



Annual Report 2005

Summary

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Introduction

This is a summary of the second annual report of the European Data Protection Supervisor (EDPS), an independent authority set up to ensure that the European Community institutions and bodies respect their obligations when it comes to the fundamental right to protection of personal data.

While 2004 was the first year of activity, during which a new institution was literally built up (including finding appropriate office space and the first phases of recruitment), the second annual report covers a year of consolidation. The three main roles of the EDPS laid down in Regulation (EC) No 45/2001² - supervision, consultation and cooperation – were further refined and broadly recognized by those concerned. A press service was established and efforts were devoted to developing external communications. The size of the authority grew moderately with new recruitments and temporary support from the first trainees.

It is important to emphasize that **more and more EU policies depend on the lawful processing of personal data**. Many public or private activities in a modern society nowadays generate personal data or use such data as input. This is naturally also true for the European institutions and bodies in their administrative and policy making roles, as well as for the implementation of their policy agenda. **Effective protection of personal data**, as a fundamental value underlying EU policies, should be seen as **a condition for their success**. The EDPS will continue to act in this general spirit and expects a positive response in return.

Supervision

The EDPS's supervisory role is to monitor and ensure that Community institutions and bodies comply with existing legal safeguards whenever they process personal data. In that sense, the EDPS complements the national data protection authorities that supervise the processing within their respective Member States. The major developments of 2005 in the context of improving the data protection culture of the institutions and bodies were:

Firstly, efforts were devoted to the further development of the network of **Data Protection Officers** (DPOs) of institutions and bodies. These officers have the task of ensuring in an independent manner the internal application of Regulation 45/2001. In November 2005, a position paper was issued on their role in ensuring effective compliance with the Regulation. The paper was sent to the heads of the EU administration and it underlines the fact that the DPOs are a strategic partner for the EDPS. One of the key messages is that all bodies need to appoint a DPO as a vital first step on their way towards complying with their data protection obligations. A second key message is that DPOs must be notified more adequately of personal data processing within their institution or body and that they notify to the EDPS those processing operations that entail specific risks for the people concerned and therefore need to be prior checked.

¹ The full text of the Annual Report 2005 and all of the reference documents can be downloaded from our website – www.edps.eu.int. Printed copies can also be ordered from the secretariat: edps@edps.eu.int.

² OJ L 8, 12.1.2001, p. 1

Secondly, considerable resources were allocated to **prior checking** those processing operations that are likely to present specific risks. Although this task was typically designed to deal with new processing operations before they start, most prior checks have so far been 'ex post' as many of the existing systems were launched before the EDPS started its activities or before the Regulation entered into effect.

In 2005, 34 opinions were issued on prior checking cases, 30 of which were on existing systems of various institutions and bodies. Other cases were consultations about the need for prior checking, or cases found not to be subject to prior checking which still gave reason for comments. The EDPS has defined a number of thematic priorities, which guide the prior checking, notably medical files, staff appraisal, disciplinary procedures, social services and e-monitoring. At the end of 2005, 29 notifications were in process and many more are expected in the near future. The institutions and bodies have been encouraged to submit their notifications for prior checking by spring 2007 at the latest.

Thirdly, the EDPS received some 27 **complaints** last year, although only 5 of them were declared admissible and further examined. In practice, a large majority of complaints received fall outside the EDPS's area of competence. In such cases, the complainant is informed in a general way and, if possible, advised on a more appropriate alternative. With respect to the handling of complaints within his competence, the EDPS has been in contact with the European Ombudsman to examine a potential scope for collaboration in the near future.

Fourthly, considerable efforts were invested in the elaboration of a background paper on how the two fundamental rights **public access to documents** and **data protection** relate in the context of the EU institutions and bodies. Work on another paper, concerning the use of **electronic communications** has begun, and the paper will be published by mid-2006.

Finally, a number of activities relating to the shared supervision of **Eurodac** (the finger print system used for asylum procedures throughout the EU) were prepared. The EDPS is the supervisory authority of the central unit, while the national data protection authorities are responsible for supervising the use of Eurodac in their respective Member States. The EDPS was globally satisfied with the findings of the first phase of his inspections.

