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ASSISTANT SUPERVISOR

Ms Cecilia MALMSTRÖM  
Commissioner for Home Affairs  
European Commission  
B-1049 Brussels

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Dear Ms Malmström,

On 20 March 2012, the Commission consulted the EDPS on the proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union ('the proposal').

The present proposal is closely linked to a draft proposal for a regulation on strengthening the mutual recognition of freezing and confiscation in the area of serious crime. Both the draft proposal for a regulation as the proposal for a directive were - before adoption - sent to the EDPS at an earlier stage as a package including also a joint chapeau communication entitled "Crime must not pay towards more effective recovery of criminal assets in the EU". The EDPS commented on the package as a whole. Given that the proposal for a regulation is the most relevant instrument as regards the protection of personal data, and has not been adopted yet, we look forward to be consulted on it when being adopted by the Commission.

Although the current proposal for a directive does not directly involve the processing of personal data, we find it appropriate and useful to draw your attention to some aspects related to the impact some provisions may have on data protection when being implemented at national level. We wish to emphasise that our analysis is restricted to data protection aspects. We have not assessed whether the provisions contained in the proposal are in conformity with other fundamental rights.

We welcome the general reference to the right to protection of personal data in the explanatory memorandum and recital 18 of the proposal. However, we note that neither the proposal nor its impact assessment analyse the impact of the proposed measures on the protection of personal data.

The proposal determines purposes which will involve the gathering and processing of personal data. For instance Article 4 of the proposal provides courts with extended powers of confiscation which go beyond the direct proceeds of a crime, and includes property in question has been derived by the convicted person from for "similar criminal activities". This

power raises the question by which means and through which procedures or proceedings the information on similar activities will be collected.

The same question arises with regard to Article 6 which requires that confiscation of proceeds of crime which were transferred to third parties should be available under certain circumstances. How and which categories of data related to the third party will be gathered and processed? Another example can be found in Article 5 which introduces the non-conviction based confiscation in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. How, for instance, will the data related to the illness of a person be collected and assessed?

The proposal would benefit from further clarification on these matters and should at least make clear that when implementing these provisions, Member States have to define the conditions for the processing of personal data that were collected for other purposes, in compliance with the right to data protection as contained in Article 8 of the Charter of Fundamental rights.

Our services remain available, should you need any clarification in relation with this letter.

I have sent the same letter to Ms Viviane Reding, Vice-President of the European Commission, as well as to the Presidency of the Council and the rapporteur in the European Parliament, Ms Monica Luisa Macovei.

Yours sincerely,

**(signed)**

Giovanni BUTTARELLI

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