying cross border social security fraud under the Regulations

It is generally accepted, on the basis of the legal grounds to exchange data contained in the Regulation, that the Regulations provide sufficiently clear legal grounds for the exchange of data between member States in individual cases of suspected fraud or error to take place. See annex 1 for details.

There is a divergence of views, however, on the extent to which the obligations to exchange data under the basic and implementing Regulations include data-matching to address fraud and error in the proper implementation of those Regulations. This difference in views and in legal approach to sharing data creates practical problems for Member States in obtaining the necessary data to establish the validity of social security claims.

³ paragraph 33

Data matching is a process whereby two sets of personal data are matched in order to identify any information which is inconsistent. In the pensions context, some Member States operate a monthly system of electronic exchange of personal information whereby, for example, Member State A in which a number of pensioners from Member State B are living provides death data to Member State B. In this way, Member State B can check the death data against its list of pensioners living in Member State B to identify any anomalies between the two sets of data, i.e. are pensions being paid in respect of persons who have died.

In relation to unemployment benefit, data-matching is employed in a situation where one administration sends a list of people it pays unemployment benefit to who are resident in another State to check if any of those people are registered as employed i.e. whether they are wrongly claiming unemployment benefit in the first State, in which case further investigation would be required.

The Commission has anecdotal evidence that the types of data-matching arrangements described above are usually carried out on the basis of bilateral arrangements which make explicit provision for exchange of personal data. Such bilateral agreements would be subject to the requirements of the Directive, and in particular would need to meet the criteria of article 6 in that the data exchange is lawful and proportionate, and meet the requirements of Article 7 to be legitimate in so far as the processing has the consent of the relevant person, or would be in compliance with a legal obligation or in pursuance of a professional duty.

The Commission has been advised, however, that a number of other Member States rely on or would like to rely on the general powers in the basic and implementing Regulation as the legal basis for such data matching. In doing so, Member States would still be exchanging data on a legitimate basis as required by Article 7 of the Directive, but there is a view that the provisions in the Regulations do not make a sufficiently clear reference to data-matching to identify fraud an error in the implementation of the Regulations and therefore it is difficult to say that the provisions "foresee" such data-matching for fraud prevention in social security. In that regard, the requirement in the Directive that the data would be exchanged "lawfully" under Article 6(1)(a) could be in doubt where the provisions in the Regulations are being relied upon (rather than where specific bilateral agreements between Member States are being relied upon), taking into account that the concept of "lawfully" includes the requirement that any interference with private and family life under Article 8 of the European Convention of Human Rights must be foreseeable to be lawful.

For more information on the potential legal grounds for data-matching in the Regulations see annex 2.

Secure platform for exchange of personal data

In addition to the legal obstacles member States encounter in data-matching, they also find it difficult to exchange data securely, particularly the exchange of bulk data. In that regard there is a move to utilise a secure platform for the exchange of data to ensure it is not lost or corrupted when in transit from one Member State to another. In its Opinion the European Data Protection Supervisor welcomed Article 4 of the then proposed implementing Regulation which stated that the transmission of data between relevant bodies "shall be carried out by electronic means under a common secure framework that can guarantee the

confidentiality and protection for exchanges of data"⁴, thus ensuring that the data transfer is secure and does not "fall into the wrong hands".

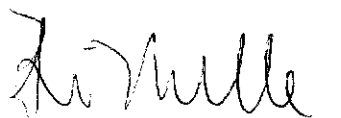
Since the coming into force of the Regulations, significant work has been undertaken in working towards the establishment of the secure platform envisaged in the proposal; the EESSI platform (Electronic Exchange of Social Security Information), which is on-going. There is also an existing electronic platform run by the Commission (the Internal Market Information System), which has been designed for Member States' authorities to securely exchange personal information. However, in order for a secure platform to be used for the data-matching to identify fraud and error, one unified and uncontroversial legal ground for the exchange of data to combat fraud and error must be identified.

The Commission anticipates, therefore, that if the Regulations are amended to establish a clear legal ground for data matching in the field of fraud and error, it could be used to facilitate the secure transfer of such data and improve the protection of the individuals to whom the data relates.

The Commission takes the view that an amendment to the Regulations which provides a specific legal ground for Member States to data match in order to identify and combat fraud in the proper implementation of the Regulations would resolve outstanding concerns about the extent to which the legal grounds in the Regulation currently allow such data exchange. In that regard any amendment would ensure that the data matching (which currently takes place on the basis of bilateral arrangements) would have one clear and identifiable legal ground for exchange of their data in the Regulation. It would also facilitate the use of a secure platform for the exchange of such data, ensuring that data could not be lost or corrupted in transit.

The Commission seeks the opinion of the European Data Protection Supervisor on whether the clarification of the legal position in these circumstances is desirable as part of the proper implementation of the Regulations in a way that is in compliance with Directive 95/46 EC.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Koos Richelle', with a stylized flourish at the end.

Koos Richelle

⁴ Paragraphs 39 and 40 of the Opinion.