EUROPEAN DATA PROTECTION SUPERVISOR

GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Jonathan FAULL
Director-General
for Internal Market and Services
European Commission
B-1049 Brussels

Brussels, 27 March 2013
GB/ZB/mk/D(2013)0605 **C 2013-0016**

Subject: European Commission Communication to the EP, the Council, the EESC and the Committee of Regions; Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies (the 'Action Plan').

Dear Mr Faull,

Thank you for the letter of 12 December 2012, in which the Commission informed the EDPS about the Action Plan: European company law and corporate governance–a modern legal framework for more engaged shareholders and sustainable companies (the 'Action Plan'). The EDPS understands that the Action Plan outlines the initiatives that the Commission intends to take in order to modernise the company law and corporate governance framework in Europe.

According to the EDPS, some of the items listed in the Action Plan may have significant relevance for data protection and privacy. As you know, the EDPS considers it very important that the Commission carefully evaluates the impacts and potential risks on data subjects and considers adequate safeguards at an early stage, before it proposes any legislation that may have an effect on data protection and privacy. As part of this evaluation, the EDPS offers his assistance to the Commission and would welcome if -where relevant- the Commission were to informally consult him on specific legislative changes to be adopted following the Action Plan. These may include, in particular, the two action items referred to below.

Relevant action items

One of the three main 'lines of action' is outlined in the Action Plan as follows: 'Enhancing transparency – companies need to provide better information about their corporate governance to their investors and society at large. At the same time companies should be allowed to know who their shareholders are...' (see page 4 of the Action Plan).

Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30
E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu
Tel.: 02-283 19 00 - Fax : 02-283 19 50

- Under this 'line of action', 'Section 2.3 Shareholder identification' appears to be particularly relevant for data protection and privacy. According to this Section, '[t]he Commission will propose, in 2013, an initiative to improve the visibility of shareholdings in Europe as part of its legislative work programme in the field of securities law.' [1]
- Further, Section 3.1 of the Action Plan 'Better shareholder oversight of remuneration policy' can also be relevant. This Section provides, in particular, that the 'Commission will propose in 2013 an initiative, possibly through a modification of the shareholders' rights Directive, to improve transparency on remuneration policies and individual remuneration of directors, as well as to grant shareholders the right to vote on remuneration policy and the remuneration report.'

Section 2.3 on shareholder identification

With regard to this first point, the EDPS reminds that any legislative proposals aimed at 'increasing visibility' of shareholdings must take into due account shareholders' rights to the protection of their personal data and their privacy. In principle, the data protection and privacy safeguards should be developed in accordance with, and should provide no less protection than, similar safeguards adopted for other types of investments and financial dealings, including for the protection of investors' privacy in bank accounts.

For this reason, when proposing new requirements regarding increased transparency of shareholdings, the policy-makers should carefully assess and clearly articulate the public policy objectives sought with such increased visibility and balance these objectives against the risks to shareholders' rights to the protection of their personal data and their privacy. As part of this assessment, it will be particularly important to assess and clearly specify how increased visibility is to be achieved in practice. It will also be important to specify what categories of personal data of shareholders will be recorded, where and subject to what safeguards they will be kept, and who may have access to the data of shareholders and for what purposes.

The EDPS wishes to point out that making shareholders' details available in centralised depositories, should that be an option to be considered, would likely lead to increased accessibility of these data. This would, in turn, also lead to increased risks to personal data. Modern technology makes the disclosure of shareholders' personal data vulnerable to misuse, unless data protections safeguards similar to those applicable to other forms of wealth holdings are adopted. For example, if shareholders cannot prevent a member of the public, or a fellow-shareholder in the same company, from accessing their name, address and wealth holdings, this will make their personal data vulnerable to misuse. In addition, various regulatory authorities and law enforcement authorities may also take an interest in requesting access to any new depositories for purposes that may go beyond, and may not be compatible with, the original purposes sought by the Action Plan.

