

FRALEX

Thematic Legal Study on assessment of data protection measures and relevant institutions

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Executive Summary

- [1]. In the 1990's Hungary with its unique model of combining the protection of personal data with the protection of freedom of information pioneered in Europe. Almost two decades have passed since the Constitutional Court first interpreted the right to the protection of personal data and it is time to review the current level of protection of this fundamental right.
- [2]. Hungary has ratified all the relevant legal instruments of the United Nations and of the Council of Europe, joined the European Union in 2004 and transposed the *acquis communautaire* into its national legislation. Since 1995, the Parliamentary Commissioner for Personal Data Protection and Freedom of Information with a six-year mandate has been elected by the Parliament. The novelty in the double mandate is that the same law regulates the two constitutional rights and the same person supervises these 'complementary imperatives' which also impose limits upon each other.¹ Therefore, potential conflicts between two Acts and Commissioners can be avoided. However, the present system places a greater burden on the Commissioner of resolving any collision between these rights.
- [3]. The Commissioner is furnished with effective investigative power, though doesn't act as an administrative authority, as his recommendations and statements have no binding power (with the exception of blocking/destroying illegally processed data). Clearly, the Commissioner's most significant aids emanate from the publicity of his activities and the prestige of his position. However, despite the legal safeguards built into the nomination and election procedure of the Commissioner, these procedures are still susceptible to political considerations. Moreover, inadequate budgetary measures may also compromise the financial independence of his department.
- [4]. The Commissioner plays a significant role in providing opinions on legislative drafts, occasionally reinforced by presenting these drafts in the Parliament. Definitely, the Commissioner's most important activity is the supervision of compliance with data protection law upon complaints or *ex officio*. The number of complaints are constantly rising which may correspond to his intensive awareness raising activities in the media. Unfortunately, the number of *ex officio* investigations is decreasing, indicating a shrinking terrain for

¹ László Majtényi, *Freedom of Information, the Hungarian Model*, p. 2; available at: <http://www.lda.brandenburg.de/sixcms/media.php/2232/maitenyi.pdf> (28.01.2009)

planned inspections. Last, the irregular pattern of complaints is not necessarily telling of the most problematic data processing practices.

- [5]. Monitoring is the least functioning element of the Hungarian data protection system. A significant number of data processing entities, though so required, do not register with the data protection register, while only a critically low portion send reports on refused requests. Regrettably, the transparency of the Commissioner's operations also leaves a lot to be desired, as only a selection of case-studies are available online and particularly in light of his 'dual mandate' it is difficult to evaluate the way resources are allocated among the different activities of the Commissioner.
- [6]. Furthermore, another legal remedy is available to individuals against the violation of the right to protection of personal data. Individuals may initiate a court procedure if the data controller does not provide information on processing their personal data or refuses to rectify or delete the data (except for data processing ordered by law). Court proceedings are totally separated from the Commissioner's investigation. Moreover the Commissioner is not allowed to act if a case is pending in court. It is even more challenging to assess the courts' role in this field as access to court files is very limited and mainly case-studies selected by judges are publicly available. In the court proceedings most of the data protection claims are combined with other civil rights claims, such as the right to good reputation or to image. No general trends on jurisprudence can as yet be discerned.
- [7]. There are some areas where amendments could enhance the efficiency of the Commissioner's work, but taking into account all the shortcomings of the system, the greatest development could result from a change in the practice of civil servants.

1. Overview

- [8]. The protection of personal data is a constitutional right in Hungary.² Hungary is member of the European Union and ‘may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities’.³ The Constitution also stipulates that Hungary ‘accepts the generally recognized principles of international law, and shall harmonize the country’s domestic law with the obligations assumed under international law’.⁴ Hungary has ratified all the major international instruments relevant for the protection of privacy or for the protection of personal data, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its Additional Protocol, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.⁵
- [9]. Act No. 63 of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest⁶ provides the general rules on the protection of personal data, which are complemented by sectoral legislation. There are separate acts on the protection of medical data and human genetic data. Other pieces of legislation also contain provisions on the protection of personal data, e. g. the Act on the Police, Act on National Security, Act on the Use of Name and Address Information for Research and Direct Marketing.⁷ There are three main relevant sources of interpretation of data protection law: the courts, the Parliamentary Commissioner for Data Protection and Freedom of Information and the Constitutional Court. The roles of the courts and the Commissioner are discussed below; the function of

² Article 59 of the Constitution, Hungary/Törvény 1949. évi XX. (20.08.1949)

³ Article 2/A of the Constitution, Hungary/Törvény 1949. évi XX. (20.08.1949)

⁴ Article 7, of the Constitution, Hungary/Törvény 1949. évi XX. (20.08.1949)

⁵ Hungary/Tvr. 1976. évi 8. (22.04.1976); Hungary/ Törvény 1993. évi XXXI. (07.04.1993); Hungary/Törvény 1998. évi VI. (27.02.1998) and Hungary/Törvény 2005. évi LIII. (18.06.2005), Hungary/Törvény 2002. évi VI. (01.03.2002)

⁶ Hungary/Törvény 1992. évi LXIII (17.11.1992)

⁷ Hungary/Törvény 1997. évi XLVII. (05.06.1997); Hungary/Törvény 2008. évi XXI. (14.05.2008); Hungary/Törvény 1994. évi XXXIV. (20.04.1994); Hungary/Törvény 1995. évi CXXV. (28.12.1995); Hungary/Törvény 1995. évi CXIX. (27.12.1995)

the Constitutional Court needs explanation. In the Hungarian legal system the most important function of the Constitutional Court is the constitutional review of statutes and other legal instruments. Anyone can initiate *ex post review* of legal provisions, requesting the partial or total annulment of the legal provision. If the Constitutional Court finds that a legal provision is contrary to a constitutional provision, it may render that provision void. The same applies to the *elimination of unconstitutionality by omission*, i. e. when a legislative organ has failed to fulfil its legislative tasks, thereby creating an unconstitutional situation. When finding such an omission, the Constitutional Court may instruct the organ liable for the omission to fulfil its task. Both instruments function similarly to *actio popularis claims*, thereby providing substantial possibilities in modernising and keeping data protection legislation within the framework of the rule of law.

- [10]. Two parallel debates characterise the last two decades of personal data protection in Hungary. The first one could be named as data protection fundamentalism which is based on the fact that the Hungarian data protection law uses the absolute definition of personal data, which means personal data remain personal as long as its relation to the data subject can be restored, regardless of the difficulty of restoration.⁸ This definition leads to several problems in practice, especially in cases where the protection of personal data does not serve the protection of the right to privacy or the protection of the data subject either, only the protection of the right itself. The second debate connects to the first one at the question of the relationship between the right to protection of personal data and the freedom of information. In some cases it is clear that if a person performs public functions his/her personal data pertaining to these activities shall be public. The legislation solved this problem for better or worse by introducing the idea of ‘data public on grounds of public interest’. However, there are other cases where the lack of the notion of privacy in the Hungarian legal system leads to unsolvable legal problems. This debate is about the access to the files of the security agencies of the former regime. The legal issue contains elements of the right to personal data protection, the right to privacy, the right to access to public information and the right to truth. During the last twenty years no legislation was able to resolve it, moreover the Parliament, the Data Protection Commissioner, the Constitutional

⁸ The definition is the following: ‘*Personal data* shall mean any data relating to a specific (identified or identifiable) natural person (hereinafter referred to as ‘data subject’) as well as any conclusion with respect to the data subject which can be inferred from such data. In the course of data processing such data shall be considered to remain personal as long as their relation to the data subject can be restored.’ See Article 2 of Hungary/Törvény 1992. évi LXIII (17.11.1992)

Court, the archivists and legal professionals have represented totally different approaches from the very beginning of the debate.

