

Comments on the draft Guidelines 05/2022 of the European Data Protection Board

This paper exclusively reflects the views of its author.

On 12 May 2022, the European Data Protection Board published its draft Guidelines 05/2022¹ “on the use of facial recognition technology in the area of law enforcement” (hereinafter referred to as Draft Guidelines or Draft).

Lack of authority to issue these Guidelines

Before (and largely instead of) making comments on the substance of the Draft, it must be noted that nothing in Directive (EU) 2016/680² (hereinafter: LED) or in the GDPR authorises the European Data Protection Board to issue such Guidelines. In this regard, this Draft is action *ultra vires*. An academic study, however, should not bear any numbers, suggesting that it is an official document issued within the competence of the EDPB.

From law enforcement perspective or from general perspective?

Although the title of the Draft is about the use of facial recognition technology in “law enforcement”, the Draft is full of irrelevant parts, i.e. parts that explain cases outside law enforcement (for example when the Draft refers to contractual relationships—c.f. Subchapter 2.2, paragraphs 38, 46 etc.). The Draft even fails to clarify what “law enforcement” means (cf. paragraph 31, where it says “law enforcement and criminal justice”). The EDPB should further bear in mind that national security is out of the scope of European Union law.

Does the LED have a direct effect?

I haven’t heard about it. However, the Draft analyses the text of the LED as if it was directly applicable (see Subchapter 3.2) and the LED should not be transposed into national legislation. The EDPB is not an advisor to national legislators.

* * *

In sum, the Draft could be an academic paper but no official EDPB guidelines.

Zsolt Bártfai

¹ https://edpb.europa.eu/system/files/2022-05/edpb-guidelines_202205_frtlawenforcement_en_1.pdf

² 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