



**EDPS - European Data Protection Supervisor**  
**CEPD - Contrôleur européen de la protection des données**

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**The EDPS as an advisor to the Community Institutions on  
proposals for legislation and related documents**

*Policy paper*

**BRUSSELS, 18 March 2005**

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## *Policy paper*

### 1. The objective of this paper

This paper must make clear how the EDPS proceeds, in order to fulfil his assignment in an effective way, as far as the consultation on proposals for legislation is concerned.

The EDPS endeavours to become an authoritative advisor who contributes to the quality of the legislation of the European Union, in so far as matters concerning the processing of personal data are concerned. By presenting this policy paper the EDPS aims to position himself as a reliable and predictable player in the process of legislation. The policy paper is an important step in a process to acquire such a position and enhances by itself the effectiveness of the EDPS as an advisor on proposals for legislation.

The policy put forward in this paper includes three elements: the scope of the advisory task of the EDPS, the substance of the interventions and the approach/working methods.

Last, but not least: this paper on consultation on proposals for legislation does not stand by itself. The paper has been announced in the first annual report of the EDPS and will be followed by other papers in which the EDPS will describe how he understands the different tasks that Regulation (EC) 45/2001 conferred to him.

### 2. Background

#### 2.1. The tasks of the EDPS

Regulation (EC) 45/2001 concerning the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L [2001] nr. 8), establishes an independent supervisory authority, called the European Data Protection Supervisor (or, in short: EDPS). By enacting this regulation, the European Parliament and the Council have implemented the provisions of Article 286 of the EC Treaty.

Established as an independent authority, the EDPS shall - according to Article 41 of Regulation 45/2001 - be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies (within the area of the processing of personal data). In the 17th Recital of the Regulation the community legislature directs to the EDPS how he should understand this assignment: "The effectiveness of the protection of individuals with regard to the processing of personal data in the Union presupposes the consistency of the relevant rules and procedures applicable to activities pertaining to different legal contexts."<sup>1</sup>

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<sup>1</sup> To complete the picture: the 16th Recital states that the monitoring tasks of the EDPS should not apply to bodies established outside the community framework (such as bodies established under the third pillar of the EU-Treaty). The monitoring tasks are not addressed in this policy paper. .

Article 41 confers two responsibilities upon the EDPS:

- the EDPS shall be responsible for monitoring and ensuring the processing of personal data by Community institutions or bodies;
- the EDPS advises Community institutions and bodies and data subjects on all matters concerning the processing of personal data. More precisely, according to Article 46 (d) of the Regulation 45/2001 he shall advise all Community institutions and bodies, either on his own initiative or in response to a consultation. When it comes to proposals for Community legislation, Article 28 (2) states that the Commission shall consult the EDPS "when it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data".

This policy paper merely concerns the second of the mentioned responsibilities and addresses the advisory task of the EDPS on proposals for legislation and related documents. Advice to be given by the EDPS before institutions draw up internal rules (see: Article 46, (d) of the Regulation) and advice on administrative measures taken by Community institutions or bodies fall outside of the scope of this paper.

## 2.2. The Advisory task of the EDPS in its context

The advisory task of the EDPS on proposals for legislation and related documents must be interpreted in the light of

- a. a growing importance of the protection of fundamental rights within the framework of the European integration;
- b. the need for consistency as a constitutive element of an effective data protection;
- c. the EDPS operating in the specific EC/EU-context in which competences on the European level and national level coexist;
- d. The Strategic Objectives 2005-2009, issued by the Commission<sup>1</sup>.

Ad a: The European Union is founded on a respect for fundamental rights, as has been stated in Article 6 of the Treaty of the European Union. Over the years, the importance of the protection of fundamental rights has grown. It is to be mentioned that the Treaty of Amsterdam provided for a progressive establishment of an area of freedom, security and justice, at the occasion of the Treaty of Nice the EU Charter of fundamental rights was proclaimed and the European Court of Justice emphasizes more and more the importance of fundamental rights within the context of Community action. The protection of personal data - which includes the control by an independent authority - has been recognised in the EU Charter of fundamental rights as a fundamental right of the same value as the respect for private and family life. The importance of the protection of fundamental rights has been reiterated by the European Council of 4 and 5 November 2004 in the Hague-programme ("strengthening freedom, security and justice in the European Union") and by the Commission in its Strategic Objectives 2005-2009.