2. Data Protection Authority

2.1 Outlines of the Data Protection Authority

- [11]. The Hungarian Constitution sets up a system of general and specialised ombudspersons.⁹ The Parliamentary Commissioner for Civil Rights has general competence and is responsible for protecting constitutional rights which are not protected by specialised ombudspersons.¹⁰ One of the specialised ombudspersons is the Parliamentary Commissioner for Data Protection and Freedom of Information (hereinafter: DP & FOI Commissioner). There is no hierarchical relationship between the ombudspersons. Act No. 59 of 1993/ 6.22.1993 on the Parliamentary Commissioner for Civil Rights (hereinafter: Ombudsperson Act) provides the general rules on the functions of the Parliamentary Commissioners. Act No. 63 of 1992/ 17.11.1992 on the Protection of Personal Data and Public Access to Data of Public Interest (hereinafter: DP & FOI Act) defines the rights and duties of the DP & FOI Commissioner. The Constitution stipulates that all ombudspersons are ‘responsible for investigating or initiating the investigation of cases involving the infringement of constitutional rights which come to their attention and for initiating general or specific measures to remedy such infringements’. The institution of ombudspersons was established on the basis of the Nordic ombudsperson models. The DP & FOI Commissioner operates with soft law instruments supported by the power of publicity. His recommendations and statements have no binding power, thus they cannot be enforced and reviewed by courts. The only exception is the decision of the DP & FOI Commissioner in which he orders ‘the blocking, deletion or destruction of unlawfully processed data, the prohibition of unlawful processing or technical processing of data, and the suspension of the transfer of data to foreign countries’.¹¹ Consequently, the DP & FOI Commissioner is not to be considered as an authority in the sense of administrative authorities under the Hungarian legal system. Until 2008, three ombudspersons and one deputy ombudsperson, from 2008 onwards four ombudspersons are sharing a common office. On the basis of the annual national budget the exact budget and the number of employees allocated to the DP & FOI Commissioner cannot be identified. In 2007, the DP & FOI Commissioner reported that his

⁹ The Hungarian translation of ‘Commissioner’ and the expression ‘Ombudsman’ are used as synonyms both in everyday and legal language.

¹⁰ Article 32/B of Hungary/Törvény 1949. évi XX. (20.08.1949)

¹¹ Paragraph 4 of Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

spending relating strictly to his core activities reached HUF 382,1 million (EURO 1,53 million) and that he employed 42 full time and three part time employees.¹²

2.2 Requirements of Article 28 of Directive 95/46/EC

- [12]. Consultation relating to legislating and the adoption of measures are regulated by the DP & FOI Act. There is no clear duty on public bodies to directly consult the Commissioner. However, public bodies drafting laws or drawing up administrative measures have the duty to make these public, whereas the Commissioner has the corollary duty to comment on drafts. The DP & FOI Commissioner 'shall make proposals for the adoption or amendment of legislation on data processing or on public access to data of public interest and to data public on the ground of public interest, and give an opinion on such draft legislation'.¹³ Another provision provides control over national level or other major data processing entities. 'The Data Protection Commissioner may perform a prior check before the technical processing of new data files or before the application of new technical data processing technologies at data controllers processing the following: a) data files of national authorities, or national labour or criminal data files; b) customer files of financial organisations or public utility providers; c) files of telecommunications service providers relating to the users of their services; or d) data files containing specific statistical data specified in a separate Act.'¹⁴
- [13]. 'The data controller shall notify the Data Protection Commissioner of his intention to technically process new data files or to apply a new technical data processing technology 30 days prior to commencing such activities. The Data Protection Commissioner shall inform, within 8 days of receiving the above notification, the data controller of his intention to perform prior checking, and shall carry out the check within 30 days. The data controller shall not start to technically process the data until the Data Protection Commissioner has completed his prior check.'¹⁵ If the public body fails to notify the DP & FOI Commissioner he still has the possibility to present his opinion, if the draft measures or regulations are identified by his investigation.

¹² DP & FOI Commissioner, *Annual Report 2007*, (31.01.2009.)

<http://abiweb.obh.hu/abi/index.php?menu=beszamolok> (24.01.2009)

¹³ Para 1 of Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

¹⁴ Para 2 of Article 31 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

¹⁵ Para 3 of Article 31 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

- [14]. The DP & FOI Act provides all the powers necessary for effective investigations. '(1) In performing his tasks the Data Protection Commissioner may request the data controller to supply information on any question that may be related to personal data, data of public interest or data public on grounds of public interest, and he may inspect all such documents and request a copy of and have access to all such data processing operations. (2) The Data Protection Commissioner may enter any premises where data are processed. (3) The data controller shall within thirty days reply to the recommendation issued to him on the merits. (4) State and service secrets shall not prevent the Data Protection Commissioner from exercising his rights laid down in this Article, but the provisions on confidentiality shall be binding on him as well. In cases of data processing involving state or service secrets the Data Protection Commissioner shall exercise his rights in person or through members of his staff who passed the national security screening initiated by him.'¹⁶
- [15]. The DP & FOI Commissioner has effective powers of intervention. He can deliver opinions before processing operations are carried out;¹⁷; 'may issue a recommendation within his competence generally or for a specific data controller' and he 'may inform the public of the launching of his investigation, of the fact of the unlawful processing (technical processing) of data, of the person of the data controller (technical data processor) and of the range of processed data, as well as of the measures initiated and decisions made by him'.¹⁸ Furthermore 'if the data controller or technical data processor fails to discontinue the unlawful processing (technical processing) of personal data, the Commissioner may order in a decision the blocking, deletion or destruction of unlawfully processed data, prohibit the unlawful processing or technical processing of data, and suspend the transfer of data to foreign countries. The decision may not be remedied in an administrative procedure'.¹⁹ If the data processing entity fails to react to the recommendation of the DP & FOI Commissioner or the latter does not agree with the reaction of the data processing entity to his recommendation he can refer the matter to the Parliament in his annual report and request a Parliamentary investigation.²⁰

¹⁶ Article 26 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

¹⁷ See above, 'prior check', para 12.

¹⁸ Point e) of Article 24 and para 3 Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

¹⁹ Para 4 Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

²⁰ Ara 1 of Article 26 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

- [16]. The DP & FOI Commissioner may initiate disciplinary or petty (administrative) offence procedures with the competent authority and shall initiate criminal procedures if he suspects a crime has been committed.²¹ Neither the DP & FOI Act nor the Ombudsperson Act gives him power to initiate procedures in civil courts. However, the DP & FOI Commissioner has the power to issue decisions on the blocking, deletion or destruction of unlawfully processed data, etc. against which the data processing entity can seek judicial review. ‘The data controller, the technical data processor or the data subject may request judicial review from the court against the decision of the Data Protection Commissioner pursuant to paragraph (4) – within 30 days after its receipt – on the grounds of infringement. The Court shall proceed according to the regulations on lawsuits against public administration of the Civil Procedure Act.’²² In this latter case the DP & FOI Commissioner is a defendant in the court procedure.
- [17]. The DP & FOI Commissioner shall hear complaints according to the following rules: ‘Anyone may report to the Data Protection Commissioner if he thinks that his rights have been violated, or that there is an imminent danger thereof, in connection with the processing of his personal data or with the exercise of his right to have access to data of public interest or to data public on grounds of public interest, except when judicial proceedings are already pending concerning the case in question’.²³ The applicant is protected by the following provision: ‘No one shall suffer any prejudice on grounds of his complaint to the Data Protection Commissioner. The applicant shall enjoy the same protection as persons making reports of public interest’.²⁴ As ‘state and service secrets shall not prevent the Data Protection Commissioner from exercising his rights’ the DP & FOI Commissioner also hears claims when domestic law adopted pursuant to Article 13 of Directive 95/46/EC applies.²⁵ The DP & FOI Commissioner informs the applicant of the outcome of his investigation and of the measures taken.²⁶
- [18]. The powers given to the DP & FOI Commissioner correspond to the requirements of Article 28 of Directive 95/46/EC, though there are a few short-comings in the national provisions in force, as follows.

²¹ Para 24 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

²² Para 5 of Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

²³ Para 1 of Article 27 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

²⁴ Para 2 of Article 27 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

²⁵ Para 4 of Article 26 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

²⁶ Para 1 of Article 19 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

2.2.1 Providing Opinions

- [19]. The DP & FOI Commissioner has to be notified only on draft legislation, which means that ministries have to inform the DP & FOI Commissioner of legislative proposals prepared by them, before submission to the Parliament. In practice most of the governmental bodies fulfil this obligation, although there are examples of repeated breaches of the law, such as by the Ministry of Finance.²⁷ As the violation of this legal provision has no sanction and does not render the regulation invalid, the failure to inform the DP & FOI Commissioner may easily occur in the future as well.

2.2.2 Bills by Members of Parliament

- [20]. The Constitution stipulates that ‘legislation may be initiated by the President of the Republic, the Government, all Parliamentary Committees, and any Member of Parliament’.²⁸ The President of the Republic has never exercised this right, but Parliamentary Committees and the Members of Parliament occasionally initiate legislation. Such initiatives are not ‘drafts’, but ‘bills’ and as such are not to be sent to the DP & FOI Commissioner for his opinion.

