



12.7.2010

## NOTICE TO MEMBERS

Subject: Petition 0481/1998 by Mr Heinz Huber (Austrian), on the storage of data concerning EU citizens by the German authorities responsible for the registration of foreigners

### 1. Summary of petition

The petitioner, resident in the Federal Republic of Germany since 1971, maintains that a number of German legal provisions concerning foreign residents and data protection infringe Community law, in particular Directive 95/46/EC of October 1995 concerning data protection. He regards the storage of data concerning EU citizens by the German authorities as an infringement of the right to self-determination regarding personal data, constituting a form of discrimination compared to the treatment of German citizens.

### 2. Admissibility

Declared admissible on 2 October 1998. Information requested from the Commission under Rule 192(4).

### 3. Commission interim reply, received on 13 August 1999.

The relevant Commission departments are currently working on a response to the issues raised in the above-mentioned petition.

As these issues concern not only compliance with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, but also compliance with the directives on the free movement of persons, the various Commission departments concerned are having to conduct an in-depth analysis of the respective rules and procedures.

The Commission takes the view that it must respond to petitions from EU citizens within a reasonable time-frame, in order to meet their need for information and support. These matters are hence given the utmost priority. With regard to Mr Huber's complaint, the Commission regrets that the complexity of the subject and the need for the matter to be given careful consideration have prevented it from responding more rapidly. However, the Commission will endeavour to provide a properly substantiated response as soon as possible.

#### **4. Further Commission information**, received on 21 June 1999.

##### 1. The facts

Mr Huber, an Austrian national who has been living in Singen, in the Land of Baden-Württemberg, Germany, since 1971 and who has held an unlimited residence permit (unbefristete Aufenthaltserlaubnis) since 26 January 1995, complains of two incidents involving the German authorities.

Firstly, on 26 April 1997 the municipal department responsible for the registration of foreign residents asked him to produce a valid passport, for himself and his underage daughter (his passport had expired on 9 April 1997). He was told that if he did not do so, he would be liable to a punitive measure, such as expulsion, under legislation relating to foreigners.

Secondly, when Mr Huber submitted his new passport, on which his daughter was included, to the foreign residents department on 7 May 1997, the official kept a photocopy of the first two pages saying that a copy of the passport had to be filed in the register of foreigners. Mr Huber regards this as a breach of Community law, particularly of the directives on the free movement of persons and Directive 95/46/EC on the protection of personal data, not to mention the principle of non-discrimination on grounds of nationality.

##### 2. Legal aspects

###### 2.1 The directives on the free movement of persons

The various directives concerning right of residence<sup>1</sup> stipulate that a national of a Member State who wishes to live in another Member State for more than three months must apply for a residence permit. To obtain this permit, the person in question must produce, amongst other things, a valid identity document (identity card or passport).

As regards the impact the expiry of the identity document may have on residence, Article 3(2) of Directive 64/221<sup>2</sup> states: 'Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory'.

The statement by the foreign residents department of Singen that the petitioner could be liable

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<sup>1</sup> *Inter alia*, Directive 68/360 on the right of residence for workers, OJ L 257, 19.10.1968.

<sup>2</sup> Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ L 56, 4.4.1964.

to expulsion if he did not produce a valid passport is therefore contrary to the aforementioned provision.

The issue of the penalties that may be applied if the requirement to possess a valid identity document is breached has been brought before the Court of Justice in connection with proceedings for failure to fulfil an obligation. In a judgment of 30 April 1998<sup>1</sup>, the Court ruled that ‘by treating nationals of other Member States residing in Germany disproportionately differently, as regards the degree of fault and scale of fines, from German nationals when they commit a comparable infringement of the obligation to hold a valid identity document, the Federal Republic of Germany has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty...’.

Regardless of the specific issue of penalties referred to above, the Commission has already received a complaint about the German local authorities’ practice of checking the validity of an EU citizen’s national identity document, without this being justified by the issue or renewal of a residence permit or by a change of residence. The German authorities have been asked to provide further information on this practice. In the light of their reply, the Commission departments concerned will decide whether or not to propose the initiation of infringement proceedings.

## 2.2 The directive on the protection of personal data

The collection of personal data referred to by Mr Huber took place on 7 May 1997, hence before the entry into force on 25 October 1998 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>2</sup>.

Nevertheless, Mr Huber’s personal data were transmitted, registered and stored on the central register of foreigners (Ausländerzentralregistergesetz) and presumably they are still there. Since Germany has still not transposed the directive (which entered into force on 25 October 1998) into national law, infringement proceedings have been initiated for breach of Article 32(4) of Directive 95/46/EC, which requires Member States to communicate to the Commission the provisions of domestic law which they adopt in the field covered by this directive. Therefore, there are grounds for considering the extent to which the events in question comply with Directive 95/46/EC as transposed, in the future, into domestic law.

