

Conference of the Independent Data Protection Authorities of the Federation and the Federal States

Key data protection points for the trilogue on the data protection directive in the field of justice and home affairs

I. Preliminary remarks

On 9 October 2015, the Justice and Home Affairs Council adopted its position on the draft directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (in the following: the draft JHA directive). Now the European Commission, European Parliament and Council are discussing their various positions on the draft JHA directive in what is known as the trilogue, with the aim of adopting both this draft directive and the General Data Protection Regulation by the end of 2015.

Since the Commission first presented its proposals in January 2012, the Conference of the Independent Data Protection Authorities of the Federation and the Federal States (in the following: the Conference) has repeatedly made public its position on data protection reform.¹ On 26 August 2015, the Conference presented its position on the trilog concerning the General Data Protection Regulation,² and on 11 June 2012 it presented its comments on the entire package.³ From the beginning, the Conference has supported the Commission's aim of building "a modern, strong, consistent and comprehensive data protection framework for the European Union" while pointing out the importance of ensuring a high and uniform standard of data protection in the area covered by the draft directive. This directive will close a gap in EU law, which so far has no comprehensive legislation governing data processing by police and judicial authorities in the EU. The Conference has repeatedly criticized the lack of such legislation.⁴

The Conference advocates a directive which will bring about a minimum of harmonization within the EU at the highest possible level. It therefore welcomes the drafts of the Council and the European Parliament, as both call for a minimum of harmonization. The Conference expects that, with the help of the directive, German law and court rulings will continue to provide impetus for the creation of effective data protection law.

With this in mind, the Conference views the draft JHA directive as an important step towards improving data protection in the EU. The central aim of data protection in the area of data

¹ "Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century", Communication from the Commission, COM(2012) 9 final, no. 6.

² Conference trilogue paper on the General Data Protection Regulation, available in German at <https://www.datenschutz.hessen.de/entschliessungen.htm>

³ Opinions on the General Data Protection Regulation and the JHA Directive of 11 June 2012; resolutions *Ein hohes Datenschutzniveau für ganz Europa* (A high level of data protection for all of Europe), 21–22 March 2012 and *Europäische Datenschutzreform konstruktiv und zügig voranbringen!* (Advancing European data protection reform constructively and quickly), 8–9 November 2012, each available in German at <https://www.datenschutz.hessen.de/entschliessungen.htm> and <https://www.datenschutz.hessen.de/taetigkeitsberichte.htm>

⁴ Opinion on the JHA directive of 11 June 2012, p. 3.

processing by the police is to set limits on the collection and storage of police data: Individuals should have no reason to fear that the police will keep records on them if they have given the police no reason to do so. Data lawfully collected by the police may be used for other law enforcement purposes only under special conditions. And crime victims or witnesses, for example, should be able to trust that the police will process their data only within limits and in compliance with strict rules. These are only a few basic demands to be met by the JHA directive. The Conference regrets to note that provisions concerning these basic demands, especially in the Council's version of the draft JHA directive, are often general or limited to a reference to national laws, if they exist at all.

The Conference expects the provisions on the enforcement of data protection law by the data protection authorities will provide a major boost to German data protection law governing the police and judicial authorities. The data protection authorities need more than toothless provisions in this area. They must be able to enforce data protection effectively. Effective oversight means that data protection authorities have the necessary tools to put a stop to violations of data protection law by agencies under their supervision, if necessary with a court decision if the supervised agency insists on another interpretation of the law.

The issues addressed in the following are the most important points which the Conference believes the participants in the trilogue should specifically concentrate on.

For ease of use, this paper is oriented on the structure of the current drafts of the JHA directive.

II. The individual proposals

1. The scope of the JHA directive must not be expanded at the expense of the General Data Protection Regulation!

The scope of the JHA directive cannot be considered in isolation, as it also determines the scope of the General Data Protection Regulation: According to its Article 2 (2) (e), the Regulation does not apply anywhere the JHA directive does apply. With this in mind, various proposals have been discussed in the past, some of which could lead to a significantly expanded scope for the directive. In Article 1 (1), the Council's version of the directive also raises questions with the added wording "the safeguarding against and the prevention of threats to public security".

The Conference sees no convincing reasons to depart significantly from the division between the regulation and the directive as originally planned. According to the Commission's original proposal, the directive lays down rules relating to the "protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties". The Council has objected that this does not include threat prevention where it is not intended to prevent a crime, which in turn means that data processing by the police would be subject to two different legislative acts. In order for all police tasks to be governed by a single act, i.e., the JHA directive, the Council believes that the scope of the directive should be expanded accordingly. There has even been talk of having the JHA directive cover data processing by the public order administration when it prosecutes administrative offences. But

this turns the Council's original argument on its head: Expanding the JHA directive in this way would mean that the public order administration would be covered by both the General Data Protection Regulation and the JHA directive, depending on the task it is performing. The Conference opposes such expansion. If a compromise must be found which expands the scope of the JHA directive for data processing by the police, then the wording in the recitals and the body of the act must ensure that data processing by the public order administration is not included. This is not the case in the Council's version. The Regulation should apply to data processing by authorities other than the police.