2.2.3 Non-transparency of International Negotiations

- [21]. Article 28 of Directive 95/46/EC requires ‘that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals’ rights and freedoms with regard to the processing of personal data’. This requirement does not only encompass national, but also international regulations if they have direct or indirect implications on the rights and obligations of individuals. There is no Hungarian legislation, nevertheless, which obliges governmental bodies to notify the DP & FOI Commissioner if international instruments are being negotiated or if the Government takes part in EU legislative procedures. Even if the DP & FOI Commissioner is aware of such procedures, it is down to the governmental body’s discretion whether or not to invite the DP & FOI Commissioner to provide his opinion relating to the protection of individuals’ rights and freedoms with regard to the processing of personal data. The given body decides how much time

²⁷ DP & FOI Commissioner, *Annual Report 2003*, p.91; DP & FOI Commissioner, *Annual Report 2004*, p. 141.

²⁸ Para 1of Article 25 of the Constitution, Hungary/ Törvény 1949. évi XX. (20.08.1949)

to allow for producing an opinion.²⁹ For example, in case of Council Regulation (EC) No. 2252/2004 of 13 December 2004, which introduced the biometric passports in the EU, the DP & FOI Commissioner was not consulted by any governmental body and he could give his opinion only in form of an open letter.³⁰

2.2.4 Flawed Administrative Powers

- [22]. Although the DP & FOI Act provides quasi administrative powers for the DP & FOI Commissioner by stating that he ‘may order in a decision the blocking, deletion or destruction of unlawfully processed data, prohibit the unlawful processing or technical processing of data, and suspend the transfer of data to foreign countries’, it does not provide for the enforcement of such orders. The lack of enforcement possibilities prevents the Commissioner from using this power.

2.3 Remit of the Data Protection Authority

- [23]. The DP & FOI Commissioner safeguards both the constitutional right to the protection of personal data and to public access to data of public interest.³¹ The DP & FOI Commissioner is responsible for investigating or initiating the investigation of cases involving the infringement of the above-mentioned two constitutional rights which come to his attention and for initiating general or specific measures for their remedy.³² The DP & FOI Act specifies the duties of the DP & FOI Commissioner as follows: ‘a) shall supervise compliance with this Act and other rules of law on data processing on notice or – if there is no judicial proceeding pending concerning the case in question – ex officio; b) shall investigate complaints lodged with him; c) shall ensure the maintenance of the data protection register; d) shall promote a uniform application of statutory provisions on the processing of personal data and on public access to data of public interest; and e) may issue a recommendation within his sphere of

²⁹ The DP & FOI Commissioner mentions in the annual report that although the Ministry of Justice and Law Enforcement has invited the DP & FOI Commissioner to participate in the negotiations related to the work of the Article 36 Working Party, only short (few hours) deadlines were given for providing opinions. (Hungary/Adatvédelmi Biztos Irodája, *Az adatvédelmi biztos beszámolója 2007*, p. 240)

³⁰ [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-85336&als\[theme\]=BTS%20Biometric%20Passports](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-85336&als[theme]=BTS%20Biometric%20Passports) (25.01.2009)

³¹ Para 1 of Article 23 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

³² Para 2 of Article 23 of Hungary/Törvény 1992. évi LXIII. (17.11.1992) and para 1 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

tasks generally or for a specific data controller; f) shall practise the right to form opinion in connection with the activity of an organ performing state or local government function, or other public function determined by a rule of law considering special and individual publication lists regarding data to be disclosed according to the provisions of a separate Act; g) shall represent the Republic of Hungary, co-operating with organs and persons specified in a separate Act, in joint data protection supervisory authorities of the European Union; h) shall exercise the powers and perform the tasks as laid down in this Act'.³³

- [24]. The DP & FOI Commissioner's remit has three important attributes distinguishing him from Commissioners of other legal systems. First, the DP & FOI Commissioner cannot issue legally binding decisions (with the above-mentioned exception). Therefore his recommendations and statements cannot be challenged and are not subject to judicial review. Secondly, he safeguards only two constitutional rights, consequently doesn't have to share his attention and resources among all other rights. Thirdly, the DP & FOI Commissioner shall not investigate if there's a pending judicial procedure, thus the same infringement cannot be adjudicated twice resulting in different outcomes. At the same time, complainants have access to procedures both before courts and the DP & FOI Commissioner. The former is bound to the individual's claim and may result in an enforceable court decision remedying the specific violation, while the latter procedure is not limited by the individual's claim. It can provide individual remedy and trigger a thorough investigation by the DP & FOI Commissioner aimed at inspecting a data-processing entity systematically, pointing to widespread practice of maladministration and violations of rights or identifying flaws of the law in general.
- [25]. The duty of safeguarding both the right to the protection of personal data and the right of access to public information carries the burden of striking a balance between them. The two rights exhibit two aspects of the same phenomenon. The balance must be struck on a case by case basis and also at the level of the DP & FOI Commissioner's institutional activity.³⁴ Throughout the 13 years of the DP & FOI Commissioner's existence it hasn't been clarified whether or not the striking disproportion between the number of data protection and freedom of information complaints has originated from the DP & FOI Commissioner's approach or his case work has reflected general societal trends. All in all, the 'dual model' resulting

³³ Article 24 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

³⁴ See Annex, Table IV.

from the scope of the DP & FOI Act and the DP & FOI Commissioner's activities has functioned well and a possible division of the two rights might be counter-productive as transparency and confidentiality are two sides of the same continuum.

2.4 Resources of the Data Protection Authority

- [26]. On the basis of publicly available sources no accurate analysis can be carried out on the resources of the DP & FOI Commissioner acting as data protection authority. Until 2008, three ombudspersons and one deputy ombudsperson, from 2008 onwards four ombudspersons are sharing a common office.³⁵
- [27]. According to the Ombudsperson Act the operational costs of the ombudsperson and of his office, as well as the number of employees shall be defined in a special chapter of the national budget.³⁶ On the basis of the annual national budget the exact budget and the number of employees allocated to the DP & FOI Commissioner cannot be identified.³⁷ However, the DP & FOI Commissioner in his annual report publishes the direct expenses of his department, excluding the general operational costs which belong to the common office of the ombudspersons, as well as the number of employees working in his department.
- [28]. According to the 2007 Annual Report of the DP & FOI Commissioner, the average time of handling a complaint has not changed significantly between 2005 and 2007 (in 2005 – 72 days; in 2006 – 63 days; in 2007 – 69 days), though the number of complaints had constantly risen until 2005 and from 2006 to 2007.³⁸ These figures could, on the whole, be interpreted as if the current resources of the DP & FOI Commissioner were sufficient to ensure the effective use of his powers. Unfortunately, a meticulous analysis taking into consideration all his powers, the proportion and weight of complaints and ex officio investigations, and last but not least the share of the freedom of information and of the data protection activities is not yet available.

³⁵ In 2008 the position of the Deputy of the Parliamentary Commissioner for Civil Rights was abolished and the position of the Parliamentary Commissioner for the Future Generations has been established.

³⁶ Para 3 of Article 28 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

³⁷ See details in Annex 1.

³⁸ Hungary/Adatvédelmi Biztos Irodája, *Az adatvédelmi biztos beszámolója 2007*, p. 31.

2.5 Guarantees of Independence granted to the DP & FOI Commissioner

- [29]. Although the DP & FOI Commissioner is elected for six years by a majority of two-thirds of the votes of the Members of Parliament, the election process does not provide the independence of the Commissioner that it should.³⁹ For a two-thirds majority usually the cooperation of governmental and oppositional parties is needed.⁴⁰ As in the case of other public offices, parliamentary parties either informally distribute the positions (e.g. of the other ombudspersons) among each other or they compromise by promoting a person who does not pose a threat to any political party. In theory, such trading ought to be avoided as Article 32/B of the Constitution prescribes that the President of the Republic recommends the nominee. In fact, the latest nomination procedure has shown that only the fifth nominee could gain a two-thirds majority as the President refused to negotiate with the parliamentary factions in 2007 and 2008. The term of the second DP & FOI Commissioner expired on 13 December 2007 and the new Commissioner was elected on 29 September 2008. In 2001 the term of the first DP & FOI Commissioner expired on 30 June, but the new one was elected only on 13 December 2001. During these interim periods the Parliamentary Commissioner for Civil Rights acted as DP & FOI Commissioner, without fulfilling a legal requirement, i.e. having the ‘significant experience either in conducting or supervising proceedings involving data protection or in the scientific theory thereof’.⁴¹
- [30]. It is a further concern that ombudspersons may be re-elected once, which may make them prone to favouring political parties, resulting in a further threat to their independence.⁴²
- [31]. The Ombudsman Act prescribes that anyone who, during four years prior to nomination, has been a Member of Parliament, President of the Republic, member of the Constitutional Court, member of the Government, secretary of state, specialised secretary of state, member of the local government council, notary, public prosecutor, professional member of the armed forces, of police organs, or the employee of a party, may not be elected as ombudsman.⁴³ There are no post-employment restrictions on the ombudspersons. It is

³⁹ Para 4 of Article 32/B of the Constitution.

