



EDPS NEWSLETTER

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1. EDPS opinion on transatlantic information sharing for law enforcement purposes

On 10 November, the EDPS adopted an opinion on the Final Report by the EU-US High Level Contact Group on information sharing and privacy and personal data protection. The Report, presented by the EU Presidency in June 2008, defines common principles on privacy and data protection as a first step towards the exchange of information between the EU and the US to fight terrorism and serious transnational crime. It also identifies options for a possible instrument that would apply the agreed common principles to data transfers.

The opinion stresses the need for a careful analysis of the considered ways forward and recommends the development of a **road map** towards a possible agreement. Such a road map would involve all stakeholders at the different stages of the procedure and contain guidance for the continuation of the work.

The opinion calls for clarification and concrete provisions on the following aspects:

- **nature and scope of an instrument on information sharing:** for the sake of legal certainty, the EDPS shares the report's preferred option for the adoption of a legally binding instrument. This general instrument would need to be combined with specific agreements on a case by case basis to reflect the many specificities of data processing in the field of security and justice. The scope of application should also be clearly circumscribed and provide for a clear and common definition of law enforcement purposes at stake;
- **redress mechanisms:** adequate means for redress including administrative and judicial remedies should be available to all individuals, irrespective of their nationality;
- **measures guaranteeing the effective exercise of individuals' rights:** further work is needed concerning the transparency of data processing and the conditions of access and rectification to personal data.

The opinion emphasizes that the conclusion of an agreement between the EU and the US should take place under the **Lisbon Treaty** - depending on its entry into force – to guarantee better legal certainty, full involvement of the European Parliament and judicial control of the European Court of Justice.

🔗 EDPS opinion ([pdf](#))

2. EDPS reaction to adoption of Data Protection Framework Decision in third pillar

Three years after the initial Commission proposal, on 27 November, the Council of the European Union adopted the Framework Decision on the protection of personal data in the field of police and judicial cooperation in criminal matters – the first general data protection instrument in the EU third pillar.

Throughout the negotiations, this piece of legislation has been a major focus of attention for the EDPS who issued three opinions as well as comments on the

subject. The EDPS opinions acknowledged the initiative as a considerable step forward for data protection in police and judicial cooperation while at the same time repeatedly calling for significant improvements to the proposal to ensure high standards in the level of protection offered.

The EDPS welcomes the adoption of the Framework Decision as an important first step forward in a field where common standards for data protection are very much needed. He however considers that the level of data protection achieved in the final text is **not fully satisfactory**. In particular, he regrets that the Decision only covers police and judicial data exchanged between Member States, EU authorities and systems, and **does not include domestic data**.

In the EDPS view, further work is also needed - whether under the Lisbon Treaty or not - with regard to the following points:

- the need to **distinguish** between **different categories of data subjects**, such as suspects, criminals, witnesses and victims, to ensure that their data are processed with more appropriate safeguards;
- ensuring an adequate level of protection for **exchanges with third countries** according to a common EU standard;
- providing **consistency** with the first pillar's **Data protection Directive 95/46/EC**, in particular by limiting the purposes for which personal data may be further processed.

🔗 EDPS press release ([pdf](#))

3. EDPS opinion on patients' rights in cross-border healthcare

On 2 December, the EDPS adopted an opinion on a proposal for a Directive on the application of patients' rights in cross-border healthcare. The proposal aims at establishing a Community framework for the provision of cross-border healthcare within the EU for those occasions where the care patients seek is provided in another Member State than in their home country. The implementation of such a scheme requires the exchange of personal data relating to the health of patients between authorized organisations and healthcare professionals of different Member States.

The EDPS welcomes the proposal and supports the initiatives for improving the conditions for cross-border healthcare. He however expresses concerns about the fact that current Community healthcare-related initiatives are **not always well co-ordinated** regarding privacy and security considerations - especially with regard to **ICT use**, thus hampering the adoption of a universal data protection approach towards healthcare. This is also evident in the current proposal where, although references to data protection can be found, these are mainly of a **general nature** and fail to specifically address the data protection dimension of cross-border healthcare.

