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Mr Philippe Renaudière
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Dear Mr Renaudière,

On 3 August 2006 you sent a request for cooperation or consultation under Articles 24(b) respectively 46(d) of Regulation (EC) 45/2001 concerning the publication of personal data on the Internet and the applicability or not of Article 9 of the Regulation.

Your questions relate to the judgement of the European Court of Justice of 6 November 2003 (C-101/01) in the "Bodil Lindqvist" case and the possible implications of this judgement for the publication of personal data on the Internet through the Europa website by a controller in a European institution.

Please find attached the replies to the questions you have raised. This should enable you to give appropriate instructions to the Commission Data Protection Coordinators and the relevant controllers.

I am of course available for additional queries, should you need further guidance on these issues.

Best regards,

Peter HUSTINX



Co-operation or consultation under Articles 24(b) respectively 46(d) of Regulation (EC) 45/2001 concerning the publication of personal data on the Internet and the applicability or not of Article 9 of the Regulation.

Questions raised by Commission DPO

1. Whether the judgement is also applicable to the Community Institutions and Bodies under the Regulation (EC) 45/2001, considering that the Lindqvist case was based a) on Directive 95/46 and b) on a publication on a private website which was not intended to be read by the general public?

Article 9 of Regulation (EC) 45/2001 provides that personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient. The regime concerning the transfer of data to third countries in Article 9 of Regulation (EC) 45/2001 is formulated in the same terms as in Directive 95/46/EC. However, neither Article 25 of the Directive, nor Article 9 of the Regulation, defines the concept of transfer to a third country.

The European Court of Justice concluded in the Lindqvist case that "there is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country" (paragraph 71).

According to the Court, "if Article 25 of Directive 95/46 were interpreted to mean that there is transfer [of data] to a third country every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet" (paragraph 69).

The EDPS supports an interpretation of the Regulation which is in line with the interpretation of the Directive. This has been reiterated in numerous prior checking opinions and is supported by the 12th recital in the preamble to the Regulation which promotes "consistent and homogeneous application of the rules for the protection of individual's fundamental rights and freedoms with regard to the processing of personal data". Thus the fact that the Lindqvist case was based on the Directive does not change anything in this respect.

As to the fact that the Lindqvist case concerned a private web site which was not intended to be read by the general public, the Court did not focus on this particularity and its conclusions apply to the loading of information on a publicly accessible internet web site in general. When refusing to apply the regime of transfer of data as provided for in Chapter IV of the Directive to the placing

of personal data on an internet web site the Court was seeking primarily to guarantee the effectiveness of the Community system of protection of personal data. Indeed it would be unrealistic to apply the regime of restriction of transfers to each and every placing of information on an internet site. If an opposite view were adopted, a check would have to be made that all the States to which the data are transferred have an adequate level of protection. It would be enough if only one State did not offer an adequate level of protection for the placing of data online to be prohibited.

The emphasis in the Court's analysis on a publicly accessible website implies that its conclusions do not seem to apply to situations where the Internet is used as a technical platform for closed groups of users. This may particularly be the case for a closed website¹ or an intranet which is only accessible for a defined group of users. The problems with the special regime for the transfer of data to third countries, which are highlighted in the Court's judgement, do not arise in those situations. Article 9 of the Regulation remains therefore applicable in these cases. The nature of the controller – being a private person, a private company or a public body - does not seem to be relevant for the Court's analysis.

2. Whether Article 9 of Regulation (EC) 45/2001 is applicable to a world wide publication of personal data on the Internet, through a public website like Europa, by a Community Institution or Body?

It follows that Article 9 does not apply to the world wide publication of personal data on the Internet, through a public website.

3. Which articles would you consider to be applicable in case you conclude that Article 9 is not applicable for a world wide publication of personal data on the Internet, through a public Website like Europa, by a Community Institution or Body?

