EUROPEAN DATA PROTECTION SUPERVISOR

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Subject: **Application of the proposed General Data Protection Regulation GDPR to EU institutions and bodies**

Dear Ms Reding,

As you are well aware, the issue of the application of the proposed General Data Protection Regulation ("GDPR") to EU institutions and bodies has been raised in the context of the discussions on the reform package, both in the European Parliament and in the Council.

By letter of 25 July 2013 (your ref. Ares(2013) 3038864s), your services announced the intention of the Commission to start the process of aligning with the proposed general EU data protection framework. Our services have meanwhile responded (our ref. D(2013)2176 C 2013-0713) to a request for information by DG JUST anticipating the possible revision of Regulation (EC) No 45/2001 ("Regulation 45/2001") by outlining the various activities of the EDPS, and identifying areas in which specific provisions of Regulation 45/2001 proved to be helpful in the exercise of our tasks, as well as difficulties encountered in the application of the Regulation.

With the present note, we would like to share with you several considerations which should, in our view, inform the Commission's reflection on the future instrument which should amend or replace Regulation 45/2001.

On a number of occasions[1], we have expressed a clear preference, in principle, for including data processing by EU institutions and bodies within the scope of the GDPR. A single legal text would not only reduce the risk of (unintended) discrepancies, but would also be the most suitable vehicle for data exchanges between the EU level and the relevant public or private entities in the Member States. In general, it would contribute to legal certainty and to the comprehensiveness of the overall legal framework for personal data processing in the EU.

The outcome of the legislative process so far clearly shows that this view is shared by both the European Parliament and the Council of Ministers. Indeed, both institutions opted for the deletion of the proposed exemption for EU institutions in Article 2(2)(b) of the GDPR. We also note the new provisions (Article 89a(1) and recital 14) proposed by the LIBE Committee.

However, including EU institutions and bodies in the GDPR would also have a clear disadvantage. It would confirm that the distinct approach to police and judicial cooperation taken in your proposals of 25 January 2012 also applies to EU bodies operating in that area. It goes without saying that we would welcome the application of the future Regulation to those bodies at EU level, also to ensure consistency with other bodies operating wholly or partly in the Area of Freedom, Security and Justice, such as OLAF or Frontex.

If it were possible to propose a legal framework for personal data protection at the EU level which would include bodies active in the area of police and judicial cooperation, and provide sufficient incentives so that they remain within the scope during the legislative process, we would certainly not be opposed to this policy option.

Of course, and independently of the architecture chosen, the specific legal and institutional setting of the EU institutions and bodies also requires certain additional rules which should complement the generally applicable provisions of the GDPR. Such additional rules should ideally be set out in a separate chapter of the GDPR and should include at least the following elements.

1. *The advisory role of the EDPS and consultations on legislative proposals*

Over the past ten years, the EDPS has developed extensive consultation activities which are not well reflected in the current text of Regulation 45/2001. The current Article 28(2) does not reflect the now well-established procedure by which the EDPS is normally consulted by the Commission at an early stage of preparation of a legislative proposal (and provides informal comments), followed by a formal consultation after the adoption of a proposal (resulting in formal comments or an opinion), and their necessary follow-up.

Moreover, the obligation to consult as currently practiced by the Commission – including informally at an early stage – applies not only to proposals for legislative acts as currently

[1] See point 169 of the EDPS Opinion of 14 January 2011 on the Communication from the Commission on "A comprehensive approach on personal data protection in the European Union", points 27 and 89 of the EDPS Opinion of 7 March 2012 on the data protection reform package, and the Additional EDPS comments on the data protection reform package of 15 March 2013.

defined in Article 288 of the TFEU, but also to policy documents (communications), international agreements, and draft non-legislative acts, i.e. delegated and implementing measures. Also the important role of the EDPS policy inventory should be properly reflected in the legislative text.

2. Role of the EDPS vis-à-vis the Court of Justice of the EU

Article 46(c) of Regulation 45/2001 excludes from the EDPS competence as to monitoring and ensuring the application of the Regulation, the Court of Justice acting in its judicial capacity. The exact scope of this exception has not always been easy to determine and warrants further clarifications. For example, it is unclear whether activities such as the processing of personal data related to publication of judicial decisions on the internet are presently under the scope of EDPS competence or not.

Pursuant to Article 47(1)(h), the EDPS has the power to refer the matter to the CJEU under the conditions provided for by the Treaty. Article 47(1)(i) grants the EDPS the powers to intervene in (direct) actions brought before the CJEU. However, no possibility has been explicitly provided to make observations in preliminary ruling cases (Article 267 TFEU). There is no justification for treating direct actions and preliminary references differently. Indeed, experience shows that important questions related to data protection arise more often in preliminary ruling cases than in direct actions. Moreover, where the CJEU considers that expert input on data protection issues is required, it makes use of provisions of its Statute to allow for contribution by the EDPS to the case.

