HELLENIC REPUBLIC
DATA PROTECTION AUTHORITY

Athens, 29.07.2009

OPINION 2/2009

On DNA analysis and the creation of a database of DNA profiles

The Data Protection Authority, consisting of the President Mr. Christos Yeraris, the members Mr Leonidas Kotsalis, Mr Agapios Papaneofitou, Mr Antonios Roupakiotis and the alternate members Ms Grammati Pantziou, and Mr Grigorios Lazarakos convened on 21-7-2009. It reconvened on 24-7-2009, having the same composition, but with the participation of the member Mr Andreas Pombortsis instead of Ms Grammati Pantziou and the additional participation of the alternate member Mr Petros Tsantilas. The HDPA convened in order to form an opinion on a draft law of the Ministry of Justice concerning DNA analysis and the creation of a database of DNA profiles.

The draft law provides for the replacement of the first item of paragraph 1 and the last item of paragraph 2 of Article 200A of the Code of Criminal Procedure, while paragraphs 3 and 5 of the Article 200A are repealed and paragraph 4 is, therefore, renumbered to 3 and is also replaced. The proposed amended Article 200A reads as follows (amendments appear in italics):

"*1. When there are serious indications that an individual has committed a felony or a misdemeanor which is punishable with imprisonment of at least three months, law enforcement authorities shall necessarily collect a cellular sample for DNA testing in order to determine the identity of the offender.*

The analysis is restricted solely to the data which is necessary for determining the offender and takes place at a state or university laboratory.
The accused is entitled to his/her DNA analysis for his/her own defence.

2. If the aforementioned analysis proves to be conclusive, the result shall be announced to the person to whom the cellular sample belongs to, and he or she shall have the right to ask for a re-analysis. In that case, the provisions of Articles 204 to 208 shall apply. The investigating officer or the public prosecutor shall also have the right to ask for a re-analysis. If the analysis proves to be negative, the cellular sample and the DNA profile shall be immediately destroyed. If, however, the analysis proves to be positive, the cellular sample shall be destroyed immediately, but the DNA profile of the *person who is accused of the offence, shall be kept in a special database which is maintained by the Criminal Investigation Department at the Hellenic Police Headquarters. This data is kept so that it can be used in the investigation of other offences and shall be destroyed in all cases after the death of the person involved. The operation of the database shall be supervised by a deputy public prosecutor or a chief public prosecutor who is appointed by the Supreme Judicial Council, in accordance with the law, for a two-year term of office.*

3. The destruction of the cellular sample and DNA profile referred to in paragraph 2 shall take place in the presence of the judicial officer who supervises the operation of the database. The person to whom the cellular sample belongs to is asked to be present during the destruction of his/her sample and he/she may be accompanied by a counsel and a technical expert."

The Authority took into consideration the written and oral report of the rapporteur, Mr. Leonidas Kotsalis, and the assistant rapporteurs, Ms. Zoe Kardasiadou and Ms. Fotini Karvela,. It also studied provisions, relevant publications and case-law, especially the recent ad hoc decision of the European Court of Human Rights (ECHR) concerning the S and Marper case against the United Kingdom on 4-12-2008, and, following a detailed discussion, issued the following opinion:

DNA profiles are derived from the (genetic) analysis of non-nuclear DNA and refer to the identity, gender, genetic family heritage, as well as the racial background

of the person to whom they refer to, since the above can be determined by using the same technical equipment (kits). The substantial amount of information DNA profiles contain, their reliability in relation to the identification of the people they refer to, the technological developments in relation to the future potential of DNA analysis, together with the fact that only minimum traces of cellular samples are required for DNA analysis and that the person in question, to a large extent, cannot substantiate whether he or she has left such traces, all serve to make a distinction between DNA profiles and other unique human features, such as fingerprints.

Cellular samples contain all genetic information; that is to say not only DNA profiles but all of a person's genetic code, including information pertaining to the person's health, particularly genetic susceptibility to certain illnesses. It is in the interest of data protection to take suitable organisational and technical measures, so as to ensure that no more personal information will be extracted from any cellular sample than has been stated within the purpose of their processing. In S and Marper vs. United Kingdom, 4-12-2008, par. 72 -73, the European Court of Human Rights judged that cellular samples contain sensitive personal data and that their storage *per se* constitutes an interference with the right to respect for the private lives of the individuals concerned, as this is laid down in Article 8 of the European Convention of Human Rights.

