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COVER NOTE

from:	Peter HUSTINX, Supervisor - European Data Protection Supervisor
date of receipt:	22 February 2007
to:	Mr Frank-Walter STEINMEIER, President - Council of the European Union
Subject:	European Parliament resolution on Rome II Proposal

Dear Mr Steinmeier,

I am writing to you concerning the European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II") (9751/7/2006 – C6-0317/2006 – 2003/0168(COD), (hereinafter "the EP resolution"), which was adopted by Parliament in Strasbourg on 18 January 2007, and more precisely, concerning Amendment 15, which deletes Article 1, paragraph 2, point (g)¹ and Amendment 19, which adds a new Article 7a (Violations of privacy and rights relating to the personality).

¹ This Article was introduced by the Common Position (EC) No 22/2006 adopted by the Council on 25 September 2006 (hereinafter "the Council Common Position"). It reads: *"The following shall be excluded from the scope of this Regulation: (...) (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation"*.

A thorough analysis of the implications that both the deletion and the new text would have *vis-à-vis* Directive 95/46/EC² (hereinafter "the Directive") would have been appropriate, but has unfortunately not been possible at this stage due to a lack of time. However, I would like to share with you some doubts and concerns as to the new text incorporated by the EP resolution. Indeed, it could create certain inconsistencies with the Directive.

In the first place, it is not completely clear whether the new Article 7a was intended to cover violations of legal rules for the processing of personal data as provided for in the Directive and related instruments, and if so to which extent this might be the case. The object of the Directive is to protect the fundamental rights and freedoms of natural persons and in particular their right to privacy, with respect to the processing of personal data (Article 1). This implies that there is certainly a relationship with the right to privacy, but not a complete overlap. As you know, the right to the respect for private life and the right to the protection of personal data are dealt with separately in Articles 7 and 8 of the European Charter of fundamental rights. Therefore, it would seem that there are at least different scenarios as to the scope of the new Article 7a in this context.

To the extent in which the new Article 7a would apply to violations of legal rules within the scope of the Directive, it should be noted that it takes a different approach from Article 4 of the Directive as to applicable law. The main rule of the Directive, laid down in Article 4, paragraph 1 sub (a), refers to the national law of the Member State where the "controller" is established. If the "controller" is established in a third country, the national law of the Member State where the equipment used is situated, may be applicable according to Article 4, paragraph 1 sub (c) of the Directive.

² 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, Official Journal L 281 , 23/11/1995 P. 0031 - 0050.

In the second place, there are a number of more detailed concerns as to the only part of Article 7a which explicitly mentions the notion of "personal data". Paragraph 3 of Article 7a reads as follows: *"[p]aragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data"*.

It is not clear whether paragraph 3 was added by the Parliament with a view to:

- preventive measures or prohibitory injunctions against a publisher or broadcaster in the context of personal data handling (if consideration is given to the direct reference to paragraph 2, which would imply that the general connecting factor mentioned in paragraph 1, first subparagraph, might still be of application for other non-contractual obligations arising out of a violation to data protection rules), or
- handling of personal data in general (considering that if the legislator would have wanted to limit the application of paragraph 3 to preventive measures or prohibitory injunctions against a publisher or broadcaster in cases of handling of personal data, a separate paragraph would not have been needed and the reference to personal data could have been added to paragraph 2).

The Justification to Amendment 19, as expressed in the Recommendation for second reading on the Council Common Position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II"), presented by the Committee on Legal Affairs of the Parliament, does not provide for any concrete explanation in this regard. This lack of clarity would create problems of interpretation that will not contribute to the legal certainty that the Proposal is aiming to accomplish.

Moreover, the text of paragraph 3 presents some terminological inconsistencies with Directive 95/46/EC, which may well lead to misinterpretation:

- paragraph 3 refers to paragraph 2, which implies that the connecting factor would be the "publisher or broadcaster" instead of the "controller". This might be appropriate if paragraph 3 would be limited to the handling of personal data in the context of a publication or broadcast, but not if this paragraph would refer to the handling of personal data in general;
- the proposal uses the connecting factor "habitual residence", whereas Article 4.1.a of the Directive speaks about "establishment". These concepts have a different impact, mainly in what concerns natural persons³;
- "handling of personal data" is more restrictive than the concept of "processing" used by the Directive. No explanation is given as to the purpose of such a limitation.

As mentioned before, the interaction between the new Article 7a and Article 4.1.a and c of the Directive should have been analysed, as well as the possible effects that other draft rules would have on this, for instance:

- to what extent Article 27 of the Council Common Position (and also the text as modified by Amendment 24 of the EP resolution) would deprive Article 7a of any sense in data protection cases;
- if this would not be the case, what would be the effect of Article 3 of the Council Common Position (Universal application) in data protection cases.

³ See Article 23 of the Common Position (EC) No 22/2006 adopted by the Council on September 2006.

The uncertainties mentioned above suggest that a more careful approach should be taken in the upcoming legislative instances in order to arrive at a clear view of the implications that the proposed text might have in relation to existing data protection legislation, and also to avoid the potential problems that have been briefly described in this letter.

I have sent a similar letter to the President of the Parliament and the President of the Commission, and remain at your disposal, should you have any question.

(Complimentary close).

(Signed) Peter HUSTINX