According to Article 3 of the said directive, the directive does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law. Given that the data processing criticised in this case falls within the scope of various directives concerning right of residence (see footnote 1), as well as Directive 64/221/EEC on special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Directive 95/46/EC on the protection of personal data is indeed applicable.

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<sup>1</sup> Case C-24/97, Commission v Germany.

<sup>2</sup> Directive 95/46/EC of 24 October 1995, OJ L 281, 23.11.1995, p. 31.

Article 6(b) of Directive 95/46/EC stipulates that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. In accordance with Article 7(e), personal data may be processed without the consent of the person concerned only if, *inter alia*, processing is ‘necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed’.

In the case in question, the law on the foreigners’ register (Ausländerzentralregistergesetz) states that the aim of the register is to support the competent authorities in the implementation of measures concerning legislation relating to foreigners or to asylum. The department for the registration of foreign residents in Singen is required to forward the data for inclusion on the register.

Under German law, all German public authorities have access to certain ‘basic’ data, such as name, forename, date of birth, place of birth, sex, nationalities, previous names, aliases, marital status, etc. Authorities responsible for certain areas (e.g. for foreigners, asylum, police, public prosecutors, courts, national employment agency, nationality department, secret services, military counter-espionage, Ministry of Foreign Affairs, embassies and other public authorities dealing with visas) may also obtain access to additional data. In addition, the law provides for access by private bodies and authorities from third countries. Direct on-line access may also be granted. Some authorities are allowed to submit specific search notices with regard to foreigners whose place of residence, for various reasons, is unknown (‘Suchvermerke’); they may also ask for ‘information on groups of people’ (‘Gruppenauskunft’, ‘Rasterfahndung’).

The law makes no distinction between nationals of EU Member States and other foreigners. Data on German citizens are not placed on a similar central register.

It is not clear why personal data on Mr Huber and his daughter need to be stored on this register. Firstly, the stated objectives of the register do not allow the exact reasons for keeping these data on the register to be determined. Moreover, it seems difficult to justify why access to basic data is granted not only to the authorities responsible for implementing Community directives on freedom of movement and on right of residence, notably the aforementioned Directive 64/221/EEC, but also to all German authorities and some third countries, not to mention private bodies, and why some authorities have access to additional data.

In accordance with the right to freedom of movement and residence, as enshrined in the Treaty, in Community directives and in Court of Justice case law, a national of a Member State – unlike other foreigners – to a large extent enjoys the same right of residence as a citizen of the host country. It should be stressed, however, that residence permits have only a declaratory effect and are not an essential component of the right of residence. Even in the event that the arrangements for managing this right allow the host country to take certain measures to ensure that the conditions for entitlement to the right of residence are met, or to defend the public interest within the limits established by Directive 64/221/EEC, the effectiveness, expediency and proportionality of the method chosen by Germany are open to question.

The storage of data on Mr Huber and his daughter on the register of foreigners enables them to be permanently monitored in a way that German citizens are not.

The processing of the personal data on Mr Huber and his daughter thus appears to go beyond the measures that are authorised for the implementation of the right of residence or for the safeguarding of the public interest, and should therefore be deemed unnecessary, pursuant to Article 7(e) of Directive 95/46/EC.

However, before making a final decision, any explanations from the German authorities would have to be taken into consideration.

### 3. Conclusions

(a) As regards the **directives on right of residence**, the Singen foreign residents' department's statement to the petitioner that he could be liable to expulsion if he did not produce a valid passport is contrary to the above-mentioned provision of Directive 64/221/EEC. The Commission will continue to review the practice of the German authorities of checking the validity of the national identity document of EU citizens when this is not justified by the issue or renewal of a residence permit or by a change of residence.

(b) With regard to compliance with the **directive on the protection of personal data**, the petitioner has agreed to a Commission proposal to refer his case to the German official responsible for the protection of personal data<sup>1</sup>. If the Committee on Petitions agrees with this proposal, the Commission will proceed with the referral.

### 5. **Interim Commission reply**, received on 22 February 2000.

Parliament has sent the petition and the Commission's position to the German authorities so that they may respond to the issues raised.

To date, the Commission has received no reply from the German authorities. As soon as their views have been received, the Commission will consider them and give Parliament its final opinion on Mr Huber's petition.

### 6. **Further Commission communication**, received on 20 February 2001.

#### 1. The facts

Mr Huber, an Austrian national who has been living in Singen (Baden-Württemberg) in Germany since 1971 and who has held an unlimited residence permit (unbefristete Aufenthaltserlaubnis) since 26 January 1995, complains of two incidents regarding the German authorities.

Firstly, on 26 April 1997, the municipal department responsible for the registration of foreign nationals asked him to produce a valid passport, for himself and his underage daughter (his passport had expired on 9 April 1997). He was told that if he did not do so, he would be liable to punitive measures, provided for under legislation relating to foreign nationals, such as

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<sup>1</sup> Der Bundesbeauftragte für den Datenschutz, Postfach 200112, D-53131 Bonn.

expulsion.

