



**536/14/EN
WP 211**

**Opinion 01/2014 on the application of necessity and proportionality
concepts and data protection within the law enforcement sector**

Adopted on 27 February 2014

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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Website: http://ec.europa.eu/justice/data-protection/index_en.htm

0.0 Executive Summary

Given that it is difficult to think of many border control or law enforcement proposed or existing measures¹ that may mean intruding on an individual's private life without also processing their personal data, the Article 29 Working Party (WP29) has developed this opinion to re-highlight the importance of the concepts of necessity and proportionality. Whilst the concepts have grown out of the wider privacy context it is important to understand their relationship to data protection.

Although Directive 95/46/EC, as a pre-Lisbon instrument, is not applicable to a large extent in the AFSJ area WP29 recalls its principles to be generally applicable in the area of data protection. Furthermore the principles appear in other instruments such as Convention 108 which are applicable to the AFSJ area.

The opinion gives some practical guidance to legislators and AFSJ authorities when thinking about proposing new or reviewing existing measures by drawing on case law and experience WP29 members. Thought should be given to:

- the legal basis for a measure, particularly under Art. 8(2) of the European Convention of Human Rights;
- the specific issue to be tackled such as the seriousness of the issue and social and culture attitudes;
- the reasons behind the measure which are closely linked to the decisions about – data retention, minimised collection and data quality; and
- providing sufficient evidence to support the reasons for choosing the measure.

1.0 Introduction (Aim and Structure)

1.1 This opinion aims to clarify the concepts of necessity and proportionality and their application to proposed or existing measures² to resolve issues within the law enforcement context at multiple levels – local/regional, national or European. The intended audience of this opinion is primarily the EU and national legislator and authorities responsible for tackling issues in the Area of Freedom, Security and Justice) (hereafter AFSJ³). To be clear this means authorities within the scope of the proposed Directive of the European Parliament and of the Council 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, and those mentioned in Title V of the Treaty of the Functioning of the European Union (TFEU).

1.2 At a European level, the concepts of necessity and proportionality have evolved from the case law of the European Court of Human Rights (ECtHR) dealing with Art. 8 of the

¹ In this context WP29 defines measures to be any proposed or existing measures which aim to tackle an issue in a law enforcement context. This could be, for example, a piece of European or national law which seeks to address a specific or a variety of issues to be dealt with by an AJSF agency through to surveillance of a suspect by a law enforcement body

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³ A list of authorities dealing with issues in the area of Freedom, Security and Justice (AJFS) can be found here http://europa.eu/legislation_summaries/justice_freedom_security/index_en.htm

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which sets out the right to respect for private and family life. Although data protection is in-of-itself a distinct concept, and now separate and autonomous fundamental right under Art. 8 of the European Charter of Fundamental Rights (the Charter), which has the same legal value as the Treaties as per Art. 7 of the TFEU, WP29 wants to draw attention to the approach set out by ECtHR under Art. 8 of the Convention because of the importance of the close relationship and interaction that it has with data protection. This is especially so in the AFSJ context.

Following this logic, WP29 first looks at how the ECtHR has defined the concepts of necessity and proportionality when dealing with Art. 8 of the ECHR before addressing the approach of the European Court of Justice (ECJ) when interpreting Arts 7 and 8 of the Charter. In order to offer some practical guidance we conclude by looking at the elements which need to be taken into account when taking AFSJ measures and draw out some of the lessons learned from the ECtHR's approach and the experience WP29 (and its members) already have in this field.

The WP29 believes this opinion will help the legislator and AJSF authorities to be better placed to understand the elements that must be taken into account to avoid any future proposed AJSF measure from simply having "added value" or "being useful" but instead be necessary and proportionate. It goes without saying this will also help them to be compliant with the principles of data protection too.

This opinion may also be helpful to some National Data Protection Authorities (NDPAs) when asked to review these concepts in an AJSF context.

- 1.3 WP29 intends to review, and where necessary, update this document based on further jurisprudence and relevant experience of NDPAs in this area.

PART II

2.0 EU and European legal framework

- 2.1 An examination of past, present and future data protection legislation reveals that the protection of personal data evolved from the right to private life as provided for in Art. 8 of the ECHR of 1950. With the increase of new technologies and surveillance possibilities, both in the public and in the private sector, became apparent that there needed to be further protection for individuals from third parties (particularly the State) in addition to 'defensive' rights recognised under Art. 8 of the ECHR by ensuring that the individual had the right to control his/her own personal data.

The protection of personal data was recognized as a separate right for the first time in the Council of Europe Convention for the protection of individuals with regard to the automated processing of personal data (Convention 108) which constituted an important source of inspiration also in Directive 95/46/EC.

The references to the right to privacy in Art. 1 of Convention 108 and the preamble and Art. 1 of Directive 95/46/EC show that the right to data protection inter-relate with the right to privacy.

The right to protection of personal data has evolved as a separate right in the subsequent European Charter of Fundamental Rights (the Charter), which as well as providing for the right to a private and family life under Art. 7, also provides an explicit right to the protection of personal data under Art. 8.

Art. 52 of the Charter sets out the scope of these rights. Art. 52(1) requires that limitations on both these rights must be provided for by law. They must be subject to the principle of proportionality and may only be made if they are necessary and genuinely meet objectives recognised by the European Union or they need to protect rights and freedoms.

Art. 52(3) of the Charter requires that rights which are found in both the Charter and the ECHR, such as the right to a private and family life, should be given the same meaning and scope as they have under the ECHR.

How much the rights inter-relate can also be seen in the recent jurisprudence of the European Court of Justice. When applying the necessity and proportionality tests in privacy/data protection cases, it favours a joint reading of Art. 7 & 8 of the Charter⁴.

- 2.2 This shows there is a clear link between the right to data protection and the right to a private and family life provided under both the ECHR and the Charter. Since AJSF authorities are Public Authorities, they will be subject to the ECHR and so, according to the requirements of Art. 51(3) of the Charter, the concept of privacy in an AFSJ context must have the same meaning and scope as it is given under the ECHR.

