



Inventory 2009

I. Introduction

This is the third public inventory of the EDPS as an advisor on proposals for legislation and related documents. It is published in December 2008 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.

The main sources of the inventory are the Commission Legislative and Work Programme 2009 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 2009.
- 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 since then with a frequency of three times a year.

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. In exceptional cases the subject can reappear in the annex, where the EDPS issues a second opinion. The opinions of the EDPS can be found elsewhere on the EDPS-website (in the section 'consultation', under 'opinions').

II. Short analysis of the context

a. Developments within the EU

The Lisbon-Treaty has substantive consequences for the legal framework of data protection within the EU, for instance by the introduction of a single legal basis for data protection (Article 16 TFEU). Uncertainty about the fate of the Lisbon Treaty is an important element of the context in which the EDPS operates. To this adds that in 2009 a new European Parliament will be elected and a new Commission will be nominated. Priorities of the new Commission might have significant consequences for the work of the EDPS as advisor.

Further considerations have been given to the future of the Area of Freedom, Security and Justice, independently of the Lisbon Treaty. In the report of the so called Future Group the balance between mobility, security and privacy was given a central place. This report, and the principle of convergence introduced in this report, will be a building block for the new multi-annual program in this area to be adopted under Swedish Presidency of the Council (often referred to as the 'Stockholm-Program'). Another important development in this area is the gradual creation of a single judicial area (a 'true area of justice') by the development of networks connecting the judicial systems of the Member States.

The Commission Legislative and Work Programme 2009 takes active solidarity in times of crisis, across Member states and between EU-institutions as a starting point. The following intentions can be mentioned, as having specific importance for the working field of the EDPS: the need for global coordination and regulation, initiatives for a Europe closer to the citizens (fundamental rights and citizenship, migration, justice, security and safety, consumer protection and health) and strategies for better regulation.

b. Technological developments

The Commission issued in 2008 an important Communication on the future networks and the Internet which will constitute the main basis of the so called ubiquitous information society. This communication gave illustrative examples of emerging technologies supported by three major technological trends: unlimited bandwidth, ubiquitous network access points, unlimited storage capacity. Although promising innovation, productivity gains, growth and jobs, the ubiquitous information society will only lead to a sustainable development if the issues related to security, data protection and privacy are appropriately addressed at the early stages of its development. In the same sense the research efforts of the EU supporting the development of the ubiquitous information society should be mentioned, more precisely the projects which have been awarded in 2008 from the FP7 calls for proposals relating to ICT trust and security research.

In the end of 2008, the Council and the European Parliament found a compromise on the revised Common Consular Instructions. This compromise requests an in depth study on biometrics and its limits.

c. Law enforcement and border control

2008 has been a productive legislative year. A number of important measures was adopted with relevance for data protection. The adoption of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters means that now also in the third pillar a general EU-framework exists for data protection. Other measures are Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Prüm), new legal frameworks for Europol and Eurojust and the Regulation on the Visa Information System. In 2009, emphasis will be on the implementation of these measures in the Member States.

One major proposal, for the Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, is still in discussion in Council. The intensive discussions on the necessity and proportionality of this proposal, which was mainly designed to contribute to the combat of terrorism, are welcomed and demonstrate that a more balanced approach is sought in the decision making process.

Furthermore, (ethnic) profiling is becoming a theme in the discussions on intelligence led policing. The question arises to what extent profiling can be acceptable as instrument.

There are important developments in border management. Final preparations are taking place for the entry into force of SIS 2, which includes a supervisory role of the EDPS, the establishment of a European Management Agency for large scale information systems is announced, and fundamental new measures like a European entry-exit system might be developed in the short term.

d. International transfers and globalisation

Will the EU and the US come to an agreement on data sharing for law enforcement purposes? A lot of energy is put in the preparation of such an agreement, e.g., by the so called High Level Contact Group. If this would lead to an agreement, this agreement might have an even wider impact than on the law enforcement exchange with the US alone.

There are a number of developments towards global harmonisation of data protection standards, for law enforcement but also in other areas. For example, the APEC is developing standards and there are activities by the Latin American countries and by the Francophone countries.