To address the main areas of concern with regard to data protection, the EDPS issues a number of recommendations in the form of five basic steps for amendments:

- the provision of a **definition for "health data"**, covering any personal data that can have a clear and close link to the description of the health status of a person;
- the introduction of a **specific article on data protection**, clearly describing the responsibilities of the Member States and identifying areas for further development (i.e. security harmonization and privacy integration in e-health);
- the adoption of a Community mechanism for the definition of a **commonly acceptable security level** for health data to be applied by the Member States;
- the incorporation of the notion of **"privacy by design"** in the proposed Community template for e-Prescription;
- the introduction of a more explicit reference to the specific requirements relating to the **subsequent use** of health data (Article 8 of Data Protection Directive 95/46/EC).

🔗 EDPS opinion ([pdf](#))

4. Measuring compliance in EU institutions and bodies ("Spring 2009" exercise)

In spring 2007, the EDPS took stock of progress made in the EU institutions and bodies as concerns compliance with Regulation (EC) No 45/2001. This exercise led to a public report and to inspections in four EU bodies.

As announced, the operation was the start of an ongoing exercise by the EDPS in order to assess further progress made in this field. Letters were therefore sent out in October 2008 requesting further updates on the situation in the EU agencies and institutions. Additional questions were raised on further implementation of the Regulation, notably as regards the implementation of the data subject's rights and the level of complaints lodged with data protection officers.

Replies to these requests are expected in December 2008 and will lead to a further report in the course of spring 2009.

5. News on EDPS prior checking of personal data processing

Processing of personal data by the EU administration that is likely to result in specific risks for the people concerned (the data subjects) is subject to a prior check by the EDPS. This procedure serves to establish whether or not the processing is in compliance with Regulation 45/2001, which lays down the data protection obligations of the EU institutions and bodies.

5.1 Security investigations - European Commission

On 2 October 2008, the EDPS issued an opinion on security investigations at the European Commission's Security Directorate / Administrative Requisitioning Sector. This service is competent to take certain measures against criminal or unlawful acts as concerns Commission buildings and persons working within these buildings or having access to them, along with any other act which may prejudice the institution. This includes the storing of any elements of proof, searches to collect such elements, hearing the declarations of plaintiffs, witnesses or, if need be, of the persons responsible for such acts.

The EDPS examined the processing of the data in the procedures of security investigations and requested that the service examine the proportionality of the activities carried out. In this respect, the investigations must be proportionate not only to the general purpose of the processing activity, but also to the purpose of the specific processing operation. The EDPS also highlighted the necessity of affording adequate guarantees to ensure the protection of the data and recommended the adoption of a specific protocol to be respected in the frame of forensic searches. As concerns the transfer of data to third countries and international organisations, the EDPS recommended that, in those cases in which the transfer could only be justified on the basis of Article 9(7) of Regulation (EC) No 45/2001, a register be established containing information that would include the purposes of the transfer, the persons concerned, the right of access, the legal basis and lawfulness of the transfer, the recipient of the data and an indication of the conservation period of the data by the recipient.

The EDPS also pointed out that the right of access to personal data must be established as a principle and that any exceptions to this right must therefore be applied restrictively. The EDPS accepted on this basis that Article 20(1)(c) of the Regulation could serve to protect the interests of whistleblowers.

🔗 EDPS opinion ([pdf](#)) (FR)

5.2 Prior check on the procedure for the selection of European Data Protection Supervisor and Assistant Supervisor

The European Parliament and the Council shall appoint by common accord the Supervisor and Assistant Supervisor for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates (Article 42(1) of Regulation (EC) No 45/2001).

Two EDPS opinions were adopted on this procedure under the direction of the Assistant Supervisor: one opinion on the procedure at the Commission to establish a short list of candidates, and one opinion on the procedure at the Council and the European Parliament.

The EDPS paid particular attention to the information provided to the candidates, in particular as concerns the fact that, should they be short listed, their personal information would be made available to the public, notably due to the public nature of the Parliament's LIBE Committee sessions. Further information from

both the Parliament and the Council was also requested relating to the processing of the data by both those institutions.