The non-application of the regime of transfers of personal data does not mean the absence of a normative framework. As the Court emphasizes in the Lindqvist judgement, "Chapter IV of Directive 95/46, in which Article 25 appears, sets up a special regime, with specific rules, intended to allow the Member States to monitor transfers of personal data to third countries. That Chapter sets up a complementary regime to the general regime set up by Chapter II of that directive concerning the lawfulness of processing of personal data" (paragraph 63). Consequently the placing of personal data on a public website should respect all provisions of the Regulation, except for those relating to transfers.²

Examples drawn from the EDPS Background paper on "Public access to documents and data protection" illustrate this point. The EDPS has taken the view that the publication of the results of a competition organised by EPSO in the Official Journal and on the website of EPSO is not contrary to the data protection legislation as long as EPSO informs candidates during the selection procedure of the public disclosure of their names and provides the possibility for data subjects to opt out on legitimate grounds in compliance with Article 18. The EDPS has stipulated that such disclosure by EPSO is justified by reasons of accountability and may be considered as necessary for the performance of a public task or to comply with a legal obligation as laid down in the public access regulation (Article 5).

Another example mentioned in the Background paper concerns the publication of the name of a petitioner on the website of the European Parliament. The EDPS underlines that consent, as defined in Article 2(h) of the data protection regulation, is obtained for disclosure of the name and petition number in a public meeting and therefore such a limited public disclosure does not

¹ See e.g. CIRCA website on EU-China Tourism Agreement (case 2006-192)

² The same reasoning applies to Articles 7 and 8 which use the same terminology, not compatible with the reality of a publication.

infringe Article 4. However the EDPS underlined that it is not clear to what extent the consent to be mentioned in a general register and minutes of a meeting might lead to unambiguous consent in the terms of Article 5(d) for publication of the names of the petitioner on the website of the European Parliament. The person concerned must therefore be clearly made aware of such a publication and given the opportunity to opt out on legitimate grounds.

The general provision in Article 4.1(a) that "personal data must be processed fairly and lawfully" prevents that publication of personal data on a public website could be used as a pretext to circumvent possible restrictions in the transfer of personal data to third countries. The specific circumstances of a case might warrant a closer analysis in the light of this provision.³ However, this will be a highly exceptional situation, and publications of personal data can therefore continue to take place in practice, without raising further questions, either on the basis of the public access regulation, or in conformity with the general principles of the data protection regulation.

4. In case you conclude that Article 9 is not applicable for a world wide publication of personal data on the Internet, through a public Website like Europa, by a Community Institution or Body, could you please develop:

a - Whether you consider that the EDPS shall be consulted respectively informed, and if YES, under which provisions?

No, the EDPS need not be consulted or informed about such publications. However, the EDPS is available for consultation on any administrative measure designed to ensure that publication of personal data on the Internet takes place with due respect for the Regulation.

b - Whether you consider that there is a need for prior-checking, and if YES, under which provisions?

Publication on the Internet as such does not qualify as processing operation presenting specific risks justifying prior checking under Article 27.1 of the Regulation. Having said this, if a processing operation qualifies for prior checking under Article 27.2 on other grounds, the publication on the Internet will be taken into account as an additional element in the assessment. For example, if the results of a promotion exercise were to be published on the Internet, the processing operation in the context of the promotion exercise would qualify for prior checking under Article 27.2 (b) as it is intended to evaluate personal aspects relating to the data subject. The publication on the internet would be considered as an additional element when assessing compliance with the principles of the Regulation.

Article 27.2 (c) stipulates that are subject to a prior check "processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes". The EDPS underlines that the publication on the Internet does not in itself qualify as a prior checking case under Article 27.2 (c) simply because a website provides for links. Indeed, Article 27.2 (c) aims at preventing data collected for different purposes from being linked together. The risk is that it will be possible to deduce new information from the linkages made between different data, not intended for that purpose, thus diverting the data from the purpose for which they were initially collected. This risk is not necessarily present in the case of a link on a website.

Should a processing operation not qualify for prior checking under Article 27.2, but should the DPO still have concerns relating to the publication on the Internet, he may decide to submit any relevant issue to the EDPS for consultation under Article 28.1 or Article 46(d) of the Regulation.

³ Such as a case in which a closed website is opening up for general use, and personal data are thereby made publicly accessible.