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The Police and Criminal Justice Authorities Directive: Data protection standards and impact on the legal framework

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A B S T R A C T

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This article presents a two-sided analysis of the recently adopted Police and Criminal Justice Authorities Directive. First, it examines the impact of the Directive on the current legal framework and considers to what extent it is capable of overcoming existing obstacles to a consistent and comprehensive data protection scheme in the area of police and criminal justice. Second, it delivers a brief outline and review of the provisions of the Directive itself and explores whether the instrument improves upon the current legislation and sets out adequate data protection rules and standards. Analyzing the Directive from these angles, this article finds that while a considerable improvement and major step forward for the protection of personal data in its field, the Directive is unlikely to mend the fragmented legal framework and achieve the intended high level of data protection standards consistent across European Union member states.

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1. Introduction

Data protection, or the safeguarding of individuals with regards to the processing of personal data, has long been considered an important part of European Union law. Originally a mere aspect of the right to privacy¹, data protection first received explicit recognition in a number of legal instruments before subsequently being acknowledged as an autonomous human right². Despite this broad recognition, however, certain European data protection standards saw divergent national

implementations while others fell outside of the scope of Community law altogether, thereby creating a fragmented legal framework plagued by inconsistencies and considerable legal uncertainty. In particular, data protection in the areas of law enforcement and criminal justice was spread across numerous bilateral agreements and Union instruments suffering from a limited scope of application and often low minimum standards.

As a direct result thereof, the European Commission made full use of the new legal basis provided by the Lisbon Treaty³ and proposed a broad data protection reform for the Union in

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¹ For an overview of how the right to data protection recently developed in the European Court of Human Rights (ECtHR) and subsequently the Court of Justice of the European Union (CJEU), see: Taylor, Mistale, "Conference Report – 'Safeguarding the right to data protection in the EU', 30th and 31st October 2014, Paris, France", *Utrecht Journal of International and European Law* 2015, Vol. 31, Issue 80, 146–151.

² Art. 8 Charter of Fundamental Rights of the European Union, OJ. 2012 C 326.

³ Art. 16 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ. C326, 13 December 2007.

2012⁴. Accompanying the General Data Protection Regulation (GDPR)⁵ which covers the processing of personal data for general and commercial purposes, a Directive applicable to police and criminal justice authorities was introduced by the Commission⁶. Following four years of negotiations and amendments, the European legislator finalized its data protection reforms and adopted both instruments in April 2016. While generally overshadowed by the broader and more generally applicable GDPR, the Police and Criminal Justice Authorities Directive (hereafter ‘the Directive’) remains of considerable importance and will shape the processing of personal data by judicial authorities and law enforcement agencies for years to come.

This article seeks to approach the analysis and review of this often neglected yet unmistakably important piece of legislation from two different angles. First, a closer look shall be taken at the Directive’s role in and impact on the European legal framework. The current legal structure shall be examined and the extent to which the Directive is capable of overcoming existing obstacles to a consistent and comprehensive data protection scheme in the area of police and criminal justice shall be evaluated. Second, a brief review of the Directive shall be delivered which aims to establish whether, at first sight, the instrument improves upon the current situation and sets forth adequate data protection rules and standards.

2. The role and impact of the Directive on the current legal framework

2.1. The state of the current legal framework

As a result of the pre-Lisbon pillar system in the European Community, data protection in the Area of Freedom, Security and Justice was highly divided and legally distinct from other fields⁷. This lack of a harmonized and coherent European data protection regime has led to a disparity in the application of general data protection principles and an irregular patchwork of national standards and rules⁸. Because of this, the area of police

and criminal justice has been covered by a considerable number of different European legislative instruments.

The Council of Europe’s Convention No.108⁹ is regarded a ‘mother instrument’ applying general data protection principles to all automatic processing of data in both the public and private sectors. The Convention is supplemented by Recommendation No. R(87)15¹⁰ on the use of personal data in the police sector which sets out guidelines for the specific implementation of general data protection principles in the law enforcement sector.

At the Union level, article 8 of the European Charter of Fundamental Rights establishes the autonomous right to data protection, while article 16 of the Treaty on the Functioning of the European Union (TFEU) serves as the legal basis for the recent data protection reforms¹¹. Data protection for general and commercial purposes is currently regulated by Directive 95/45/EC¹², which is set to be replaced by the GDPR in order to improve data protection standards and mend the inconsistent implementation of the instrument at the national level¹³. In addition to this general purpose Directive, Regulation (EC) 45/2001¹⁴ lays down the groundwork of data protection rules for bodies of the European Union.

Data protection in the sector of law enforcement and criminal justice, however, has been the subject of far less extensive regulation¹⁵ and has been described as “weak and not productive”¹⁶. It is characterized as “a patchwork of data protection regimes” offering no stable or uniform legal structure and causing both considerable legal uncertainty and inconsistent enforcement of data protection rules¹⁷.

⁴ European Commission Press Release 25 January 2012, <http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en>.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L119/1, 4 May 2016.

⁶ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, O.J. L119, 4 May 2016.

⁷ Glon, Christina, “Data protection in the European Union: A closer look at the current patchwork of data protection laws and the proposed reform that could replace them all”, *International Journal of Legal Information* 2014, Vol. 42, 475.

⁸ Kasneci, Dede, “Data Protection Law: Recent Developments”, (PhD thesis, Trieste University, 2008-09).

⁹ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 18 January 1981.

¹⁰ Council of Europe Recommendation No. R(87)15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector, 17 September 1987.

¹¹ Hijmans, Hielke, “The European Union as a Constitutional Guardian of Internet Privacy and Data Protection: the Story of Article 16 TFEU – Short Summary”, (PhD thesis, Amsterdam University, 2016).

¹² Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L281, 23 November 1995.

¹³ Korff, Douwe, “EC study on implementation of data protection directive – Report on the findings of the study”, July–September 2002, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287667>.

¹⁴ Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, O.J. L8/1, 12 January 2001.

¹⁵ Colonna, Liane, “The new EU proposal to regulate data protection in the law enforcement sector: raises the bar but not high enough”, *IRI Promemoria* 2012, Issue 2, 4.

¹⁶ Kasneci, Dede, “Data Protection Law: Recent Developments”, (PhD thesis, Trieste University, 2008-09).

¹⁷ Hijmans, Hielke and Scirocco, Alfonso, “Shortcomings in EU data protection in the third and the Second Pillars. Can the Lisbon Treaty be expected to help?”, *Common Market Law Review* 2009, Issue 46, 1496.

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