



PETER HUSTINX
SUPERVISOR

President of the Council of the European Union
General Secretariat
Council of the European Union
Rue de la Loi 175
1048 Brussels

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Subject: Various legislative proposals concerning certain restrictive measures with regard to Afghanistan, Syria and Burma/Myanmar

Dear Mr President,

In its letters of 6 May, 19 July, 31 August and 16 September 2011 the Commission consulted the EDPS on various legislative proposals concerning certain restrictive measures with regard to Afghanistan, Syria and Burma/Myanmar.

These legislative proposals, which meanwhile have been adopted by Council and published in the Official Journal¹, provide for the processing of personal data.

The EDPS welcomes the above consultations. We note that the legislative proposals that were sent to us, insofar as provisions relating to data protection are concerned, are similar to the legislative proposals that have already been object of an EDPS opinion. Therefore, we have decided in this case not to issue a new formal opinion and to refer instead to the below mentioned opinions and letters in this area.

As stated in the Opinions of 28 July and 16 December 2009², the EDPS will issue further opinions on proposals for legislation in this area only when those new proposals substantially diverge from the provisions of the proposals on which the EDPS has already issued an opinion. These points were confirmed by our letters of 20 July 2010 and 16 March 2011 on new proposals in this area and were developed in the Opinion of 24 November 2010 on the

¹ Respectively, OJ L 199, 1.08.2011, p.1 (Afghanistan), OJ L 228, 3.9.2011, p. 1 (Syria) and OJ L 281, 28.10.2011, p. 1 (Burma/Myanmar).

² Respectively, OJ C 276, 17.11.2009, p. 1 and OJ C 73, 23.03.2010, p.1.

Communication from the Commission to the European Parliament and the Council - "The EU Counter-Terrorism Policy: main achievements and future challenges".

However, we would like to address two relevant issues after analysing the proposals and adopted Regulations with regard to Afghanistan, Syria and Burma/Myanmar.

The first issue concerns the fact that the proposals of the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy have been substantially changed by the Council in the part relating to the data protection safeguards.

We regret to see that the Council Regulations adopted on Syria³ and Afghanistan⁴, which in the text initially proposed by the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy included important references to data protection rules, have been significantly weakened by the Council on the following points:

- the adopted Regulations do not designate a controller as was initially proposed; introducing this designation within all legislative acts in this area would be an important step to clarify the responsibility for data processing, also with a view to prior checking under Article 27 of Regulation 45/2001;
- the procedure for data subjects to contest the listing is less precise than was foreseen in the proposals and no longer mentions that the results of a review shall be forwarded to the UN Sanctions Committee (see e.g. Article 11 of the proposal and the adopted Regulation on Afghanistan);
- the inclusion of new data subjects on the list following a decision by the UN Security Council or the Sanctions Committee is no longer dependent on the provision of a statement of reasons as was foreseen in the proposal on Afghanistan.

Furthermore, all three proposals included provisions which established:

- that data on family members of listed persons may not be entered unless necessary for the sole purpose of identifying the listed natural person;
- a reference to the list of data processing activities carried out under the Regulation.

Those provisions have been removed.

In the light of the above considerations, it seems that there has been an almost automatic deletion by the Council of those parts of the proposals of the Commission and the High Representative which address data protection under the current framework on restrictive measures, despite the fact that the need to improve the procedure and the safeguards available to listed individuals has been confirmed by the General Court in the "Kadi II" case.⁵ We strongly recommend to the Council to reflect on how to better strengthen the data protection safeguards as required by the EU legislation and act accordingly.

In this context, we also mention the fact that we are currently analysing a Commission notification for prior checking related to the processing of personal data in connection with regulations requiring asset freezing as Common Foreign and Security Policy (CFSP) related

³ Council Regulation no. 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria.

⁴ Council Regulation (EU) No 753/2011 of 1 August 2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan.

⁵ Judgment of 30 September 2010 in case T-85/09 Kadi v. Commission, see in particular par 157, 177 and 181.

restrictive measures. The analysis carried out in that context is based on the same data protection requirements mentioned in this letter.

The second issue concerns the need for the EU legislator to consolidate the current framework on restrictive measures also with a view to data protection safeguards.

We consider that it is high time - also in consideration of the increasing use of this kind of instruments - for the EU legislator to address in a detailed, comprehensive and consistent way the issue of data protection in relation to restrictive measures, in order to enhance the protection of fundamental rights, as well as the legal certainty and the effectiveness of the measures taken.

We strongly reiterate the recommendation to the European Commission, the High Representative of the Union for Foreign Affairs and Security Policy and to the Council to abandon the current piecemeal approach - with specific data protection rules for each country or organisation - and to develop a general and consistent data protection framework for restrictive measures, ensuring respect of fundamental rights, and in particular of the fundamental right to the protection of personal data.

In this perspective, we look forward to significant developments in this area, and in particular to the new framework of administrative measures in the area of restrictive measures on the basis of Article 75 TFEU, as envisaged by the 2012 Commission Work Programme,⁶ as well as possible developments regarding a general data protection framework based on Article 215 (3) TFEU.

In the meantime, we remain available to offer the EDPS expertise and to provide any further advice you may need.

This letter has also been sent to the President of the European Commission, the President of the European Parliament and the High Representative of the European Union for Foreign Affairs and Security Policy.

Yours sincerely,

(signed)

Peter HUSTINX

Cc: Mr Uwe Corsepius, Secretary-General
Mr Jan Tombinski, Ambassador, Head of Polish Permanent Representation

⁶ Item 59 of Annex I to the Commission Work Programme 2012.