This means that the meaning, scope and application of concepts such as necessity and proportionality in the AFSJ field must also be no less than those afforded to them under Art. 8 of the ECHR.

⁴ ECJ, C-291/12, Schwarz v. Stadt Bochum, Judgment of the Court of 17 October 2013.

PART III

3.0 What the ECtHR says about necessity and proportionality and the right to a private and family life

3.1 Given the link between privacy and data protection outlined in Section 2, and that it has been the ECtHR which has developed the concepts of necessity and proportionality in its interpretation of Art. 8 of the ECHR, we must look to its case law first to understand its approach.

3.2 Art. 8(1) of the ECHR provides that:

'Everyone shall have the right to respect for his private and family life, his home and his correspondence.'

However, the right is not absolute and Art. 8(2) sets out the grounds the State may interfere with an individual's right to privacy:

'There shall be no interference by a public authority with the existence of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention or detection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

3.3 The ECtHR has set out three criteria which must be satisfied to ensure that any interference is in compliance with Art. 8(2). So an interference must be:

- in accordance with the law,
- in pursuit of one of the legitimate aims set out in Art. 8(2), and
- necessary in a democratic society

An interference with an individual's Art. 8 rights must therefore satisfy all three criteria of the test in order for it to be justified. Below WP29 has either summarised or referred to relevant ECtHR case law to help clarify what the ECtHR has said about each of these criteria.

3.4 Criteria 1: In accordance with the law

In the case of *MM v United Kingdom*⁵, the ECtHR set out the criteria that must be met for an act or activity to be 'in accordance with the law'. An activity must: have some basis in domestic law and be compatible with the rule of law; and the law must be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual to regulate his or her conduct⁶.

⁵ *MM v United Kingdom* Appl. No. 24029/07 (ECtHR 13 November 2012).

⁶ *Huwig v France* Appl. No. 11105/84 (ECtHR 24 April 1990)

In order to meet these requirements, the ECtHR indicated that the law:

*'...must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.'*⁷

In short, an activity will be in accordance with the law if it has a legal basis (set out in either common or statute law) and provides clearly defined rules governing how the activity will operate. Such rules should also, where applicable, clearly set out the extent of any discretion given to the law enforcement authority and guidance on how that discretion should be exercised and provide adequate legal safeguards.

3.6 Criteria 2: In pursuit of a legitimate aim

This criterion is reasonably self-explanatory but is closely linked with the requirement that an interference will be 'necessary in a democratic society'. To be in pursuit of a legitimate aim requires that an activity is carried out in pursuance of one of the aims set out in Art. 8(2), e.g. the prevention or detection of disorder or crime, protection of the rights and freedoms of others etc.

3.7 Criteria 3: Necessary in a democratic society

Closely linked with the previous criterion an AJSF measure must also be 'necessary in a democratic society' if it gives rise to an interference that is for the pursuance of the legitimate aim.

- 3.8 There have been a variety of cases in which the ECtHR has seen fit to examine the meaning of the phrase 'necessary in a democratic society'. In *Handyside v United Kingdom*⁸ the ECtHR set out that 'necessary' was '*...not synonymous with indispensable...neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"*'.⁹ The ECtHR also said: "*In this context, necessity implies the existence of a pressing social need*".¹⁰
- 3.9 This is important, as it means that 'necessity' should not be interpreted too broadly, as this would make it easier for fundamental rights to be circumvented. Nor should it be interpreted too literally, as this would set too high a bar and make it unduly difficult for otherwise legitimate activities which may justifiably interfere with fundamental rights to take place.
- 3.10 In the same case the Court looked at the right to freedom of expression, to the existence of and continued development of a 'democratic society'. It said that: *with this in mind, 'every "formality", "condition", "restriction" or "penalty" imposed...must be proportionate to the legitimate aim pursued.'*¹¹

⁷ *MM v United Kingdom* Appl. No. 24029/07 (ECtHR 13 November 2012).

⁸ *Handyside v United Kingdom* Appl. No. 5493/72 (ECtHR 7 December 1976).

⁹ *Handyside v United Kingdom* Appl. No. 5493/72 (ECtHR 7 December 1976) par. 48.

¹⁰ *The Sunday Times v United Kingdom* Appl. No. 6538/74 (ECtHR 6 November 1980) par. 59.

¹¹ *Handyside v United Kingdom* Appl. No. 5493/72 (ECtHR 7 December 1976) par. 49.

3.11 Finally, the ECtHR explained that its role was then to decide ‘...whether the reasons given by the police to justify the actual measures of “interference” are relevant and sufficient’.¹²

3.12 There have now been a number of cases before the ECtHR that have all referred to one or more of the tests the ECtHR has set for itself when determining whether a measure is ‘necessary in a democratic society’¹³.

Pressing social need - Does the interference correspond to a pressing social need?

Proportionality – Is the interference caused by the measure proportionate to the legitimate aim being pursued?

Relevant & Sufficient Reasons – Were the reasons given to justify the interference relevant and sufficient?

Again, WP29 has set out below some explanation of how the ECtHR has dealt with each of these tests.

3.13 Test 1: Pressing social need

We have already explained above that an AJSF authority might have a legitimate aim under Art. 8(2), eg “prevention, detection and investigation of a crime”. Whilst the notion of a ‘pressing social need’ is difficult to define, it will always involve identifying, within the broader sphere of the legitimate aim pursued, the specific societal need to be addressed with a view to protecting public security.

3.14 What the ECtHR are essentially trying to address here is whether the AJSF authority, for example, has identified the reason why they need to interfere with an individuals’ privacy rights. However, the term ‘*pressing* social need’ implies a greater level of severity, urgency or immediacy associated with the need that the measure is seeking to address. Therefore defining your pressing social need will mean taking into account a number of factors. They may include public concern, nature of the issue to be tackled and so on. These factors will certainly influence any personal data that may be processed to tackle that issue/pressing social need.

