



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Directorate C: Fundamental rights and Union citizenship  
Unit C.3: Data protection

Brussels, 16 MARCH 2015  
JUST/C.3/AK - ARES(2015)113933E

Mr  
Tobias XXXXXXXXXXXXXXXX  
Freedom not Fear Movement  
XXXXXXXXXXXXXXXXXXXX  
DE - XXXXXXXXXXXXXXXX

**Subject: Resolution to the Commission to make the defense of human rights a top priority**

Dear Mr XXXXXXXXXX,

We acknowledge receipt of the resolution which you sent to President Juncker and with which you seek to make the defense of human rights a top priority. You also ask for the opening of infringements against Member States which continue to indiscriminately retain communication data or whose intelligence services process communications data equally indiscriminately. Mr Juncker asked me to thank you for bringing it to his attention and I am replying on his behalf

Indeed, in times of revelations of mass surveillance particularly the right to data protection together with all the other fundamental rights which you list need to be observed. As you are aware, the Commission has been deeply concerned about media reports on surveillance programmes which appear to enable, on a large scale, access to and processing of data of Europeans.

As regards any fundamental rights issue it needs to be pointed out though that the Charter of Fundamental Rights of the European Union does not apply to every situation of an alleged violation of fundamental rights. According to its Article 51(1), the Charter applies to Member States only when they are implementing European Union law. Moreover, Article 6(1) of the Treaty on European Union states that, "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

The area of national security falls within the competences of national governments, as it is underlined by Article 4 (2) of the Treaty of the European Union and Article 72 of the Treaty on the Functioning of the European Union. In addition, the relevant EU legislation applicable to data protection explicitly excludes from its scope of application processing

operations concerning public security, defence and State security (Article 3 (2) of the Directive 95/46<sup>1</sup> and Article 1 (3) of Directive 2002/58<sup>2</sup>).

This being said, it needs to be pointed out that where a Member State claims non-applicability of EU law due to the national security exemption, this clause in accordance with settled case-law of the Court of Justice will be interpreted strictly<sup>3</sup>. Consequently the Member State which seeks to take advantage of such exceptions needs to prove that it is necessary to have recourse to it in order to protect its essential security interests<sup>4</sup>.

Furthermore, where this clause is being invoked, national authorities and courts need to balance individuals' rights on the one hand with interests of national security on the other hand.

Following the media reports, the Commission has actively followed-up on the allegations. It is, in principle, for national authorities, including data protection supervisory authorities, to ensure the correct implementation and enforcement of EU data protection legislation vis-à-vis public and private bodies in the European Union. However, the Commission, in its role as guardian of the Treaties and in awareness of the gravity of the raised allegations has asked some Member States to clarify the scope of mass surveillance programmes, their proportionality, and the extent of judicial oversight that applies.

In addition, the Commission is closely following a number of on-going developments at European and national level. These include complaints made against the use of the Tempora programme in the cases of Big Brother Watch<sup>5</sup> before the European Court of Human Rights as well as the case of Privacy International and others against British Intelligence and Security agencies before the British Investigatory Powers Tribunal<sup>6</sup>. In the case of Big Brother Watch several non-governmental organisations and private citizens have lodged a complaint against the UK and its alleged use of surveillance programmes in a generic way thereby allegedly infringing the right to privacy as enshrined in Article 8 of the European Convention of Human Rights. In the case of Privacy International the individual parties have claimed infringements of Articles 8 and 10 of the European Convention of Human Rights, with the latter protecting freedom of expression.

Furthermore, a recent decision of the Irish High Court in the case of Maximilian Schrems and Data Protection Commissioner [2013 no 765JR] has raised a number of issues inter alia the question of whether access of personal data on a allegedly mass and undifferentiated basis by security authorities such as the NSA can be compatible with the

<sup>1</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O J L 281, 23.11.1995, p. 31-50.

<sup>2</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37-47.

<sup>3</sup> See e.g. cases C-38/06 *Commission v Portugal*, C-239/06 *Commission v Italy*, C-461/05 *Commission v Denmark*, C-387/05 *Commission v Italy*. See also judgments in 36/75 *Rutili v Minister for the Interior* (paragraphs 26 and 27) and C-54/99 *Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* (paragraph 17).

<sup>4</sup> See cases cited in footnote 3.

<sup>5</sup> See *BIG BROTHER WATCH and others against the United Kingdom*, ECtHR, App. No(s). 58170/13.

<sup>6</sup> For further reference see the website of Privacy international <http://www.privacyinternational.org/node/3>. See also recent decision of the Investigatory Powers Tribunal of 5.12.2014.

right to data protection, as for instance enshrined in Article 8 of the European Charter of Fundamental Rights. In this context the court has decided to make a reference for preliminary ruling for the European Court of Justice. Evidently the Commission will be paying close attention to this procedure.

In summary, the Commission will continue to follow these developments closely and will - also against their background - assess the appropriate steps to be taken in the future.

Yours sincerely,



BRUNO GENÇARELLI