Secondly, when Mr Huber presented his new passport, on which his daughter was included, to the foreign nationals department on 7 May 1997, the official kept a photocopy of the first two pages saying that a copy of the passport had to be filed in the register of foreign nationals. ('Ausländerzentralregister' created by the Registration of Foreign Nationals Act).

Mr Huber regards this as a breach of Community law, particularly of the directives on the free movement of persons and Directive 95/46/EC on the protection of personal data, not to mention the principle of non-discrimination on grounds of nationality.

## 2. Procedure

Following the recommendation made by the Commission and its analysis of the situation, the European Parliament forwarded by letter of 22 December 1999 (-309160-) and by letter of 13 April 2000 (-109046-) copies of the petition by Mr Huber and the communication from the Committee on Petitions to the official responsible for the protection of personal data (Bundesbeauftragter für den Datenschutz).

He was asked whether it was necessary to enter the petitioner's personal data on the central register of foreign nationals. He replied by letter of 20 September 2000.

In the meantime, the petitioner forwarded further information, including a copy of his personal data entered on the central register of foreign nationals and his request to the authority administering the register to remove them. His application was rejected, together with his subsequent administrative appeal. The petitioner has now registered a complaint with the administrative court against the authority which refused to remove his data from the register.

## 3. Legal aspects

### 3.1. The directive on the protection of personal data

The German official responsible for the protection of personal data sent a reply to the general question regarding the need to enter the personal data of European Union citizens on the central register of foreign nationals. He did not give a ruling on the particular case of the petitioner since he did not have sufficient information. He had, however, consulted the Federal Ministry of the Interior which took the view that it was necessary to bring the Central Registration of Foreign Nationals Act into line with Directive 95/46/EC when the latter was transposed under national law. At the same time the Ministry did not consider the entry of personal data of European citizens into the central register of foreign nationals to be an infringement of Community law. The federal official responsible for data protection was less categorical, making a distinction between the practical advantages on the one hand and the strict legal requirement on the other of such registration procedures.

He indicates that all residents in Germany are registered in local registers ('Melderegister') organised on a decentralised basis and containing a certain category of data. The register of foreign nationals on the other hand, which is organised on a central basis, contains, in

addition to this data, more specific information particularly relating to a resident's foreign status. With regard to European citizens, only the central register of foreign nationals (as opposed to the local registers) contains information concerning their conditions of residence or measures such as deportation or expulsion ('Ausweisung und Abschiebung'). In addition the register contains information concerning the situation of foreign nationals in general but which can never or only in exceptional cases relate to European Union citizens, given their preferential status.

He argues that Community law does not require Member States to give nationals of other Member States of the European Union full equality with, for example, German citizens. European citizens could therefore be entered in the register if it were legally necessary as opposed to purely practical for either the public authorities or citizens themselves. Directive 95/46/EC requires a legitimate justification for the processing of personal data. Article 7(e) indicates that processing may legitimately be carried out if it is necessary for the performance of the task carried out in the public interest. He distinguishes between the following cases:

- If the basic data are the same as in the local registers of residents (Article 3(4) and (5) of the Central Registration of Foreign Nationals Act), it is not legally necessary for them to be entered also on the central register of foreign nationals (notwithstanding the practical advantages of accessing throughout Germany for administrative purposes which do not exist in respect of German citizens).
- If the information refers to the conditions of residence of an individual (Article 3(6) of the Central Registration of Foreign Nationals Act), that is to say if a limited or unlimited resident's permit has been issued, this may in certain situations need to be verified by one or other German authority. However, it is possible for individuals themselves to prove that they are legally resident and entry in a central register is therefore not essential and it is not necessary to have this information permanently available throughout the Federal Republic of Germany.
- A decision ordering the expulsion from Germany (Article 3(7) and Article 2(3) of the Central Registration of Foreign Nationals Act) of a national from another Member State might justify entry in a central register of foreign nationals. However, if no such measures have been taken with regard to the individual concerned, personal data relating to him should not be entered in the central register of foreign nationals.
- Finally, with regard to information relating to the situation of foreign nationals in general (under the remaining provisions of Article 3 of the Central Registration of Foreign Nationals Act), which is in principle different from the situation of European nationals who enjoy preferential status, such information should not in principle be entered in a register if it concerns European nationals. In this case, personal data should not therefore be entered in the register.

Having thus established that registration can only be justified by decisions regarding deportation 'aufenthaltsrechtliche Entscheidungen' or 'Ausweisungs und Abschiebungsverfügungen', the federal official responsible for the protection of personal data concludes that, with regard to European citizens who are entitled to freedom of

movement, it would be disproportionate to enter 'basic' data, supplementary personal data and data concerning their conditions of residence on the central register of foreign nationals. He takes the view that only nationals of other Member States concerning whom deportation orders ('aufenthaltsrechtliche Entscheidungen'), have been issued need to be entered on this register.

