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EUROPEAN DATA PROTECTION SUPERVISOR

Inventory 2013

A strategic approach to legislative consultation

1. ISSUES OF STRATEGIC IMPORTANCE FOR 2013

This document presents the public inventory of the EDPS in his role of advisor on proposals for EU legislation and related initiatives. The inventory forms an integrated part of the annual work cycle of the EDPS and sets out his approach in the area of consultation for the upcoming year.

The following is a non-exhaustive list of key issues on which the EDPS will concentrate in the course of 2013

- a. Towards a new legal framework for data protection
 - Proposals for a general data protection regulation and for a directive in the area of criminal justice from 25 January 2012.
 - Upcoming proposals, in particular relating to data protection in EU institutions and bodies
- b. Technological developments and the Digital Agenda, IP rights and Internet
 - Internet monitoring (e.g. the fight against child pornography, Cybercrime and IP rights)
 - Cyber-security
 - Cloud computing
- c. Further developing the Area of Freedom, Security and Justice
 - Eurojust Reform
 - Europol Reform
 - Cybercrime
 - Smart Borders package
 - Negotiations on agreements with third countries on data protection
- d. Financial sector
 - Regulation and supervision of financial markets and actors
 - Banking supervision
 - Anti Money Laundering
- e. eHealth
 - Proposals on Clinical trials and Medical devices.
 - eHealth action plan

2. STRATEGIC FRAMEWORK

2.1. EU policies and data protection: an overview

In recent years we have witnessed a steady increase in the number of EDPS opinions issued regarding proposals for EU legislation and related documents. In the course of 2012, the EDPS issued 33 legislative opinions and 15 sets of formal comments and provided informal advice to the Commission or other Institutions in 37 cases. An analysis of the 2013 Commission work programme confirms that this trend will continue and that the number of EDPS opinions could potentially increase even further in future.

In general, the following main trends can be identified as predominant in this context. Therefore, the EDPS will respond to these trends through the actions and with the methodology described in this document.

1. The need to take account of privacy and data protection implications of legislative proposals is becoming essential in all areas of EU policy. It is becoming increasingly apparent that the fundamental right to data protection cannot be regulated "only" in data protection law but that many different policy areas have to take data protection into account.
2. There is an increasing tendency of endowing administrative authorities (both EU and national) with effective information gathering and investigative tools. This is the case in particular in the area of freedom, security and justice and in relation to the revision of the legislative framework concerning financial supervision.
3. In this context the increasing importance of "internet monitoring", by public authorities as well as by private parties, is clearly to be considered in relation to irregularities on internet, from issues like combating child pornography over cyber crime to Intellectual Property Rights.
4. EU legislation increasingly facilitates significant exchanges of information between national authorities, quite often involving EU-bodies and large-scale databases (with or without a central part) of increasing size and processing power. This requires careful consideration by the policy makers and actors in the legislative procedure when setting out data protection requirements, because of the important consequences these exchanges can have for the privacy of citizens, e.g. by facilitating the monitoring of citizens' lives.
5. Recent years have been characterised by impressive developments in the field of technology, mainly due to the widespread use of internet and geo-location technologies. Such developments have a significant impact on a citizen's right to privacy and data protection.

The importance of the fundamental right to privacy and data protection in the post-Lisbon legal framework cannot be overstated and it is clearly demonstrated by the recent case law of the Court of Justice.¹ The *Schecke* judgment of the Court of Justice, demonstrates how sufficient consideration of data protection issues is needed, where relevant, before drawing up proposals for EU legislation. It is, therefore, important that EDPS advice is provided in a timely manner so that it can be fully integrated in the legislative process. A strategic approach is crucial.

¹ Case C-70/10, *Scarlet Extended SA v SABAM*, judgment of 24 November 2011; Joined Cases C-92/09 and C-93/09, *Schecke*, judgment of 9 November 2010.

2.2. A strategic approach to legislative consultation

The EDPS faces the challenge of fulfilling his ever-increasing role in the legislative procedure while guaranteeing high-quality and well-appreciated contributions to it, to be delivered with limited resources.