⁴⁰ Since 1990 only for the 1994-1998 term had the parties of government a two-third majority in the Parliament.

⁴¹ Para 1 of Article 23 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

⁴² Para 5 of Article 4 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

⁴³ Para 3 of Article 3 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

remarkable that three ombudspersons resigned in order to take on high-ranking positions for which they needed the support of political parties. A Parliamentary Commissioner for Civil Rights became member of the Constitutional Court (elected by a majority of two-thirds of the votes of the Members of Parliament and nominated by the Nominating Committee which shall consist of one member of each political party represented in the Parliament). A deputy Parliamentary Commissioner for Civil Rights became a minister (appointed and dismissed by the President of the Republic, based on the recommendation of the Prime Minister). Another deputy Parliamentary Commissioner for Civil Rights became the General Prosecutor (elected by the Parliament, recommended by the President of the Republic).⁴⁴ Remarkably, no DP & FOI Commissioner has followed the example of these ombudspersons so far.

- [32]. A further risk to the independence of the DP & FOI Commissioner is posed by his department's budget. Although the budget of the Parliamentary Commissioners' Office is in a special chapter of the annual budget adopted by the Parliament, the proposal on the budget is prepared by the Ministry of Finance. The ministry is not obliged to consult the ombudspersons and they have no means to express their opinion before the bill on the annual budget is introduced by the Government to the Parliament. The special chapter covers the functioning of all ombudspersons, but the division of resources in practice depends on the positions of the different ombudspersons within the Parliamentary Commissioners' Office. Therefore the independence of the DP & FOI Commissioner has to be protected not only from the government, but also from the other ombudspersons. Notably, however, concerns in this regard have not yet been raised in public.

2.6 Own Initiative Activities

- [33]. According to the DP & FOI Act 'the Data Protection Commissioner shall supervise compliance with this Act and other rules of law on data processing upon notice or – if there is no judicial proceeding pending concerning the case in question – *ex officio*'.⁴⁵ This provision enables the Commissioner to supervise any data processing falling under the scope of the DP & FOI Act as *lex generalis* or regulated by any sectoral legislation as *lex specialis*. The only

⁴⁴ Para 4 of Article 32/A, para 4 of Article 33, para 1 of Article 52 of Hungary/Törvény 1949. évi XX. (20.08.1949)

⁴⁵ Point e) of Article 24 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

limitation is that the DP & FOI Commissioner shall not investigate ex officio if a judicial procedure is pending in the case (the same applies to investigations initiated by complainants).⁴⁶ In practice this restriction doesn't inhibit the ex officio procedures in cases where a judicial procedure is pending, as the DP & FOI Commissioner still has the possibility to supervise the data processing activities of an entity in general, so as to identify systemic problems and to issue recommendations on their general data processing practice without touching upon a specific violation of data protection law.

- [34]. The weight of the own initiative investigations/audits within the Commissioner's work primarily depends on the Commissioner's perception of his role, and secondly on resources available to him. The first DP & FOI Commissioner had the practice of investigating the major data processing entities of a county and several counties were inspected every year.⁴⁷ The second Commissioner abandoned this practice and used this possibility less frequently, which could be explained by the significant rise in the number of complaints and requests for opinions on legislative drafts, while resources did not accordingly increase.

2.7 Monitoring and Information Duties

- [35]. In theory, the DP & FOI Act enables the Commissioner to have an oversight on the practice of data controllers: 'The data controller shall annually report on refused requests to the Parliamentary Commissioner of Data Protection.'⁴⁸ In practice only a fragment of the data controllers fulfil their obligation⁴⁹ and in numerous cases the quality of data they provide renders the use of data for any purpose impossible. In this area there hasn't been much improvement in the last 12 years, although the announcements on call for reports are published in the Official Gazette and the DP & FOI Commissioner frequently helps data controllers with instructions. Violations are identified mainly by complaints lodged at the Commissioner's office, court decisions published on the Internet (since mid-2007) and by inquiries of and reports by the media.

⁴⁶ See para 1 of Article 27 of Hungary/Törvény 1992, évi LXIII. (17.11.1992)

⁴⁷ Hungary's administrative division consists of 19 counties and the capital.

⁴⁸ Para 3 of Article 13 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

⁴⁹ See Annex, Table II.

2.8 Decisions and Opinions available to the Public

- [36]. The DP & FOI Commissioner publishes a selection of recommendations and statements on his website, which is updated frequently. The annual report provides an overview of the DP & FOI Commissioner's annual work and contains a selection of case studies. The annual report shall be submitted to the Parliament until the end of March of the following year. After the resolution of the Parliament on the adoption of the report, it shall be published in the Official Gazette. The DP & FOI Commissioner publishes the report in a book format as well as on his website. As the recommendations and statements are all created in electronic form and a considerable part of the consultations are in written form, it would not require too much of an effort from the DP & FOI Commissioner to publish them on his website. Such publicity could expose the employees of the DP & FOI Commissioner to the criticism of data protection professionals which could in turn cause embarrassment in the short term, but improve the quality of work on the long run. The opinions of the DP & FOI Commissioner on legislative drafts are rarely published, which may provide him with a room to manoeuvre, but limits the public scrutiny of his work.
- [37]. Documents produced by the DP & FOI Commissioner have to be disclosed and in practice are disclosed, if access to them is requested. In accordance with the Ombudsman Act the identity of the individual complainant shall not be revealed if he so requests. The names of the complainants are deleted from the published recommendations/statements and shall be withheld when documents are disclosed on request, unless they are considered as data public on grounds of public interest.

2.9 Opinions of the Working Party

- [38]. In the Hungarian legal system the Working Party established under Article 29 of Directive 95/46/EC has no special standing and its opinions are not binding. In practice, the DP & FOI Commissioner uses its opinion as a source of inspiration especially in negotiations on EU acquis matters and when issuing opinions on national legislation implementing EU legislation.⁵⁰ Furthermore, the opinions of the Article 29 Working Party are used by NGOs presenting opinions on legislative drafts to ministries or on bills to Members of the Parliament.

⁵⁰ Hungary/Adatvédelmi Biztos Irodája, *Az adatvédelmi biztos beszámolója 2007*, pp. 195-252.

2.10 Advisory Role of the Data Protection Authority

- [39]. With few exceptions all ministerial and governmental decrees, as well as draft laws are submitted to the DP & FOI Commissioner in the course of the consultation among the governmental bodies.⁵¹ Occasionally the Commissioner is requested to give opinion on an extremely short deadline and in few cases he is not consulted at all.⁵² In most cases the legislator complies with his opinion and even if the opinion is disregarded, the DP & FOI Commissioner still has the possibility to present his comments to the Parliament, which is done in practice, if he considers it necessary.

2.11 Awareness Raising Role

- [40]. The awareness raising activities of the DP & FOI Commissioner are diverse and extensive. The Commissioner and the employees of his office are present at a vast number of conferences where professional audience and issues are addressed. However, the majority of awareness raising work aims at general audience which includes several hundreds of interviews annually and also the participation at Sziget Festival, one of the largest music and cultural festivals in Europe.⁵³ The awareness raising role of the DP & FOI Commissioner is crucial in empowering citizens to exercise their rights to privacy and protection of personal data and informing them on possible remedies in case of their rights are breached. Awareness raising has had considerable results shown by surveys and the rise in the number of complaints.⁵⁴

⁵¹ See Annex, Table III.

⁵² See para. 19. and 51.

⁵³ More than 300 interviews in televisions, radios and other electronic media in 2003, Annual Report of DP&FOI Commissioner 2003, available at: <http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2003/I> (25.01.2009); 343 interviews in televisions, radios and other electronic media in 2004, Annual Report of DP&FOI Commissioner 2004, available at: <http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/I> (25.01.2009); 556 interviews in televisions, radios and other electronic media in 2005, Annual Report of DP&FOI Commissioner 2005, available at: <http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2005/I> (25.01.2009)

⁵⁴ See Section 5 on Rights Awareness.

