

GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Ms Catherine DAY
Secretary-General
European Commission
B-1049 Brussels

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GB/ABu/mk (2014)1974 **C2014-0692**
Please use edps@edps.europa.eu for all
correspondence

Subject: **Public consultation on the revision of the Commission's Impact Assessment Guidelines - data protection aspects**

Dear Ms Day,

With this letter, we would like to contribute to the public consultation on new draft Impact Assessment Guidelines which the European Commission is currently holding. We welcome and support the underlying policy objective of ensuring that Commission initiatives, and in particular proposals for EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence, the added value of EU action and a cost-benefit analysis of alternative courses of action for all stakeholders. We consider that the new draft Guidelines constitute a significant improvement over the previous version and, overall, provide a useful instrument to guide Commission staff at the earliest stages of preparation of EU policy initiatives.

We welcome that the draft Guidelines now explicitly refer to fundamental rights and the need to evaluate the impacts that policy proposals might have on such rights (e.g. on p. 19, 24 and 38). We encourage the Commission to further elaborate and strengthen those references, so as to fully reflect the growing importance of fundamental rights in the EU legal order, in particular since the entry into force of the Lisbon Treaty.

Indeed, as you know the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights in 2009 placed a strong emphasis on the protection of fundamental rights in the EU, and in particular the rights to privacy and to the protection of personal data enshrined in Articles 7 and 8 of the Charter. Recent judgments from the Court of Justice, annulling the Data Retention Directive in *Digital Rights Ireland* and on the right to request removal of certain information from search engines in *Google Spain* have removed any doubts over the need for EU activities to uphold the fundamental rights to privacy and to data protection. It is therefore essential that the Commission takes all the necessary steps, starting from the earliest stages of the EU decision-making process, to ensure respect of those rights.

In practical terms, we would like to make the following suggestions:

- Given the significance of the Charter of Fundamental Rights in the EU post-Lisbon legal order, the question of impacts of proposed EU policy and legislative initiatives on fundamental rights should be given more visibility in the document, just as it has been recognised in the new Commission structure proposed by President-designate JUNCKER (cf. the proposed portfolio of First Vice-President TIMMERMANS). We would therefore urge you to include in the Guidelines a separate question about the anticipated impact on fundamental rights as it is the case for the subsidiarity principle (Question 2 on p. 11 of the Public Consultation Document).
- In addition, fundamental rights should figure more prominently among the various potential impacts listed on p. 17. Firstly, they could be mentioned explicitly alongside social impacts of "broad nature". Secondly, impacts on the rights to privacy and data protection certainly merit inclusion among impacts of "specific nature", alongside competitiveness, innovation, impacts on health, environment etc.
- In the same vein, the question whether the proposal is in line with the Charter of Fundamental Rights appears for the first time only in Section V "From Impact Assessment to Policy Making". This may lead to this question being asked far too late during the decision-making process, after the options have been "set in stone" and their other impacts analysed. Moreover, such a broad formulation does not do justice to the complexity of the matter. It would seem more helpful for the Commission policy-makers if more specific guidance was provided, including examples of specific impacts that policy initiatives might have, for example on the rights to gender equality, fair trial, transparency, or indeed privacy and data protection.
- In this context, whenever a proposed measure would have a foreseeable impact on the rights to privacy and personal data protection, in particular because it would constitute an interference with the right of individuals to respect for their private and family life, home and communications as guaranteed in Article 7 of the Charter, evidence of its necessity and proportionality should be included in the Impact Assessment report. In addition, it should be demonstrated in the Impact Assessment report that the same purposes cannot be achieved with less intrusive means¹.
- More detailed guidance would also seem necessary in order to offer meaningful assistance to policy makers as to how to conduct the analysis of "legal feasibility" with respect to compliance with fundamental rights (p. 38). Finally, the references to the rights to privacy and personal data protection included in the list of proposed "key questions" on pp. 43-44 should be elaborated and clarified.

Providing more substantive guidance to policy-makers becomes even more pressing when one considers the complexity of many legislative files, as well as the impact of

¹ For further guidance on how to analyse impacts on privacy and data protection, see for instance section 4 of the Policy paper referenced in footnote 2 below.

information technology on modern society. Indeed, there are hardly any legislative proposals nowadays which do not imply some form of automated data processing, from e-government applications to large-scale IT systems. In this context, we refer to the recent policy paper *"The EDPS as an advisor to EU institutions on policy and legislation: building on ten years of experience"*² which explains how the EDPS conducts its analysis in the context of providing advice to the Commission and to the other EU institutions on the basis of Articles 28(2), 41 and 46(d) of Regulation 45/2001³. We hope that the manner to analyse compliance with Articles 7 and 8 of the Charter proposed therein will also be useful to your services in further elaboration of the draft Impact Assessment Guidelines. Furthermore, specific guidance on how to assess the impact on individuals of proposals involving the use of an IT system processing personal data is in EDPS' plans.

Finally, allow me to reiterate that the strategic objective of the EDPS is to ensure that both the European Commission, as most frequent initiator, and the European Parliament and the Council as the co-legislators are aware of data protection requirements and integrate data protection in new legislation. To this end, we are ready to conclude a Memorandum of Understanding with the three main institutions which would set out how in practice we can add value in the EU legislative process through exercising our advisory role.

The EDPS remains at your disposal to discuss and assist your staff with developing and improving policies, including the proposed draft Impact Assessment Guidelines, to ensure that the data protection and, more broadly, fundamental rights aspects are adequately taken into account.

Yours sincerely,
Giovanni BUTTARELLI

(signed)

Annex: EDPS policy paper "The EDPS as an advisor to EU institutions on policy and legislation: building on ten years of experience", 4 June 2014

Cc: Ms Marianne KLINGBEIL, Deputy Secretary-General
Ms Mona BJÖRKLUND, Head of Unit "Impact Assessment", SG
Ms Françoise LE BAIL, Director General, DG Justice
Mr Paul NEMITZ, Director, DG Justice
Mr Bruno GENCARELLI, Head of Unit, DG Justice
Mr Philippe RENAUDIÈRE, Data Protection Officer

Contact person: Anna BUCHTA (tel. 02 283 19 10)

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³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.