Systematic registration of all European citizens should not therefore be carried out.

The Commission agrees with the view advanced by the federal official responsible for the protection of personal data. Since no action to deport the petitioner or similar action has been taken (see extracts concerning him drawn from the central register of foreign nationals of 17 July 2000), the Commission concludes that there is no justification for an entry concerning him on the central register of foreign nationals.

The processing of the personal data of Mr Huber and his daughter therefore goes beyond the measures authorised for the purpose of establishing right of residence or safeguarding public interests and should be considered as unnecessary under Article 7(e) of Directive 95/46/EC.

### 3.2. Directives on freedom of movement of persons

As indicated in the previous communication, the Commission contacted the German authorities following another complaint regarding the practice of the German local authorities of investigating the validity of national identity documents held by Union nationals without this being justified by the need to issue or renew residence permits. Following this exchange of letters, the Minister of the Interior of Rhineland-Palatinate, the Land in which the other complainant was resident, forwarded a circular on 14 September 1998 to the authorities responsible for foreign nationals instructing them to refrain from summoning European Union citizens for the sole purpose of producing an identity card or a current passport. The Commission would have expected such instructions to be issued at federal level, so as to ensure that such unauthorised administrative procedures were not followed in other Länder.

## 4. Conclusions

4.1. With regard to compliance with **Directive 95/46/EC on the protection of personal data**, the Commission considers that the petition has brought to light a situation which runs counter to this directive. It recommends that the European Parliament inform the petitioner and, if appropriate, the relevant authorities and administrative tribunal accordingly.

In addition, this case will automatically be examined by the Commission on verification of the transposition of the Directive. Since the German authorities have not yet transposed Directive 95/46/EC (the deadline being 24 October 1998), the Commission has registered a complaint with the Court of Justice against Germany for failure to notify national measures transposing the Directive.



4.2. Concerning compliance with **directives on the right of residence**, the Commission is currently investigating whether the administrative practices of each of the Länder regarding the verification of identity documents held by Community nationals are in accordance with Community law.

**7. Further communication** from the Commission, received on 13 December 2001.

The Commission has been asked for its views on a letter from the petitioner of 25 May 2001 (received by the Internal Market DG on 18 July 2001), in which he refers to problems in connection with upholding his rights in the German courts.

The additional information does not concern the interpretation of the directive on personal data protection, but access to justice. In particular, the petitioner criticises the fact that the public prosecutor does not wish to pursue his case, as it is not in the public interest. In these circumstances, it is not for the Commission to say why the public prosecutor decided to shelve the matter.

There is no need for the Commission to change the position it has held to date (the petitioner is right: his data should not be held on the German central register of foreign nationals). The Committee on Petitions has also taken the same view.

**8. Further communication** from the Commission, received on 3 April 2002.

The Commission has been asked for its views on a letter from the petitioner of 26 November 2001 to Parliament in which he sends further information.

The petitioner makes the following requests.

- (a) The Court of Justice should investigate and penalise the refusal by the German authority responsible for the central register of foreigners to delete personal data it holds on the petitioner.
- (b) The Commission should act to uphold the petitioner's fundamental rights.
- (c) Parliament should act to correct the shortcomings in the transposition and application of Directive 95/46/EC on personal data protection in the Federal Republic of Germany.

The additional information includes statements by the authority responsible for the central register of foreigners (Bundesverwaltungsamt) made during administrative and judicial review procedures. The authority refuses to accede to the petitioner's request to delete his personal data which is held in this register. The authority advances the arguments already used by the Federal German Ministry. There are therefore no new arguments in the letters from the Bundesverwaltungsamt. When the Commission was giving its views on the petitioner's case, it considered the arguments put forward by the Bundesverwaltungsamt and judged them unconvincing.

With regard to (a): the petitioner maintains that the German court is refusing to bring this case before the Court of Justice for a preliminary ruling. But it seems that the case has not yet been concluded, and the petitioner is free to make a formal request for the case to be referred for a preliminary ruling at this stage or the next of the proceedings.

With regard to (b): there is no need to change the position which the Commission has adopted to date in this case. The petitioner seems to be right as to the substance: his data should not be included in the German central register of foreigners. The Commission has already undertaken to take this case into account automatically when checking transposition of the directive in Germany. The Commission also proposed requesting an opinion from the federal commissioner responsible for personal data protection. This opinion endorsed the Commission's approach. Moreover, following this new request from the petitioner, the Commission contacted the German federal office for data protection, which stated that its annual report for 1999/2000 included a chapter on the problem highlighted by the petitioner's case and that the federal commissioner considers, as does the Commission, that EU citizens should not be included in this register, unless they are subject to an expulsion order which is valid under Community law. In addition, the federal commissioner will shortly be participating in a meeting of the German Parliament home affairs committee where this question can be debated. The office of the German federal commissioner for data protection also indicated that the petitioner can at any time make direct contact with this institution again.