DNA profiles constitute personal data, as set out in Article 2, items a) and c) L. 2472/1997, in that they relate directly or indirectly to an individual, by reference to his/her physical and/or biological identity. The fact that the individual's racial origin can be revealed from DNA profiles renders them sensitive personal data as set out in Article 2, Paragraph 2, item b) L. 2472/1997. The same may apply even more so to cellular samples, especially when the latter are stored for a long time and when one takes into consideration the fast-pacing technological developments in this area. In any case, the processing of cellular samples, even when the only purpose of doing so is to extract DNA profiles, puts the individual at high risk as far as his/her right to personal data protection is concerned. This approach is already being followed by other European Data Protection Authorities, including the European Data Protection Supervisor, and it is adopted by EU legislation, in particular Decision 2008/615/JHA of the Council of the European Union "relating to the improvement of cross-border

cooperation, especially concerning the fight against terrorism and cross-border crime." (EU L 210, 6/08/2008). According to this legislation, the creation of databases of DNA profiles and the exchange of these files within the context of the principle of availability is put under stricter rules than, for example, the exchange of fingerprints.

The collection, storage, use, transmission, as well as any other act/operation of processing in the meaning of Article 2 item d) L. 2472/1997, constitutes an infringement of the individual's right to personal data protection (Article 9A Constitution). The interpretation of Article 9A of the Constitution must take place in the light of domestic and foreign High Courts case law, in particular the European Court of Human Rights (ECHR), which always has the final say in interpreting the classic catalogue of human rights. The ECHR has recognised that the use of DNA information in order to detect crime is, in principle, a legitimate purpose, in accordance with Article 8 of the European Convention of Human Rights, the Convention 108 of the Council of Europe, and the Recommendations No R 87 (15) "on the processing of personal data in the police sector" and No R92 (1) "on the use of analysis of DNA within the framework of the criminal justice system", provided, however, that specific strict conditions are fulfilled so that this use does not in any way affect the core of the respective right and that it is necessary in a democratic society. This point of view is also supported by the courts of other Member States such as the German Federal Constitutional Court (see 2 BvR 1741/99 of 14.12.2000, par. 48 et seq.) and it is anchored into the national legislation of other Member States. DNA profiles and particularly in relation to the creation of a respective database, must be provided for by a law with specific qualitative features and these measures must be proportionate to the legitimate aim of crime investigation. Because of the unique features of DNA profiles, the above two requirements are interpreted strictly.

The principles of legality and proportionality, as well as the presumption of innocence run through criminal law and criminal law procedure in order to ensure that justice is administered in accordance with the rule of law. Criminal preliminary proceedings demand a strict adherence to the principle of proportionality, due to human rights' breaches which may take place at this stage of criminal proceedings. The public interest in protecting society from crime is balanced against human rights, whose core must not be infringed upon. DNA analysis is a means of evidence, more

particularly, a special form of expert opinion, whilst at the same time being part of the investigation phase. As part of the investigation phase, it is governed by articles 251, 243, 33, 34, 35 Code of Criminal Procedure, overseen by the prosecutor and should only be carried out within these guarantees. With regard to the measures of procedural coercion, the general rule is that the more invasive the measure is, the more serious the crime purported to have been perpetrated by the accused person needs to be. Due to the particularly invasive character of the collection of the cellular sample and the amount of DNA information revealed by it, special guarantees are required for the collection and storage of DNA profiles.

Based on the thoughts outlined above and the respective arguments in the report of the rapporteurs, the Hellenic Data Protection Authority (HDPA) hereby puts forward the following observations in relation to the amendment.

First of all, it is noted that the DNA analysis has a clear basis in the law which is to be found in the second section of the Code of Criminal Procedure relating to the means of evidence. The amendment under discussion presents the following positive features: a) the cellular sample shall be destroyed immediately after the genetic analysis, b) it is required that there are serious indications that a person has committed a criminal act , c) the purpose of genetic analysis is restricted to identifying the offender, and d) it is required that the cellular sample shall be compared with that found at a scene related to the crime under investigation. However, this provision does not meet all the qualitative features required for restricting the human right to the protection of personal data.

More specifically:

1. Adherence to the principle of proportionality (see esp. its aspect of necessity) that the law should expressly stipulate that genetic analysis shall only be permitted, if there is no other means of evidence capable of identifying the offender. Consequently, the phrase "…*if necessary*" should be added before the phrase "*in order to determine the identity of the offender*." .