3.15 One particular case reviewed by the ECtHR was the case of *Dudgeon v United Kingdom*¹⁴. The claimant alleged that legislation in place in Northern Ireland criminalising homosexual activity regardless of where it took place, the age of those involved or whether they had consented or were capable of giving consent, breached his rights under Art. 8 of the ECHR.

3.16 Although the ECtHR agreed that there was a need for there to be some regulation of all sexual activity, it remained to be determined whether the legislation in Northern Ireland, which went well beyond the regulation of similar activities found in other member states party to the ECHR, was still ‘necessary’.¹⁵

¹² *Handyside v United Kingdom* Appl. No. 5493/72 (ECtHR 7 December 1976) par. 50.

¹³ See for example *S & Marper v United Kingdom* Appl. Nos. 30562/04 and 30566/04 (ECtHR 4 December 2008) Par. 101; *Khelili v Switzerland* Appl. No. 16188/07 (ECtHR 18 October 2011); *Klass and others v Germany* Appl. No. 5029/71 (6 September 1978); *Leander v Sweden* Appl. No. 9248/81 (ECtHR 26 March 1987); *Huvig v France* Appl. No. 11105/84 (ECtHR 24 April 1990); *Z v Finland* Appl. No 22009/93 (ECtHR 25 February 1997); *K & T v Finland* Appl. No. 25702/94 (12 July 2001)

¹⁴ *Dudgeon v United Kingdom* Appl. No. [7525/76](#) (ECtHR 22 October 1981)

¹⁵ *Dudgeon v United Kingdom* Appl. No. [7525/76](#) (ECtHR 22 October 1981) ‘...to preserve public order and decency [and] to protect the citizen from what is offensive or injurious...to provide sufficient safeguards against

3.17 The ECtHR, linking back to the legitimate aims given as being the reason for the legislation, and also commenting on the significant change in societies' views on homosexuality since the legislation had been passed, said:

*'It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.'*¹⁶

In short, whilst the Northern Irish police were pursuing a legitimate aim, when it came to addressing whether the measures they took were 'necessary in a democratic society' or not they had failed the pressing social need test because they could not satisfactorily demonstrated to the ECtHR that there was one¹⁷. Although there had been objections from certain areas of society, the broader views of society as a whole suggested that there was no longer a need for the legislation to go as far as it did with respect to sexual acts amongst homosexual males. Furthermore, there was no sufficient evidence that the measures were justified to prevent harm to those vulnerable sections of society or, if not taken, would have resulted in adverse effects on the public.

3.18 The very essence of a pressing social need will mean that it is fluid and will have some element of subjectivity to it. Therefore key to its satisfaction will be context and evidence. The severity of a pressing social need or the associated harm/detriment /negative affect on society may influence how 'pressing' the pressing social need is.

For example, it may be an accepted argument that the public perception of violent sexual crime is more severe/pressing than burglary. Therefore it could be accepted that a greater level of interference of an individual's privacy or data protection rights may be justified to tackle that particular crime. However, it could be equally argued that due to prevalence of burglary, how this crime is carried out, how many people it effects etc could be just as, if not more severe, in one or more Member States. However, what will be important in determining this severity will be context and evidence supporting the justification for interferences to tackle such crimes.

3.19 Given the above, and after reviewing much of the ECtHR's jurisprudence in this area, it seems when thinking about (and this is not an exhaustive list) the ECtHR has highlighted possible factors when assessing 'pressing social need' might be:

- Is the measure seeking to address an issue which, if left unaddressed, may result in harm to or have some detrimental effect on society or a section of society?
- Is there any evidence that the measure may mitigate such harm?
- What are the broader views (societal, historic or political etc) of society on the issue in question?
- Have any specific views/opposition to a measure or issue expressed by society been sufficiently taken into account?

exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence'.

¹⁶ *Dudgeon v United Kingdom* Appl. No. [7525/76](#) (ECtHR 22 October 1981) Par 60

¹⁷ See also in this regard *Khelil v Switzerland* Appl No. 16188/07 (ECtHR 18 October 2011)

3.20 Test 2: Proportionality

The second test (proportionality) as set out by the ECtHR, essentially requires that a measure which interferes with an ECHR right should go no further than needed to fulfil the legitimate aim being pursued.

- 3.21 Two notable cases heard by the ECtHR involving the issue of proportionality in the area of privacy law are *Z v Finland*¹⁸ and *S & Marper v United Kingdom*¹⁹. In the case of *S & Marper*, the applicants complained that the retention of their DNA and fingerprint samples by the Police constituted an unjustified interference with their Art. 8 rights. In *Z*, the issue was that the applicant's personal information (including her health status) was publically disclosed.
- 3.22 In both cases, the ECtHR accepted that the activities in question pursued the legitimate aim of the prevention or detection of crime or disorder. The ECtHR then turned to whether the activities were 'necessary in a democratic society'.
- 3.23 In view of this, the ECtHR considered the reasons given were not relevant or sufficient enough to override the applicant's interest in the data being kept confidential.
- 3.24 In the *S & Marper* case the ECtHR was critical of the 'blanket and indiscriminate nature'²⁰ of the power to obtain and retain DNA samples. It noted the lack of any consideration of 'the nature or gravity of the offence'²¹, or 'the age of the suspected offender'²² and commented that the retention was not time limited whatever the nature or seriousness of the offence. The lack of safeguards was also highlighted, notably the 'limited possibilities for an acquitted individual to have the data removed'²³, and the lack of any independent review of the justification for retaining the samples.
- 3.25 The factors considered by the ECtHR in both these cases demonstrate the broad range of factors which may be relevant when assessing the proportionality of a measure. The *S & Marper* case in particular, demonstrates that a blanket measure, even where it can be shown to meet a legitimate aim, is unlikely to meet the proportionality aspect of being 'necessary in a democratic society'.²⁴
- 3.26 Given the above and after reviewing much of the ECtHR's jurisprudence in this area it seems when thinking about (and this is not an exhaustive list) the ECtHR has highlighted possible factors when assessing 'proportionality' might be:

- **Existing vs proposed measures**

It should also be noted that this factor may also fit with the notion of necessity in its strictest sense. When looking at whether a proposed measure is necessary (either by replacing or adding to existing measures) one way to look at this approach is to first review the effectiveness of existing measures over and above the proposed measure. This can look at each individual existing/proposed measure or taking a holistic view

¹⁸ *Z v Finland*, Appl. No. 22009/93 (ECtHR 25 February 1997)

¹⁹ *S & Marper v United Kingdom*, Appl. No. 30562/04 and 30566/04 (ECtHR 04 December 2008)

²⁰ *S & Marper v United Kingdom*, Appl. No. 30562/04 and 30566/04 (ECtHR 04 December 2008) para.119

²¹ *S & Marper v United Kingdom*, Appl. No. 30562/04 and 30566/04 (ECtHR 04 December 2008) para.35

²² *S & Marper v United Kingdom*, Appl. No. 30562/04 and 30566/04 (ECtHR 04 December 2008) para.119

²³ *S & Marper v United Kingdom*, Appl. No. 30562/04 and 30566/04 (ECtHR 04 December 2008) para.119

²⁴ See also in this regard *Campbell v United Kingdom* Appl. No. 3578/05 (ECtHR 27 March 2008)

of existing measures. If the proposed measure does meet the necessity part the assessment it must also meet the test of whether or not it is still a proportionate response by weighing up the legitimate aim that the proposed measure is pursuing and the pressing social need identified over above the rights and freedoms of the individual's right to privacy.

However this assessment is done it should involve an evidence led explanation of why the existing measures are no longer sufficient for meeting that need. It must be clearly demonstrable how the proposed measure will address the pressing social need identified backed up by evidence. This could include evidence based examples of where the measure has been used before in the same or similar circumstances and has proven to be effective. If part of the reason why the new measure is being proposed is to remedy deficiencies in the existing measures' effectiveness, then this should also be clearly explained and evidenced.

At this stage, an explanation of what other measures were considered and whether or not these were found to be more or less privacy intrusive should be presented. If any were rejected which were found to be less privacy intrusive, then the strong justifying reasons as to why this measure was not the one that was selected to be implemented should be given²⁵.

- **Scope - Is the scope of the proposed measure sufficiently limited?**

This may cover the number of people affected by the measure or the amount of information collected or the period for which that information will be retained. Scope may cover all, some or none of these things depending on the nature of the measure in question.

- **Safeguards - What measures are in place to safeguard fundamental rights?**

The term safeguards in this context is also broad and may cover, for example, steps taken to limit the scope of a measure, or caveats placed upon when or how it can be exercised. Alternatively, it may involve requiring some other objective decision to be made prior to a measure being deployed in that case. Safeguards may also cover any rights of appeal afforded to individuals against a particular measure or its effects and the scope of those rights.

- **Nature of the interference**

This could include the type of information being collected, the context in which the measure is to be carried out or the nature of the activity that is subjected to the measure. In the *Dudgeon* case, the ECtHR placed significance on the particularly sensitive nature of the activity being affected as well as the circumstances in which the measure was deployed. Whilst the sensitivity of the activity or information being affected will be relevant, it is equally relevant to consider whether a measure will take place in circumstances in which individuals may have a heightened expectation of privacy. For example, the privacy considerations in terms of context are very different when installing CCTV cameras on a public street as opposed to installing them in toilets or hospital wards.

²⁵ To help with this process, it may be helpful to refer to WP29's work on privacy impact assessments

- **The severity of the pressing social need and associated harm or detriment to or effect on the public.**

Just as the nature of the interference, including the types of activity affected or information collected, are relevant considerations, so too is the nature of the pressing social need to be addressed. The more severe the issue and/or the greater or more severe or substantial the harm or detriment which society may be exposed to, the more an interference may be justified.

The Member State under the ECHR always has a margin of appreciation when identifying their pressing social need and the level of interference when pursuing a legitimate aim. The ECtHR has made clear that in assessing this margin it will always be subject to judicial scrutiny, especially the safeguards in place.²⁶

A valid general aim within Art. 8(2) could include the prevention or detection of crime or disorder. It could be argued that, broadly speaking, the prevention or detection of crime in general is in itself a pressing social need and so any activity carried out for this purpose is always addressing a pressing social need. However, even if this were true, it would still be necessary, when assessing proportionality, to be able to identify the specific crime that a measure was intended to prevent/detect, and at the same time, consider the harm, detriment or risk that the public would be exposed to if this issue be left unaddressed.

3.27 **Test 3: Relevant & sufficient reasons**

The ECtHR's third test makes clear that an interference must be justified by relevant and sufficient reasons linked to the requirements of the two previous tests. Concluding that there are relevant and sufficient reasons to justify interference is easier only if proper consideration of whether a pressing social need exists and the measure proposed/taken is the most proportionate. However, in addition to or instead of their own analysis, an AFSJ authority/legislator may rely on research, surveys or other information to underpin its reasoning.

3.28 An example of the extent that sufficient and relevant reasons must be shown is highlighted in the case of *K and T v Finland*²⁷. In this case, the applicants contested the decision of the local authorities in Finland to remove two children from their care and place them in foster care and related restrictions on access to the children. In its view the ECtHR felt that the authorities, although dealing with two children in the same family had provided sufficient and relevant reasons to demonstrate the action they took for one child but not the other.