With regard to (c): it is not for the Commission to reply on behalf of Parliament. Nevertheless, the petitioner should be reminded with regard to this aspect of his request, that the Treaties give the Commission the task of monitoring the transposition and implementation of Directive 95/46/EC. As this directive obliges Member States to make provision for appeals and compensation for injury suffered because of illegal treatment, the Commission considers that there is no need for additional legislative initiatives at Community level.

On 24 January 2002 the Commission received from Parliament the letter from the Permanent Representative of the Federal Republic of Germany sent to Parliament on 12 September 2001, which the petitioner refers to in his letter of 26 November 2001. The Permanent Representative states the following:

- (1) the Federal Republic of Germany has transposed directive 95/46/EC on personal data protection;
- (2) the Federal Government is currently preparing a draft law concerning residence and integration by EU citizens and foreigners. As part of the legislative process, consideration will be given to the feasibility of not including EU citizens in the central register of foreigners.

Concerning (1): the Commission had initiated proceedings against Germany in the Court of Justice because Germany had not communicated to it by the deadline its national measures to transpose Directive 95/46/EC. Once it had communicated these measures, the Commission dropped the case against Germany. However, this does not prevent the Commission from bringing a new case in the Court for incorrect transposition of the directive. The Commission is currently investigating whether the national measures that have been communicated are in compliance with the directive.

Concerning (2): with regard to the work on the draft law on immigration, it seems, according to information from the federal German commissioner for data protection, that there are no plans yet for a provision stating that EU citizens need not be included in the central register of foreigners.

However, the Commission can only welcome the German Federal Government's openness with regard to this problem and proposes to encourage it to take all necessary measures so that EU citizens, and in particular the petitioner, can enjoy their rights with regard to residence and personal data protection.

**9. Further Commission communication**, received on 30 April 2004.

The Commission has been asked to provide further information on this petition.

1. The Commission would first like to comment on the petitioner's letter of 22 February 2003, in which he asks to be informed in writing whether the Commission intends to bring infringement proceedings against Germany with regard to this case, and if it does not, he states that he will bring a complaint against the Commission to the Court of Justice for failure to act.

The Commission replied to the petitioner on 18 March 2003, informing him that his petition had also been registered with the Commission as a complaint (see details under 2), and that investigation of this complaint could lead to proceedings against Germany. However, the Commission pointed out to the petitioner that, according to consistent Court of Justice case law, it was for the Commission to decide whether to take proceedings under Article 226 of the EEC Treaty and as the last step in these proceedings refer the matter to the Court of Justice, but it had no obligation to do so (see for example the Court judgment of 13 June 2002 in case C-474/99).

2. In its previous communications to Parliament's Committee on Petitions, the Commission stated that it would take this case into account when reviewing implementation of the directive. The first report on implementation, COM(2003) 265 final, was adopted on 15 May 2003. In the 20-page report itself it was not possible to report in detail on implementation in the 15 Member States. However, the report is based on a detailed analysis of implementation, which shows that there are still many shortcomings in implementation. To remedy these shortcomings, the Commission proposes bilateral discussions with the Member States. As the primary focus of such discussions must be the data protection laws themselves and not other (special) laws which also include provisions on data protection, the Commission, as mentioned above, has also registered the petitioner's letter of 22 February 2003 as a complaint, and as part of the complaints procedure, it wrote to the German authorities on 14 October 2003 with an official request for its opinion on this matter.

The Permanent Representation of Germany replied on 11 December 2003, stating in essence that it considered that storing data on EU citizens in the central register of foreign nationals was compatible with the data protection directive 95/46 EC, as the directive did not contain a general prohibition on storing such data and, under Article 7(f) of the directive, such storage was required. One of the main reasons for this requirement was indeed to be able quickly to check and verify the residence status of foreigners, which was only possible with a central register. If data on EU citizens was stored as well, this could for example ensure that the authorities could ascertain immediately that a foreign EU national had an EU residence permit. Storage ensured that preferential status could be quickly recognised and taken into account. It could not be limited to cases in which measures under the law on foreign nationals

had been taken against EU citizens, since preparing and implementing such measures often required precisely the data that could be supplied by the central register of foreign nationals (e.g. date of first entry into the country, relevant public authority responsible for foreign nationals, etc).

The Commission is currently studying this answer in detail.

**10. Commission reply**, received on 20 October 2005.

The Commission has been asked to supply further information on this petition.

As stated in its most recent additional reply, the Commission decided on 7 July to initiate the first stage of infringement proceedings pursuant to Article 226 of the EC Treaty in respect of this petition and of the petitioner's complaint on the same subject which is currently pending before the Commission.