2. The list of offences for the investigation of which, the use of DNA profiles is allowed, is expanded. This list will now include all felonies and misdemeanours

for which the statutory minimum limit is an imprisonment sentence of at least three months. The fact that the provision in question does not make any qualitative distinction between the immediate use of a DNA profile for the investigation of a specific offence and its storage so that it can be used for the investigation of other offences in the future, combined with the fact there is a great number of offences provided for by different laws (and not just by the Penal Code), renders the aforementioned expansion of the list particularly problematic within the context of the principle of proportionality. This issue may be addressed in two different ways. Given the expressed will of the legislator to create a database with DNA profiles, this problem could be addressed as follows: a) one way is to amend the proposed provision so that analysis and storage of DNA profiles is only allowed for the investigation of felonies, or b) the other way is to keep the expanded list of offences when it comes to the use of a DNA profile for the investigation of an actual offence (as provided currently by the amendment) , but when it comes to the storage of DNA profiles for future use, this should only be permitted for the investigation of very serious offences e.g. felonies and/or the offences that violate specific legal interests , for instance sexual freedom (even though the latter may fall under the category of misdemeanours). Should the second solution be preferred, every in concreto judgment should be based not only on the severity of the offence, but also on other criteria concerning the offender himself (previous life, personality etc), which may establish the probality of him commiting offences in the future (negative prognosis).

3. The term “other offences” in paragraph 2 of Article 200A, as amended, shall be supplemented with the words “as provided for in par. 1” so as to prevent the indirect expansion of the list of crimes.

4. The proposed amendment does not make any distinctions regarding the storage of DNA profiles of convicted and acquitted persons, of adults and minors. At the same time, the storage of DNA profiles, as the amendment stands, may last for an unlimited period of time (the only time limit is the death of the suspect). The generality of the amendment, combined with the lack of substantive criteria regarding the conditions under which the storage of DNA profiles for future use is permitted, impinges on the principle of proportionality, especially on the requirement flowing from it to have a strictly defined and necessary storage period for the data and the state obligation to accord increased protection to minors and

to those who have already served their sentences. As regards the treatment of minors, the provisions of article 121 et seq of the Penal Code must be taken into account. Furthermore, the provision under discussion renders void the presumption of innocence regarding those who have been accused of a crime, but have been acquitted (yet their DNA profiles are stored). The above mentioned problems can be addressed as follows: a) the DNA profiles of those who have been irrevocably acquitted for whatever reason, should be removed from the database of DNA profiles b) the DNA profiles of those who have been irrevocably convicted may only be stored for a limited period of time after their sentence has been served, c) the DNA profiles of minors below the age of 13 to whom only reformative and rehabilitation measures may apply, will not be stored and d) the DNA profiles of minors over the age of 13 who have been irrevocably convicted, may be stored for a specific period of time, significantly shorter than that applicable to adults.

5. Taking into account that a) the amendment permits the storage of unidentified DNA profiles against which the DNA profiles of the suspected person are compared in order to facilitate the investigation of other offences in the future, b) the storage of unidentified DNA profiles gives rise to issues of personal data protection, in that these unidentified DNA profiles may lead to the identification of the perpetrator, and c) the Decision 2008/615/JHA of the Council of the European Union which contains relevant provisions (articles 4 & 26 par. 2), we opine that the conditions for the storage of unidentified DNA profiles should be expressly regulated, and that it should not be allowed for unidentified DNA profiles to be used for the investigation of any other offences apart from those clearly stipulated by the amendment. It is, however, permitted to store them under more flexible conditions than those applying to the identified profiles. It is recommended that the storage time should match the prescription (limitation) time set for the offence, the investigation of which triggered the collection of the said DNA profile.

6. As far as the database of DNA profiles is concerned, a law or presidential decree, relating to the powers and the structure of the Hellenic Police, should make provisions, among other things, for the following : a) the aim of the transfer and on-line access to DNA profiles, which should coincide with the aim for which the initial storage is allowed, b) the public authorities which have access to the

database or to which transfer is allowed, c) the rights of access and objection of the data subjects, including the obligation of the data controller to inform the data subjects about the operation of the database and that their profiles will be stored in the said database, d) the deletion and blocking procedures that are in place in cases in which the data is not deleted, e) the appropriate measures for the security of the database, for the avoidance of non-authorized access, modification and transfer of the data and for the monitoring of every intervention.

