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Ms Viviane REDING
Vice-President of the European Commission]
European Commission
B-1049 Brussels

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GB/HH/et/D(2011)1571 C 2011-0106

Subject: Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Dear Ms Reding,

I am writing with reference to the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹

The EDPS has not issued an opinion on this proposal, in view of its main substance which has no direct impact on data protection. Nevertheless, we find it appropriate and useful to draw your attention to some aspects relating to the proposal, taking into account that it raises broader issues, which have particular importance for the enforcement of the rights to privacy and the protection of personal data and which may require further reflection in the longer term.

The right to data protection protected under Article 8 of the Charter for the Fundamental Rights and under Article 16 TFEU is a right of the individual, closely related but not identical to privacy and defamation which are explicitly mentioned in Recital 13 and Article 37 of the proposal.

The EU framework for data protection is currently under review and a proposal for a new legal instrument will have to deal with different challenges which are in some way connected to issues of jurisdiction and recognition and enforcement of judgments (for instance, more harmonization, options on applicable law, collective redress, jurisdiction of data protection authorities).

¹ COM(2010) 748 final.

This is why we consider of particular importance to address the relation with the data protection framework in the EU and to facilitate in the future the settlement of cross-border disputes.

The proposal is to be considered without prejudice to existing data protection laws currently implementing Directive 95/46/EC. This is why we do not consider essential at this stage to amend it by introducing a specific clause or safeguard.

However, we recommend further reflections with regard to the proposal and in the longer term after the adoption of the instrument by Parliament and Council, on all the potential implications, in particular in relation to the review of the EU data protection framework.

In connection with such a general reflection on a very complex issue we would like to draw your attention to a few more specific subjects.

Should jurisdictional rules protect the weaker party also in data protection litigation?

One of the main concerns with regard to jurisdiction involving data protection issues is to ensure a fair balance between the rights of the data subject and the organization that processes the data of the data subject (the "controller" in the meaning of Directive 95/46/EC)².

Often, but not always, the data subject is the "weaker party", typically an individual with relatively limited means against a larger corporation or government organization. As such, his or her situation is comparable to the situation of an insured individual vis-à-vis an insurance company; an employee vis-à-vis the employer; or a consumer vis-à-vis a commercial enterprise.

In all these situations the proposal provides specific rules to protect the weaker party and allows him or her to sue and to be sued in his or her home country. The same facilitation and protection of the "weaker party", however, has not been considered in the proposal for data protection lawsuits more generally. This is an issue that may be considered for future reflection and the full range of implications of an eventual specific rule for data protection issues should be comprehensively analysed.

In the meantime, the specific jurisdictional rules in the proposal concerning consumers, employees and insured persons seem to be operative for data protection implications arising in connection with the contractual arrangements (e.g. in case of security breaches leading to loss or unauthorised dissemination of personal data).

The need of a strict interpretation of the 'policy exception' rules

The proposal mentions privacy, defamation, and rights relating to personality as 'public policy exceptions'. We favour a strict interpretation of those exceptions, since there is a risk that the public policy ground will be used to deny recognition of judgments, and thus, ultimately discourage cross-border litigation within the EU.

*The retention of the *exequatur* for privacy issues*

Another problematic point of this exception is the uncertainty regarding its exact scope. It is not clear whether the exception for privacy rights is intended to cover also violations of legal rules for the processing of personal data as provided for in Directive 95/46/EC, and if so, to which extent this may be the case. While the proposal retains

² See Article 2(d) of Directive 95/46/EC.

the exequatur for privacy rights and other rights relating to personality, this exception does not specifically refer to "data protection" issues. Therefore, it is not sufficiently clear whether for "data protection" issues the general rules apply (thus no exequatur is required), or whether data protection will be considered as a subset of "rights relating to personality", and thus, the exequatur requirement will also be retained for all data protection issues. This may create problems of interpretation and will not contribute to the legal certainty that the proposal aims to establish.³

In addition, we recommend that on the basis of a comprehensive overview a more careful approach should be taken with a clear view of the implications that the proposed text might have in relation to existing data protection legislation. Clarification of the exceptions, and their abolishment, is to be considered.

This is even more evident in the perspective of the expected further harmonisation of the EU data protection framework after its review. If a substantive further harmonisation will be realised, there is all the more reason to abolish the exequatur requirement also in this area.

Better align the courts' jurisdiction with the 'competence' of DPAs

The rules relating to the jurisdiction of courts, when deciding data protection matters, as outlined above, are very different from the rules set forth in Directive 95/46/EC to determine the competence of data protection authorities.⁴

Pursuant to Article 28(1) and (2) of Directive 95/46/EC, a data subject may complain to the data protection authority, for example, in the country where he or she is domiciled, with regard to activities of an organization operating out of an "establishment"⁵ of a "controller" located in another Member State. The data protection authority thus seized must cooperate with the data protection authority of the Member State where the controller is established, and may also need to apply a law different from its own.

We encourage further reflection on how to better align these two sets of jurisdictional rules -those applicable to data protection authorities and those applicable to courts deciding in civil and commercial matters- to avoid, whenever possible, that a data protection authority in one Member State, and a court in another Member State would be competent to handle disputes arising out of the same facts.

This is all the more important because the decision of a data protection authority can in principle be challenged in court in the Member State where the data protection authority is located. It would be desirable to minimize the potential overlapping that might arise from courts of different Member States deciding, on one hand, upon the administrative and on the other hand, the civil/commercial/public aspects of the same case.

³ We note that the draft report of the European Parliament's Committee on Legal Affairs also points out that for purposes of legal certainty, it would be better not to have exceptions for privacy-defamation, and collective redress. See draft report, Explanatory Statement, Section 1, page 47.

⁴ For the latter, see Article 28(1) and (6) of Directive 95/46/EC. See also Opinion 8/2010 of the Data Protection Working Party (Working Party 29) on applicable law, adopted on 16 December 2010 (WP 179), in particular, Section II.2.d) on "Applicable law and jurisdiction in the context of the Directive".

⁵ See Article 4(1)(a) of Directive 95/46/EC.

In these perspectives, we look forward to the further developments in this area. In the meantime, we remain available to put at your disposal the EDPS expertise and to provide any further advice you may need.

I have sent these comments to the European Parliament and to the Council as well.

Yours sincerely,

(signed)

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