



## **Inventory 2011**

### ***I. Introduction***

This is the fifth public inventory of the EDPS as an advisor on proposals for EU legislation and related documents. The 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.

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".<sup>1</sup> 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 this years' inventory are, as usual, the Commission Legislative and Work Programme 2011, but also the Action Plan implementing the Stockholm Programme, the Commission's Digital Agenda for Europe as well as other relevant planning documents of the Commission. The inventory has been prepared by the Staff of the EDPS. During the preparation process, stakeholders within the Commission were given the possibility to provide input. This input is highly appreciated.

The inventory consists of two documents:

- This introductory part which includes a short analysis of the context, as well as the priorities of the EDPS for 2011.
- 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 was published for the first time in December 2006 and has been updated normally three times a year since then<sup>2</sup>.

Once the EDPS has given his opinion (or another public reaction) on a document, the document will normally be deleted from the Annex. It has to be underlined however that the involvement of the EDPS in the legislative process does not stop once his

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<sup>1</sup> To be found at the EDPS website under 'The EDPS' >> 'Publications' >> 'Papers'.

<sup>2</sup> Apart from December, the update takes place in principle in May and September.

opinion has been issued. In exceptional cases the subject can reappear in the Annex, where the EDPS intends issuing a second opinion. The opinions of the EDPS can also be found on his website.<sup>3</sup>

## ***II. Short analysis of the context***

Due to the publication of the Commission Work Programme 2010 and the Action Plan implementing the Stockholm Programme in March and April respectively, last year's inventory was published later than usual, namely in June instead of December. Therefore, only six months have passed since that publication. Several of the initiatives included in the 2010 Inventory have been also carried over and/or will be further pursued by EU legislators in 2011.

As a consequence, the main trends and priorities identified in the 2010 Inventory can mostly be considered still valid today. However, some important developments took place during the last six months mainly as a result of communications adopted by the Commission. It adopted a Communication on a comprehensive approach on personal data protection in the European Union<sup>4</sup>, a Communication on Europe's Digital Agenda<sup>5</sup>, as well as several communications as a start of the implementation of the chapters of the Stockholm Programme on information exchange.<sup>6</sup> Another important development is that significant steps have been set towards the negotiations of agreements on data protection with third countries, in particular with the United States on a general EU-US data protection agreement and also with a few other third countries on PNR.

Following the entry into force on 1 December 2009 of the Treaty of Lisbon the previous pillar-structure has been abolished, bringing about fundamental changes with regard to police and judicial cooperation in criminal matters. The new legal setting after Lisbon also has consequences for the activities of the EDPS. In his role as legislative advisor, the current practice in which the EDPS advises the legislator on legislative activities with data protection relevance in all EU policy areas is confirmed.

### **a. Towards a new legal framework for data protection**

The right to data protection has been underlined and reinforced by the Lisbon Treaty. The right to data protection is set out in Article 8 of the EU Charter on Fundamental Rights which now has the same legal value as the treaties. The right is furthermore laid down in Article 16 TFEU which now constitutes the single legal basis for the adoption of data protection legislation. This new legal basis has given important impetus to the discussion on the revision of the EU rules on data protection. On 4 November 2010, the Commission issued a Communication laying down a comprehensive approach on personal data protection in the

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<sup>3</sup> Under 'Consultation' >>> 'Opinions'.

<sup>4</sup> COM (2010) 609 final.

<sup>5</sup> COM(2010) 245 final.

<sup>6</sup> E.g. COM (2010) 386 final on the EU Counter-Terrorism Policy, COM(2010) 385 final, an overview of information management in the area of FSJ, COM (2010) final, EU Internal Security Strategy in Action".

European Union. The Commission identified several key issues and objectives for the future review, including changes aimed at strengthening individuals' rights, enhancing the internal market dimension of data protection, revising data protection in the area of police and judicial cooperation in criminal matters, better facing globalisation and bolstering enforcement. The EDPS welcomes the Commission's initiative. The EDPS strongly believes that the legislative proposal or proposals that will follow must be equally ambitious and actually enhance the effectiveness of the instruments of data protection. In particular, the EDPS encourages the idea of strengthening the current rules on data protection and supports the inclusion in the new legislative text of the area of police and judicial cooperation (which is currently dealt with in the separate Framework Decision 2008/977/JHA). A proposal for a new legal framework is expected in 2011. The new legal framework on data protection is one of the top priorities of the EDPS in 2011.

b. The further development of the Area of Freedom, Security and Justice

In December 2009, the Stockholm Programme was adopted. The Programme is the successor of the Hague Programme and sets the priorities for developing the European Area of Freedom, Security and Justice in the next five years. The Stockholm Programme emphasises the need to protect personal data in a global society which is characterised by rapid technological change and borderless information exchange.

