

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by email) European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
BE-1047 Bruxelles

Reference CM1212
Regarding Note on the proposal for a General Data Protection Regulation and the proposal for a Directive on the protection of personal data in the area of judicial co-operation in criminal matters and police co-operation (COM(2012) 9,10 and 11).

Date 23 November 2012

Dear members of the Civil Liberties, Justice and Home Affairs Committee,

Please find attached a note of the Meijers Committee on the proposal for a General Data Protection Regulation and the proposal for a Directive on the protection of personal data in the area of judicial co-operation in criminal matters and police co-operation (COM(2012) 10 and 11) of 25 January 2012.

In this note the Meijers Committee proposes a number of amendments to be made to the proposals. These suggestions concern (1) the Data Protection Directive in the law enforcement sector (2) the use of profiling and (3) the tasks and powers of supervisory authorities.

Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. mr. C.A. Groenendijk
chairman

Note on the proposal for a General Data Protection Regulation and the proposal for a Directive on the protection of personal data in the area of judicial co-operation in criminal matters and police co-operation (COM(2012) 9,10 and 11).

The Meijers Committee welcomes the proposals for a revised legal framework of data protection. They are built upon the core principles of data protection and respond to the need to update current data protection standards in view of rapid technological developments.

However, the Meijers Committee does feel that improvements are needed to guarantee that fundamental rights are protected adequately. Therefore, the Meijers Committee proposes a number of amendments to be made. These suggestions centre around three subjects that will be dealt with below:

- 1) the wide discretionary powers for the Member States in the Data Protection Directive in the law enforcement sector;
- 2) profiling in both the Regulation and the Directive;
- 3) the role of supervisory authorities in both the Regulation and the Directive.

1. The Data Protection Directive in the law enforcement sector (COM (2012) 10)

The widespread use of personal data for investigative purposes demands precise, transparent, clear and uniform rules.

The Meijers Committee wishes to underline that the right to protection of one's personal data is laid down in Article 8 of the EU Charter of Fundamental Rights (EUCFR). Any limitation of the rights laid down in the Charter can be legitimatised only when provided for by law, respect the essence of the right, is subject to the principle of proportionality, is necessary and genuinely meets the objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others.¹ Secondary EU law undermining the essence of data protection may be declared incompatible with the EU Charter.²

The Meijers Committee recalls that according to established case law of the ECtHR, the onward transmission of personal data to other law enforcement authorities than those initially collecting the information, may constitute a further separate interference with the rights under Article 8 ECHR.³

The Meijers Committee is of the opinion that the current proposal for a Directive leaves too wide a discretionary power to Member States with regard to the use and processing of personal data in the law enforcement sector. It also contains insufficient safeguards to prevent possible infringement of the fundamental right to data protection. The Meijers Committee would like to make the following suggestions.

- **Article 13** provides many general exceptions to the right of a data subject to have access to his/her personal information. The Meijers Committee believes that the power to exempt categories of data from access by the data subject should be limited.⁴ The Committee proposes to add to Article 13(1):

“Member States shall provide that the controller assesses in each specific case by way of a concrete and individual examination whether partial or complete restrictions on the basis of one of the grounds in paragraph 1 applies”.

¹ See the judgment of the European Court of Justice [CJEU], 9 November 2010, Joined Cases C-92-09 and C-93/09, *Schecke- Eifert*, para. 50.

² See the judgment of the CJEU, 1 March 2011, C-236/09, *Test Achats*, in which a provision in Directive 2004/113/EC was judged to be incompatible with Articles 21 and 23 of the EU Charter on non-discrimination and equality between men and women.

³ See ECtHR *Leander v. Sweden* appl.no. 9248/81, 26 March 1987 and ECtHR *Weber and Saravia v. Germany* appl.no.54934/00, 29 June 2006.

⁴ See also the EDPS Opinion on the Data Protection Reform Package, p. 373 and Opinion on the data protection reform proposals by the Article 29 Working Party, p.28 and the opinion by Privacy International on the Directive, p.9.

