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SUPERVISOR

Mr R. MADELIN
Director-General CONNECT
European Commission
B-1049 Brussels

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Dear Mr Madelin,

Since July 2012, we have been following the public consultation launched by the Commission in which it sought input from citizens, organisations, public authorities and all stakeholders potentially engaged or interested in self- and co-regulation and other multi-stakeholder voluntary actions in the EU on how best to codify a set of design principles for achieving objectives through a multi-stakeholder process. In November, the results of the consultation were published on the Commission website.

We welcome the initiative towards a code for self- and co-regulation as an important tool, in particular to facilitate compliance with the legislation and policy of the Union and the Member States. In the area of data protection, various tools are being developed by private stakeholders, in close cooperation with public authorities, in order to ensure that the organisations responsible for data processing can be effectively held accountable for compliance with the law. Furthermore, the proposed new data protection regulation (COM (2012) 11 final; Article 38 of the proposal) provides that the Member States, the data protection authorities and the Commission encourage the drawing up of codes of conduct intended to contribute to the proper application of the law. These are two examples of how self-regulation could be linked to public policies. In our view, these examples could be taken into consideration when a code will be further developed.

Another element which in our view should be further developed is the link with legislation, in particular where the protection of fundamental rights is involved, as is the case with data protection. It should be ensured, where possible, that self- and co-regulation effectively contributes to the respect of the law, and in particular of fundamental rights, and that it, for instance, provides for effective redress mechanisms, mainly in cross border situations which often exist in on line environment.

We note that several stakeholders drew the Commission's attention to the role of public authorities in this context. On page 3 of the Overview of the results, it is indicated that 20 participants requested clarification on the role of public authorities in the envisaged specific action. There is a need, as stated in the same document, for greater clarification on powers and

responsibilities of public actors, especially when there is a *de facto* delegation of powers to private actors in a context of co-regulatory processes.

It is precisely this point which triggered the specific attention of the EDPS. The issue of self- and co-regulation indeed raises questions about the role of public authorities. Especially in case fundamental rights are at stake, there should be no doubt about the responsibilities of the government. Obviously, clarity as to the scope of such responsibilities should not disappear in soft-law constructions with vague boundaries between private and public actors.

The lack of clarity about the role of public authorities in self- and co-regulation is a general fundamental rights concern, but also relates more specifically to the right to data protection. For instance, the voluntary introduction of private enforcement mechanisms played a key role in the discussions surrounding the heavily criticised ACTA agreement. In our Opinion on the ACTA agreement of 24 April 2012, we have explained our serious concerns as to such form of self-regulation.¹

We encourage the Commission, when further developing this matter, to take due account of the fundamental rights aspects and concerns which the issue of self- and co-regulation raises.

We hope to be appropriately informed and involved in the matter. Furthermore, with a view to the implications for fundamental rights in general, we would recommend the Commission to see how the Fundamental Rights Agency could be involved in the thinking process as well.

Yours sincerely,

(signed)

Peter HUSTINX

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¹ The Opinion of 24 April 2012 can be found at the EDPS website (www.edps.europa.eu under 'consultation'), see in particular Section IV.3.