The Conference is critical of the expanded scope of the JHA directive added to the Council version which comes at the expense of the General Data Protection Regulation. Data processing by the public order administration and for the purpose of threat prevention should be governed by the General Data Protection Regulation, as it is in the drafts of the Commission and the European Parliament.

2. Exceptions to purpose limitation only subject to strict rules!

In its comments of 11 June 2012, the Conference wrote that it was necessary to make clear that the provisions on purpose limitation must not be construed to mean that "data collected under the scope of the directive for a given purpose may be further processed for any other purpose also covered by the directive without further legal prerequisites". The significance of purpose limitation is also emphasized in the EU Charter of Fundamental Rights, which lists it as a fundamental principle of data protection in Article 8 (2). In the JHA directive, purpose limitation (Article 4 (1) (b)) should therefore be made stricter overall.⁵

In its version, the Council has added to the Commission's original proposed Article 4 (2) in such a way that the JHA directive allows further processing for a different purpose if applicable (national) law provides a legal basis for such processing and the further processing is necessary and proportionate to that other purpose. The Commission's draft proposed only general rules stating that further processing must not be "incompatible" with the purpose for which the data were originally collected and not excessive (Article 4 (1) (b) and (c)).

The Conference regrets that the Council draft does not provide more ambitious and stricter requirements. The Conference believes that the proposed provisions leave too much room for national lawmakers to fill. The concept of incompatibility should be more specifically defined based on the rulings of the Federal Constitutional Court, which state that incompatibility exists "when the change of purpose would circumvent constitutionally based restrictions on the use of certain collection methods, so that the information could not have been collected for the new purpose, or could not have been collected in this way" ("hypothetical substitute intervention").⁶

The Conference advocates making any exceptions to purpose limitation subject to strict rules and calls on the Member States to set specific requirements for further processing. In the Council's version, the concept of incompatibility in Article 4 should be specified in paragraph 1 (b) of the JHA directive as follows: "Further processing of personal data shall be regarded as incompatible with the original purpose of collection if it would not have been permitted to collect the data for the new purpose, or not in this way".

⁵ Opinion on the JHA directive of 11 June 2012, p. 5.

⁶ Federal Constitutional Court 100,313,389; consistent practice of the Court.

3. Innocent persons and other special groups need more protection!

Protection for innocent citizens and special conditions for special groups of persons are central concerns of data protection in the field of police and judicial authorities. The Conference therefore regrets the deletion of Article 5 in the Council's version and points to the European Parliament's version of Article 5, which is oriented on a comment by the Article 29 Working Party.

The aim of Article 5 as proposed by the Article 29 Working Party is to ensure that the data of certain groups of persons (crime victims, witnesses, contact persons, etc.) are stored under stricter conditions and with shorter retention periods, and that data of other persons not suspected of a crime may not be stored at all or only in very limited cases.

The Conference opposes the deletion of Article 5 of the JHA directive in the Council version and supports Article 5 in the European Parliament version.

4. Reviews of the need for and proportionality of stored data must be conducted regularly!

Regardless of the right to have one's data deleted, those engaged in data processing should be required to review the need for and proportionality of stored data at regular intervals. While Article 4b (2) of the European Parliament draft requires such reviews, the Council draft does not. The Council draft only requires the Member States to set retention periods for "records" (Article 23 of the JHA directive) where possible. This is not enough. Instead, to reinforce the principle of proportionality the Conference calls for mandatory time limits for storage and review, in particular to protect certain groups of persons such as crime victims, witnesses and contact persons.

To reinforce the principle of proportionality, the Conference calls for mandatory time limits for storage and review on the model of Article 4b (2) of the European Parliament's draft, in particular to protect certain groups of persons such as crime victims, witnesses and contact persons.

5. Modern data protection needs comprehensive notification obligations!

Notification is one of the core data protection rights of data subjects. Data subjects who are not aware that their data are (secretly) collected and stored have no possibility of effective legal redress. Although the data protection supervisory authorities are responsible for overseeing the processing of such data, all individuals should be able to review police measures concerning themselves or have such measures reviewed.

The Conference thus advocates strengthening the rights of data subjects through notification obligations and supports the European Parliament's proposal for Article 11 of the JHA directive.

To safeguard the rights of individuals and ensure effective legal redress through supervisory authorities and courts, the Conference advocates strengthening the rights of data subjects through notification obligations and supports the European Parliament's proposal for Article 11 of the JHA directive.

6. No special rules on data subjects' rights in criminal investigations and proceedings!

The Conference advocates a comprehensive, uniform provision on the rights of data subjects within the scope of the JHA directive. By contrast, Article 17 states that, with regard to personal data contained in a judicial decision or record processed in the course of criminal investigations and proceedings, these rights are carried out "in accordance with national law". Already in its comments of 11 June 2012, the Conference called for clarity on the content of Article 17 of the JHA directive. Unfortunately, the drafts presented by the European Parliament and the Council do not provide the necessary clarity. The Conference therefore reiterates the need for such clarity, as otherwise doubts could arise about the applicability of data subjects' rights in criminal investigations and proceedings. Article 17 should therefore be deleted and the rights of data subjects in criminal investigations and proceedings should be the same as in the rest of the JHA directive.