- **Article 36** gives Member States a broadly formulated power to derogate from the conditions laid down in Articles 34 and 35, which provide that the transmission of personal data to third states requires either a decision by the European Commission on the adequate level of protection in the third country, or the adduction of appropriate safeguards in a legally binding instrument. The Meijers Committee proposes to add additional safeguards to Article 36:

“By way of derogation from Articles 34 and 35, Member States shall provide that a transfer of personal data to a third country or an international organisation may take place only on condition that:

- (f) ***the transfer is specifically documented, including information on data transferred, time of transfer, data about the recipient and reason for the transfer.***

- **Article 46** offers less powers to the supervisory authorities than under the proposed Regulation. The Meijers Committee suggests to include in the Directive a provision containing the same rules on access to premises for supervisory authorities as provided for under the Regulation:

“Member States shall provide that each supervisory authority must in particular be endowed with:

- (a) ***investigative powers, such as powers of access to data forming the subject matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties, including access to any of the premises of the controller or the processor.***

- **Article 59** stipulates that the Directive leaves provisions on data protection in prior acts unaffected. The Meijers Committee is of the opinion that the safeguards in the Directive should function as an absolute minimum with respect to other proposals and existing legislation on the processing of data for judicial cooperation in criminal matters and police cooperation. Existing legislation should be re-assessed in the light of the safeguards laid down in the underlying proposal. The Meijers Committee therefore proposes that Article 59 will be amended as follows:

*“The specific provisions for the protection of personal data (...) in acts of the Union adopted prior to the date of adoption of this Directive (...) remain unaffected, **in so far as these acts provide for a higher standard of data protection than provided for in this Directive.**”*

Finally, the Meijers Committee regrets the choice for a Directive instead of a Regulation. The result of this choice will be that during the implementation period (in this proposal: two years), the necessary safeguards laid down in this Directive will not be directly applicable.

2. Profiling

Both the proposed Regulation and the Directive contain provisions on the use of profiling on the basis of personal information. These provisions give substance to the existing principle under which automatic decision-making is prohibited.

Profiling means that on the basis of pre-established criteria certain persons are to be selected from data bases or data collections. This may be done for private or commercial purposes or for public prosecution or investigation purposes. These criteria may include sensitive information on the person concerned, such as information on race, religion, health, political conviction, or genetic information, but also, as is provided for in the proposed Regulation, on personal preferences, reliability or behaviour.

Profiling may lead to the situation where persons are treated differently or even disadvantaged compared to persons who are not selected on the basis of these pre-established criteria. Therefore, strict rules with regard to the use of profiling are necessary. This does not only follow from the right to privacy (Article 8 ECHR and Article 7 EUCFR), but also from the prohibition of discrimination (Article 14 ECHR and Article 21 EUCFR).

Article 20, sub 1 of the proposed Regulation contains the basic principle that every person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour. The Meijers Committee notes that Articles 20 and 21 of the proposed Regulation contain far reaching-exceptions to the right not to be subjected to measures resulting from profiling, or automated processing. The wide discretionary powers of the Member States in this respect are not in accordance with the criteria underlying a lawful limitation of the fundamental rights of data protection and the principle of non-discrimination as protected in the ECHR and the EUCFR.⁵ The Meijers Committee would like to make the following suggestions:

- **Article 20(2)(a)** establishes that 'a person may be subjected to a measure referred to in paragraph 1' when 'it is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention'. This provision allows consumers to be excluded from certain goods or services on the basis of irrelevant or discriminatory grounds. The Meijers Committee suggests to supplement the right to have a "human intervention" in Article 20(2)(a) with a right to be heard before a measure which significantly affects a person is taken. The Meijers Committee therefore proposes to amend Article 20(2)(a) as follows:

"2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:

- (a) *is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention **and the right to be heard by the authorities taking the measure or decision before a measure which produces legal effects concerning this natural person or significantly affects this person is taken.**"*

- **Article 20(2)(b)** allows for profiling to take place if the processing of personal data "is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests". The Meijers Committee finds the reference to "suitable measures" by a Union or Member State law problematic. Firstly, it is unclear what constitutes a "suitable measure." Secondly, other EU legislation may itself provide for safeguards, which however go below the desired level of data protection.

For instance, the proposal for an EU PNR system has been severely criticised because it allows for profiling with regard to a large group of unsuspected people and no clear rules are provided on the selection of criteria, as well as on the use of profiling and the further transmission of data gathered on the basis of profiling to third countries.⁶

The exception in Article 20(2)(b) should itself provide for a clear set of limitative grounds. Hence, it is suggested that the text be amended as follows:

"2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:

⁵ See also the report of the European Union Agency for Fundamental Rights (FRA): *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide* (2010).

⁶ COM (2011) of 2 February 2011.

(b) is expressly authorized by a Union or Member State law which safeguards the minimum level of protection for the data subject as provided for in this Regulation.