Consultation

The EDPS's consultative role is to advise Community institutions and bodies on all matters relating to the protection of personal data, and especially on proposals for legislation that have an impact on data protection.

A **paper on the advisory role**, presented in March 2005, lays down the policy. It emphasizes that the advisory task has a wide scope, which was subsequently confirmed by the Court of Justice. The policy paper also sets out the substantive approach towards proposals for legislation that have a data protection impact, as well as the procedural role in the different stages of the legislative process. The paper was well received and the European Commission is making good use of the availability of the EDPS to make informal comments on a draft proposal before it is submitted for formal consultation. All formal opinions are published and most often presented to a relevant committee in the European Parliament and/or the competent working party of the Council, and systematically followed throughout the legislative process.

The EDPS issued six formal **opinions** in 2005 which clearly reflect the relevant subjects on the policy agenda of the Commission, the Parliament and the Council. The most significant were:

- the exchange of personal data in the 'third pillar' of the EU (police and judicial cooperation in criminal matters);
- the development of large scale information systems, such as the Visa information system (VIS) and the second generation of the Schengen information system (SIS II); and
- the highly controversial subject of the mandatory retention of data on electronic communications for access by law enforcement authorities.

The EDPS also advises on **administrative measures**, and more in particular on implementing rules of institutions and bodies in the area of data protection. This provides an important opportunity to influence, in a more structural fashion, the way in which data protection policies are implemented. Advice was given on the specific implementing rules concerning the role of DPOs.

The EDPS also, for the first time, made use of the possibility to **intervene in cases** which raise important questions of data protection **before the Court of Justice**. The cases concerned the transfer of PNR-data on airline passengers to the United States, and the EDPS intervened in support of the conclusions of the Parliament, which seeks to annul the related decisions of the Commission and the Council.

Cooperation

The EDPS's cooperative role includes working together with national supervisory authorities and supervisory bodies in the 'third pillar' of the EU, with a view to improving consistency in the protection of personal data.

A very important platform for cooperation with national supervisory authorities is the **Article 29 Working Party**, established by Directive 95/46/EC to advise the Commission and to develop harmonised data protection policies, of which the EDPS is a full member. A certain number of important proposals for legislation were covered by the EDPS and the Working Party in separate opinions. In these cases, the EDPS has welcomed the general support of national colleagues as well as additional comments which can lead to better data protection.

Cooperation with **supervisory bodies in the 'third pillar'** (i.e. supervisory bodies for Schengen, Customs, Europol and Eurojust - usually made up of representatives of national supervisory authorities) has concentrated to a large extent on the preparation of common positions with a view to the development of a much needed general framework for data protection in the third pillar of the EU. Discussions have also taken place around a new system of supervision with regard to SIS II which will build on a close cooperation between national supervisory authorities and the EDPS.

The EDPS has cooperated actively in the context of the **European and International Conferences** of Data Protection Commissioners, and has chaired different sessions.

In September 2005, in cooperation with Council of Europe and OECD, the EDPS hosted a workshop on data protection in **international organisations**. Often exempted from national laws, including laws on data protection, international organisations should nevertheless subscribe to the universal principles on data protection, as they also process sensitive data in many cases.

External communications

In 2005, specific attention was paid to the development of an **information strategy** that can give adequate support to the strategic roles of the EDPS. Raising awareness about data protection generally, and about the roles and activities of the EDPS more specifically, is an important

condition for effective supervision, consultation and cooperation. The information strategy has distinguished target groups in relation to the different roles:

- Supervision: data subjects, notably EU staff (as the individuals whose data are processed) and DPOs and controllers, as responsible for the processing systems.
- Consultation: the European legislator; the Commission, the Parliament and the Council, focusing on specific DGs, committees and working groups.
- Cooperation: the Article 29 Working Party and other relevant forums for cooperation, such as in the joint supervisory bodies in the third pillar, and the European and the International Data Protection Conferences.

The EDPS has also invested in an enhancement of **information and communication tools**. A general information campaign in all EU institutions and bodies, and in all Member States, was followed up in 2005 by the introduction of a press service, a regular newsletter, the development of a new logo and house style, and will soon be completed by the introduction of a new website, which will be the most important tool of communication for the EDPS.