3.29 **What the ECJ says about necessity and proportionality and the right to a private and family life**

3.30 Apart from the thorough analysis of the ECtHR jurisprudence on Art. 8 of the ECHR presented so far, the WP29 wishes to also draw attention to more recent efforts by the ECJ to apply necessity and proportionality tests to Arts. 7 & 8 of the Charter. In its *Schwarz* case²⁸, the ECJ developed a method to assess whether the exercise of the rights

²⁶ *Klass and others v Germany*, Appl. No. 5029/71, (ECtHR 6 September 1978)

²⁷ *K and T v Finland*, Appl 25702/94 (ECtHR 12 July 2001)

²⁸ *Schwarz v. Stadt Bochum*, ECJ, C-291/12, (CJEU 17 October 2013), not yet published, Mr Schwarz challenged the refusal of the authorities of the German city of Bochum to issue him with a (EU) passport unless

derived from Art. 7 & 8 of the Charter have been unduly restricted. The ECJ starts its analysis with Art. 52 (1) and reiterates that limitations to fundamental rights must:

- *be provided for by law,*
- *respect the essence of those rights,*
- *and, in accordance with the principle of proportionality, be necessary, and*
- *genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” (para. 34 of the judgment).*

3.31 When having a closer look at the question of proportionality and necessity, the ECJ said that it “*must establish whether the limitations placed on those rights are proportionate to the aims*” and “*to the objectives*” (of the relevant legislation). “*It must therefore be ascertained whether the measures implemented are appropriate for attaining those aims and do not go beyond what is necessary to achieve them (see par. 40 of the judgment)*”.

Furthermore, the Court said in par. 46 of the judgment, that: “*in assessing whether such processing is necessary, the legislature is obliged, inter alia, to examine whether it is possible to envisage measures which will interfere less with the rights recognised by Art.s 7 and 8 of the Charter but will still contribute effectively to the objectives of the European Union rules in question*”.

3.32 More recently still the Attorney General of the ECJ, Pedro Cruz Villalón, delivered in December 2012 his opinion on the Irish and Austrian cases against the Data Retention Directive 2006/24/EC (DRD) in cases C-293/12 and C-594/12. In his remarks he made clear that whilst the DRD was in pursuit of legitimate aim it was still unnecessary due to the DRD’s “[incompatibility] *with the proportionality principle in that it requires member states to ensure that the data is retained for a period whose upper limit is two years.*”²⁹ Therefore the DRD is unnecessary due to the lack of relevant and sufficient reasons given for its retention period of two years. This has led to a disproportionate intrusion into the private lives of customers whose data is retained without any suspicion for the maximum of two years.

3.33 **Summary**

It is important to emphasise that the ECtHR has made clear that failure to satisfy all three criteria will mean that bar of necessity will not be met.

Therefore working through each of the criteria – in accordance with the law; legitimate aim and necessary in a democratic society (and in this case the three tests as well) will all be a requirement to ensure compliance that any AJSF measure is a necessary interference with an individual’s right to a private and family life.

What is also clear from the case law is that there is a relationship between privacy and data protection which will require a joint reading of both provisions. WP29 explores this relationship further in Parts IV and V.

he has two fingerprints stored on that passport. This obligation originates in Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents.

²⁹ Advocate General’s Opinion on Advocate General’s Opinion Press Release http://europa.eu/rapid/press-release_CJE-13-157_en.htm

4.0 Making the link between privacy and data protection

As is made clear above Art. 52 (3) of the Charter any interpretation of Art. 7 of the Charter should have the same meaning as Art. 8 of the ECHR. Protection of personal data is also a fundamental right enshrined in Art. 8 of the Charter and specific provisions of its implementation are outlined in Art. 16 of the Lisbon Treaty. Specific rules governing the right are set out in the current Data Protection Directive 95/46/EC and Data Protection Framework Decisions (JHA/2009/977). Although Directive 95/46/EC does not necessarily cover all AJSF authorities in all members states, its principles (derived from Convention 108) will still be, generally, applicable. Given that it is difficult to think of many AJSF measures that will be privacy intrusive but not process personal data too when proposing, implementing or reviewing any AJSF measure both rights and both sets of rules protecting them must be considered.

- 4.1 When looking at an AFSJ measure it is necessary several factors to be taken into account to ensure that it complies with both privacy and data protection rules. As with all fundamental rights, limitations to the right to privacy and the right to data protection are subject to the requirements of Art. 52 (1) of the Charter. They are “subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

The term ‘necessary’ also appears in secondary legislation, e.g. Art. 3 of the DPF. Subject to the various qualifications of applying the Directive in the AFSJ context, it should be noted that the term “necessary” is also used extensively throughout it and, perhaps most importantly throughout Arts 6 and 7 which provide criteria for making data processing legitimate. Of particular relevance, given the focus here on necessity in an ASFJ context, is Art. 7(e). This provides that processing will be legitimate if: “*processing is **necessary** for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed*”.

In this regard the term ‘necessary’ in the Directive provides an important safeguard in relation to legitimacy of processing of personal data, and under Art. 13, it should be seen a safeguard which *limits* any data processing for the purposes set out under that Article.

- 4.2 Furthermore with regard to data processing in the ASFJ context, the ECJ has been explicit regarding the concept of necessity and the need for a consistent approach to its application and its impact on data protection stating: “*Having regard to the objective of Directive 95/46/EC of ensuring an equivalent level of protection in all Member States, the concept of necessity laid down by Art. 7(e) of the directive cannot have a meaning which varies between the Member States.*”³⁰

Whilst there is a smaller amount of jurisprudence regarding this relationship at the ECJ, its decisions are largely consistent with the ECtHR’s approach. Therefore adopting the

³⁰ Huber C-524/06 Huber vs Germany, CJEU (16 December 2008)

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=76077&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=30432>

approach taken by the ECtHR to the concept of necessity should provide a consistent approach to its application in a data protection context.

5.0 Ensuring AFSJ measures are compliant with privacy and data protection rules

Privacy and data protection are distinct concepts. However, they often inter-relate. So both need to be considered if trying to implement an AJSF measure that affects them.

The ECtHR has made clear its approach in addressing the privacy aspect of such measures – set out above. The ECJ has also issued its first judgments applying the necessity and proportionality test to privacy and data protection cases. The WP29 will now address some additional concrete examples where the necessity and proportionality of data protection legislation was and is at stake. The examples are structured following four key principles of data protection as they are expressed in the Directive: fair and lawful processing, purpose limitation and data minimisation, and data retention. The WP29 refers to the Directive, even if it is, as a pre-Lisbon instrument, not applicable to a large extent in the AFSJ area. However, the WP29 recalls its principles to be generally applicable in the area of data protection as they appear in other instruments such as Convention 108 and the DPF, which are applicable to the AFSJ area.