3. Compliance

3.1 Data Protection Register

- [41]. Data controllers are required to register their data-processing activities in the Data Protection Register. The DP & FOI Act prescribes eight parameters of data processing that have to be registered.⁵⁵ At the same time, extensive categories of data controllers are exempted from this obligation.⁵⁶ In the annual reports the DP & FOI Commissioner summarises the most common types of data processing activities registered: e.g. internet based data processing, direct-marketing, signatures collecting, employees' data processing, local data processing of municipalities. The Data Protection Register is freely accessible on the Commissioner's website.⁵⁷
- [42]. The DP & FOI Act distinguishes between two categories of sensitive data, although both are defined as 'special data': 'a) racial, national

⁵⁵ Article 28 of Hungary/Törvény 1992. évi LXIII. (17.11.1992):
'(1) Prior to commencing his activity, the data controller processing personal data shall notify the Data Protection Commissioner of the following to be registered: a) the purpose of the data processing; b) the data categories and the legal basis for the processing thereof; c) the range of data subjects; d) the source of data; e) the categories and recipients of transferred data, and the legal basis of the transfer; f) the time limits for the deletion of certain types of data; g) the name and address (seat) of the data controller and of the technical data processor, the actual place of data processing or technical data processing, as well as any activity of the technical data processor related to the processing of data; and h) the name and contact information of the internal data protection officer.'

⁵⁶ Article 30 of Hungary/Törvény 1992. évi LXIII. (17.11.1992):
'Registration in the data protection register shall not be required where data processing operations a) involve the data of persons having an employment, membership, student or customer relationship with the data controller; b) are governed by the internal rules of churches, religious denominations or religious communities; c) involve personal data relating to the diseases or state of health of persons receiving medical care, for purposes of medical treatment or preservation of health or for social insurance claims; d) involve data collected with the purpose of granting financial or other social assistance to the data subject or data registering such assistance; e) involve personal data of persons concerned by administrative, prosecutorial or judicial proceedings that are related to the conducting of such proceedings; f) involve personal data for the purpose of official statistics, provided that the identification of individuals with such data can be finally made impossible in a manner specified by the provisions of a separate Act; g) involve data of companies or organs under the Press Law that serve solely their own informational activity; h) serve the purposes of scientific research, provided that the data are not made public; i) were transferred from the data controller to the archives; or j) serve a natural person's own purposes.'

⁵⁷ <http://abiweb.obh.hu/abi/index.php?menu=4> (25.01.2009)

or ethnic minority origin, political opinion or party affiliation, religious or ideological belief, or membership in any interest representing organisation; b) state of health, pathological addictions, sexual life or criminal personal data'.⁵⁸ The following rule applies to processing special data: 'Special data shall not be processed unless a) the data subject has given his written consent; or b) regarding data set out in point a) of paragraph (2) of Article 2 (i. e. the first set of sensitive data), an international agreement prescribes it or it is ordered by an Act, either in order to enforce a fundamental right provided for in the Constitution or in the interest of national security, crime prevention or criminal investigation; or c) ordered by an Act in other cases'. There is no special monitoring mechanism on compliance with these rules. Complaints lodged at the Commissioner and own motion initiatives can disclose cases of non-compliance.

3.2 Data Protection Officers

- [43]. The DP & FOI Act stipulates that 'an internal data protection officer holding a higher education degree in law, public administration or information technology, or a qualification equivalent thereto, shall be appointed or commissioned within the organisation of the data controller or of the technical data processor'. The DP & FOI Act entrusts the internal data protection officer with numerous duties, such as participating in decision making on data processing issues, monitoring compliance with the DP & FOI Act or ensuring the training of the staff on data protection.⁵⁹ Several organisations provide vocational training for internal data protection officers and the training is registered by the Educational Authority.⁶⁰

3.3 Court Decisions

- [44]. Since 1 July 2007 the Act XC of 2005 on the Freedom of Information by Electronic Means requires that 'decisions on the

⁵⁸ Point 2 of Article 2 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

⁵⁹ Para 2 of Article 31/A of Hungary/Törvény 1992. évi LXIII. (17.11.1992): 'The internal data protection officer shall a) contribute to or assist in making decisions related to data processing and to the enforcement of the rights of data subjects; b) monitor compliance with this Act and other rules of law on data processing, as well as with the provisions of internal data protection and data security rules and with data security requirements; c) investigate reports submitted to him, and call on the data controller or technical data processor to discontinue any unlawful data processing observed by him; d) draw up the internal data protection and data security rules; e) maintain the internal data protection register; and f) ensure the training of the staff in data protection.'

⁶⁰ Among others the Budapest University of Technology and Economics, <http://infota.org/baf/> (25.01.2009)

merit rendered by the Supreme Court and the Courts of Appeal shall be disclosed' online, which also includes the publication of decisions issued by lower courts in the course of the procedure.⁶¹ Although the scope of the decisions is limited in time and restricted to the jurisprudence of the higher courts, the online database still provides access to data protection cases. Due to the low number of cases on the violation of data protection rules, available only since mid-2007, no clear trends can be identified regarding compliance or lack of compliance with data protection legislation. Having summarily reviewed some 40 cases available on the Internet, clear conclusions cannot be drawn in relation to court practice.⁶²

⁶¹ Part four of Hungary/Törvény 2005. évi XC. (14.07.2005)
http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/2005_XC (25.01.2009)

⁶² <http://www.birosag.hu/engine.aspx?page=anonim> (25.01.2009)

4. Sanctions, Compensation and Legal Consequences

[45]. Although the DP & FOI Act establishes its own rules on compensation for damages, in practice courts interpret these provisions as special rules for the interpretation of the Civil Code and not as an independent legal framework.⁶³ The Civil Code in its chapter on civil rights regulates that ‘data processing and technical data processing by computer or other means shall not violate civil rights’.⁶⁴ The violation of data protection rules establishes liability under civil law and depending on the circumstances of the case the individual may ‘a) demand a court declaration of the occurrence of the infringement, b) demand to have the infringement discontinued and the offender restrained from further infringement; c) demand that the offender make restitution in a statement or by some other suitable means and, if necessary, that the offender, at his own expense, make an appropriate public disclosure for restitution; d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the offender and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature; e) claim damages in accordance with the tort liability regulations under civil law’.⁶⁵ Claims originating from violation of data protection rules are usually handled together with other civil rights claims and in the judgments no separate sanctions are imposed, but jointly with other claims, such as those arising from violating one’s good reputation, right to image, and the right to privacy. The main difference between the claims originating from the violation of data protection rules and other civil rights is the way of substantiating them, as according to the DP & FOI Act ‘the data controller shall be exempted from liability if he proves that the damage was the result of force majeure beyond the sphere of data processing’. This is far stricter than the general tort liability rules. In

⁶³ Article 18 of Hungary/Törvény 1992. évi LXIII. (17.11.1992): ‘(1) The data controller shall be liable for any damage suffered by data subjects as a result of an unlawful processing of their data or as a result of an infringement of the technical requirements of data protection. The data controller shall also be liable for any damage suffered by the data subject resulting from the actions of a technical data processor. The data controller shall be exempted from liability if he proves that the damage was the result of force majeure beyond the sphere of data processing. (2) No compensation shall be paid for the part of damage suffered by the damaged person as a result of his intentional or grossly negligent conduct.’

⁶⁴ Para 1 of Article 83 of Hungary/Törvény 1959. évi IV. (11.08.1959)

⁶⁵ Para 1 of Article 84 of Hungary/Törvény 1959. évi IV. (11.08.1959)

November 2007, in case of a highly defamatory book, which not only violated the good reputation of the plaintiff, but also disclosed sensitive data without the individual's consent, the second instance Metropolitan Court of Appeal upheld the first instance decision, which obliged the publisher to pay 1.2 million HUF (EURO 4.800) non-pecuniary damage. The court also ordered the defendant to discontinue the violation of the plaintiff's rights, make restitution in a statement in a national daily newspaper, and delete the section subject to action from the future editions of the book.⁶⁶ This judgment aptly illustrates the general practice and the average amount of compensation awarded in such cases.

