

Inventory 2008

Introductory Part

1. General

This is the second public inventory of the EDPS as an advisor on proposals for legislation and related documents. It is published in December 2007 on www.edps.europa.eu.

This inventory forms part of the annual work cycle of the EDPS. Once a year the EDPS reports retrospectively on his activities in the Annual Report. In addition, the EDPS publishes an inventory of his intentions in the area of consultation for the next year. As a result, the EDPS reports twice a year on his activities in this area.

The background of this inventory can be found in the Policy Paper of 18 March 2005, "The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents". In this paper, the EDPS laid down his policy in the area of consultation on legislative proposals, one of his main tasks based on Articles 28 (2) and 41 of Regulation (EC) No. 45/2001. The working method of the EDPS is described in Chapter 5 of the policy paper. An important part of this working method is the selection and planning (including a regular review of this selection and planning), needed in order to be effective as an advisor. This inventory builds furthermore on the first inventory, published in December 2006.

The main sources of the inventory are the Commission Legislative and Work Programme 2008 and several related planning documents of the Commission. The inventory has been prepared by the Staff of the EDPS. In the preparation process, several stakeholders within the Commission have been given the possibility to give their input. This input is highly appreciated.

The inventory consists of the following elements:

- this introductory part which includes a short analysis of the context, as well as the priorities of the EDPS for 2008.
- an annex of the relevant Commission-proposals and other documents that have been recently adopted or that are programmed, and that require the attention of the EDPS.

The annex has been published for the first time in December 2006 and has been updated twice in the course of 2007 (in April and in September). Also, in 2008, it will be updated on a regular basis¹.

¹ NB: The column with the two colours (red and yellow) shows the priority status of each topic for the EDPS:

Red => the EDPS will issue an Opinion (high priority)

Yellow => the EDPS may issue an Opinion or react in another formal way

Once the EDPS has given his opinion on a document (or another public reaction), the document will be deleted from the Annex, although it has to be underlined that the involvement of the EDPS in the legislative process does not stop once his opinion has been issued. The opinions of the EDPS can be found elsewhere on the EDPS-website (in the section 'consultation', under 'opinions').

Short analysis of the context

a. Developments within the EU

The entry into force of the Lisbon Treaty is foreseen for 2009, but the consequences of the Treaty will already be felt in 2008. In this context:

- The EDPS will take stock of the consequences of the new Treaty for data protection, such as the new legal basis for data protection (Article 16 B of the Lisbon Treaty), as well as of the abolishment of the pillar-structure.
- How to act in the period of transition? In some areas, in particular the area of police and judicial cooperation in criminal matters, it will make a difference whether a legislative measure will be adopted under the present Treaty or under the Lisbon Treaty, with qualified majority voting, co-decision by the European Parliament and the availability of infringement procedures. In some case, it may be better to wait for the new Treaty before taking new legislative measures.

The Commission Legislative and Work Programme 2008 takes a focused approach and concentrates on a limited number of new policy initiatives. Within this approach there is much emphasis on impact assessments before the Commission presents a proposal as well as on the review of existing EU-legislation and pending proposals.

This approach is also reflected in the way the Commission envisages proceeding in the Area of Freedom, Security and Justice. The Commission Legislative and Work Programme 2008 mentions the completion of the Hague Programme for freedom, security and justice (from November 2004), as well as further steps towards a common policy on migration.

b. RFID, biometrics and other technological changes

The impact of new technologies will become ever more important. The development and use of new technologies is expected to contribute to a qualitative change of society as a whole. New perspectives are characterised as 'ubiquitous computing', the 'internet of things' or a 'totally interconnected and networked everyday life'².

Particular attention should be given to RFID and biometrics. RFID must be seen as a relatively new technological phenomenon with impressive possibilities. To the contrary, the use of biometrics is not new; only the scale of its use is rapidly changing, in the area of law enforcement, but also in other areas.

c. Major trends in law enforcement.

² See EDPS Annual Report 2006, Par 3.5.1.

The Inventory 2007 noted as a major trend the legislative activities relating to the increased need for storage and exchange of personal data for law enforcement purposes and in particular for the combat of terrorism and organised crime. This trend continues in 2008.

In the legislative field, the adoption of a political agreement on the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters meant that now for the first time a general legal framework for data protection in this area will be established on the level of the EU. However, the Framework Decision does not apply to all situations and other instruments for data protection in this area are still in place. The result is a legislative patchwork.

Moreover, new legal instruments are proposed as an addition to existing legal instruments, which have not yet been fully implemented. This raises questions relating to the necessity of such new instruments, instead of focussing on the practical implementation of existing instruments.

