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correspondence

Subject: Prior-checking notification regarding the Video-surveillance Policy adopted by the European Parliament (EP) on 20 April 2013 (case 2013-0471)

Dear Mr Thomann,

On 30 April 2013, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Parliament (EP) a notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the video-surveillance system at the EP as laid down in the EP's Video-surveillance Policy ("the Policy") adopted on 20 April 2013. The EDPS had previously been informed of the adoption of the Policy by a letter by the EP's Deputy Secretary General of 26 April 2013. The EDPS received a revised notification template and some annexes on 27 November 2013 and a comprehensive version of the revised notification including all relevant annexes on 13 December 2013.

The EDPS welcomes the adoption of the EP's Video-surveillance Policy ("the Policy") as a milestone in achieving compliance with the recommendations made in the Video-Surveillance Guidelines¹ (henceforth: "Guidelines") issued by the EDPS in March 2010, as these Guidelines requested that EU bodies and institutions bring their existing practices in compliance with these Guidelines by 1 January 2011.

¹http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-03-17_Video-surveillance_Guidelines_EN.pdf.

In the light of the notification in the version notified on 13 December 2013, the EDPS will highlight only those EP practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines and will restrict his legal analysis to those practices. In the light of the accountability principle guiding his work, the EDPS would nonetheless want to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place in the frame of the video-surveillance system at the EP.

Section 4.3 of the Guidelines outlines the situations in which the EDPS considers that a prior checking notification under Article 27 of the Regulation is required to assist the relevant institution in establishing additional data protection safeguards in cases where its activities go beyond the standard operations for which the Guidelines already provide sufficient safeguards. The situations referred to in Section 4.3 of the Guidelines include inter alia the use of covert surveillance. As noted in the notification submitted and in Section 4.4 of the Policy, the EP intends to use "*in rare cases and with no link whatsoever to the CCTV system, ...for limited periods of time stand-alone covert surveillance during internal investigations*" as foreseen in Section 6.11 of the Guidelines. The processing operations under examination are thus subject to ex-post prior-checking in conformity with Article 27 of the Regulation.

However, as has been highlighted by the EDPS upon publication of the Guidelines², only in exceptional cases will the prior-checking be comprehensive and cover *all* aspects of a video-surveillance system. In most cases, the EDPS will *not* comprehensively review all aspects of the institution's video-surveillance practices. Instead, as in the case at hand, the EDPS will usually focus his recommendations on those aspects of video-surveillance which differ from, or are in addition to, the common practices and standard safeguards set forth in the Guidelines.

1. Proceedings

The procedure was notified for prior checking under Article 27 of the Regulation on 30 April 2013. Additional information was requested from the EP's DPO on 2 May 2013 and received on 23 May 2013. The case was suspended between 2 May 2013 and 23 May 2013 and again between 16 July 2013 and 28 November 2013 (i.e. a total of 155 days). A meeting at services' level took place on 18 September 2013. The two months deadline under Article 27(4) of the Regulation was extended by another two months for reasons of complexity on 3 December 2013. The EDPS received a revised notification template and some annexes on 27 November 2013 and a comprehensive version of the revised notification including all relevant annexes on 13 December 2013. According to Article 27(4) of the regulation, the present Opinion must be delivered within a period of two months, that is no later than 3 February 2014.

2. Use of covert surveillance

Facts

According to Section 4.4 of the Policy "*No ad hoc surveillance operations are foreseen within the framework of the CCTV system... However, in rare cases and with no link whatsoever to the CCTV system, the EP may use, for limited periods of time, stand-alone covert surveillance during internal investigations... These cameras are placed only under strict conditions guaranteeing a minimum impact on privacy. A prior checking notification to the EDPS..., including the specific procedures to be followed and additional data protection safeguards*

² See "Frequently asked questions on video-surveillance: prior checking", Section 5, available under http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-03-17_FAQ_videosurveillance_EN.pdf.

that have been implemented, will be included in Annex 9. In case of doubt concerning data-protection issues for specific cases, the DPO will be consulted".

Draft Section 4.4 of the Policy (as notified on 13 December 2013) foresees that "No ad hoc surveillance operations are foreseen within the framework of the CCTV system. However, in rare cases of regular intrusion, theft, or other severe security infringements, and with no link whatsoever to the CCTV system, the EP may use, for limited periods of time, stand-alone covert surveillance during internal investigations. In order to minimise the impact on privacy, these cameras are placed only under strict conditions: following an official written request by the person responsible for the area, a risk and impact assessment of placement (guaranteeing that the risk level outweighs the impact on privacy), and prior written authorisation by the Director for Security and Risk Assessment. Maximum time for placement of such cameras is one month, after which the aforementioned procedure must be repeated.

Once placed, such cameras will record only during predefined times and use motion detection. The images will be watched only by the EP officials in charge of the investigation. Relevant images are securely stored along with the investigation for up to ten years, while all other images are immediately deleted.

After conclusion of the investigation, people who have been identified on images relevant for the investigation are notified. In case of criminal offences or threats to other parties, data may be transferred to security services of other EU Institutions or to relevant national authorities. Such transfer is subject to a rigorous assessment of the necessity and to prior approval by the Director for Security and Risk Assessment. A data protection form is signed by the receiving party."