- [46]. The DP & FOI Commissioner's statements and recommendations have no binding power. The DP & FOI Commissioner may 'order in a decision the blocking, deletion or destruction of unlawfully processed data, prohibit the unlawful processing or technical processing of data, and suspend the transfer of data to foreign countries'. This can be considered as a sanction, however he has no means to enforce such decisions. The DP & FOI Commissioner's statements and recommendations themselves don't result in sanctions or compensation unless the publication of them is regarded as a sanction. The individual complainants may use the statements and recommendations in any administrative or court procedure to substantiate their claims. However, lacking binding power they may be considered only as remarkable interpretations of the law.
- [47]. The enforcement of data protection legislation through sanctions and compensation awards entirely depends on the individuals concerned, as in the Hungarian legal system only persons whose rights have been violated may claim compensation in court.⁶⁷ The DP & FOI Commissioner doesn't provide either legal advice or representation in court procedures, but provides general legal advice on data protection issues. Furthermore, a limited number of NGOs provide free legal advice and representation in such cases.⁶⁸ The Central Office of Justice (a department of the Ministry of Justice) can also provide legal aid to the socially disadvantaged provided for by Act LXXX of 2003 on legal assistance. Levies and duties, as well as fees of the opponent's attorney are to be borne by the losing party.⁶⁹ Data protection court procedures are not subject to court levies and

⁶⁶ Hungary/Fővárosi Ítéletábla/2.Pf.20.805/2007/3. (13 November 2007)

⁶⁷ There are some areas where *actio popularis* is available, but that's the exception and those issues rarely relate to data protection rights.

⁶⁸ Hungarian Civil Liberties Union, Hungarian Helsinki Committee (in police / prison service data-processing cases).

⁶⁹ Point a) para 1 of Article 42 of Hungary/Törvény 1990. évi XCIII. (24.12.1990)

duties.⁷⁰ In standard civil procedures, in which an individual claims compensation for damages deriving from the violation of civil rights, the losing party has to pay levies and duties which, dependent on the damage claim, may be rather high in the Hungarian context – as a main rule six (+ three on appeal) per cent of the value of the claim, minimum 7000 (EURO 28), maximum 900,000 HUF (EURO 3.600).

- [48]. The Labour Code provides that trade unions ‘shall have the right to inform their members of their rights and obligations concerning their financial, social, cultural, as well as living and working conditions, furthermore to represent their members against the employers and before state authorities in matters concerning labour relations and employment matters’.⁷¹ Furthermore, ‘employers shall consult the workers’ council prior to passing a decision in respect of [...] b) proposals for setting up a personnel records system, the set of data to be recorded, plans for the contents of the data sheet specified in Section 77 and staff policy plans; [...] f) the introduction of new work organization methods and performance requirements; g) plans for internal regulations affecting the employees’ substantive interests’.⁷² These rules provide possibilities for the workers’ council in giving opinions on measures that may restrict workers’ privacy (point f and g) and the union may provide legal assistance and representation, if the employer does not comply with the data protection rules. Only few union websites contain information on personal data protection issues and references in the human rights literature on the unions’ practice in this field are also absent. However, there are numerous cases where the DP & FOI Commissioner inspected labour union and personal data protection issues. In the 1990’s on few occasions labour unions tried to gain access to non-member workers’ data. Lately, it has become more common that the unions file complaints with the Commissioner related to strike law and workplace surveillance issues.⁷³

⁷⁰ Point o) para 1 of Article 57 of Hungary/Törvény 1990. évi XCIII. (24.12.1990)

⁷¹ Para 2 of Article 19 of Hungary/Törvény 1992. évi XXII. (04.05.1992)

⁷² Para 3 of Article 65 of Hungary/Törvény 1992. évi XXII. (04.05.1992)

⁷³ See cases of the DP & FOI Commissioner: workers’ data: 120/K/1996, 678/K/1999; strike law: 381/H/2006-18; surveillance: 103/A/2004, 1805/A/2005.

5. Rights Awareness

[49]. In the last twenty years only a handful of surveys have been conducted on the right to privacy and to protection of personal data. In 1989 a survey based on the methodology of the *Younger Committee Report on Privacy* had the following results: The national problems had to be graded on a 1-5 scale, the protection of privacy received 4.53 point in a list where the economic crisis had 4.91, pensions 4.7, social security 4.66, freedom of expression 4.64, freedom of information 4.47, unemployment 4.47, equal rights of women 4.28, refugee issues 4.15, private enterprises 4.13, workers' power 3.86, and the plural party system 3.46.⁷⁴ In 2005 the Eötvös Károly Institute in cooperation with the Legal Sociology Department of Eötvös Lóránd University conducted a survey on the awareness and knowledge of the constitution covering a representative sample of 1000 individuals. 8.1 % of the respondents believed that 'under the current constitution the right to privacy cannot be exercised at all; according to 56.5 % it can be exercised to a small degree; and according to 33.5 % it can be exercised to the highest degree'. As to the question whether or not the level of the protection of private life should be changed, 38.9 % of the respondents opined that the level of protection was adequate, 58.3 % called for a higher level of protection.⁷⁵ In 2008, Szonda Ipsos Media, Opinion and Market Research Institute conducted a survey for the Ombudspersons' Office on the recognition and appreciation of the ombudspersons.⁷⁶ According to the survey, from 15 % in 1998 the proportion of citizens actively knowing the ombudsmen in 2007 had grown to 32 %. While 72 % of the respondents had heard about the Parliamentary Commissioner for Civil Rights, 59 % knew about the DP & FOI Commissioner. 11 % of the respondents were certain and another 28 % believed they would seek a remedy from the ombudsmen in case their rights had been violated. In relation to public trust the ombudsmen ranked third among major public institutions (52 %).

⁷⁴ Iván Székely, János Tölgyesi, Gábor Várnai: *Információs Privacy Magyarországon* [Information Privacy in Hungary], 1991, Magyar Közvéleménykutató Intézet [Hungarian Opinion Research Institute], (manuscript).

⁷⁵ László Majtényi, *Az információs szabadságok. Adatvédelem és a közérdekű adatok nyilvánossága*. [The freedom of information. Data protection and access to public data], 2006, Budapest, Complex Kiadó. pp. 58-61.

⁷⁶ http://www.obh.hu/szonda_ipsos_OBH.doc (26.01.2009)

6. Analysis of deficiencies

6.1 Further Deficiencies

- [50]. The DP & FOI Commissioner identified several shortcomings of the DP & FOI Act in 2004 as amendments on occasion of the EU accession were introduced.⁷⁷ Since then not all of these defects were remedied. First, he warned that the 30-day deadline for notification on commencing the technical data processing was difficult to comply with as the data processing entities usually finalised their systems just before starting to use them. Second, he drew attention to the lack of legal criteria on the content of the internal data protection rules. The third and most important issue related to legal loopholes regarding the Commissioner's right to order 'in a decision the blocking, deletion or destruction of unlawfully processed data, prohibit the unlawful processing or technical processing of data, and suspend the transfer of data to foreign countries'.⁷⁸ The DP & FOI Act does not cover situations when the data controller fails to comply with the Commissioner's decision and does not seek judicial review either. In this case the Commissioner's decision remains ineffective, as no enforcement measures are available to him. In 2004 the Commissioner did not foresee that the lack of sanctions for not seeking judicial review combined with the absence of enforcement powers would – as it happens in practice – deter the Commissioner from exercising his power to review.
- [51]. A major shortcoming of the Hungarian legal system is that the DP & FOI Commissioner's access to international and EU level negotiations on data protection issues is very limited and his opportunity to comment on the position of the government is entirely up to the discretionary decision of the negotiating civil servant. Thus, it is common practice that the government signs international agreements or votes for EU legislation which contains rules in clear contradiction with the principles of the Hungarian data protection law and the Constitution (e.g. The Prüm Convention).
- [52]. The independence of the Commissioner is threatened by the practice of national security checks required for his colleagues taking part in

⁷⁷ DP & FOI Commissioner, *Annual Report 2004*
<http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/II/1/1> (26.01.2009)

⁷⁸ Para 4 of Article 25 of Hungary/Törvény 1992. évi LXIII. (17.11.1992)

investigations that require the inspection of classified information or of personal data. His activities can be easily prevented by the national security agencies in case they fail to issue security clearances for the employees of the Commissioner.