The German government's reply to the Commission's letter of formal notice of 9 July was received by the Commission's relevant unit on 20 October. This 20-page reply is currently being subjected to a careful analysis in cooperation with several of the Commission's other departments involved, with a view to reaching a decision in Spring 2005.

**11. Further Commission reply**, received on 7 May 2007.

Since its last communication, the Commission has decided to send a reasoned opinion to the Federal Republic of Germany for having failed to fulfil its obligations under Articles 12, 17 and 18 of the EC Treaty and under Articles 6 and 7(e) of Directive 95/46/EC<sup>1</sup> concerning the storage of personal data of EU citizens in the German central register for foreigners.

The Commission is of the opinion that a general and systematic storage of personal data of EU citizens in the German central register for foreigners motivated in particular by referring to the possibility of expulsion is not in line with the Treaty provisions on restrictions of the freedom of movement of persons and with the provisions in Directive 2004/38<sup>2</sup> (previously Directive 64/221/EEC<sup>3</sup>). As such, the differences in treatment as compared to German nationals cannot be justified by reference to the purely hypothetical possibility of an expulsion measure against EU citizens.

Furthermore, the storage of personal data of EU citizens in the AZR irrespective of any personal conduct of the individual is neither necessary nor proportionate under Articles 6 and 7(e) of Directive 95/46/EC.

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<sup>1</sup> Directive 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; OJ L 281, 23.11.1995, p. 31-50.

<sup>2</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC; OJ L 158, 30.4.2004, p. 77-123; corrigenda: OJ L 229, 29.6.2004, p. 35-48 and OJ L 197, 28.7.2005, p. 34-34.

<sup>3</sup> OJ 56, 4.4.1964, p. 850. Directive as last amended by Directive 75/35/EEC (OJ 14, 20.1.1975, p. 14).

On the same subject matter, the Court of Justice of the European Communities has received a reference for a preliminary ruling, pursuant to the first and second paragraphs of Article 234 EC, by the Higher Administrative Court for the Land of North-Rhine-Westphalia (Oberverwaltungsgericht für das Land Nordrhein-Westfalen).<sup>1</sup>

**12. Further Commission reply**, received on 7 Mars 2008.

As stated in its most recent additional reply, the Commission sent on 27 June 2007 a reasoned opinion to the Federal Republic of Germany for having failed to fulfil its obligations under Articles 12, 17 and 18 of the EC Treaty and under Articles 6 and 7(e) of Directive 95/46/EC<sup>2</sup> concerning the storage of personal data of EU citizens in the German central register for foreigners. On the same subject matter, the Court of Justice of the European Communities has received a referral for a preliminary ruling, pursuant to the first and second paragraphs of Article 234 EC, by the Higher Administrative Court for the Land of North-Rhine-Westphalia (Oberverwaltungsgericht für das Land Nordrhein-Westfalen).<sup>3</sup> The oral hearing before the Court of Justice of the European Communities took place on 8 January 2008.

The Commission is following this case which will provide relevant interpretative guidance for the proper application of the provisions of the Directives concerned. There is no need for the Commission to change the position it has held to date. In the light of the decision of the Court of Justice, the European Commission will be in a better position to assess the position under Community law.

**13. Further Commission reply**, received on 30 January 2009.

In the Case C-524/06<sup>4</sup> on the same subject matter as this petition by Mr Huber, the European Court of Justice (Grand Chamber) ruled on 16 December 2008:

“1. A system for processing personal data relating to Union citizens who are not nationals of the Member State concerned, such as that put in place by the Law on the central register of foreign nationals (Gesetz über das Ausländerzentralregister) of 2 September 1994, as amended by the Law of 21 June 2005, and having as its object the provision of support to the national authorities responsible for the application of the law relating to the right of residence does not satisfy the requirement of necessity laid

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<sup>1</sup> Case C-524/06; OJ C 56 of 10.03.2007, p.19.

<sup>2</sup> Directive 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; OJ L 281, 23.11.1995, p. 31-50.

<sup>3</sup> Case C-524/06; OJ C 56 of 10.03.2007, p.19

<sup>4</sup> Case C-524/06; OJ C 56 of 10.03.2007, p.19

down by Article 7(e) of 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, interpreted in the light of the prohibition on any discrimination on grounds of nationality, unless:

- it contains only the data which are necessary for the application by those authorities of that legislation, and
- its centralised nature enables the legislation relating to the right of residence to be more effectively applied as regards Union citizens who are not nationals of that Member State.

It is for the national court to ascertain whether those conditions are satisfied in the main proceedings.

The storage and processing of personal data containing individualised personal information in a register such as the Central Register of Foreign Nationals for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) of Directive 95/46.

2. Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.“

The Court's ruling is consistent with the arguments of the Commission and the Conclusions of the Advocate General. The Commission will study the judgment closely when assessing how to proceed with the infringement procedure.

