ARTICLE 29 Data Protection Working Party

Brussels, 12/06/2012
Just.c.3(2012)818031

Ms. Cecilia Malmström
Commissioner for Home Affairs
B - 1049 Brussels
Belgium

Subject: **Proposal for a Regulation establishing the European Border Surveillance System (EUROSUR)**

Dear Commissioner Malmström,

On 12 December 2011, the Commission adopted a proposal for a Regulation establishing the European Border Surveillance System (EUROSUR) (the proposal).[1] This proposal is currently under discussion under ordinary legislative procedure.

The Article 29 Working Party (Working Party), the advisory body composed of the data protection authorities of the EU Member States, has followed this file with close attention. In this context, the Working Party would like to make several remarks on the proposal with a view to address some issues that may affect data protection requirements. These comments relate to four issues: the conditions under which EUROSUR may exceptionally process personal data; purpose limitation of the systems to be used to feed EUROSUR; transfers of personal data to third countries; and the role of Frontex.

First, regarding the possible processing of personal data, the Working Party notes that the proposal could be formulated more clearly from a legal point of view. While the explanatory memorandum states that "*EUROSUR is not intended as a system to regulate the collection, storage, or cross-border exchange of personal data*"[2] and that the situational pictures "*will as a general rule not involve personal data*"[3], the proposal leaves room for such exchanges. The

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[1]   COM(2011)873 final
[2]   Explanatory memorandum, p. 3
[3]   ibid, p. 2

Working Party is of the opinion that if similar exchanges are envisaged, even to a limited extent, specific boundaries need to be delineated vis-à-vis the scope and categories of personal data processing, its limited use and retention. While the Working Party welcomes the references to the EU Charter of Fundamental Rights and the applicable legislation on data protection in recitals 6 and 7, it would prefer to see explicit provisions in the active text of the proposal. Currently, the only reference to the applicability of data protection legislation is in Article 18(5) and relates only to third country transfers of data stemming from the common application of surveillance tools. The Working Party strongly advises that an explicit Article on data protection is included, having regard especially to the stated main purpose of the system, which is not to process personal data. Those situations in which this could be exceptionally permitted should be expressly and exhaustively mentioned in this Article, along with references to the applicable legislation.

Second, the Working Party would also like to draw your attention to the fact that some of the systems which are supposed to feed EUROSUR contain personal data, which might not be evident at first sight. For example, vessel monitoring systems can contain personal data relating to the captain or owner of a vessel. In this context, the principle of purpose limitation will also have to be considered - the purposes of these systems are different from those of EUROSUR, demanding an assessment of the compatibility of purposes. Additionally, in relation to the use of surveillance tools, the Working Party seeks clarity on which tools might be used, given that for example video surveillance, depending on the range and resolution of images, may incidentally result in data processing concerning identifiable individuals.

Third, Article 18 of the proposal regulates cooperation with neighbouring third countries. The Working Party stresses that the stringent safeguards for transfers to third countries under Directive 95/46/EC[4] and Regulation (EC) 45/2001[5] (as applicable) apply. This should be given extra weight since many of these neighbouring third countries are not even bound by Council of Europe Convention 108.[6]

Finally, the Working Party would like to see Frontex' role clarified. Articles 6 and 7 of the proposal establish that Frontex shall host EUROSUR's technical infrastructure. However, the Working Party sees that Frontex' role extends beyond pure technical services - it shall also draw up a "*European Situational Picture*" (Article 10) and a "*Common Pre-Frontier Intelligence Picture*" (Article 11). It seems that the raw material collected for these pictures may sometimes contain personal data: Article 18(5) mentions the applicability of Directive 95/46/EC and Regulation 45/2001 to the exchange of information derived from the common application of surveillance tools; page 2 of the Explanatory Memorandum mentions that personal data may only be transferred to Frontex if the conditions of Regulation (EC) 2007/2004 are met, while similar provisions are absent from the active text. The Working Party encourages the EU legislator to clarify this issue in the legislative procedure by clearly setting out under which circumstances Frontex may use personal data contained in EUROSUR. If Frontex is to play a double role as a hosting provider and as a user of the system, this should be clearly set out in the proposal.

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[4] OJ L 281, 23.11.1995, P. 31
[5] OJ L 8, 12.01.2001, P. 1
[6] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS 108

The Working Party will continue to closely follow this file and remains at your disposal for further consultation.

This letter has also been sent to the European Parliament and the Council.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29
Working Party