5.1 Processing data fair and lawfully

The Directive's first principle is expressed under Art. 6.1(a) of the Directive as:

1. Member States shall provide that personal data must be:
(a) processed fairly and lawfully;

5.2 An AFSJ authority must have a legal framework (codified or common /statue law) to ensure that the powers it exercises are legitimate. It is of particular importance in a codified jurisdiction that the AJSF authority has a legal basis to exercise specific powers to carry out its functions in pursuit of that legitimate aim. To ensure full compliance with the meaning of 'lawfully' in data protection terms, it is recommended that consideration of the elements of the ECtHR's three tests under 'necessary in a democratic society' might be a useful way to also ensure that data protection rules are also met.

5.3 For example, in *Dudgeon v United Kingdom*³¹, it was not disputed that the police acted in accordance with the law, or that they were pursuing a legitimate aim. However, the police had failed to demonstrate that the steps they took to intrude on Mr Dudgeon's private life were 'necessary in a democratic society'. WP29 took a similar approach when it issued its opinion on the European Commission's proposals on Smart Borders. The Commission identified four central aims to be tackled and would require processing of millions of citizens' data. However, WP29 concluded that there was insufficient evidence to indicate how the Commission's proposals would achieve the aims they asserted. From a data protection perspective the Commission had failed to define with sufficient clarity their purpose for processing which led to a failure to also meet the data minimisation/retention principles. From a wider privacy perspective the proposals were not a proportionate response to the pressing social need identified and ultimately the legitimate aim pursued. From either perspective the measures, if taken, would have also been unlawful.

³¹ *Dudgeon v United Kingdom*, Appl. No. 7525/76 (ECtHR 23 September 1981)

5.4 In the UK the Data Protection Directive has been transposed in a way that all law enforcement bodies are also subject to its provisions. As such in July 2013, the UK DPA took formal enforcement action against a police force for their use of Automatic Number Plate Recognition (ANPR) covering all roads into and out of a small rural town in Hertfordshire, England. In this case, the processing of personal data was generally compliant with the requirements of national data protection law. The force was complying with relevant national standards on retention, was processing the personal data collected for a policing purpose and was not processing irrelevant or inaccurate data in relation to that purpose.

However, personal data are still required to be processed ‘lawfully’ in compliance with other legal rights and obligations, including the right to privacy. Following the reasoning of the ECtHR, the UK DPA found on closer inspection that the force had failed to properly identify a sufficiently pressing social need to justify the level of intrusion into the private lives of so many (innocent) individuals. There was also a lack of evidence to properly demonstrate how the introduction of ANPR on such a large scale in such a low crime area would significantly aid in addressing the issues which the force had identified. The UK DPA, therefore, found that the measure was an unjustified interference with the individuals’ privacy rights under the Charter/ECHR. The processing was thus unlawful for the purposes of data protection law.

5.5 Therefore to ensure personal data is processed fairly and lawfully, an AJSF measure must be in accordance with the law and be part of a legitimate aim pursued under Art. 8 of the ECHR. But, it must also be necessary in democratic society. Again by following the tests set out by the ECtHR the measure should be in compliance not only with the right to privacy but also compliance with the principle of processing data fairly and lawfully.

5.6 **Purpose limitation and data minimisation principles**

Whilst purpose limitation and data minimisation principles are distinct, they often inter-relate. Therefore WP29 deals with them both here. The Directive sets out these principles in Art. 6.1(b) and (c) respectively:

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

5.7 The principle of purpose limitation³² is about understanding *why* certain personal data is being processed. This means being as specific as possible about the purposes for which a proposed measure might warrant collection and processing of personal data. By doing so it should also lead to better compliance with the data minimisation principle. The data minimisation principle exists to ensure that only the minimum amount of personal data is processed to achieve the purpose set out. These data protection principles link very closely with the concept of proportionality in a privacy context. But again, by achieving compliance with these principles will also contribute to achieving necessity

³² Art. 29 Workign party opinion on Purpose limitation link: http://ec.europa.eu/justice/data-protection/Art.-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

overall. The Advocate General Poiras Maduro (2008) made this clear in his remarks: *“The concept of necessity [...] is well established as part of the proportionality test. It means that the authority adopting a measure which interferes with a right protected by Community law in order to achieve a legitimate aim must demonstrate that the measure is the least restrictive for the achievement of this aim”*.³³

- 5.8 In its opinion on the European Commission’s proposed Smart Borders Package, WP29 reiterated its arguments that insufficiently defined purpose limitation - coupled with the lack of evidence to demonstrate that the proposed measure would tackle a pressing social need - would not be data protection compliant. On the Entry and Exit System (EES), in particular, which involved the processing of millions of citizens’ data, WP29 found that: *“[EES]...will detect over stayers but not tackle any of the underlying causes and, taken on its own, has no means to reduce the number of over stayers, other than perhaps functioning as a mild deterrent.”*³⁴
- 5.9 Another example where such concerns were raised was in relation to the Data Retention Directive. WP29 voiced its concern that the blanket retention for all people’s data held by EU telecommunications providers for 2 years so that AJSF authorities could access it was a disproportionate interference with an individual’s right to privacy. It also argued that the Data Retention Directive lacked sufficient clarity and would breach the purpose limitation principle. WP29 also proposed more proportionate alternative measures such as “quick freeze procedures” in order to offer a less privacy intrusive way to achieve the goals of the proposal and concluded that the proposal should include re-evaluation and sunset clauses³⁵.
- 5.10 Two other examples of dealing with purpose limitation and proportionality can be seen in cases handled by DPAs at a national level, one dealt with by the Maltese DPA and one by the Italian DPA. Both cases highlight why it is so important that specific reasons must be given to process personal data – particularly if the AJSF measure requires processing personal data of non-suspects.