The discussion on search engines, their responsibilities and the application of EU law on data protection to non EU based search engines demonstrate a need for a more global approach.

e. Towards a new legal framework for data protection?

In his opinion of 25 July 2007 on the implementation of the Data protection Directive 95/46/EC the EDPS suggested to start the thinking about a future framework on data protection, which is not by definition fundamentally different than the present one.

Several activities have been employed since, either or not inspired by this suggestion. The Commission installed an Expert Group on Personal Data and it commissioned a study on

the future of the legal framework for data protection. Moreover, the European Conference of Data Protection Commissioners will discuss this issue in 2009. The UK Information Commissioner commissioned a study to support these discussions.

Other relating activities are ongoing, such as the 'London Initiative' to make data protection more effective and also the Article 29 Working Party spends its resources on several fundamental issues of data protection, such as presently the concepts of controller and processor and questions relating to applicable law.

As a first legislative step, the modification of the ePrivacy Directive can be mentioned. In the discussions on this modification, several broader themes are taken on board, like for instance the security breaches.

f. And the EDPS?

The way the EDPS has operated in this context can be summarized as follows:

- All subjects are covered. Information storage and exchange is becoming an instrument for many policy areas, quite often as a means to promote the functioning of the internal market.
- Involvement in all stages, from reactions to Green papers, to advices to conciliation meetings in the co-decision procedure.
- A continuation of substantive lines. The consistency of output is crucial, whereby the EDPS strives to find the right balance between data protection and other (public) interests.

III . Priorities EDPS for 2009

The policy of the EDPS as an advisor on EU-legislation and related documents will not fundamentally change. However, the - possible - changes in the context will determine new points of gravity. It is obvious that the EDPS will intensively participate in discussions on possible modifications of the legal framework on data protection. These discussions will get an additional impetus if and when the Lisbon Treaty enters into force.

In terms of subjects, three main areas can be determined. In the first place public health, a new area of attention for the EDPS, in the second place - like in former years - the area of Freedom, Security and Justice and in the third place the Information Society.

- a. General issues
 - Depending on developments, further preparation of the entry into force of the Lisbon Treaty.
- b. In public health
 - The development of eHealth-systems.
 - The issue of secondary use of medical data.
 - How to deal with legislative activity relating to sensitive information.
 - Some other fundamental questions, also relating to criticism in the medical sector about data protection law.
- c. In Area FSJ.
 - The Stockholm Programme as a new general framework.
 - Monitoring the consequences of the adoption of the DPF.
 - Border management and entry-exit system.

- The transition to SIS 2 and the establishment of a Management Authority.
 - Elaborating the principle of convergence (from: Report Future Group)
 - Activities relating to eJustice and the single judicial area.
 - Develop a position on questions relating to profiling.
- d. Developments in the information society.
- Further developments of fundamental issues raised around the ePrivacy Directive (security breaches, relation with IP-rights, etc).
 - Recommendations on RFID.
 - Social networks, science networks and research networks.
- e. Towards possible modifications of the framework on data protection.
- Further defining the concepts of controller and processor and clarifying the issue of applicable law and jurisdiction (also with national Data Protection Authorities, in framework of the Article 29 Working Party).
 - Giving input in various activities on the possible future framework.
 - Follow up of the discussions on the modification of Regulation 1049/2001.
 - In a wider context, the consequences for data protection of measures promoting transparency and accountability of EU-institutions (example: publication of beneficiaries of EU-Funding).
- f. Development of networks for cross border information sharing.
- IMI, Consumer protection, health data
- g. Towards external agreements and global standards.
- Follow up of the EDPS-opinion on the Report of the High Level Contact Group, possibly leading to an agreement EU-US on the exchange of law enforcement data.
 - Other agreements on consumer data, like e.g. the Anti Counterfeiting Trade Agreement.
- h. Other
- The EDPS will present one or more documents on its advisory policy, which will address in any event possible interventions in comitology-procedures or other procedures where legislative powers have been delegated to the Commission, the involvement of the EDPS in decisions relating to the transfer of data to third countries, as well as the consequences of legislative advices for the supervisory functions of the EDPS.

Brussels, December 2008.