#### **14. Further Commission's reply**, received on 12 July 2010.

Following the ECJ ruling in Case C-524/06, the German authorities submitted additional responses (17.7.2009, 16.3.2010) to the reasoned opinion in the framework of the infringement case, taking into account the ruling of the ECJ and informing the Commission of the legislative amendments which have to be adopted at national level to conform to that judgment and to allow the closure of the infringement.

The Commission was asked again by the Petitions Committee to submit comments in relation to the latest events.

#### The Commission's comments on the petitioner's arguments against the background of the judgment of the ECJ C-524/06

The Higher Administrative Court for the *Land* North-Rhine Westphalia referred questions to the Court of Justice concerning the compatibility of the processing of personal data within the German centralised register with the prohibition on any discrimination on grounds of nationality provided for in Article 12 TEU as well as with the requirement, laid down in Directive 95/46/EC, that the legitimacy of processing personal data is to turn on whether such processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority. In view of the fact that the scope of application of Directive 95/46/EC does not cover the processing of personal data concerning public security, defence, State security, or the activities of the State in areas of criminal law, the Court considered only

the compatibility of data processing with a view to applying the legislation relating to the *right of residence* and *for statistical purposes* in the light of that directive, whereas it examined the compatibility of data processing for the purposes of fighting crime with Article 12 TEU.

The ECJ concluded that the right of residence of a Union citizen in the territory of a Member State other than his own is not unconditional, and may be subject to limitations. Therefore, the processing by a centralised register of personal data in order to apply the legislation relating to the right of residence satisfies the requirement of necessity within the meaning of Directive 95/46/EC *provided that only the data necessary for that purpose are processed and that the centralised nature of the register enables that legislation to be more effectively applied.*

With regard to data processing for *statistical purposes*, the ECJ concluded that the Member States are entitled to adopt measures to ensure access to exact knowledge of population movements on their territory. However, it took the view *that such statistics do not necessitate the collection and storage of individualised information as in this case.* Such processing of personal data does not therefore satisfy the requirement of necessity within the meaning of Art. 7 (e) of Directive 95/46/EC.

Finally, with regard to the fight against crime, the ECJ pointed out that that objective is focused on the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators. It follows that, as regards a Member State, the situation of its nationals cannot be different from that of the nationals of other Member States who are resident in its territory. Since the German register does not contain the personal data of German nationals, the systematic processing of personal data relating only to nationals of other Member States for the purposes of fighting crime constitutes discrimination on grounds of nationality which is prohibited by Article 12 EC.

The ruling of the ECJ generally followed the Commission's observations.

In view of the decision of the ECJ the Commission obtained clarifications on the allegations it had raised in the reasoned opinion in the infringement case against Germany.

It is to be noted that the ECJ neither excludes the necessity of the processing of personal data of Union citizens in the AZR, nor does it absolutely confirm its unconditional necessity. In the end it leaves it up to the national Court to ascertain whether the conditions which it lists as needing to be fulfilled by the AZR are in compliance with Art. 12 of TEU and the provisions of Directive 95/46/EC.

In view of the conclusions of the judgment C-518/07, the allegation raised in the reasoned opinion that the general and systematic storage of personal data of EU citizens in the AZR, existing in addition to the local registers including German and EU citizens alike, does not comply with the necessity test of Art. 7(e) of the data protection Directive 95/46/EC in combination with Art. 6 (1) (a), has not been fully confirmed by the ECJ. As a matter of fact, the ECJ ruled that it is up to the Member State to demonstrate that a centralised system of processing of personal data a) contains only the data which are necessary for the application by those authorities of that legislation and b) that only the data necessary for that purpose are processed and that the centralised nature of the register enables that legislation to be more effectively applied.

The Commission's comments on the petitioner's arguments against the background of the legal and administrative steps undertaken by Germany with a view to comply with the judgment of the ECJ C-524/06 (continuation of the infringement proceeding 2003/4327 as an Art. 260 TFEU procedure)

Actions taken by Germany in view of compliance :

a) *Administrative letter (order) from the Federal Ministry of Interior of 12.2.2009 in relation to the petitioner's data in the AZR to the Bundesamt for Migration and Refugees (which manages the AZR) and in relation to any other data of EU citizens*

This administrative letter invites the competent authorities to apply the conclusions of the ECJ judgment not only to the petitioner but to all EU citizens.

In this context the Commission refers to the jurisprudence of the ECJ in case C-162/99, *Commission vs. Italy*<sup>1</sup>, point 22:

" Second, it must be borne in mind that the need to ensure that Community law is fully applied requires Member States not only to bring their legislation into conformity with Community law **but also to do so by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent** to allow individuals to know the full extent of their rights and rely on them before the national courts (see, to that effect, with regard to directives, Case C-360/87 *Commission v Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission v Luxembourg* [1995] ECR I-1589, paragraph 10)."