In the near future, under the Treaty establishing a Constitution for Europe, the importance of fundamental rights shall even be more pre-eminent. Accordingly, the European Union shall accede to the European Convention on the protection of human rights and fundamental freedoms. Moreover, the Hague Programme declares that the Constitution already served as a guideline for the level of ambition of the European Council in the area of freedom, security and justice.

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<sup>1</sup> Communication of 26 January 2005, COM (2005) 12 Final.

Ad b: Consistency is to be regarded as an indispensable element to achieve a high level of data protection on the European level. Because of the need for consistency with the level of protection in the Member States Article 286 was inserted in the EC-Treaty. Regulation 45/2001 provides for instruments to enhance the consistency on the European level (see, as examples, the list of duties of the EDPS mentioned in Article 46 of the regulation).

There is a second reason why the EDPS emphasises consistency. A consistent interpretation of matters concerning data protection is needed. A consistent approach of these matters is a preliminary condition for a systematic attention within the Commission, the Council and the European Parliament to the justified interests of the data subjects. This leads to point c, as mentioned above.

Ad c: The protection of personal data within the European Union is to a large extent supervised by the national data protection authorities referred to in Article 28 of Directive 95/46/EC. The EDPS only has supervisory powers related to data processing by the Community Institutions themselves. This situation reflects the division of powers between the European level and the national level under the EC-Treaty. Horizontal coordination of the activities of the national authorities takes place within the framework of the Article 29-Working Party, which also advises on certain Community proposals.

In the framework of Title VI of the EU-Treaty (referred to in this paper as the 'third pillar') there is a number of joint supervisory bodies with specific tasks (supervising the data protection within the Schengen Information System, Customs, Europol and Eurojust), but until now these bodies do not provide for a systematic input in proposals for new legislation.

This division of competences functions when it comes to supervision but is not sufficiently adequate in relation to advisory tasks on proposals for European legislation. By nature, European legislation has an impact on the European as well as on the national jurisdiction. There is a risk of overlapping, or even contradictory advices, and of important lacunae in the third pillar.

Ad d: The Commission demands in its Strategic Objectives for Partnership for European Renewal. The EDPS envisages to be a responsible partner of the Community legislature (Commission, Council and European Parliament), within the area of his mission. He can contribute to the achievement of some of the objectives mentioned by the Commission: high quality of legislation, with emphasises on proportionality and impact assessments, a responsible use of new ICT-technologies, an effective protection of human rights and a strategic approach of security matters.

To conclude: the EDPS, in his advisory policy, will take as a base a high level of protection of fundamental rights (as a consequence of the remarks made ad a), with an emphasis on consistency (as a consequence of the remarks made ad b and ad c) and with due regard to the strategic objectives as formulated by the Commission.

### 3. The scope of the advisory task of the EDPS

The EDPS understands his advisory task as follows:

a. he advises the Community Institutions on proposals for legislation as well as on related documents;

- b. he advises on all proposals which have a significant impact on the protection of individuals' rights and freedoms with regard to the processing of personal data;
- c. he also advises on legislation in the framework of the third pillar of the European Union (i.e. outside the scope of the EC-Treaty)

This wide interpretation of the advisory task results from the perspectives given in Paragraph 2 above.

Ad a: Under the EC-Treaty legislation takes the form of a directive or a regulation. On several occasions the formal Commission proposal is preceded by a consultation document and/or a communication. The EDPS does not only give advice on formal proposals, but may also react on preceding documents. These preceding documents serve as the basis for the policy choices made in the proposals for legislation.

