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Ms F. LE BAIL  
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Dear Ms Le Bail,

On 20 September 2011, the Commission provided us with a copy of the Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law'. As data protection has been indicated as a harmonised area in which the potential role of criminal law could be further explored, we would like to use this opportunity to share with you some further reflections.

The Communication sets out the framework for the further development of an EU criminal policy, based on Article 83(2) TFEU. This provision allows the EU to establish 'minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'. For some policy areas it has been established that criminal law measures at EU level are required, while other areas are mentioned as needing further exploration, such as data protection.

That data protection is mentioned here is in line with what has been stated earlier in the Commission Communication 'On a comprehensive approach on personal data protection in the European Union' which announces a revision of the current data protection framework. In pt. 2.1.7 of that Communication, the Commission announces that it will 'assess the need for strengthening the existing provision on sanctions, for example by explicitly including criminal sanctions in case of serious data protection violations, in order to make them more effective'.

At present, under Directive 95/46/EC, it is left to the discretion of the Member States whether to impose criminal sanctions on breaches of the data protection rules (see Article 24 of Directive 95/46/EC). The ePrivacy Directive 2002/58/EC (as amended by Directive 2009/136/EC) is more explicit, requiring the Member States in Article 15a to lay down rules on penalties 'including criminal sanctions where appropriate' applicable to infringements of the national provisions adopted pursuant to Directive 2002/58/EC.

There is no recent overview of how the 27 EU Member States have implemented Article 24 of Directive 95/46/EC and Article 15a of Directive 2002/58/EC and how these national rules are applied in practice. The most recent overview of the implementation of Directive 95/46/EC was provided by the Commission in the 'First report on the implementation of the Data Protection Directive', which dates back to 2003.<sup>1</sup> From the technical annex to this report it followed that all the laws of the, at that time, fifteen EU Member States contained extensive penal provisions, making most actions contrary to the data protection law a criminal offence, punishable by fines or, in serious cases even by imprisonment.<sup>2</sup> The annex subsequently underlined the procedural differences that existed between the Member States, but did not clarify where the differences lay in substance. It was also not clear from the report whether the criminalisation of breaches of data protection rules was generally considered an effective means to ensure the full implementation of the data protection rules.

We believe that the further exploration of the potential role of criminal law as a necessary tool to ensure effective enforcement of data protection rules requires a thorough investigation into the added value of criminal enforcement of data protection rules, based on the practical experience gained in the Member States. Therefore, we welcome the announcement on p. 7 of the Communication that a thorough analysis will be made in the Impact Assessment preceding any legislative proposal, including, for instance, an assessment of whether Member States' sanction regimes achieve the desired result.

In this respect, it is relevant to note that the Fundamental Rights Agency, in its annual working programme 2012, announces that a study will be conducted on the redress mechanisms for data protection and their use. Although Article 24 of Directive 95/46/EC is not explicitly mentioned, it seems that the issue of criminal enforcement of data protection rules and its possible relation with other mechanisms could be part of the investigation.

The issue of the effectiveness of data protection rules is one of the main incentives for amending the current data protection framework. It follows from the Communication 'On a comprehensive approach on personal data protection in the European Union' that many means other than enforcement through criminal law are envisaged which aim at enhancing the effective implementation of the data protection rules. This is to be achieved, for instance, through strengthening the rights of data subjects, reducing the administrative burden on controllers and through strengthening the institutional arrangements for better enforcement of the rules in which the national Data Protection Authorities play an essential role. An assessment of the extent in which the use of criminal law is essential for the effective implementation of data protection rules, should be made with a view to this wider context.

We do see the potential benefits of aligning the minimum standards for criminal sanctions for cases of serious breaches of certain data protection provisions. Therefore, we welcome the fact that data protection is mentioned in the Communication as an area which will be further explored. We encourage the Commission to conduct the thorough analysis it announces and to place this analysis in the light of the wider discussion on the revision of the data protection framework.

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<sup>1</sup> First implementation report of 15 May 2003, COM(2003)265.

<sup>2</sup> See the Technical Annex at p. 30.

We will closely follow further developments and hope to provide you with more specific input at a later stage.

Yours sincerely,

**(signed)**

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