As regards administrative practice, the ECJ held in case C-367/98, *Commission vs. Portugal*<sup>2</sup>, point 41:

"[...] The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended. **Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfillment of a Member State's obligations under the Treaty**, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty (see, in particular, Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, paragraph 18, and Case C-358/98 *Commission v Italy* [2000] ECR I-1255, paragraph 17)."

The German authorities informed the Commission that as a result of this administrative circular requests from German authorities and bodies to have access to data stored in the AZR have been refused if the conditions of the ECJ judgment have not been fulfilled.

Against the background of the abovementioned jurisprudence, the Commission does not consider an administrative letter issued by a senior official of a federal Ministry as sufficient for granting legal certainty to citizens, given that the legislation on the central register for foreigners, which contains the provisions infringing Directive 95/46/EC, is still in force.

b) *Amendments of the administrative provision which accompanies the legislation on the*

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<sup>1</sup> Judgment of 18.1.2001.

<sup>2</sup> Judgment of 4.6.2002.



*central register for foreigners (Allgemeine Verwaltungsvorschrift AVV zum AZR-Gesetz) to comply with the judgment of the ECJ*

This amendment has entered into force on 3.11.2009 and is currently applied in Germany and seems in line prima facie with the ECJ ruling.

*c) Amendment of the legislation on the central register for foreigners (AZR-Gesetz)*

The German authorities submitted a detailed timetable for the adoption of the amendment to the Commission. Germany indicated also that it is not sufficient to simply amend this specific legislation on the central register but that it will need to be determined which legislation closely linked to the AZR also needs amending.

Germany informed the Commission that due to the Federal elections which took place in Germany in September 2009 the initial timetable for adoption - according to which an agreement on a draft text should have been obtained by the competent bodies by August 2009, the elaboration of the draft by the Ministry of Interior by November 2009, participation of the Länder by February 2010 and decision of the cabinet on the government's proposal by April 2010 and the final adoption after consultation of the Parliament and the Länder parliaments by the end of 2010 - could not be maintained.

In addition, the Commission was informed that Germany needs to implement the conclusions of its Federal Constitutional Court (Bundesverfassungsgericht) on the data retention which has effects also in the context of the AZR.

The Commission has had contact with the German authorities and is awaiting an update on the state of play on the work towards the adoption of the amendments to the legislation on the central register on foreigners.

The Commission's comments on the petitioner's arguments against the background of the judgment of the Oberverwaltungsgericht Nordrhein-Westfalen of 24.6.2009 in the case of the petitioner

The petitioner had submitted a complaint to the competent court in Germany to obtain the erasure of his personal data (name, date of birth, nationality, legal status, sex, 1<sup>st</sup> day of entry in Germany, registration status, passport details, chronology of move from and to Germany in the registry, file numbers of his entries and listing of bodies which transferred data to the central register for foreigners) on 22.7.2000. His request was refused with decision of the Oberverwaltungsgericht Nordrhein-Westfalen of 24.6.2009.

The Oberverwaltungsgericht referred to the conclusions of the ECJ in his judgment and justified the refusal of the erasure of the data by demonstrating that the conditions of the ECJ judgment are fulfilled. The collection of the data under the AZR was therefore in line the judgment. As data can only be deleted from the AZR (under the AZR legislation) if the storage was unjustified or if an initially legal storage became illegal and none of these two reasons were fulfilled, the request for erasure was denied.

In this context the Commission refers to the reasoning of the ECJ in C-524/06 in relation to the fact that *it is necessary for a Member State to have the relevant particulars and documents*

*available to it in order to ascertain<sup>1</sup>, within the framework laid down under the applicable Community legislation, whether a right of residence in its territory exist [...]. The ECJ also argued that "however, such a register must not contain any information other than what is necessary for that purpose. In that regard, as Community law presently stands, the processing of personal data contained in the documents referred to in Art. 8 (3) and 27 (1) of Directive 2004/38 must be considered to be necessary, within the meaning of Art. 7 (e) of Directive 95/46, for the application of the legislation relating to the right of residence."<sup>2</sup>*

The Commission is currently analysing the judgment of the Oberverwaltungsgericht in view of its compatibility with the ruling C-524/06.

### Conclusions

The ECJ ruled in the case C-524/06 on 16.12.2008 and it is the Commission's task to monitor the implementation of this ruling. The Commission is in regular contact with the German authorities and continues to monitor closely the attempts undertaken by Germany to put in place the complete legal framework in order to ensure the implementation of the judgment of the ECJ C-524/06. In view of the explanations above, it is obvious that this is a complex task. The Commission hopes that these attempts will be fruitful. However, the Commission reserves the right to take further steps pursuant to Article 258 TFEU should this not be the case.

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<sup>1</sup> Point 58 of C-524/06.

<sup>2</sup> Point 59 of C-524/06.