The advisory task of the EDPS also extends to:

- implementing acts as meant in Article 202, third indent, EC Treaty ("comitology");
- the negotiations on behalf of the EC and the conclusion of agreements between the EC and one of more States or international organisations, with respect to the need for confidentiality of these negotiations.

Ad b: According to Regulation (EC) 45/2001, the advice of the EDPS concern "matters concerning the processing of personal data". This definition is wider than the application of Regulation no. 45/2001 itself and even wider than legislation that has the processing of personal data as its main objective, such as Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L [1995] nr. 281) and Directive 2002/58/EC on privacy and electronic communications (OJ L [2002] nr. 201). All legislation that includes provisions on the processing of personal data or includes provisions that have an effect (or a potential effect) on such processing can be the object of consultation. In his Opinion of 22 October 2004 on a proposal for a regulation on the protection of the financial interests of the Community, the EDPS used the following wording: "proposals which build on, supplement or amend the existing legal framework for data protection, and [...] proposals which have a significant impact on the protection of individuals' rights and freedoms with regard to the processing of personal data." What counts is the impact on the effectiveness of the protection itself, rather than the formal impact on the existing Community framework on data protection.

Ad c: Regulation (EC) 45/2001, that confers duties and powers to the EDPS, does not limit the advisory task to proposals for legislation within the first pillar. On the contrary, the EDPS has a general mission to ensure the respect of the fundamental rights and freedoms, which mission can not easily be accomplished if such an important area as the third pillar is left out. Moreover:

- It is part of the mission of the EDPS to put an emphasis on the consistency of the level of protection of individuals within different legal contexts (see, more in particular, the 17th Recital of Regulation 45/2001, cited hereinabove).
- "Cooperation" with authorities established under the third pillar - with a view to improving consistency - is expressly mentioned in Article 46, sub f, ii).
- Regulation 45/2001 makes thus references to a consistent approach on data protection that is not limited to the action of the European Union within the framework of the first pillar. Such references are to be endorsed, since the existing legal instruments mainly guarantee a high level of data protection under the first pillar but do not apply to the third pillar. In addition, when it comes to the substance of the matters the borderline between the pillars is indistinct.

- Article 28 (2) obliges the Commission to consult the EDPS, when it adopts a legislative proposal. This obligation applies to *any* legislative proposal by the Commission.
- The borderline between the first pillar and the third pillar is not always clear. It happens that proposals, issued under the third pillar, affect competences under the EC-Treaty. In such cases, in accordance with Article 47 EU, the matter should be treated as a first pillar matter.
- The pillar structure will come to an end under the Constitution.

Finally, if needed, the EDPS will give advice on proposals in the third pillar ex officio, for instance in case of an initiative for legislation by one or more Member States under Article 34 (2) of the EU-Treaty.

#### 4. The substance of the interventions

##### 4.1. General notions

The EDPS is an advisor and not a participant in the legislative process. The EDPS shall give well targeted advice as expert in a specific area. The general point of departure for the interventions by the EDPS is to ensure that these interventions have an added value in the legislative process for the purpose of the mission of the EDPS as formulated in Regulation (EC) 45/2001.

The following general notions will play a central role in the interventions of the EDPS.

In the first place, a high level of data protection reflects a key value in a democratic society but is not always visible as such. Moreover, the impact of a proposal on the protection of personal data is not always evident, given the technical nature of data processing and the different criteria involved. The EDPS shall communicate a clear and recognisable message *to make visible what relevance a proposal has to the protection of personal data*. It has to be kept in mind that legislation not only serves as an instrument to achieve a policy goal, but also as a safeguard for fundamental values. At the end of the day it is a political choice to decide whether or not a risk is acceptable within a democratic society. The EDPS envisages to provide the decision makers with the information which enables them to make a rational choice. In brief, to make visible why, in a certain case, the privacy of a citizen is at stake.