- **Article 20(3)** allows for profiling for the purpose of evaluating certain personal aspects relating to a natural person, if not “solely” based on the special categories referred to in Article 9 (race or ethnic origin, political opinions, but also genetic data or data concerning health). This provision does not exclude that the use of the mentioned discriminatory sensitive criteria may play a decisive role in the evaluation of a person. The Meijers Committee suggests to add “decisively” to the text:

“3. Automated processing of personal data intended to evaluate certain personal aspects relating to a natural person shall not be based solely or decisively on the special categories of personal data referred to in Article 9.”

- **Article 21** provides for a broad range of public interests exemptions further limiting the rights of individuals and the obligations of the data processors. These restrictions serve to protect public security, the prevention, investigation, detection and prosecution of criminal offences, but also ethics for regulated professions; other public interests of the Union or of a Member State and the protection of the data subjects or the rights and freedoms of others. This broad range of exceptions applies also to limitations on profiling.

The Meijers Committee supports the position of among others the EDPS and the Article 29 Working Party to restrict the wide use of public interest exemptions in Article 21.⁷

The Meijers Committee advocates above all to delete Article 21(1)(e).

This exception on the basis of “a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority” in cases of public security, criminal offence or other public interests, is insufficiently precise. The other grounds of Article 21(1) already provide for sufficient flexibility to meet the interests of public authorities in the exercise of their duties.

Regarding the proposed Directive in the law enforcement sector the Meijers Committee notes the following:

- **Article 9(1)** goes even further than the proposed Regulation. It leaves the decision whether measures on the basis of profiling with adverse legal effects or significantly affecting individuals are justified, completely to the scrutiny of the national legislator. This discretionary power is incompatible with the standards as developed in the Recommendation of the Committee of Ministers of the Council of Europe to the Member States on the protection of individuals with regard to automatic processing of personal data in the context of profiling.⁸ The Meijers Committee suggests to amend Article 9(1) of the proposed Directive, by including the same fundamental right as defined in the proposed Regulation and to add a new paragraph stating that :

‘1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person’s performance at work, economic situation, location, health, personal preferences, reliability or behaviour.’

⁷ EDPS Opinion on the Data Protection Reform Package, paras. 159-165 and Opinion on the data protection reform proposals, page 12.

⁸ Recommendation CM/Rec(2010)13, adopted on 23 November 2010.

The text of Article 9(2) should be amended as follows:

“2. Subject to the other provisions of this Directive, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing is expressly authorized by a Union or Member State law which safeguards the minimum level of protection for the data subject as provided for in this Directive.”

Paragraph (2) will become paragraph (3), and should be amended as follows:

“3. Automated processing of personal data intended to evaluate certain personal aspects relating to the data subject shall not be based solely or decisively on special categories of personal data referred to in Article 8.”

3. Supervisory authorities

The last decade has seen the advent of a great number of legislative instruments on data processing and –exchange, both at EU and at national level. At EU level these include large scale data-bases such as the Schengen Information System (SIS), Eurodac, Visa Information System (VIS). In addition, there is a number of proposals pending such as the EU PNR system, the data exchange with third countries and the Communication on the Terrorist Financing Tracking System (TFTS)). On the basis of these new instruments, the national and EU supervisory authorities have to deal with extended tasks and an increasing workload. However, the powers and financial resources of these bodies have not been increased in par.

The current proposals include improvements with regard to the tasks and powers of the supervisory authorities, such as the increased power to impose sanctions and the obligation to co-operate with other data protection authorities. However, the practical effects of these amendments very much depend on the national implementation of these provisions and on whether the national supervisory authorities are provided with “adequate human, technical, and financial resources” in accordance with Article 47(5) of the proposed Regulation and Article 40(5) of the Directive.

In addition, recent case law has underlined the importance of the independence of national supervisory authorities.⁹

- **Article 90 of the Regulation and Article 61 of the Directive** provide for an evaluation by the Commission of the Data Protection Framework established by these regulations. These provisions should include an obligation for the Commission to pay **particular attention to the effective application of Article 47(5) of the proposed Regulation and Article 40(5) of the proposed Directive in the Member States, as well as Articles 73-74 and 77-78 of the proposed Regulation and Articles 50-51 and 54-55 of the Directive.**

Concluding Remarks

The Meijers Committee emphasizes that the adoption of a new legislative framework protecting the rights of individuals with regard to the processing of their personal data should be complemented with a **comprehensive data protection policy** within the EU. This means that new measures extending the collection, processing, and use of personal data, such as the Smart Borders Project and the extended use of personal data for the purpose of law enforcement, should be critically reviewed, assessing both the necessity and added value of these measures, as the possible risks and impact for fundamental rights of citizens.

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⁹ See the judgment of the CJEU , 16 October 2012, Case C-614/10 (*Commission v. Austria*), Grand Chamber judgment, not yet reported.