The programme does also underline the need to exchange data for the security of Europe, and introduces the development of an Internal Security Strategy. When developing the Area of Freedom, Security and Justice, the European legislator constantly has to find the right balance between the security and free movement of citizens on the one hand, and the protection of their privacy and personal data on the other hand. The Communications on information exchange mentioned above indicate that the Commission takes this assignment seriously.

It goes without saying that all the steps which are announced in the Stockholm Action Plan and in the various communications on this matter will be closely followed by the EDPS. The EDPS wishes to mention in particular the setting up of an entry-exit system and the Registered Traveller Programme, the envisaged Directive on the use of PNR for law enforcement purposes, the introduction of a European TFTP, the creation of EUROSUR, the possibility of an EU-ESTA and the use of security scanners at airports. All these initiatives have important data protection implications. It will also closely follow the negotiations for agreements on data protection with third countries. Last but not least, the EDPS will actively participate in the review of the Data Retention Directive and see whether the need for such a Directive and the proportionality of such a measure is established.

c. Technological developments: the Digital Agenda for Europe

In May 2010 the Commission published its Communication on a Digital Agenda for Europe. The digital agenda sets out priorities to speed up the roll-out of high speed internet and tap the potential of digital technologies for households and firms. Many of the announced initiatives in relation to the digital agenda may have

significant data protection relevance, such as the framework for electronic identity (eID) and authentication and the review of the Directive on reuse of public sector information. The EDPS will also continue to follow the proposals which envisage the introduction of new technology in areas such as road transport (the e-mobility package) and energy (the use of smart grids). In addition, he will look at the Communication on privacy and trust in digital Europe and the Review of the Directive on radio and telecommunication equipment.

#### d. Other areas

As a general rule, the EDPS will remain vigilant regarding all other initiatives that may significantly affect data protection. In 2011, the EDPS will in particular look at the new initiatives in the area of transport, including among others the body scanners initiative. He will also focus on large scale data exchanges, which might take place in the IMI-system (Internal Market Information) and the Consumer Protection Cooperation System and in the frame of the eJustice project. He will continue to give input in the discussions on a new regulation for transparency, as far as data protection is concerned. These discussions are even more important after the judgement of the Court of Justice in Bavarian Lager.<sup>7</sup>

### **III. Priorities EDPS for 2011**

The policy of the EDPS as an advisor on EU-legislation and related documents will not change. The consistency of output is crucial, whereby the EDPS strives to strike the right balance between data protection and other (public) interests. As in previous years, the EDPS intends to give his opinion on all legislative proposals which have a substantive impact on data protection. The EDPS may also look at non-legislative measures whenever they raise substantial data-protection issues. The following is a non-exclusive list of the main issues on which the EDPS will likely concentrate in the course of 2011:

- a. Towards a new legal framework for data protection
  - Revision of EU data protection framework.
  - Revision of the data protection rules, applicable at the EU level.
  - Finalising ongoing work in the following main areas: clarifying the notions of 'accountability' and 'consent' and the issue of applicable law and jurisdiction (also with national Data Protection Authorities, in the framework of Article 29 Working Party).
  
- b. Further developing the Area of Freedom, Security and Justice
  - EU-PNR
  - EU TFTP
  - Review of Data Retention Directive
  - Border management and entry-exit system
  - Registered traveller programme (RTP)
  - EU-ESTA

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<sup>7</sup> Case C-28/08, *European Commission v The Bavarian Lager*, not yet published in ECR.

- EUROSUR
  - Terrorism and freezing of funds
  - Negotiations on agreements with third countries on data protection
- c. Technological developments and the Digital Agenda
- Communication on Privacy and Trust in digital EU
  - eMobility package
  - Regulatory framework on smart grids
  - Review of the directive on re-use of public sector information
  - Review of the Directive on radio and telecommunication equipment
- d. Other areas
- Initiatives in the area of transport (including the use of body scanners)
  - Customs cooperation
  - eJustice, IMI and CPCS
  - Review of Transparency Regulation.

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