In the second place, the EDPS recognizes that legislation has to meet several, sometimes contradictory public interests. The EDPS shall take into account that for this purpose the fundamental rights and freedoms of natural persons to have their privacy protected may be subjected to exceptions, conditions and limitations, but this may not result in the rights and freedoms being deprived of their substantive content. In other words, *the result may not be that a private person will be deprived of or unduly restricted in the exercise of his legally enforceable rights to data protection*. The exceptions, conditions and limitations must be specified, explicit and for legitimate purposes so as to make sure that judicial review can be effective.

In the third place, the EDPS shall *assess EC/EU-acts with an impact on data protection from a wider perspective* (i.e. not only as a watchdog of human rights). The EDPS takes into account that these acts also serve the free flow of information within the internal market or other important interests of the EU. Further more, the general principles on the quality of legislation

apply to all legislative action of the EU. So do the principles put forward in the Commission white paper on European governance. For these reasons, the EDPS will look with a critical view to formalities - such as notifications to be made - required in proposals for European legislation. Unnecessary bureaucratic obligations have to be avoided, since they are not beneficial to the level of data protection.

In the fourth place, the EDPS shall consider the proportionality of an interference with data protection. Proportionality does not stipulate that two matters of public interest have to be weighed one against the other but focuses only on the choice of the measure that is proposed to protect a public interest, like for instance the security of citizens or the transparency of government. Is the proposed measure appropriate and is any other - less intrusive - measure available which would provide equally good protection? In this respect, *the EDPS endeavours to provide alternatives* to the Community institutions. The effectiveness of an intervention of the EDPS can be enhanced if he is capable to present alternatives that can protect other public interests, without interfering - or interfering less intrusively - in the protection of personal data.

In the fifth place, the advice must be *quick enough* so as not to delay the legislative process. The EDPS considers the momentum of his intervention as an autonomous quality criterion.

#### 4.2. Analysing the impact

The EDPS shall analyse the impact of a proposal on the protection of individuals' rights and freedoms with regard to the processing of personal data. This analysis contains the following elements:

##### a. Description of the impact

- the relevant elements of the proposal from the perspective of data protection;
- the impact of a proposal on the protection of personal data itself;
- a typology of the personal data affected, e.g. are sensitive data involved as mentioned in Article 8 (1) of Directive 95/46/EC?
- does the proposal improve the level of data protection within the area concerned or does it harm the level of protection?

##### b. Compatibility with the existing legal framework on data protection

- the quality and the proportionality of the data, their collection and their processing;
- an explicit specification of the purposes of the gathering, processing or exchange of data;
- guarantees that the data are no longer kept than required by these purposes;
- where appropriate, guarantees that the access to these data is limited to persons acting in specific qualities and as far as necessary for the purposes mentioned above;
- in all its aspects, a fair treatment of the data subject, in accordance with the principles that underlie Directive 95/46;

##### c. Quality assessment

- the quality of the proposed provisions, seen from the perspective of an effective protection of the data subject;
- is it desirable that a Community competence is established, modified or applied?
- are the provisions enforceable?

##### d. Necessity and proportionality of exceptions

- the justification of exceptions, conditions or limitations to the protection by another public interest;
- are these exceptions, conditions or limitations necessary to reach the policy goal?
- moreover, is a new (or modified) legal instrument desirable?
- an a priori assessment of the proportionality of the proposed measures;

- where needed, a balancing act.

The intensity of this analysis will depend on the seriousness of the impact of a proposal on the protection of personal data. In some cases a quick scan of the proposal will be sufficient.

A summary of the analysis will be included in the advice.

#### 4.3. Points of reference

The points of reference for the analysis will be:

- Article 8 of the Charter of Fundamental Rights of the European Union, with respect to the meaning and scope of the rights guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms, in particular its Article 8. According to settled case-law of the European Court of Justice, legal texts must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures, and more in particular in the light of Article 8 ECHR.

