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### **Face recognition technology admissible without legal basis - Judgment paving the way to mass biometric data matching?**

On the 23<sup>rd</sup> of October the Administrative Court of Hamburg (VG) pronounced its judgement on the action for annulment of the Hamburg Ministry of the Interior against an administrative order of the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) concerning the deletion of a biometric database used by the police in the course of the G20 investigations. The action brought by the Ministry of the Interior has been granted.

The judgement of the VG Hamburg raises several questions from a data protection point of view. The Court limits the competence of the Data Protection Commissioner to a legal control of the concrete practice of data processing and to infringements of specific data protection laws. This is problematic and contradictory in cases where the data processing by the controller is carried out without a legal basis and therefore without any legal framework for administrative scrutiny.

The license plate screening, which was the subject before the Federal Constitutional Court and was seen there as an encroachment on fundamental rights, is recognised by the VG Hamburg as systemic data processing. However, it is not seen to be comparable with the storing and biometric matching of persons at the G20 summit. Due to the proximity to the riots at the G20 summit at that time, the Court assumes, that photographs of those affected were less serious than the processing of license plates. This is not convincing. The scanning of license plates immediately automatically deletes the data of uninvolved road users as non-hit-cases, while the biometric facial impressions of participants and non-participants of the G20 summit remain stored in the database for an indefinite period of time.

The Court apparently sees the general clause of § 48 Bundesdatenschutzgesetz (BDSG), which regulates the processing of special categories of data, including biometric data, in a blanket form, as a sufficient legal basis for creating masses of facial profiles for criminal prosecution. Especially this relates for uninvolved persons. In principle, this opens the way for collecting all conceivable data from the public domain and generating biometric profiles for criminal prosecution in the future, without concrete legal requirements enabling independent control to protect the rights of those affected. It is to be feared that such a practice will not only be established in Hamburg, where the responsible Ministry of the Interior is already considering further areas of deployment, but also in the areas of responsibility of the Federal Government and other German states. In spite of the fundamental questions raised by the present case and despite the consent of the plaintiff of the involved parties, the Court declared that the invocation of the court of appeal would not be admissible. Once the written grounds for the judgment have been submitted, it has to be examined whether an application for an admission of the appeal to the Hamburg Higher Administrative Court has chances to be successful.

Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information, commented: "The technical means available to law enforcement authorities in the digital world require permanent adaptation to possible threat situations. In this respect, the code of criminal procedure, which essentially dates back to the 19th century, and a general clause in the BDSG are not sufficient.

In this respect, prosecuting authorities with new enforcement powers have to be bound by specific statutory provisions aligned on the fundamental rights of affected persons. Only this enables an independent control of the data processing for the purpose of criminal investigation. Modern investigation technologies such as the use of automatic facial recognition under the conditions of Big Data in a free and open society require a clear legal basis to safeguard the right of informational self-determination and privacy."

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