Draft Section 3 of the Policy (as notified on 13 December 2013) additionally clarifies that "*In principle, we do not monitor any areas of heightened expectations of privacy such as individual offices or leisure areas, except in very rare cases and under strict conditions, as described in section 4.4. Areas with very high expectations of privacy, such as toilet facilities, are never monitored"*.

According to the notification (as notified on 13 December 2013), "*In rare cases of irregular intrusion, theft, or other severe security infringements (reported by the person(s) responsible for an area or officials of the Directorate General for Security), the temporary placement of a discrete, stand-alone camera may be authorised for placement in an area where normally there is no camera present, such as an office or a storage room, as part of a formally-opened investigation.*

Such discrete stand-alone cameras will only be placed following an official written request by the person responsible for the area, and following prior written authorisation by the Director General for Security. Such cameras are completely unrelated to each other and not connected to the CCTV system. A camera will never be installed in areas with very high expectations of privacy, such as toilet facilities."

The specific procedures to be followed are outlined in additional documents ("implementing documents"):

A document entitled "*Discrete Cameras for Investigations in the European Parliament*", which was submitted as annex 1 to the initial notification and again as part of the revised notification of 13 December 2013, stipulates that the "*Use of these cameras only occurs as a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences and/or the public security of the Institution and the Host Countries...*" and that the "*Placement of the discrete cameras is subject to the following procedure:*

(...)

Once the camera is in place and after it has been removed, additional rules apply: ...

(...)

The additional information provided on 23 May 2013, which consisted of a main text, an Impact Assessment (Annex I) and an attached form entitled "*Risk Analysis & Impact of Placement of Discrete Camera*", clarified the following aspects:

(...)

Legal analysis

As highlighted in Section 6.11 of the Guidelines, "*The use of covert surveillance is highly intrusive due to its secretive nature. Further, it has little or no preventive effect and is often merely proposed as a form of entrapment to secure evidence. Therefore, its use should be avoided*". Under the same Section of the Guidelines, proposed exceptions must be accompanied by a compelling justification, an impact assessment and must undergo prior checking by the EDPS who may impose, as necessary, specific data protection safeguards.

In that regard, the EDPS welcomes the Impact Assessment provided on 23 May 2013 as Annex I of the additional information and the fact that an "ad hoc risk and impact analysis" will be carried out in each case by filling out a form ("*Risk Analysis & Impact of Placement of Discrete Camera*").

a) Investigation of a sufficiently serious criminal offence

The Guidelines stipulate that covert surveillance should be used to investigate "*a sufficiently serious criminal offence in a formal, legally required or authorised, investigation...*".

The EDPS would like to recall that it is relevant to establish, with regard to the principle of proportionality of processing operations (Article 4(1)(c) of the Regulation), what type of internal/external allegations and evidence may lawfully trigger covert surveillance (in particular, what allegations and evidence may support a reasonable suspicion of a sufficiently serious criminal offence to be investigated).

The EDPS appreciates the selective approach taken in the notification as well as the draft Section 4.4 of the Policy, which limit the use of covert surveillance to "*rare cases of regular intrusion, theft, or other severe security infringements*".

b) Decision-making body

Under the Guidelines, the use of covert surveillance must be in accordance with the law and should be formally authorised by (i) a judge or other official having the powers to do so according to the laws of the Member State which requested the use of covert surveillance within the Institution, or by (ii) the competent senior decision-making body of the Institution according to the written and publicly accessible policy of the Institution relevant to the use of covert surveillance (e.g. a high level executive board).

The EDPS notes that no reference is made in the Policy or the other documents submitted with the notification to a formal authorisation by a judge (or other official having the powers to do so according to the laws of the Member State) *who requested the use of covert surveillance* within the Institution. Should the EP wish to avail itself of covert surveillance also under these circumstances, the EDPS suggests mentioning this in the Policy.

c) Retention period

According to the notification, the EP differentiates between images which are relevant for an investigation and those that are not.

The Impact Assessment provided on 23 May 2013 as Annex I to the additional information notes that "*Any images that are irrelevant to the investigation should immediately be deleted. Images should be checked for relevance (and deleted when irrelevant) at least once per week*" (emphasis added).

According to the notification, the use of covert surveillance is limited to "*rare cases of regular intrusion, theft, or other severe security infringements*" and (see above Section 2 a)) should be clearly limited to the investigation of sufficiently serious and clearly circumscribed criminal offences.

In line with this purpose, the EDPS would encourage the EP to check the images of such an investigation as soon as possible, followed by an immediate decision of relevance and deletion where appropriate.

4. Conclusions

The EDPS recommends that the EP adopts specific and concrete measures to implement the above suggestions, reminders and recommendations regarding the EP's Video-surveillance Policy. The EDPS invites the EP to attach this Opinion to its Policy and to include a reference to it in the Policy.

As concerns the suggestions and reminders mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the Guidelines and receive the requested information.

To facilitate our follow-up, it would be appreciated if you could provide the EDPS with all relevant documents within three months of the date of this letter which prove that all recommendations and reminders have been implemented.

Kind regards,

(signed)

Peter HUSTINX

cc.: Mr Secondo SABBIONI, DPO European Parliament