*It is to be emphasised that in the Charter - in contrast to the ECHR - the protection of personal data is formulated as a fundamental right, separate from the respect for private and family life. See, under the Constitution, Articles II-67 and II-68.*

- The community rules on the lawfulness of the processing of personal data, as included in Directive 95/46/EC, Regulation (EC) 45/2001 and Directive 2002/58/EC.

*The EDPS will check in his advices in any case if the basic principles of data collection and data procession are met. Special attention will be given to proposals that might involve sensitive data (cfm: Article 8 (1) of Directive 95/46/EC).*

- The case law of the European Court of Justice and the European Court of Human Rights. The EDPS points in particular at the criteria on the existence and the justification of an interference with private life developed by the European Court of Justice in the *Österreichischer Rundfunk-Case*<sup>1</sup>.

*Another important case in this area is the Lindqvist-Case*<sup>2</sup>.

#### 4.4. Balancing other public interests

The objective of assuring a high level of data protection can have an impact on other public interests, such as:

- a. the prevention and combat of serious and organised crime, the maintenance of public order and the safeguard of security;
- b. openness and transparency;
- c. competitiveness.

It goes without saying that this list of public interests is not limitative. Data protection can also have an impact on other public interests, such as the interests listed in Article 13 of Directive 95/46/EC or in Article 30 EC, for example: the protection of life and health of humans, animals or plants can require access to certain personal data, to combat epidemical outbreaks. Another example related to vital interests of humans is to be found in Directive 2002/58/EC. The 36th Recital - elaborated in Article 10 of the Directive - states that Member States may restrict the

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<sup>1</sup> Judgment of the Court of 20 May 2003, Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others and Christa Neukomm (C-138/01) and Joseph Lauer mann (C-139/01) v Österreichischer Rundfunk, Joined cases C-465/00, C-138/01 and C-139/01 [European Court reports 2003 Page I-4989].

<sup>2</sup> Judgment of the Court of 6 November 2003 (C-101/01), Criminal proceedings against Bodil Lindqvist [European Court reports 2003].

users' and subscribers' rights to privacy with regard to calling line identification and location data where this is necessary to allow emergency services to carry out their tasks as effectively as possible. More precise, a person has the right to eliminate the presentation of calling line identification and to deny consent to process location data of a mobile phone, but this right does not have effect towards emergency services.

Ad a: On the one hand, as has been reiterated in the Hague Program the European Union has increased its role in securing police, customs and judicial cooperation. The program also recalls the new urgency on the security of the European Union and its Member States, especially in the light of the recent terrorist attacks and the threat of new attacks. The rights to life and to security are enshrined in the ECHR and in the Charter of Fundamental Rights of the Union. The effective prevention and combat of large scale crime presuppose that law enforcement agencies have access to certain personal data. To this adds that the methods and needs in the area of criminal investigation have changed. The importance of proactive crime-analysis has grown over the years.

On the other hand, it is exactly this pressure on the level of data protection - a pressure which in itself is understandable and justifiable in a changed social context - that represents the need for a proportional approach. The EDPS emphasises the importance of the fundamental right to protection of personal data. The protection of our Western society may not lead to the devaluation of the basic values of this society itself.

Additionally, the more or less complete legal framework on the processing of personal data in the first pillar does not apply in the third pillar, at least not directly. In short, in the third pillar a consistent and integrated framework that guarantees the level of data protection lacks, apart from the Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data (Convention 108, which was adopted in 1981). Presently, the Commission has started working on such a framework, but it is not yet established. According to the EDPS, the point of departure should be that the principles laid down in Directive 95/46 apply to this area and should serve as a base line. The specific nature of this area justifies that additional principles are included. For example, the Hague Programme introduced the principle of availability (which means the conditional availability of certain data of which Member States dispose, to police and justice authorities in other Member States).

Moreover, as stated above, in the third pillar-activities - and in the activities on asylum and immigration - the pressure to use the access to personal data as an instrument to achieve an effective protection of the rights to life and security is predominant. The importance of a balanced approach by the EDPS is even more important since under Title VI of the EU-Treaty a lack of institutional balance subsists. In this domain the powers of the European Parliament as well as of the European Court of Justice are limited.

