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SUPERVISOR

Mr Alberto COSTA
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Subject: Presidency work programme and the protection of individuals with regard to the processing of personal data and the free movement of such data.

Dear Mr Costa,

I am writing to you in advance of Portugal taking over the Presidency of the Council of the European Union on 1 July 2007 in order to raise two concerns in relation to data protection and to make a practical proposal for a common approach which I would hope we can address at the start of your Presidency.

My first concern is that more and more statements are being made by leaders and representatives of Member States which seem to suggest that rights afforded by privacy and data protection legislation are viewed as incompatible with security and justice in the face of the threats posed by international terrorism. A message such as: "No right to privacy until life and security are guaranteed" is developing into a mantra suggesting that fundamental rights and freedoms are a luxury that security cannot afford. In fact, this could also be inferred from a similar statement made at the latest G6 summit in Venice by the Vice President of the European Commission, Mr Franco Frattini. At the same meeting, the Home Secretary of the United Kingdom, Dr John Reid, called for human rights law to be rewritten, stating that "The right to security, to the protection of life and liberty, is and should be the basic right on which all others are based".

This position could be potentially dangerous and may produce more problems than it seeks to solve. Not only does it reveal a lack of understanding of the current framework of human rights in general, and data protection legislation in particular, which both enable proportionate measures that are necessary for public security or defence, it also ignores the lessons learned about the abuse of fundamental rights from dealing with terrorism within Europe's borders over the last 50 years. There should be no doubt that effective anti-terror measures can be framed within the boundaries of fundamental rights. It is these rights that need to be protected under all circumstances in a democratic society. In the past examples can be found in different parts of Europe where the failure to protect fundamental rights has served as source of continued unrest rather than ensure safety and stability.

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My second concern is that the relationship between the Council of the European Union and the European Data Protection Supervisor needs further improvement, on top of the already developed and well-functioning working relationship between my office and the Secretariat General of the Council. It has been seen recently, through the implementation of the Counter Terrorism Action plan and the Council Resolution on data exchange on third country nationals expelled due to behaviour linked to terrorist activity, that, in some cases, Council initiatives are being implemented without sufficient consideration of the data protection implications. These initiatives could have been more effective with appropriate and timely involvement of the EDPS. If the Commission adopts a proposal for legislation which may have an impact on the protection of personal data, it is obliged under existing European law to submit this proposal for consultation (Article 28.2 of Regulation 45/2001). The Commission has followed this approach also for instruments in the Third Pillar of the European Union, which I have very much welcomed. However, a similar practice has not developed in the case of Council initiatives. Therefore, I would suggest that we explore in close cooperation the possibilities of improving our current working methods.

In effect, I want to ensure that data protection is regarded as a condition for the legitimacy - and indeed also for the success - of any new initiative in this field, and demonstrate the benefits of effective data protection for security and law enforcement across Europe.

In my view, it would be useful to discuss my concerns with you in greater detail, and I therefore suggest arranging a date for a meeting with you and members of your Staff. This meeting would also provide the opportunity to discuss some of the issues you will be inheriting during the Presidency, relating to data protection. In this context, I suggest including issues in the Third Pillar, such as the Data Protection Framework Decision, issues in the First Pillar, such as the ePrivacy Directive, the November Conference on RFID or the activities of the Council Working Group on Data Protection, and issues which have aspects of both First and Third Pillar activity, such as the transfer of Passenger Name Records to the United States. If more convenient for you, I would be able to attend a meeting in Lisbon.

I look forward to hearing from you.

A similar letter has been sent to your colleague, Mr António Costa, Minister of State and for Internal Administration. Copies of both letters have been sent to the Vice President of the European Commission, Mr Franco Frattini, to the Chairman of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, Mr Jean-Marie Cavada, to the Secretary General of the Council of the European Union, Mr Javier Solana and to the Permanent Representative of Portugal, Mr Álvaro Mendonça E Moura.

Yours sincerely,

Peter HUSTINX

cc: Mr Franco Frattini, Vice President of the European Commission
Mr Jean-Marie Cavada, Chairman of the Committee for Civil Liberties, Justice and Home Affairs of the European Parliament
Mr Javier Solana, Secretary General of the Council of the European Union
Mr Álvaro Mendonça E Moura, Permanent Representative of Portugal