The Conference advocates deleting Article 17 of the JHA directive and repeats its demand that the rights of data subjects given in Chapter III should apply also in the area of criminal investigations and proceedings.

7. Clarification: State-of-the-art data processing!

The Conference underscores the importance of data protection by design and by default. However, Article 19 of the directive limits, significantly and in various ways, the obligation to follow these principles, also by referring to "available technology". This does not do justice to the necessary protection of fundamental rights, because "available technology" also includes obsolete technologies which no longer offer sufficient security.

By contrast, "state of the art" makes clear that the latest available technologies are to be used. "State of the art" is a manageable definition in European data protection. It has long been used in practice and should also be used in the JHA directive.

The imprecise term "available technology" is used in various places in the directive and does not do justice to the protection needed by personal data. It should be replaced in the directive with "state of the art". So the Conference supports the European Parliament's version of Article 19.

8. The JHA directive should also provide for data protection impact assessment!

Data protection impact assessments are very important for the processing of personal data by law enforcement authorities, because such processing involves higher risks to individuals. The European Parliament has proposed provisions on data protection impact assessment which the Council however opposes.

The European Parliament's proposed Article 25a provides for data protection impact assessment "where the processing operations are likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 3 (11) of the European Parliament's draft provides a definition of the biometric data mentioned in Article 25a (2) (b).

Article 33 of the draft General Data Protection Regulation (Council version), unlike the draft JHA directive, provides for data protection impact assessment. But thorough safeguards are extremely important when dealing with personal data precisely in the processing-intensive area of law enforcement. For this reason, the Conference advocates including in the draft directive a provision to this effect.

The Conference advocates a provision on data protection impact assessment on the model of Article 25a of the European Parliament's draft of the JHA directive. In this context, the Conference is in favour of restoring the definition of biometric data as proposed by the European Parliament in Article 3 (11).

9. Good data protection needs data protection officers!

The Conference regrets that the Council's version does not make it mandatory to designate data protection officers for public agencies but instead leaves it up to the Member States. Germany's federal and state data protection commissioners have mostly very good experience of cooperation with the data protection officers of the agencies under their supervision. They consider in-house oversight to be an essential element of an all-encompassing, effective data protection regime, along with external controls by the supervisory authorities.

The Conference stresses the importance of the mandatory designation of data protection officers for public agencies and therefore supports Article 30 of the European Parliament's draft.

10. Data transfers to public authorities and courts in third countries require transparent procedures, individual review and must be documented!

The provisions on transferring personal data to third countries now provide for introducing the instrument of adequacy decisions also in the justice and home affairs area. The Conference believes that the current adequacy decisions are not applicable to the justice and home affairs area. In addition to transfers to third countries with adequate levels of data protection, most transfers will continue to be made on the basis of bilateral agreements and national law (in individual cases).

In agreement with the decisions of the European Court of Justice, the Conference calls for provisions requiring the transferring authority to weigh up the interest in transferring the data against the legitimate interests of the data subject. The JHA directive should also define documentation obligations to make it possible to review the oversight of transfers. The Conference thus regrets the deletion of the documentation obligation in Article 35 (2) from the Council's version. Further, the third countries should also be informed of restrictions on processing (retention periods, etc.).

The Conference also supports a provision equivalent to Article 43a of the European Parliament's draft of the General Data Protection Regulation, which states that the EU would neither recognize nor enforce decisions by courts and administrative authorities of a third country requiring controllers to hand over personal data unless required by international agreements on administrative or mutual legal assistance. In the individual case, such decisions would require approval by the bodies indicated in the agreements. The Conference recognizes that creating such a rule would not stop foreign intelligence services from operating in

Europe, but it could create a certain amount of transparency regarding the extent of such surveillance, could help maintain proportionality and above all create incentives to conclude international agreements.

The Conference demands that all transfers to third countries should require weighing-up in the individual case. The JHA directive must also ensure that transfers are documented and thus subject to review. The documentation obligation in Article 35 of the Commission's draft should therefore be retained. Information about national restrictions on processing must accompany every transfer. The Conference also calls for a rule on transferring personal data to third-country authorities and courts based on Article 43a of the European Parliament's draft of the General Data Protection Regulation.

11. The data protection authorities must have greater powers!

It must be possible to enforce data protection effectively. The Conference therefore expects the data protection reform to increase the powers of the data protection authorities. The data protection authorities need more than toothless provisions in this area. Article 8 (3) of the EU Charter of Fundamental Rights and Article 16 (1) of the TFEU demand effective enforcement of citizens' fundamental rights. Effective oversight means that data protection authorities have the necessary tools to put a stop to violations of data protection law by agencies under their supervision, if necessary with a court decision if the supervised agency insists on another interpretation of the law.

It must be possible to enforce data protection effectively. The Conference therefore demands that the JHA directive should give the data protection authorities greater powers. Effective oversight means that data protection authorities have the necessary tools to put a stop to violations of data protection law by agencies under their supervision, if necessary with a court decision if the supervised agency insists on another interpretation of the law.