Finally, it is to be observed that data protection and law enforcement do not necessarily represent conflicting interests. Both interests require the integrity and the security of personal data, a protection against manipulation of these data, and an effective processing so as to avoid that too many personal data will be processed.

All in all: the EDPS fully takes into account the importance of an adequate protection by government of the physical security of the people staying on its territory, but this can not have as an effect that other fundamental rights, such as the right to data protection may be limited without the need of the limitation being proved necessary and proportionate.

Ad b: Two equivalent fundamental rights can clash. For this reason the 'transparency' regulation (EC) 1049/2001<sup>1</sup> comprises an exception "if disclosure would undermine the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data". On the other hand, according to Article 8 ECHR interference in the protection of privacy is accepted "where necessary in a democratic society". Conflicts can in particular occur on matters of access to personal data or when a proposal for legislation requests the publication of those data by Community institutions or bodies.

The EDPS will focus his advice on the question whether a proposal for legislation guarantees that disclosure of documents containing personal data is limited to cases in which the disclosure is to be considered necessary in a democratic society.

Ad c: A free flow of information within the internal market is one of the objectives of the data protection legislation of the European Communities. This objective, provided that it is attained, can contribute to the competitiveness of European Union- businesses. Moreover, the establishment of an information society for all is one of the priorities in the Lisbon-Strategy for growth and employment as adopted by the European Council. This requires a significant development of information and communication technology (ICT), including a huge and safe flow of data. For this reason, an effective protection of personal data is one of the success factors of the Lisbon-Strategy.

On the other hand, the compliance costs of the data protection legislation may in certain cases be relatively high. The legislation brings about administrative costs and can because of this effect harm the competitiveness. Another priority in the Lisbon-Strategy for growth and employment as adopted by the European Council is to set targets for reducing the administrative burden (as one of the elements of a better lawmaking). Where it comes to simplification of existing community legislation, it has been stressed that the *acquis communautaire* should be respected.

The EDPS will focus on the need for a high level of privacy protection. The need for competitiveness should not be used to lower the standards, mandated by law. Moreover, the EDPS underlines the contribution of data protection law to competitiveness. The EDPS shall balance the different interests and assess whether administrative burdens with a view to privacy protection are proportionate.

## 5. The approach and the working methods

### 5.1. An effective approach

To be effective, the EDPS has to develop an approach in which attention is paid to the following aspects:

- the timing of the interventions;
- his assignment and the assignments of other advisors on proposals for community legislation;
- the choice of dossiers and additional activities. Resources are limited.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents  
OJ L 145 [2001], p. 43.

## 5.2. The timing

The EDPS is an independent advisor to the primary actors in the legislative process, the Commission, the European Parliament and the Council. Its advisory task does not affect the prerogatives of the three institutions. Under Article 251 of the EC-Treaty the Commission submits a proposal for a regulation or a directive to the Parliament and the Council. The Commission is obliged to consult the EDPS. However, Article 28(2) of Regulation 45/2001 is not clear about the timing of the consultation: before or after the adoption of a proposal.

Given his position within the institutional framework the EDPS should deliver a formal, public advice. However, the timing of the interventions by the EDPS in the legislative process is also determined by his ambition to be effective. The effectiveness of the interventions can require a more informal consultation with the institutions, in particular with the Commission as it develops a proposal. A consultation in an early stage in the legislative process enables the EDPS to ask attention for the interest of the protection of personal data, and propose modifications of a text without entering the political debate.

Without prejudice to the wording of Articles 28 (2), the consultation should, according to the EDPS, consist of two to four steps:

1. An informal consultation by the responsible service of the Commission, where appropriate, before the formal Commission-proposal will be issued.
2. A formal and public advice on the Commission-proposal to the Parliament and the Council. This advice will be published in the Official Journal (edition C) and on the website of the EDPS. Additionally, in some cases the EDPS shall issue a press release.
3. Optional: an informal consultation by the European Parliament and by the Council, at the request of one of the institutions or on the initiative of the EDPS.
4. Optional: a formal and public advice on substantial changes in the Commission proposal, in so far as these changes have a significant impact on data protection.