☞ EDPS opinions of 21 October ([pdf](#)) and 16 May ([pdf](#))

5.3 Quality checks - Office of Harmonization for the Internal Market (OHIM)

This prior checking notification followed upon staff complaints and was only submitted to the EDPS upon his specific request. It concerns a system of internal quality checks during which the work products of OHIM's trademark examiners are reviewed and the results are reported in a database created for this purpose. The primary purpose of these systematic checks is to improve the overall quality of OHIM's work products. However, the results of the checks are also used to evaluate the quality of work of each examiner and inform management of decisions regarding measures that may individually affect the examiners, such as performance appraisals, promotion, contract renewals, disciplinary measures, or training.

In his opinion published on 22 October, the EDPS recommended the adoption of a clear and formal internal decision to strengthen the legal basis of the operation and provide much needed clarity and certainty to staff members. This decision should clearly describe the system of the *ex-ante* quality checks, including their intended purpose, and provide for appropriate data protection safeguards.

Instead of fragmental email-communications, the EDPS also urged OHIM to adopt a formal data protection notice and make it available permanently on its Intranet. He also emphasised that all possible efforts should be made to improve the level of accuracy, reliability, and consistency of the data. In any event, data included in the database should only be used as one of several factors to be considered in the decision-making process. Whenever data stored in the database are used for purposes which may individually affect staff members, the staff members must also be heard and given the opportunity to put forward their positions.

☞ EDPS opinion ([pdf](#))

5.4 Internet monitoring - Court of Auditors

On 10 November, the EDPS issued a prior checking Opinion concerning the Court of Auditors' monitoring of its Internet infrastructure. The monitoring takes place to ensure the functionality of the Court's network and to verify whether Court's users employ the Internet in accordance with the allowed uses. The case is the first among the EDPS opinions involving Internet monitoring.

In the Opinion, the EDPS underlined his preference for a preventive approach to the misuse of Internet rather than a repressive one. The Court's use of software filter was praised.

However, the EDPS concluded that some of the Court's data processing activities gave rise to doubts about their compatibility with necessity and proportionality

principles. In this respect, the EDPS notably said that, in the absence of an adequate suspicion, the monitoring of all the URL's visited by all the users is deemed unnecessary and excessive.

In order to detect misuse, the EDPS advised to make use of indicators (volume of data downloaded, time spent surfing, high number of failed attempts to access blocked sites, etc) rather than monitoring URL. The EDPS nevertheless conceded that in certain specific circumstances it may be necessary for the institution to monitor the URLs of specific individuals. This is the case when there is an adequate suspicion that a given user is engaged in behaviour against the institution (downloading paedophilic material for example) as well as when the length of URLs indicates a possible attempt to engage in a URL attack.

🔗 EDPS opinion ([pdf](#))

6. EDPS recent speech

- "Introductory remarks on Presentation of European Privacy Seals", speech ([pdf](#)) delivered on behalf of Peter Hustinx at the EuroPrise Interactive Privacy Workshop (Stockholm, 13 November 2008).
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7. Events

7.1 EDPS Symposium: "Supervision in context - the EDPS after 5 years" (Brussels, 17 December 2008)

The EDPS is organising a symposium on supervision in the field of data protection on 17 December 2008 at the Bibliothèque Solvay in Brussels. The event will be an occasion to look back at work accomplished in the field of data protection supervision in the EU context. Speakers will include the EDPS and Assistant EDPS, members of the EDPS team, the European Ombudsman, the Data Protection Officer at OLAF and the Chairman of the Joint Supervisory Body for Europol.

7.2 Outcome of the 30th International Data Protection Conference (15-17 October 2008, Strasbourg)

The 30th International Conference of Data Protection and Privacy Commissioners was held in Strasbourg, from 15 to 17 October 2008, around the theme "Protecting privacy in a borderless world". It was jointly organised by the French and German data protection authorities, and was part of the official program of the French Presidency of the European Union.

All important issues of data protection were discussed, such as the result of globalisation, the protection of minors and social networks. Overall, the Commissioners adopted seven resolutions, which can be found on the [conference's website](#).

🔗 Press release on the outcome of the conference ([pdf](#))

8. Colophon

This newsletter is issued by the European Data Protection Supervisor - an independent EU authority established in 2004 to:

- monitor the EU administration's processing of personal data;
- give advice on data protection legislation;
- co-operate with similar authorities to ensure consistent data protection.

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EDPS - the European guardian of personal data protection

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