3. International cooperation

Article 46(f) of Regulation 45/2001 requires the EDPS to cooperate (a) with EU national data protection authorities and (b) with supervisory data protection bodies established under former Title VI of the TEU. In practice, the EDPS is also currently cooperating with supervisory authorities outside the EU and with relevant international organizations. In order to lend those efforts additional credibility, such cooperation should be explicitly addressed in the legal instrument.

4. Coordinated supervision of large-scale IT systems and EU bodies

Regulation 45/2001 does not address the model of coordinated supervision which was developed in recent years and which applies to large-scale IT systems such as EURODAC, CIS, VIS, SIS II, and – most recently – also to IMI. The same model is foreseen in the Commission proposals for new legal bases for Europol and Eurojust. The model consists of three layers: (1) supervision at national level is ensured by national DPAs; (2) supervision at EU level by the EDPS; and (3) coordination is ensured by way of regular meetings convened by the EDPS acting as the secretariat of this coordination mechanism.

At present, relevant provisions are included in the "sectoral" legal instruments setting up the various IT systems[2], resulting in a patchwork of coordinated supervision mechanisms which

[2] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15.12.2000, p. 1; Regulation (EC) No 1987/2006 of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006, p. 4; Regulation (EC) No 767/2008 of

are broadly similar, but sometimes differ in little details. The new data protection framework provides an excellent opportunity to streamline the existing solutions by codifying the core provisions on coordinated supervision. The "sectoral" instruments would then simply make a reference to those generally applicable provisions (while providing for exceptions or more details, where necessary and justified in a specific context).

5. *Data Protection Officer (DPO) and Data Protection Coordinator (DPC)*

Ten years of monitoring compliance in EU institutions and bodies by the EDPS have shown that the DPO plays a key role in ensuring compliance with data protection rules. The obligation for every EU institution and body to appoint at least one DPO (Article 24 of Regulation 45/2001) should be maintained - although there should be a possibility to share a DPO in certain circumstances (e.g. in cases of similar type of activity and geographic proximity) - should the GDPR not include this obligation for public authorities.

Some large EU institutions have also appointed Data Protection Coordinators (DPCs) in the different DGs/services. This has proven useful to keep an overview of processing operations in those institutions and to have relays in their different DGs/services.

6. *Inventory*

In practice, the notification to the DPO of every single processing operation (Article 25) may be seen as an unnecessary administrative burden. In this regard, one of the missions of the DPO that was developed and strongly encouraged over time is the setting up of an inventory of all processing operations of his/her institution.

Although not listed in Regulation 45/2001, the EDPS considers the inventory as an important tool in relation to the documentation of processing operations. It allows the DPOs and their hierarchy to have a holistic view of the organisation's processing operations, facilitates the identification of risks and thus allows them to be more in control. This instrument could be formally added to the missions of the DPO.

7. *Transfers to recipients subject to Directive 95/46*

Article 8(b) of Regulation 45/2001 is used by EU institutions and bodies to deal with public access requests (cf. *Bavarian Lager* case law). Experience has shown that this provision led to additional complexities in public access cases, because it contradicts the points of departure of Regulation 1049/2001. However, Article 8 (b) offers additional safeguards in certain circumstances, compared to a simple application of a national law implementing Directive 95/46.

In case of transfers of data to journalists following a request for public access, Article 8(b) allows for a balance of interests to be made with the data subject's legitimate interests. An application of the principles of the Directive without these specific rules on transfers would lead to a difference of regime as under Article 9 of Directive 95/46 journalists would benefit from the broad exemption regarding the processing of personal data carried out for journalistic purposes.

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9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60.

8. Establishment and independence

Overall, the current provisions of Chapter V of Regulation 45/2001 have not led to important difficulties in practice. In particular, the provisions on independence have been affirmed and used by the CJEU as a benchmark in cases C-518/07 (*Commission* v *Germany*) and C-614/10 (*Commission* v *Austria*). They should, therefore, be maintained in the new instrument.

Finally, we note that – unlike members of some other institutions, including the Ombudsman – neither the EDPS nor the Assistant EDPS are required to perform a solemn undertaking before the CJEU upon taking up duties. This distinction of treatment does not seem justified.

We trust that you and your services will find this input useful in shaping the future data protection framework for EU institutions and bodies, and we remain available for any further clarification that you may need.

Yours sincerely,

(**signed**)

Peter HUSTINX

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