The EDPS intends to apply this working method as much as possible to proposals outside the scope of Article 251 EC-Treaty.

In order to make this working method work:

- the EDPS shall select the most important proposals from the perspective of data protection proposals on the basis of the annual Work Program of the Commission, and communicate this selection to the institutions;
- the EDPS shall be available for informal consultations and will endeavour to fit the informal consultations within the (internal) planning and working methods of the Commission, in agreement with the Legal Service and the Secretariat-General of the Commission;
- planning of the consultation on the basis of the annual Work Program of the Commission, the midterm review of the program and other programming and planning tools used by the Commission;
- a regular review of the planning and an evaluation of the working method. To this extent, he shall convene on a regular basis with the Secretariat-General of the Commission, its legal service, DG JLS, in its coordinating responsibility for data protection and some crucial Directorates-General of the Commission (e.g. DG Infso);
- in all communications with Commission-officials the EDPS will emphasise his formal advisory role, his obligation to give public and independent opinions and his position as an advisor not only to the Commission but also to Council and Parliament;

- in his advice on the Commission proposal he will not only criticize the proposal but also mention his positive appraisal of the proposal, where appropriate;
- the EDPS shall endeavour to integrate the consultation in the (internal) working methods of the Libe-Committee of the Parliament and shall initiate regular contacts with the Secretariat-General of the Council;
- in his annual report the EDPS shall evaluate the working method.

### 5.3. The EDPS and other advisors in the field of data protection.

To a certain extent the advisory role of the EDPS has an overlap with the role given to the so-called "Article 29 Data Protection Working Party", based on Directive 95/46/EC. This overlap is all the more important since the EDPS participates in the Article 29-Working Party.

Already for several years, the Working Party has played an important role as an advisor on data protection issues, in the absence of a fully functioning EDPS. The Working Party must continue to do its important work in this area. However, the emerging role of the EDPS as an advisor on legislation - as a part of the existing institutional framework, as provided for in Article 286 EC - is bound to have consequences for the present role of the Working Party. As has been said before in this paper, the EDPS will take as a base a high level of protection of fundamental rights, with an emphasis on consistency. The assignment of the EDPS has a wide scope.

The Article 29-Working Party and the EDPS should not act as competitors but should wherever possible be complementary to each other.

The Article 29-Working Party is a permanent platform for cooperation between the data protection authorities of the Member States, so as to smooth the way for a uniform application of the Directive in the Member States. It is, as it concludes in its Strategy Document of 29 September 2004, firmly committed to foster better and harmonised data protection in the European Union. Given its composition the Working Party is an important source of information to the institutions of the European Union when it comes to the implementation and the application of data protection legislation in the Member States. It can provide the information on the adequacy of the descriptions in Directive 95/46, ten years after the directive has been issued and on the need for modification. Moreover, over the years it has developed a specific expertise within certain areas, like the international transfers of data and the global co-operation.

The EDPS shall assume his responsibilities with due respect to the specific qualities of the Article 29-Working Party. More concrete, the EDPS shall at first profit from his central position in the institutional framework. As a permanent body based in Brussels, and advising to the Commission, the Council and the European Parliament, he can give quick and flexible reactions on proposals and can give opinions in areas where the Working Party does not have a formal role (like the third pillar) or no specific competences or interest.

The EDPS shall cooperate, where appropriate, with the Article 29-Working Party. This cooperation must lead to a division of tasks, in which the EDPS can adequately fulfil the tasks imposed upon him by Regulation (EC) 45/2001 and in the near future possibly based on Article I-51 and Article II-68 of the Constitution. At the same time, the European legislator must benefit as much as possible from the experiences on the national level, put forward by the Article 29-Working Party.