For these reasons, the EDPS emphasises the need to ensure legal certainty and proportionality as to the conditions under which the management of the companies concerned or any third parties (including other shareholders of the same company but also financial supervisory authorities and law enforcement) can have access to or a right to obtain copies of personal information concerning a shareholder on the shareholders registers/depositories. As

[1] The Action Plan also refers to the position of the European Parliament on this: 'The European Parliament supports the view that companies issuing name shares should be entitled to know the identity of their owners, but that owners of bearer shares should have the right not to see their identity disclosed. This echoes concerns expressed earlier as to the privacy of retail investors.'

preliminary comments, without prejudice to further contributions the EDPS might make on this subject, the EDPS emphasises the following:

- If the Commission were to propose centralised depositories of shareholdings in Member States, it should clearly justify the benefits and need for such an arrangement, and compare any such proposed measures against less intrusive alternatives, such as, for example, establishing requirements for each company separately, to hold such registers.
- Companies and, if this were to be the case, the centralised depositories, in principle, should only use or disclose personal information on the share register for the purposes for which the information was provided, that is, administering the shareholders' shareholdings in the company, or for other purposes that are compatible with this purpose, such as, for example, convening shareholders' meetings, making arrangements for voting, or communicating with shareholders if offers are made to them as part of a regulated takeover offer (subject to adequate safeguards).
- Any further use for an incompatible purpose should be prohibited, and should only be possible subject to adequate safeguards, and provided that it is legally required for an important public interest under Article 13 of Directive 95/46/EC.
- With regard to Article 13, the EDPS takes note of the potential need for some exceptions to accommodate important public interests. For example, there may be a need for public disclosure of a substantial shareholding (e.g. over a certain percentage of total shareholding) that could influence the company so as to allow members and the general public to understand the levels of control of any particular company. In this case publication of the necessary data in the Annual Report of the companies concerned may be appropriate from the data protection perspective.
- Finally, the EDPS recommends that the Commission ensure that retail shareholders should not be disadvantaged compared to shareholders whose shareholdings are held indirectly via a custodian company, and thus, may be better protected from the general public accessing their particulars. Direct shareholders, with less complex structures in the management of their shareholdings, should enjoy similar levels of data protection to those whose shareholdings are held indirectly. In other words: some shareholders should not have more privacy by virtue of how they structure their affairs.

Section 3.1 on 'better shareholder oversight of remuneration policy'

This is another area where the need for transparency should be balanced with the rights of individuals to their privacy and protection of their data. For the case if any initiative were to allow access to information on the remuneration of individual members of management and/or supervisory boards to the public, the EDPS emphasises that there are different methods, modalities and granularities of making personal data publicly available. Some of these may be more intrusive than others and present more risks. Consequently, some may be considered proportionate, while others may not.[2]

Further, in a similar context –i.e. the balance between the right to protection of personal data and the right to public access to documents– the EDPS has recommended that EU institutions and bodies should follow a 'proactive approach' to the issue. This requires that the scope for a

[2] See, for example, ECJ judgment of 9 November 2010, joined Cases 92/09 and C-93/09 (Schecke and Eifert); in particular, paras 81, 85 and 86. In this case the ECJ underlined that derogations and limitations in relation to the protection of personal data must apply only in so far as strictly necessary. The ECJ considered, in particular, that the European institutions should explore different methods of publication in order to find the one which would be consistent with the purpose of the publication while causing the least interference with the data subjects' rights to private life and to the protection of personal data.

public disclosure of personal data is analysed proactively and at the earliest stage, and that the persons involved are informed accordingly so as to allow them to exercise their rights.[3]

We look forward to a fruitful cooperation on these initiatives with your services in view of a duly informed and well balanced approach that should meet both the requirements of data protection law and the legitimate needs for transparency. In this perspective, informal contacts have been established on staff level in order to discuss these plans further.

Sincerely,

(**signed**)

Giovanni Buttarelli
Assistant European Data Protection Supervisor

Cc: Ms Francoise Le Bail - DG JUST, Director General
Mr Jeroen Hooijer, Head of Unit - DG MARKT, Unit DDG1.F.2
Mr Patrick Pearson, Head of Unit - DG MARKT, Unit DDG1.G.2
Ms Marie-Hélène Boulanger, Head of Unit – DG JUST Data Protection
Mr Philippe Renaudière, Data Protection Officer

[3] See the EDPS paper on 'Public access to documents containing personal data after the *Bavarian Lager* ruling' of 24 March 2011, available at the EDPS website (http://www.edps.europa.eu), especially its chapter III on pages 6-11.