- [53]. The right to personal data protection is interpreted by the Constitutional Court as a right to personal self-determination.⁷⁹ It means that the individual, as a main rule, has the right to dispose of his personal data. The DP & FOI Act in its articles 11-13 fails to clearly define whether the data subject may only be informed of ‘the data processed by the data controller’ or whether he has the right to request the data himself (in case such data is recorded).
- [54]. Unfortunately, the number of the DP & FOI Commissioner’s ex officio investigations has recently decreased, which provides less room for planned inspections. Thus, several data-processing organisations against which no complaints are lodged may escape the the Commissioner’s attention.
- [55]. Seemingly, the department of the DP & FOI Commissioner couldn’t avoid the fate of officialism as years pass by. The increasing workload coupled with the growing number of staff has eroded the organisation’s flexibility and professionalism. Occasionally the quality of statements and opinions is low which implies insufficient quality control and presumably inadequate personnel policy.
- [56]. The data protection court proceedings can be regarded as terra incognita as the access to court files is rather limited and the courts fail to produce statistical data on such procedures. Legal research has not been published regarding judicial practice in this field and the judiciary is not represented at professional events discussing data protection issues.

6.2 Areas not covered by Data Protection Law

- [57]. The DP & FOI Act has a territorial scope, i.e. it does not apply to personal data of Hungarian citizens processed in third countries. However, the standards set by the European Commission referred to in para 2 of Article 9 of the DP & FOI Act often fall below the level of the Hungarian standards, which results in turning over personal data processed in Hungary to other countries, which provide weaker protection and thereby excluding such sets of data from Hungarian jurisdiction. This construction is highly problematic in cases where a

⁷⁹ Hungary/Alkotmánybíróság határozata/15/1991 (13.04.1991)

third country processes the data in a way which is clearly prohibited under the Hungarian legal standards, e.g. creating personal profiles.

6.3 Deficiencies to be Filled or Reduced

- [58]. A number of deficiencies listed above can be remedied by amendments of the national or European legislation. An amendment could solve the DP & FOI Act's deficiencies, the issues on national security checks and the clarification of the rights of data subjects. To ensure the Commissioner's right to consult in EU and other international lawmaking procedures may need more than an amendment. While presently legal rules do not prohibit civil servants or government members from consulting the Commissioner, even a clear obligation on consultation would not be effective, if it is not combined with sanctions.
- [59]. The low number of ex officio investigations is a matter of resource allocation, while adequate quality control and personnel policy are managerial concerns.

7. Good Practice

- [60]. In 1991 the Constitutional Court abolished the universal and unified personal identification number and restricted the use to certain registers. The abolition was corollary to the main approach of the decision, namely ‘the widespread use of PINs results in impairing the private sphere because even the remotest data-storage systems established for different reasons may be used to establish a personality profile which is an artificial image extending to an arbitrarily wide activity of the person and penetrating into the person's most private matters; this image, due to its construction from data torn out of their context, is most likely to be a distorted image as well. In spite of this, the data user will make its decisions on the basis of this image, will use this image to produce and forward information concerning the person in question. The large amount of these interconnected data, of which the person in question generally has no knowledge, renders the person defenseless and creates unequal communication conditions’.⁸⁰ As a result, two new ID numbers (one for national health insurance and another for tax administration) were introduced in addition to the restricted one and the unified public data-processing system was thus divided. As the Parliament and the Government did not fully comply with the Constitutional Court decision, a few years later the latter abolished the universal and unified personal identification number for the second time.⁸¹
- [61]. There are 112,000 security guards (compared to the 44,000 strong police forces) working in Hungary, in a country of ten million inhabitants.⁸² In 2004 the Constitutional Court found that the law regulating the activities of the security guards lacked all privacy and data protection rules. A year later the Government introduced a new ‘Bill on the Rules of Protection of Persons and Property and on the Activities of Private Investigations’ which already included some data protection rules, but the President of the Republic raised a constitutional veto and transferred the Bill to the Constitutional Court, which found that even the new law failed to satisfy the minimum standards of data protection. After the second decision of

⁸⁰ Hungary/Alkotmánybíróság/15/1991 (13.04.1991), available at: <http://www.ceecprivacy.org/htm/91-15.htm> (28.01.2009)

⁸¹ Hungary/Alkotmánybíróság/46/1995 (30.06.1995)

⁸² <http://www.police.hu/data/cms536138/vagyonvedelem.pdf> (28.01.2009); www.police.hu/data/cms534275/Besz_mol_sz_vege.doc (28.01.2009)

the Constitutional Court the Parliament amended the new Bill. The new Act entered into force with some remarkable provisions regarding stop and search rights of the security guards, which are limited to the minimum i.e. equal to the rights of the owner of the property where they perform their activities.⁸³

- [62]. The DP & FOI Commissioner and his department have always been open to assist and cooperate with NGOs. For example, in 2000 he reviewed the data protection plan of a Roma rights research conducted by the Hungarian Helsinki Committee, in 2004 the staff of the office of the Commissioner in cooperation with the Hungarian Civil Liberties Union tested several public health premises, whether the free of charge and anonymous HIV tests were in fact facilitated anonymously and free of charge. On the basis of the findings he issued a recommendation.⁸⁴

⁸³ Hungary/Törvény 2005. évi CXXXIII (30.11.2005)

⁸⁴ <http://beszelo.c3.hu/03/11/04zadori.htm> (28.01.2009);
<http://abiweb.obh.hu/dpc/index.php?menu=reports/2004/III/2&dok=reports/2004/27>
(28.01.2009)

8. Miscellaneous

- [63]. Deadlines are an essential element of any remedy. The procedures of the ombudspersons are not bound by any, i.e. it is up to their discretionary decision (whether and) when to deal with any complaint.
- [64]. ‘The ombudsperson shall reject evidently unfounded petitions, as well as petitions submitted repeatedly and containing no new fact or data on the merits, and he may reject petitions not submitted by the party entitled to do so, or anonymous ones. The rejection shall be justified in all cases’.⁸⁵ It is obvious that the ombudsperson shall have the means to handle vexatious petitions, but it is of concern that his statistics do not include such petitions, nor record the reasons of rejections.
- [65]. The position of the DP & FOI Commissioner and his office was established in 1995. Since then, there has been no audit examining the functioning of the office, its administrative structure and resources, human resources policy, the training of staff, efficient use of financial resources, the relationship of the Commissioner with the media, accessibility of the office, the relationship with the departments of the other ombudspersons and several other aspects. As any other complex organisation the DP & FOI Commissioner’s office would benefit from an audit.

⁸⁵ Para 2 of Article 19 of Hungary/Törvény 1993. évi LIX. (22.06.1993)

Annexes

Annex 1 – Tables and Statistics⁸⁶

Table I.

	2000	2001	2002	2003	2004	2005	2006	2007
Budget of the Parliamentary Commissioners' Office ⁸⁷ (million HUF)	560.7	599.3	623.1	1031.6	1154	1306	1282.3	1379.1
Expenses of the DP & FOI Commissioner's Office (million HUF)	110.1	130.6	153.9	n/a	n/a	340.8	348.4	382.1
Staff of data protection authority (full-time + part-time employees)	27(+3)	27(+1)	27(+2)	n/a	n/a	50(+3)	45(+2)	42(+3)
Number of procedures (investigations, audits etc.) initiated by data protection authority ex officio (<i>own initiative FOI procedures are not included</i>)	n/a ⁸⁸	n/a	n/a	34	33	22	22	26

⁸⁶ All statistical data is based on the online version of the annual reports of the DP & FOI Commissioner, unless otherwise indicated. <http://abiweb.obh.hu/abi/index.php?menu=beszamolok> (24.01.2009)

⁸⁷ Based on the annual budget Acts.

⁸⁸ In 2000 there had been 43 ex officio investigations, including FOI cases.

Number of data protection registrations (total of new/modification/deletion)	n/a	n/a	562	1105	708	892	753	991
Number of data protection approval procedures (prior check) ⁸⁹	-	-	-	-	n/a	2	n/a	n/a
Number of complaints received by data protection authority (only DP complaints)	400	405	467	647	779	1051	1139	1264
Number of complaints upheld by data protection authority ⁹⁰	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Follow up activities of data protection authority, once problems were established (please disaggregate according to type of follow up activity: settlement, warning issued, opinion issued, sanction issued etc.) ⁹¹	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Sanctions and/or compensation payments in data protection cases (please disaggregate between court, data protection authority, other authorities or tribunals etc.) in your country (if possible, please disaggregate between sectors of society and economy)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Range of sanctions and/or compensation in your country (Please disaggregate according to type of sanction/compensation)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

⁸⁹ Prior check was introduced 1 January 2004.

⁹⁰ The number of DP & FOI complaints upheld is aggregated in the annual reports, therefore no upheld DP complaint figures are available.

⁹¹ No statistics on follow up activities available in the annual reports/website of the DP & FOI Commissioner.