Finally, a continuing trend in 2008 will be the opening up of existing databases (European databases, as well as national databases) for law enforcement, in spite of the fact that the original purpose of the database is a different one. Related issues are the interoperability and interconnection of databases.

d. Changes within data protection

In his opinion on the future of Directive 95/46³, the EDPS invited the Commission to start the thinking about future changes of the directive already now. He distinguished five relevant perspectives of such a process:

- Improvement of the implementation of the Directive itself.
- Interaction with technology.
- Global privacy and jurisdiction issues, dealing with transborder data flows with effects outside the territory of the European Union.
- Data protection and law enforcement.
- The Lisbon Treaty.

These perspectives must be seen in the light of fundamental changes of the European Union - due to the increase of the free flow of information between the Member States and between the Member States and third countries - and of an evolving information society with more and more characteristics of a surveillance society.

e. Developing the Advisory role of the EDPS

The EDPS will further develop his policy in the area of consultation on legislative proposals. This ambition includes:

- Full implementation of the Inventory 2007.

³ Opinion of 25 July 2007 on the Communication from the Commission to the European Parliament and the Council on the follow-up of the Work Programme for better implementation of the Data Protection Directive, OJ C ...

- Finding new ways of increasing the effectiveness of his interventions in the policy area which required most of his attention: the Area of Freedom, Security and Justice (the field of activities of DG JLS). In this area, the EDPS has already become an authoritative advisor with a consistent approach on major issues relating to storage and exchange of information. However, it is not always easy to achieve a result that finds the right balance ensuring as much as possible privacy as well as physical security, certainly when measures are designed to play a role in the combat of terrorism.
- Developing a more systematic approach to cover - where appropriate in a proactive way - the new policy areas mentioned in the Inventory 2007 (Electronic Communications and Information Society, Public health, Work related issues, Anti-Fraud, Transparency-issues).
- Selecting other policy areas with possible relevance to the EDPS and analysing the relevance.
- Further improving the working relations with other institutions.

In this context, the EDPS refers to the so-called 'London initiative' which aims at improving the working methods of the data protection authorities. The EDPS stood at the basis of this initiative, calling for a strategic approach, frequently referred to as: "Selective to be more effective".⁴

Priorities for the EDPS for 2008

The policy of the EDPS will not shift from the directions indicated in the Inventory 2007. A major perspective will remain making visible why privacy matters. The objective of the participation of the EDPS in the EU-legislative process is actively promoting that legislative measures will only be taken after due consideration of the impact of the measures on privacy and data protection. The impact assessments mentioned in the Commission Legislative and Work Programme 2008 must give appropriate attention to privacy and data protection.

The priorities for 2008 will build on the priorities over 2007, taking into account the developments that have taken place since.

1. Preparation of the entry into force of the Lisbon treaty.
 - The issuing of a note on the impact of the Treaty on data protection (substantive, as well as institutional consequences).
 - Looking at consequences of the introduction of the ordinary legislative procedure in the area of police and judicial cooperation in criminal matters.
2. Continuing the focus on the storage and exchange of information in the Area of Freedom, Security and Justice with emphasis on:
 - Ensuring an adequate legal framework for data protection in this area, taking into account the scope of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.

⁴ See EDPS Annual Report 2006, Par. 4.5 and 5.1

- The consequences for data protection of a piling up of (new) instruments for law enforcement, in particular for the combat of terrorism and organised crime.
 - The use for law enforcement of data collected for other purposes (and extension of functions of databases), including for purposes of data mining or profiling.
 - Biometrics.
 - The future of Europol and Eurojust, as far as this affects processing of personal data.
 - The further development and implementation of large scale data bases on a European level (SIS, VIS, Eurodac), where the EDPS also has a supervisory role.
3. Continuing the focus on developments in the Information Society, with emphasis on:
- RFID and ambient intelligence, as a follow up of the Communication of the Commission on RFID and the EDPS-opinion on this communication.
 - The proposal for a modification of Directive 2002/58/EC.
 - Privacy by design and Privacy Enhancing Technologies (PET).
 - Longer term perspectives of a Surveillance Society.
4. Giving follow up to the EDPS-opinion on the future of Directive 95/46, including:
- Giving an impetus to the thinking on possible future changes of the directive.
 - Participation in activities relating to the full implementation of the directive, for instance through interpretative communications (like on the concepts of controller and processor).
5. Focussing on a few specific areas of EU-action:
- Public health, with emphasis on health information systems, e-health, safety of human products and immediate threats to public health. The principle of traceability will play an important role.
 - The use of personal data in the common policies on agriculture and fisheries.
 - The relation between data protection and the collection and use of statistics.
 - Further activities relating to public access to documents, such as the announced revision of Regulation 1049/2001.
6. External aspects of data protection, relating to the transfer to data to third countries, in particular:
- The transfer of passenger data, including the agreement with third countries and the external aspects of the proposed Council Framework Decision for a PNR-EU system.
 - The developments regarding possible common transatlantic principles (mainly common to EU and US) on exchange of information for law enforcement purposes.

December 2007.