The Article 29-Working Party has an advisory role in the first pillar. In the third pillar a formal advisory group of national data protection agencies lacks. However, an informal advisory role on proposals for legislation by these agencies is gradually developing, whereas these agencies meet on a regular basis within the informal Group of joint supervisory authorities in the third pillar (Customs, Eurojust, Europol and Schengen). This group acts as a source of information on experiences on the national level, comparable to the Article 29-Working Party. Several Member States send the same representatives to the informal group and the Article 29-Working Party. The EDPS attends the meetings as an observer, as a part of his duty to cooperate with the supervisory data protection bodies established under Title VI of the EU-Treaty (Article 46 (f) (ii) of the Regulation 45/2001).

The informal group has started its work very recently and does not yet have a fixed practice. The EDPS envisages to cooperate with this group in a similar way as he does with the Article 29-Working Party. Moreover the EDPS can secure the consistency between the pillars, as is expressly stated in the just mentioned Article 46 (f) (ii).

An even more informal platform of data protection agencies is the European Data Protection Conference that convenes once a year. In a resolution adopted in Wroclaw (Poland) on 14 September 2004 on the data protection in the third pillar this Conference underlined the importance of advising in legislative matters.

Finally, it is to be mentioned that within the Commission data protection issues are coordinated by DG JLS, notably by its Data Protection Unit (the former Unit E-5 of DG Markt, recently transferred to DG JLS). This unit is to be consulted by other Commission services, if data protection issues are at stake. The definition of tasks of this unit falls outside of the scope of this paper, since the unit only provides internal opinions. So do the tasks of the Commission's Data Protection Officer (DPO), the Legal Service, the Secretariat-General and other units within DG JLS of the Commission that represent a more general role in the area of data protection.

#### 5.4. The choice of dossiers and additional activities

The approach of the EDPS shall be as follows:

- a. Within the domain of this paper, the emphasis of the activities of the EDPS will be on effectively following dossiers in preparation within the institutions of the European Union and giving advice at the appropriate moments (see above, point 5.2).
- b. Standing practices will develop, on methodology as well as on substance in the different areas of legislation. It might be appropriate to lie down these practices in guidelines, manuals or strategy papers. These instruments could enhance the effectiveness of the advisory work of the EDPS. Decisions on the development of such instruments will be taken in a later stage.
- c. Additionally, the EDPS endeavours to identify some strategic policy themes. When it comes to these strategic themes, the EDPS shall act more proactively. Where appropriate, advice will be given *ex officio*, even without a formal legislative proposal. The EDPS also considers other means to enhance awareness on these subjects, such as the organisation of workshops, publications on the website and technical summaries. This more proactive role should be seen as a materialisation of the duty of the EDPS to monitor relevant developments (Article 46 (e) of Regulation (EC) 45/2001).

Ad a: As has been stated above (in point 2) the EDPS gives a broad interpretation of his advisory task on proposals for legislation. This task is not limited to specific proposals.

Nevertheless, the EDPS endeavours to vary the intensity of the accomplishment of the advisory task, dependent on the impact of proposals on the protection of personal data.

This intensity itself will vary over the years, depending on the impact of proposals in a certain area on the protection of personal data. At present, the proposals in the area of freedom, security and justice are of great importance. Crucial subjects in this area are the sharing of information in the framework of police and justice-cooperation as well as issues related to large scale information systems like Eurodac, VIS and SIS II. In the near future, priority will be given to - possible - proposals for modification of Directive 95/46.

The EDPS shall make public on his website a list of proposals which he considers relevant from the perspective of data protection. The importance of the proposal (seen from this perspective) will be indicated on the list.

Ad c: Purely as an illustration of the perspective of the work of the EDPS, the following subjects are mentioned, as apt to qualify as a strategic policy theme.

- Transparency and privacy.
- The transfer of personal data to third countries (as related to the PNR-Case).
- Data retention and enforcement of criminal law.
- Developments in Identity related technologies (biometrics, Radio Frequency Identification, etc.).