7. The amendment repeals the role of the judicial council as a procedural safeguard for the obtaining and analysis of cellular samples and, in doing so, it downgrades this process to a simple act of investigation. This means that the investigating officers, according to articles 33 and 34 of the Code of Criminal Procedure, may obtain and analyse a cellular sample provided that there is a relevant order issued by the prosecutor and in cases of emergency, as stipulated in Article 243, par. 2 Code of Criminal Procedure, they can perform the collection and analysis of the DNA sample even without a prosecutor's order. Since, however, the obtaining (and analysis) of a cellular sample constitutes a particularly invasive interference which requires the clarification and specification of vague legal concepts (i.e. serious indications, negative prognosis) , the judicial guarantee should be provided for, either by a judicial council decision or at least by a prosecutor's order which has specifically been issued for this reason. It is agreed that in cases of emergency the DNA profile may be obtained (but not analysed) in accordance with Article 243 par. 2 Code of Criminal Procedure. In order to avoid any possible misinterpretations of the this provision, its phrasing should be amended as follows: a) the term "law enforcement authorities" should be deleted because it does not add anything to the meaning of the provision (according to articles 33, 34 Code of Criminal Procedure police officers are general investigating officers and, as such, they will act in accordance with article 95 par. 1 Presidential Decree 141/1991 in combination with the relevant provisions of the Code of Criminal Procedure). Besides, the term *law enforcement authorities* is not defined in the Code of Criminal Procedure, b) the term *"necessarily" should also be deleted,* because the act of obtaining and analysing a cellular sample is only compulsory when the conditions specified in article 200A Code of Criminal Procedure are met. Consequently, the term "necessarily" is not only unnecessary, but it may also prove to be misleading in its application.

8. According to the proposed amendment, the database of DNA profiles should be supervised by a deputy public prosecutor or a chief public prosecutor. The public prosecutor constitutes undoubtedly an additional institutional guarantee. If, however, this were to be considered as an alternative to the supervision exercised by the Data Protection Authority, this would go against the core of Article 9A of the Constitution, which clearly stipulates that the DPA provides an institutional guarantee of the human right to personal data protection. Furthermore, the substitution of the supervision of the prosecutor for the supervision of the DPA would infringe upon Article 8 par. 2 European Convention of Human Rights and the requirements set out in Recommendations 87 (15) and 92 (1) of the Council of Europe regarding the existence of an independent supervisory authority, as these have been interpreted in the case law of the European Court of Human Rights (see also Opinion No. 1/2009 of the Hellenic DPA). The independent authority mentioned in the above provisions, apart from being independent, it must also have the necessary know-how and staff, so that it can guarantee the substantive protection of the right to personal data. The above conditions are normally fulfilled by the national Data Protection Authorities. In any case they cannot be fulfilled by one prosecutor who does not possess specialised and technical knowledge of the field in question.

Lastly, if the HDPA does not have the competence to supervise the relevant DNA profiles database, Greece will be in breach of the obligations that it has undertaken in the area of police and justice cooperation in criminal matters (third pillar) and more particularly of Decision 2008/615/JHA which is in fact invoked in the amendment's introductory statement. Within the context of exchange of genetic data, the aforementioned Decision assigns the supervision of the database to the national Data Protection Authorities of the Member States. This is drawn particularly from article 30 par. 3 and 5 which provides for specific powers of the Data Protection Authorities, and article 25 par. 1 which provides that each Member State shall transpose into its national law the Additional Protocol (181) of the 8.11.2001 (of Convention 108) and the Recommendation 87 (15) of the Council of Europe, explicitly assigning the supervisory role to an independent authority. Moreover, the most recent Framework Decision 2008/977/JHA of the Council of the European Union (OJ L 350, 27.11.2008) on the protection of

personal data within the context of police and justice cooperation in criminal matters (third pillar), makes it compulsory for the Member States to assign the supervision of all relevant processing operations and databases to the national Data Protection Authorities (article 25 in combination with recitals 33 to 35 of the preamble), and it confirms the applicability of Decision 208/615/JHA, as this contains specific provisions and a coherent set of rules covering the data protection aspects (recital 39). The reference to the judicial authorities in article 30 par. 5 of Decision 2008/615/JHA means that the person whose right to personal data protection is affected, must be provided with additional legal protection on the basis of the provisions regarding the lawful processing of his/her personal data along with any civil and criminal liability provisions. From an interpretive point of view it would be wrong to reserve this full protection only to the DNA profiles of the national database which are transferred to and/or collected by other Member States, since, according to the principle of availability, as laid down in the Hague Programme, all data of the national database is potentially available to the competent authorities of the other Member States.

The final conclusion is that the amendment under discussion should be modified along the lines of the above observations, in order to be fully harmonised with the requirements of Article 9A of the Greek Constitution and Article 8 of the European Convention of Human Rights.

The President — The Secretary

Christos Yeraris — Georgia Palaiologou