Resources

The budget authorities provided the **budgetary means** for consolidation and limited growth of the organisation, taking into consideration the need to address urgent tasks in supervision and consultation on data protection in most institutions and bodies. Major attention was devoted to the development of **human resources** and important results were achieved, both in the general area of recruitment and in special programs for traineeships and secondment of national experts.

In this context, it is difficult to overemphasise the importance of the **administrative agreement**, concluded in 2004 with the Commission, the Parliament and the Council, which has enabled the EDPS to benefit from outside support where appropriate, and to invest most resources in primary activities. A continuation of this agreement after the initial three years is therefore essential.

Perspectives

The Commission is promoting a European Information Society, based on innovation, creativity and inclusion. This society will rely on three major **technological trends**: an almost unlimited bandwidth, an endless storage capacity and ubiquitous network connections, which will naturally have implications for data protection. Data protection will be put in a new context: new forms of processing like Web Services and an erosion of the traditional technological barriers (power limitations, limited transmission range, isolated data, etc). This is well illustrated by the growing use of RFID tags and the massive development of communication networks which have great impact:

- all tagged objects become a collector of personal data;
- smart objects, carried by individuals, are always 'present' and 'active';
- an enormous amount of stored data is continuously fed with new data.

New and emerging technologies that will have an impact on data protection include:

- **RFID**: a promising and challenging technology which will constitute key elements of the so-called Ambient intelligence environments.
- **Ambient intelligence environments**: privacy and data protection requirements should be part of their design, to allow for domestication and a subsequent wide acceptance.
- **Identity management systems**: a (partly biometrics based) key element of emerging e-government services which will require proper standards.

- **Use of biometrics:** common requirements based on their inherently sensitive nature should be laid down.

A number of new **developments in policy and legislation** can also be noted, such as a focus on activities in the area of police and judicial cooperation and a general trend to increase exchanges of data between law enforcement authorities of EU Member States. Another trend concerns extending the investigative powers of law enforcement agencies (frequently including Europol) by granting them access to databases which are not originally developed for law enforcement purposes. This confirms the desirability of a comprehensive legal framework for the protection of personal data in the third pillar, independently from the approval of the proposal on the availability principle, as stated in the EDPS opinion on data protection in the third pillar.

At the end of 2005, the Commission started the process for a review of the regulatory framework for electronic communications and services, including the review of Directive 2002/58, which will be followed closely by the EDPS.

It is clear that the agenda of the EDPS as a legislative advisor is largely determined by the work programme of the Commission. It is quite likely that the mid and long term focus will partially shift towards:

- the theme 'prosperity', where the EDPS will follow further initiatives towards the development of a European Information Society.
- the theme 'security', where the EDPS will follow developments in relation to technological developments such as biometrics and the growing pressures on public and private controllers of databases to allow access for law enforcement purposes. In this context, the Commission presented as a key initiative the access by police forces to databases for external border control.

Objectives for 2006

With this in view, the EDPS priorities for 2006 are:

- Support of the DPO network, including bilateral evaluations of progress in notifications, aiming for notifications of existing operations to be completed, latest by spring 2007.
- Continue prior checking, finalising those that concern existing processing operations in the thematic priorities.
- E-monitoring and traffic data: issue guidelines on processing of personal data related to the use of electronic communication networks.
- Personal files on staff: issue guidelines on content and conservation periods.
- Transfer to third countries: issue guidelines on personal data transfers to third countries, international organisations and European bodies outside the scope of Regulation 45/2001 and Directive 95/46/EC.
- Supervision of Eurodac: an in-depth security audit of Eurodac's central data base.
- Advice on legislative proposals: consolidate and further develop the role of the EDPS and issue opinions on various subjects.
- Interventions in Court cases: consider intervention in cases raising data protection issues.
- Second version of website: will be launched by mid-2006.
- Development of resources: seek a prolongation of the present administrative agreement with Commission, Parliament and Council, and adequate enlargement of available office space to accommodate current needs and expected increases in staff.