

**CONFERENCE
OF THE REPRESENTATIVES
OF THE GOVERNMENTS
OF THE MEMBER STATES**

Brussels, 3 September 2007

CIG 9/07

COVER NOTE

from: Presidency of the IGC

to: Delegations

Subject: **IGC 2007**

Letter from the European Data Protection Supervisor, dated 23 July 2007

Attached will be found the letter from the European Data Protection Supervisor, received on 25 July 2007.



EUROPEAN DATA
PROTECTION SUPERVISOR

PETER HUSTINX
SUPERVISOR

SECRETARIAT DU CONSEIL
DE L'UNION EUROPÉENNE

SCE77 7674

RECHUE 25.07.2007

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M. VERNHES

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The Presidency of the Intergovernmental
Conference,
c.o. Secretariat-General of the Council of the EU
Rue de la Loi 175
B-1048 Brussels

Brussels, 23 July 2007
PH/HH/ab D(2007) 1194 C 2007-0476

Dear Mr President,

Today, the Intergovernmental Conference (IGC) which has been asked by the European Council to draw up a Reform Treaty started its activities. I noticed that with the start of the IGC a first draft has also been presented for a Treaty amending respectively the Treaty on the European Union and the Treaty establishing the European Community ("Reform Treaty"). Equally, first drafts of Protocols and Declarations have been presented.

The draft of the Reform Treaty includes provisions on data protection. Two declarations are also dedicated to this subject.

In the first place, I would like to use the occasion to congratulate you with the impressive amount of work that has already been done in this short time-frame.

In the second place, I find it useful to present you some suggestions aiming to even further improve the provisions and declarations on data protection. You will find my suggestions, where necessary accompanied by a short explanation in the annex to my letter. The suggestions relate to my mission to advise Community institutions and bodies and data subjects on all matters concerning the processing of personal data. They are of a merely technical nature and stay within the limits of the mandate for the IGC as provided by the European Council in the conclusions of its meeting of 21-23 June.

My suggestions relate to the proposed Article 24 of the Treaty on the European Union, the proposed Article 21 ter on the Treaty on the Functioning of the European Union, as well as to

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the Declaration on personal data protection in the areas of police and judicial cooperation in criminal matters.

The Declaration on the provision on data protection in the Charter of the Fundamental Rights of the Union speaks for itself and does not lead to any comments from my side.

Finally, it goes without saying that I am available for questions and/or further discussions on these suggestions. I have sent a copy of this letter to the President of the Commission and the President of the European Parliament.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. HUSTINX', with a stylized flourish at the end.

Peter HUSTINX

Annex: 1



Data protection under the Reform Treaty.

A. In the EU-Treaty: Article 24 (a specific provision on data protection for the area of the Foreign Common and Security Policy).

TEXT PROPOSED BY PRESIDENCY:

[...] the Council shall adopt the rules relating to the protection of individuals with regard to the processing of personal data by Member States when carrying out activities which fall within the scope of this Title, and relating to the free movement of these data. Compliance with these rules shall be subject to the control of independent authorities.

SUGGESTION EDPS:

Article 24 only refers to activities of the Member States, not of activities of the Union. It should also apply to activities of the Union, for instance if the Council at a certain stage will process a terrorist list.

B. In the Treaty on the Functioning of the European Union: Article 21ter

TEXT PROPOSED BY PRESIDENCY

1. Everyone has the right to the protection of personal data concerning him or her.

2. The European Parliament and the Council shall, in accordance with the normal legislative procedure, lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules foreseen in Article [...].

SUGGESTION EDPS:

The article should take into account that now on the basis of the current text of Article 286 EC the EDPS has been established, as competent supervisor of the processing of personal data by Union institutions under EC law. It would be logical, also for reasons of legal clarity, to bring the text of the Treaty up to date and recognise the EDPS in the text of the Treaty. Such a textual change would fall within the Mandate of the IGC.

The second sentence of Article 21ter.2 (new) could therefore read as follows:

"Compliance with these rules shall be subject to the control of the European Data Protection Supervisor and other independent authorities".

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C. Declaration on personal data protection in the areas of police and judicial cooperation in criminal matters.

TEXT PROPOSED BY PRESIDENCY

The Declaration on personal data protection in the areas of police and judicial cooperation in criminal matters proposed by the Presidency states that specific rules in these areas may be necessary because of the specific nature of these domains.

SUGGESTION EDPS:

According to the EDPS, the declaration proposed by the Presidency is too general and does not give enough guidance for the legislator of the European Union. The EDPS suggests including a declaration with the following elements:

- The 'Reform Treaty' amending the existing Treaties incorporates police and judicial cooperation in criminal matters in the Treaty on the Functioning of the European Union.
- As a consequence, the rules of Directive 95/46/EC and Regulation (Nr.) 45/2001, jointly providing for a general and comprehensive legal framework for the protection of the individual with regard to the processing of his or her personal data should in principle also apply to the processing of personal data in the area of police and judicial cooperation in criminal matters, as explained below.
- It has to be noted that Directive 95/46/EC includes a specific provision laying down that these rules shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.
- This provision is no longer appropriate since it no longer concerns activities which fall outside the scope of Community law. For reasons of legal clarity, this provision will have to be repealed.
- It has also to be noted that the processing of personal data in the area of police and judicial cooperation in criminal matters can require provisions specific to this area. Those specific provisions include safeguards for the data subject as well as exceptions to the protection, in order to reconcile the protection of the data subject with the public interest of the State in criminal matters. It is understood that the European Parliament and the Council shall, on the proposal of the Commission, adopt a proposal for a sector specific directive in this area which will apply in addition to the general directive on the protection of personal data (currently: Directive 95/46/EC) and which aims to ensure the widest possible application of the data protection principles contained in this general directive.
- Similar measures must be taken relating to the processing of personal data by Union institutions, bodies, offices and agencies.

EDPS, 23-07-2007