

The European Data Protection Board

The National Police Board comments the draft of Guidelines 01/2023 on Article 37 Law Enforcement Directive

1 Introduction

The National Police Board wants to thank the European Data Protection Board for the opportunity to comment the Guidelines 01/2023 on Article 37 Law Enforcement Directive. The National Police Board (hereinafter NPB) represents and speaks on behalf of the Finnish Police. NPB is a data controller of majority of the registers under the law enforcement directive (hereinafter LED) in Finland.

2 Legally binding instrument - Article 37(1)(A) LED

NPB agrees with the European Data Protection Board that "legally binding instrument will set a firmer and transparent legal framework with higher legal certainty, enforceable by the Parties and the data subjects" (paragraph 42). NPB also agrees that this kind of legally binding instruments can only be carry out by a ministry not a controller as stated in the paragraph 45: "Governmental bodies experienced in international affairs (e.g. Ministries of Foreign Affairs, Justice and Interior) are usually competent to negotiate these types of agreements. They often have more resources and expertise to assess the human rights and rule of law situation in 3rd countries than the national competent authorities that transfer personal data at the operational level."

However, NPB sees that there is a considerable risk that if the governmental body is not obliged to carry out legally binding instruments, in practise this will lead to a situation where the controllers are left alone and are forced to make all assessments according to the article 37(1)(B), which is not a feasible option as is explained in the chapter below.

Interpol's position as a central channel to exchange of information for crime prevention purposes as well as its high level of data protection should be stated in the Guidelines. NPB sees that the best and most efficient (and also most cost-efficient) solution for the safe data transfer to 3rd countries would be via Interpol channel using its legal basis for data protection. This would only need some re-evaluation and refinement of the INTERPOL's

Rules on the Processing of Data. In this way all member states would have the same possibilities for data transfers to 3rd countries and most importantly the high level of data protection would be ensured in a most consistent way.

3 Assessment of the transfer - Article 37(1)(B) LED

As a controller NPB would like to highlight the fact that an individual controller does not have resources, knowledge nor capabilities to assess all those 3rd countries with which the Finnish Police as a law enforcement authority needs to cooperate in order to be able to fulfil its obligations stated in the national laws. This is why the obligation imposed on individual controller can be seen completely unreasonable and unrealistic. In order to carry out such assessments which are referred in paragraph 71, there would be a need for a significant increase of experts from different sectors to make the assessments and to follow continually the situations of different countries from human right, political, diplomatic, legislative and technical perspective.

The other concern is the enforcement of agreements signed after the assessment. The controller does not have any realistic possibilities to enforce the agreement in a 3rd country nor to audit or monitor whether the agreement is followed by the authority in the 3rd country. The only body which could have real means of monitoring and auditing would be the national data protection authority, not controller.

The Guidelines offers a list of sources to which controller may use (paragraph 88) in case there already exist safeguards for a transfer to a 3rd country and controller needs to ascertain if additional ones are needed. However, the listed documents do not cover all the 3rd countries relevant legislation which the controller should also monitor according to the paragraph 84. There would not be available all the needed legislation from 3rd countries translated into Finnish national languages (Finnish and Swedish) and controller would not have a possibility to translate all the applicable laws of 3rd countries.

4 Conclusions

As noted in the Guidelines, the LED aims to facilitate the free flow of personal data for law enforcement purposes by competent authorities within the Union, as well as the transfer of such data to 3rd countries and international organisations, while ensuring a high level of protection of personal data.

NPB sees that the presented model of assessments according to article 37(1)(B) LED would not enhance the free flow of personal data for law enforcement purposes. It might even stop the essential data flow to 3rd countries. There would be uncertainty of the safety of the 3rd country citizen whose data would need to be transferred. That is due to the fact that there

would be too little resources and thus inability to ensure that all factors of the recipient country had been evaluated properly and also that the country assessment would be continually updated.

The enforcement of the additional safeguard mechanisms such as ensuring that the agreed data retention has been followed, log checks, statics of data subject request etc. are excellent safeguard mechanisms. But it is not a realistic nor fair put all the responsibility on the controller as the controller has no jurisdiction in 3rd countries. Those safeguards would depend on the 3rd country authority's willingness to cooperate, and the controller cannot have a real-time visibility to what happens in 3rd country or at the recipient authority.

The use of assessments according to article 37(1)(B) LED would lead also to a situation where there would be a vast amount of overlapping work done in LEAs around the EU countries with a result of assessments of no real consistency. This kind of situation would result in a very motley set of different practices and guidelines, which does not serve the goal, i.e. the realization of a uniform level of data protection.

NPB concludes stating that if adequacy decisions carried out by EU Commission are not an option as it seems, then the best way to assess the safety of the 3rd countries would be to re-enforce the legal basis of the data protection rules of Interpol. This would facilitate the free flow of personal data for law enforcement purposes by competent authorities within the Union, as well as the transfer of such data to 3rd countries and international organisations, while ensuring a high level of protection of personal data.

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This document has been signed electronically. Police of Finland 03.11.2023 at 11:37. Authenticity of the signature can be verified by the Registry.

cc

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