The Maltese police requested blanket and direct access to telecommunications geo-location data to tackle a series of arson attacks on the island. Whilst the data protection authority and the tribunal that followed agreed to allow access, the court of appeal in Malta decided that the measures were not proportionate. The court decided that the request for the data was too vague and broad and would have resulted in the processing of innocent people’s data. Therefore it would have been a disproportionate interference with their right to a private life. The request was deemed unlawful because it was not sufficiently defined. Therefore it was disproportionate and not necessary.

- 5.11 In Italy, the police proposed several measures to tackle football hooliganism. The Italian DPA ruled that, in light of repeated public disorder at Italian football stadiums, CCTV cameras should be allowed at football stadiums. However, in the same case, they

³³ http://curia.europa-eu/jcms/jcms/T5_5135, paragraph 27.

³⁴ Working Party Opinion 206 Opinion 05/2013 on Smart Borders

³⁵ Working Party opinion 64 Opinion 5/2002 on the statement of the European Data Protection Commissioners at the International Conference in Cardiff (9-11 September 2002) on mandatory systematic retention of telecommunication traffic data; and Working Party Opinion – Opinion 4/5 on the Proposal for a Directive of the European Parliament and Council on the Retention of Data Processed in Connection with the Provision of Public Electronic Communication Services and amending Directive 200/58 (COM(2005)483 final of 21.09.2005)

concluded that there were insufficient reasons and evidence presented to implement individualised ticketing for games – creating a large database of individuals going to football games. They concluded, therefore, the proposed measure was disproportionate to tackle the public disorder. However, in a similar case in the Czech Republic by implementing safeguards to limit the scope of the individualised ticketed, such measures were deemed proportionate. The Czech DPA ensured that only certain games which were seen as the most problematic (supported by evidence) were covered under the individualised ticketing obligation.

- 5.12 Seen from a privacy perspective it could be argued that WP29 was not convinced that the Commission’s proposals on Smart Borders were necessary because a) insufficient account had been taken of existing measures and b) with regard to EES in particular, it would have been a disproportionate response to the pressing social needs identified as it would not have adequately addressed them. From a data protection point of view by insufficiently defining its purpose, the Smart Borders proposal meant that such processing was not adequate or relevant but it was excessive thereby causing it to be stored for longer than necessary.

To achieve compliance with the proportionality test set out by the ECtHR under ‘necessary in a democratic society’ any measure must be a proportionate response to tackle the identified pressing social need, as well as making sure that there is sufficient evidence to support this view. However, from a data protection perspective the focus is on to what extent the processing of an individual’s personal data should take place as part of the AJSF measure. To achieve dual compliance here, the focus should be on being as purpose specific as possible. By doing so any processing of personal data involved is clearly understood and defined and minimises the risk that no more data than is necessary to fulfil that purpose will be processed. Therefore, being clear about what an AJSF measure is trying to achieve should ensure that the measure chosen is not only proportionate, but that any processing of personal data involved is the minimum amount required to fulfil its aim. Provided that there is also sufficient justifications for such a measure, compliance with the Charter’s Art.s 7 and 8, ECHR’s Art. 8, Directive 95/46/EC and DPFD should be attained.

5.13 Data retention

The Directive expresses the data protection principle of retention in Art. 6.1(e): *“kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use”*.

In much the same way as the data minimisation principle requires the minimum amount of data to be collected and processed to achieve the purpose of a data processing operation, the data retention principle calls for data to be stored for the minimum amount of time.

- 5.14 The ECtHR’s case law clearly demonstrates that retaining data for longer than is necessary will not satisfy the three tests under ‘necessary in a democratic society’ (see S

Marper v United Kingdom³⁶). Retention of personal data not only invokes data protection rules but also means an interference with individual's private life.

- 5.15 The lack of sufficient and relevant reasons, disproportionality and lack of a clear link with the pressing social need to retain personal data – particularly of those individuals who are non-suspects – are re-occurring themes that have been highlighted to be of concern by WP29 and other areas in recent years. This is particularly so in cases such as Passenger Name Records (PNR)³⁷ and The Terrorist Finance Tracking Program (TFTP).
- 5.16 The specific issue of re-evaluating the necessity of how long data is kept was taken up in the Europol annual inspection report 2012 which found: *“The processing of personal data of a group of 96 non-violent anarchists reported by the contributor as not representing any danger is not - and has never been - in compliance with the opening order.”....” Retaining data over 5 yrs without any check on their relevance, and reasoning the further processing as part of dealing with a backlog of data to be processed, does not constitute a proper evaluation of the necessity of the retention of these data”*. Therefore building in data retention periods at the start of a proposed measure and re-evaluating it periodically is essential to ensure compliance with a person's right to a private life and data protection law.
- 5.17 In a similar vein the German and Dutch NDPAs and courts ruled that ANPR systems must ensure that the licence plate is immediately deleted after a 'no-hit' is recorded to ensure the measure was sufficiently proportionate to achieve the purpose/pressing social need identified.
- 5.18 Therefore, data minimisation and data retention principles will often inter-relate, and are closely linked to the principle of purpose limitation. From a data protection perspective failure to tightly define the purpose is likely to lead to a breach of the data minimisation and retention principles. From a privacy perspective failure to tightly define the purpose for processing personal data will mean that the pressing social need is insufficiently defined. This could lead to the AJSF authority exercising its powers in a way that is not proportionate to the legitimate aim pursued.

³⁶ **S. and Michael Marper v. United Kingdom (nos. 30562/04 et 30566/04)**

³⁷ Opinion 7/2010 on European Commission's Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries - WP 178 Opinion 2/2007 on information to passengers about the transfer of PNR data to US authorities, Adopted on 15 February 2007 and revised and updated on 24 June 2008; Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, presented by the Commission on 6 November 2007; Opinion N° 5/2007 on the follow-up agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security concluded in July 2007; Opinion 2/2007 on information to passengers about transfer of PNR data to US authorities; Opinion 8/2004 on the information for passengers concerning the transfer of PNR data on flights between the European Union and the United States of America

PART VI

6.0 Lessons learned and practical recommendations

For an AFSJ measure to achieve compliance it is clear from the above that lessons must be drawn from both privacy and data protection.