Table II.

Information duties							
	2001	2002	2003	2004	2005	2006	2007
Entities sending report	367	566	440	496	498	446	381
Requests	56,691	264,993	147,077	276,612	315,818	212,871	283,570
Refused requests	752	484	362	435	168	422	1768

Table III.

	Advisory role							
	2000	2001	2002	2003	2004	2005	2006	2007
Opinions on legislative drafts (DP & FOI)	134	104	180	352	276	466	278	517

Table IV.

Comparison of the number of DP and FOI complaints								
	2000	2001	2002	2003	2004	2005	2006	2007
Number of complaints received by data protection authority (DP complaints)	400	405	467	647	779	1051	1139	1264
Number of complaints received by data protection authority (FOI complaints)	42	26	28	42	71	88	100	117

Annex 2 – Case Law

Case title	halapenz.hu
Decision date	10.03.2004 and 04.05.2005
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	2/H/2004-5 and 557/K/2005-3; Adatvédelmi Biztos [Data Protection Commissioner] ⁹²
Key facts of the case (max. 500 chars)	A website was launched under the name of halapenz.hu (gratuity for doctors and health care workers) which provided ‘a searchable nationwide database of obstetricians’ from which the user could access patient evaluations and learn the amount of the informal payment expected by each physician. Data was supplied by the forum members, based on their first-hand experiences. They indicated their own names, contacts, their opinion, the ‘price’ of prenatal care and attendance at childbirth if the physician named this figure in advance, as well as the name of the physician and the hospital’s data.
Main reasoning/argumentation (max. 500 chars)	The Commissioner ex officio started an investigation on the website. He found that public data may only be information on health care institutions and the public functions fulfilled by them. Such public information includes the institution’s name, contacts, health care services offered, relations with the health insurance fund, extra services available for a fee and the amount of those fees. The amount of informal payments are not relevant to the institution’s public function, they’re linked to the obstetricians as individuals. So it must be considered as the doctors’ personal data.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Commissioner tried to draw a line between personal and public data which did not lead to the clarification of the issue, but to long-lasting public and professional debates.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The website was taken down by the provider, the owner of the website started a new one and audited the new version with the commissioner. The case helped the lawmakers in drafting an amendment of the data protection law which widened the category of personal data public on grounds of public interest.

⁹² <http://abiweb.obh.hu/dpc/index.php?menu=reports/2004/III/4&dok=reports/2004/220> (29.01.2009).

Proposal of key words for data base	Personal data, public interest, public function, internet, database, gratuity, opinion
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Case title	Election databases
Decision date	19.05.2006
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	750/H/2006 Adatvédelmi Biztos [Data Protection Commissioner] ⁹³
Key facts of the case (max. 500 chars)	During the 2006 election campaign in two cases major databases were discovered in which the political preferences of citizens were recorded without the consent of the data subjects. Both cases were reported to the police. In one case the data controller admitted the illegality of the database, destroyed the data. In the other case, in which the database contained more than 10.000 names and preferences the first instance court found the data controller guilty.
Main reasoning/argumentation (max. 500 chars)	The Data Protection Commissioner issued a statement in which he recalled the resolution accepted by data protection commissioners in Montreux in September 2005 and warned against illegal data collection, stressing that political preferences were sensitive data.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was already clear on the basis of election experiences that occasionally data had been illegally collected in election campaigns, but this was the first time that databases of considerable sizes had been discovered and criminal procedures had been initiated.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The first instance court imposed 250,000 HUF (EURO 1.000) fine and 330,000 HUF (EURO 1.320) criminal procedure fee on the data controller in the case of the 10.000 strong database. The defendant appealed.
Proposal of key words for data base	Election, database, party, criminal procedure

⁹³ <http://abiweb.obh.hu/dpc/index.php?menu=reports/2006/3/1/6/2> (29.01.2009)

Case title	Agent lists
Decision date	08.03.2005 and 02.03.2005
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	431/K/2005-3 and 310/A/2005-3 Adatvédelmi Biztos [Data Protection Commissioner] ⁹⁴
Key facts of the case (max. 500 chars)	Since the democratic transition the issue of access to files of the secret services of the former regime has not been resolved. In 2005 the number of disclosures, legal by historians, archivists, researchers and illegal by anonymous leaks, reached its peak. One memorable event was when the Political Capital Policy Research & Consultancy Institute asked for the opinion of the Commissioner on the disclosure of a list produced by them, which consisted of 1300 collaborators, agents and officers who had worked for the former secret agencies and whose names had already been disclosed.
Main reasoning/argumentation (max. 500 chars)	The Commissioner refused to see the list as he could form an opinion on the question on a purely theoretical basis. He found that although under legislation in effect at the time the name, position and other information relating to the public activities of persons holding public functions were public, this provision could not apply retroactively. He added that 'only individual constitutional arguments can justify a person's learning or disclosing the identification (personal) data of career officers, informants or operative contacts'. The operative contacts 'were in general not aware of being registered by the state security organs as unorganized collaborating citizens'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This case clarified only the Commissioner's position but due to the very distant positions of the researchers, the media, the political parties, the Constitutional Court and also society in general, this issue has not been resolved.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Commissioner destroyed the list by a shredder in the presence of the media and issued a statement in which he demanded the Political Capital Policy Research & Consultancy Institute to register with the Data Protection Register and published a general statement on the issue.
Proposal of key words for data base	Former secret agencies, database, national security, transition, collision of protection of personal data and access to information

⁹⁴ <http://abiweb.obh.hu/dpc/index.php?menu=cases/DP/2005&dok=20050525> and <http://abiweb.obh.hu/dpc/index.php?menu=reports/2005/III/3&dok=reports/2005/39> (29.01.2009)

Case title	Anyacsavar – reality show
Decision date	2005 – no exact data available
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Pesti Központi Kerületi Bíróság (Central Pest City Court), Fővárosi Bíróság (Metropolitan Court) – no exact reference available
Key facts of the case (max. 500 chars)	The Commissioner found that it was illegal to produce a reality show with minors whose parents had contracted with a commercial television without the permission of the guardian authority. The reality show recorded the totality of the life of minors in two families which had swapped mothers. The contract included a clause that the minors may be exposed to serious physical and psychological risk. The Commissioner called for the suspension of broadcasting and as a response the television initiated a court procedure against the Commissioner.
Main reasoning/argumentation (max. 500 chars)	The Commissioner argued that there was a conflict of interest between the minors and the parents and the legality of such consent to data processing was dubious, which warranted the need for the guardian authority's permission.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This was the first and so far the only court procedure in which paragraph 5 of Article 25 of the Data Protection Act was applied. This provision stipulates that 'the data controller, the technical data processor or the data subject may request judicial review from the court against the decision of the Data Protection Commissioner'.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The procedure has brought to light several shortcomings of the Data Protection Act relating to proceedings under Article 25, which have been partially resolved by an amendment of the Act.
Proposal of key words for data base	Reality show, blocking, judicial review, minors, guardian authority

Case title	Vodafone tracking
Decision date	2006 – no exact data available

Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Fővárosi Ítéltábla (Budapest Appeals Court) – no exact reference available ⁹⁵
Key facts of the case (max. 500 chars)	In 2005 the mobile service provider Vodafone activated a tracking service on the mobile phones of its senior employees using company cars, without their consent and knowledge. The tracking system logged the location of the SIM cards 24 hours a day, even on weekends, downloading these data in every 15 minutes. The surveilled employees by chance found out about the operations some six months after they had started. They initiated personal rights proceedings on the basis of illegal data processing, which resulted in retaliation by the company and further labour court proceedings.
Main reasoning/argumentation (max. 500 chars)	In the beginning the employer denied the surveillance, which was refuted on the basis of log files of the system as evidence in the court procedure. Later the employer alleged that the three plaintiffs consented, which was not substantiated in the procedure in case of two and the employer did not suspend the tracking when the third plaintiff so requested.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This was the first civil case which gained wider publicity and showed the risks inherent in major data processing systems, the difficulties of proving illegal data processing and the weakness of safeguards in data-processing by service providers.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The judgement granted all claims. As the defendant did not fulfil its obligations ordered in the judgement, the plaintiffs initiated an enforcement procedure. However, Vodafone made it impossible for the plaintiffs to continue their work at the company which resulted in further legal proceedings.
Proposal of key words for data base	Tracking, GPS, fleet, Vodafone, surveillance, log files, consent.

⁹⁵ <http://index.hu/gazdasag/magyar/vofo080304/> (29.01.2009)