



JUSTITSMINISTERIET

Ministry of Justice

Ylva Johansson
Commissioner for Home Affairs
European Kommission

Date: **25 FEB. 2020**
Doc.: 1328253

Dear Commissioner Ylva Johansson,

Please accept my warmest congratulations on your appointment as Commissioner for Home Affairs. I very much look forward to our cooperation in this field.

I have read the mission letter of 1 December 2019 with great interest. I welcome the priorities outlined herein.

I would however like to take the opportunity to raise a few issues of particular importance to the role of law enforcement agencies in Denmark. It is important to me that our law enforcement agencies are able to make use of technology such as data retention, facial recognition technology etc. Furthermore, I would like to address the proposal for a regulation on preventing the dissemination of terrorist content online, which give rise to constitutional concerns for Denmark.

Retention of data

In its judgment of 21 December 2016 (in the so-called Tele2 case), the European Court of Justice found that the Directive on Privacy and Electronic Communications (Directive 2002/58/EC) read in the light of the Charter of Fundamental Rights must be interpreted in such a way that it precludes national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

Slotsholmsgade 10
DK - 1216 København K.

Phone +45 7226 8400
Fax +45 3393 3510

www.justitsministeriet.dk
jm@jm.dk

The judgement of the Court has left considerable doubts as to how national provisions on retention of data can be brought in line with the ruling in the Tele2 case.

Since the spring of 2017, there has been ongoing discussions within the EU on how Member States can organize their national rules on retention of data so that they are in accordance with the judgment.

Currently there are preliminary cases from France and Belgium pending before the Court on national provisions on retention of data. Denmark has - alongside 16 other Member States as well as the Commission - made submissions before the Court, who is expected to give its rulings in May 2020.

The retention of data is a necessary and highly efficient tool for national law enforcement agencies in regards to the prevention and investigation of serious types of crimes, including terrorism.

Denmark is therefore following the cases before the Court very closely. It is my hope that the Court will reassess its ruling in the Tele2 case, and allow Member States to establish national provisions that ensure effective retention of data for the purpose of law enforcement, while still respecting the fundamental rights under the Charter and adequately addressing public order and public security needs.

In addition, I look forward to receiving the guidelines on retention of data by EU Commission.

5G network

The use of new technology and the internet poses both opportunities and threats to the internal security of the EU as a whole as well as the Member States. Communication infrastructures are the cornerstone of our societies, with 5G networks as the building blocks of a new digital environment. However, the deployment of the 5G network also entail various challenges for law enforcement agencies in maintaining effective measures to prevent crime.

These challenges have also been addressed in various meetings in the Council of Justice and Home Affairs and the EU Counter-Terrorism Coordinator, Gilles de Kerchove, has helped shed light on the challenges at hand.

It is important that we continue to identify and tackle the relevant risks, at EU as well as national level. The deployment of the 5G network must not negatively affect law enforcement agencies' possibility to investigate.

ePrivacy negotiations and the role of law enforcement

The ePrivacy Regulation, presented by the Commission on 10 January 2017 and still subject to negotiations under the Council of Transport, Telecommunication and Energy, also raise some concerns.

While the regulation does not apply to activities of competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, there are elements to consider under the proposed text which may limit the methods of investigation of national law enforcement agencies.

As an example, a provision under the regulation places an obligation on the providers of electronic communications to establish internal procedures. However, the regulation does not specify that Member States may place additional obligations on providers of electronic communication to assist law enforcement agencies with necessary technical measures to enable access to end-users' electronic communications data. Thus, the regulation seems to create a risk of overruling national legislation that allow law enforcement agencies' access to uphold necessary and crucial means of investigation, for instance legal interception of telephone communication. Denmark suggested during the negotiations, to include a paragraph that allow Member States to place obligations on providers of electronic communications services to make the technical operations of services available as well as make access possible for law enforcement agencies to the electronic communication data.

Therefore, it is important that relevant experts on law enforcement - both at EU as well as national level - are involved in the negotiations of the regulation to ensure that the regulation does not unintentionally have negative effects on methods of investigation of national law enforcement agencies.

The proposal for a regulation on preventing the dissemination of terrorist content online (TCO)

The so-called TCO proposal addresses an issue of great importance. Denmark fully supports the efforts to remove online terrorist content across the EU quickly and effectively. Thus, the proposal is an important file and I believe that it will be an effective contribution to our essential fight against

terrorism. However, I am concerned that the on-going trilogues may result in a regulation that is incompatible with the Danish constitution.

On 6 December 2018, the Council agreed on a general approach. Despite our overall support for the Council's position, Denmark voted against the general approach because the proposed rules on jurisdiction in the regulation give rise to a constitutional issue.

According to the Council's general approach, the competent authorities in other Member States will have the power to issue removal orders and referrals, which produce legal effects on hosting service providers in Denmark.

According to the Danish constitution, such a power can only be delegated to international authorities, such as the EU, but the power cannot be delegated to other Member States.

In Denmark's view, the Danish constitutional issue can be resolved in a technical manner, by involving a Danish authority in the issuing of removal orders and referrals prior to obtaining legal effect in Denmark.

Denmark is currently in dialogue with members of the Commissioner's staff as well as the Council's Legal Service in order to reach a common understanding with the Commission that solves this matter.

I would like to express my utmost gratitude for the goodwill demonstrated by the Commission in this regard, and I hope that we together can ensure a solution that addresses the Danish situation without affecting the effectiveness of the proposed regulation.

Finally, I look forward to our future cooperation, and I will be at your disposal if you wish to discuss any of the above mentioned concerns.

Yours sincerely,



Nick Hækkerup