- 6.1 The approach set out by the ECtHR should not be seen as the only way to achieve compliance, but should act as a guideline or process that ensures compliance. Here is a summary of that process and some things to consider when proposing, implementing or reevaluating AFSJ measures.

Is the proposed measure **in accordance with the law**?

The AFSJ must have a legal basis to implement or deploy the measure

Is the measure in **pursuit of a legitimate aim**? –

The measure must be in pursuit of one of the aims set out under Art. 8(2) of the ECHR?

Is the proposed measure **necessary in democratic society**?

Pressing Social Need

Identify the pressing social need (the specific issue or specific type of crime or offence) which must be addressed

Determine the seriousness of the issue and any evidence there is to support that view. Consider the nature of the offence being investigated. Issues may have a different ‘weighting’ depending on the seriousness of the offence, its impact on society, the context in which the offence is committed etc.

Time - Assess whether measures are necessary and proportionate based on the time elapsed between the offence occurring and the time the measure was taken, for example, a crime committed when people were children. Take into account the entry into force of the law and the measures taken given the contemporary context. Furthermore regularly review the necessity and proportionality of measures to ensure that reasons given as to why measures are being taken to tackle a particular issue are still relevant.

Attitudes, culture and margin of appreciation - It is clear that Member States do have a margin of appreciation in relation to AFSJ measures. However, this margin of appreciation is always subject to judicial scrutiny. From a privacy perspective to ensure its proper exercise, relevant and sufficient reasons to justify the use of a measure and that it is proportionate to the pressing social identified must be given. From a data protection point of view there is some flexibility to take such cultural issues into account. For example, in passing the Data Retention Directive the German authorities agreed to a 3 month retention policy instead of the 2 year retention policy as in other Member States.

Proportionality

Set clear aims and be purpose specific. By understanding the goal to be achieved will help set the categories or types of data needed, the type of processing that needs to occur, and the quality of the data required.

For example, proper purpose limitation should lead to the minimum amount of people affected by a data processing operation. In an AFSJ context this could be the number of people suspected of committing a crime. So, a clear distinction between different categories of data subject should be made, and where appropriate, the types of data

processed about certain individuals should be made on a case by case basis. Another example might be DNA retention. This requires an understanding of the crime at hand and the use that the processing of DNA data can play in solving that crime. Each part of the process from collecting, processing and storing the DNA data must be taken into account to ensure that each element of the data processing is fully justified. By approaching purpose limitation in this way will mean better compliance privacy and data protection rules.

However, not all personal data to which an authority needs access is processed by them. Therefore they may need access to data originally collected by other organisations for very different purposes. As in the case of the new Eurodac Regulation, what is key to ensure necessity and proportionality in such cases, will be the safeguards to limit access.

Review existing measures and alternatives. When thinking about a measure it is important to first consider measures that already exist to tackle the issue at hand. Insufficient implementation and review of existing mechanisms and assessing them against any newly proposed measure can result in a lack of sufficient reasons and evidence to prove that the proposed measure is indeed the necessary and proportionate response to a pressing social need. Such considerations are equally important in the context of expanding access to personal data by AJSF authorities in initiatives and projects such as PNR agreements, laws governing surveillance traffic, location data, and rules on access to financial transactions.

Any less intrusive but equally effective measure (taking into account reasonable costs) are available then only these measures will be deemed necessary.

Ensure adequacy and relevance without excessiveness. A vast collection of data which can be directly accessed at will is understandably something that will always be useful and be of added value from an AFSJ authority's perspective. However, what must be equally understood is the individual's right to a private life and a right not to have their data processed without just cause. Therefore a balance must be struck.

Each proposed measure must be reviewed separately to understand its impact. Blanket application of any proposed measure is highly unlikely to meet the bar of necessity and proportionality.

Determine how long to keep data – working out the amount of time data is retained in an AFSJ context is difficult due to the concern that deletion of data may result in the loss of useful data for future investigations. However, just like when collecting each type of personal data each proposed measure must be reviewed separately to understand its impact. Blanket retention policies for proposed measures are highly unlikely to meet the bar of necessity and proportionality.

Retention should be carefully linked back to the original purposes for which the data was collected. Consider the person whom it was collected from and why. For example, the collection of data for non-suspects may have a much shorter retention period than those who are suspects or involved in the offence in some other way.

Applying a holistic approach. Particularly after 9/11 the European legislator(s) have been extremely active adopting new measures limiting the rights to privacy and data

protection in the AFSJ. This development makes it particularly important to take a holistic viewpoint when assessing the interference with privacy and data protection of a new legislative proposal. In order to say whether a new legislative proposal is still proportionate, it is necessary to assess how the new measure would add to the existing ones and whether all of them taken together would still proportionately limit the fundamental rights of data protection and privacy.

Relevant and Sufficient reasons

Evidence based proposals. Many of the criticisms over recent years from WP29 to proposed measures to tackle AFSJ issues has been due to the insufficient reasons and evidence submitted to it to justify that the proposed measure is the only proportionate one to tackle the pressing social need identified. Robust justification of the proposed measures must stand up to scrutiny when required. Therefore proposed measures must be based on evidence-based research, statistics, forecasts etc. All this will help ensure the sufficient reasons and evidence test is satisfied.

PART VII

7.0 Conclusion

In conclusion WP29 recommends that where AFSJ measures are proposed, implemented or reviewed which both privacy intrusive and process personal data are, it is recommended the approach set above. The recommended considerations in this opinion should be seen as ways to achieve compliance and act as safeguards to ensure that any future AFSJ proposed measures are truly necessary and proportionate as well as fully data protection compliant.

Done at Brussels, on 27 February 2014

*For the Working Party
The Chairman
Jacob KOHNSTAMM*