In light of this, the EDPS has, therefore, identified issues of strategic importance (outlined under section 1 above and further described below) that will form the cornerstones of his consultation work for 2013, while not neglecting the importance of other legislative procedures where data protection is concerned (i.e. the other initiatives highlighted in red in the Annex to the present document, such as the proposals for Customs Information Sharing).

The EDPS is, therefore, committed to devoting substantial resources in 2013 to the analysis of the strategic proposals, as identified in this document. These proposals can be grouped into five categories:

- ◇ Towards a new legal framework for data protection,
- ◇ Technological developments and the Digital Agenda,
- ◇ Further developing the Area of Freedom, Security and Justice,
- ◇ Financial sector reforms, and
- ◇ eHealth

They will be analysed in more detail below.

In addition to these strategic areas, the EDPS has identified a number of (non or less strategic) initiatives which may nonetheless have data protection relevance. These initiatives are listed in the Annex to this document and some are highlighted in either yellow or green. The fact that the latter are included in the Annex implies that they will be regularly monitored, but does not mean that the EDPS will issue an opinion or formal comments on such initiatives.

It should be noted that the implementation of the EDPS planning and priorities are largely dependent on the planning of the Commission. Should the adoption of any relevant proposal(s) be postponed or withdrawn for any reason by the Commission, this will of course have an impact on the EDPS agenda.

2.3. Selection of key initiatives from the Commission Work Programme 2013

The EDPS has identified some key initiatives from the Commission Work Programme for 2013, on which he will concentrate in the course of 2013. The main subject areas envisaged for 2013 are the following.

2.3.1. Towards a new legal framework for data protection

The review process of the data protection legislative framework has now reached an advanced stage. The Commission published its proposals for a new legislative framework on 25 January 2012. The EDPS issued a comprehensive Opinion on the legislative proposals on 7 March 2012, closely followed the review process and continued to fulfil his advisory role in the course of 2012 by intervening at the appropriate stages and in the appropriate fora.

The EDPS will interact with all relevant actors in the ongoing legislative procedure, as well as with stakeholders and interested parties on different levels.

As in earlier years, a priori, the EDPS will pay special attention to the most crucial elements of the new framework, such as definitions, general principles, jurisdiction for trans-border data processing activities, third-country transfers, data subjects' rights (including the new rights to be forgotten and to data portability), data controllers' obligations (including privacy by design and accountability) and oversight mechanisms. Cooperation between DPAs, the foreseen consistency mechanism as well as the creation of a European Data Protection Board, will be important focuses.

It is important to point out that the review represents the first step in a process that is due to include proposals for the revision of Regulation 45/2001, the e-Privacy Directive and specialised instruments in the field of police and judicial cooperation. The EDPS will follow developments and foresees a deep and timely involvement also regarding these upcoming initiatives.

2.3.2. Technological developments: the Digital Agenda for Europe, Intellectual property rights and Internet

The Commission has planned significant work in the area of the information society and new technologies for 2013. Particular emphasis will be given to the implementation of the Digital Agenda and the EU 2020 Programme. Several of these initiatives are likely to have significant data protection relevance. The EDPS will also monitor and engage in relevant European Research and Technological Development projects. He will in particular focus on the following policy issues:

- ◇ Internet monitoring and IP Rights
- ◇ Implementation of the Digital Agenda
- ◇ Cyber-security
- ◇ Cloud computing

In these areas, the EDPS will deal with the important issues raised by digital technologies such as, *inter alia*, the balance between IP rights and privacy (internet monitoring, IP enforcement and takedown procedures), jurisdictional issues for trans-border data processing activities (cloud computing),

2.3.3. Further development of the Area of Freedom, Security and Justice

The Commission Work Programme for 2013 shows that the Commission will take important initiatives in this area. The following items seem to be at the top of the agenda:

- ◇ Establishing a European Public Prosecutor's Office to fight against crimes affecting the EU budget and protect its financial interests;
- ◇ the reform of Eurojust; and
- ◇ Improving judicial cooperation in both criminal and civil matters.

Some important initiatives are also carried over from the 2012 work programme:

- ◇ Europol Reform
- ◇ Cybercrime
- ◇ Immigration and border control, where the Commission plans to adopt the legislative package on smart borders including an entry/exit system, Registered Travellers Programme and EUROSUR.
- ◇ Anti-terrorism and internal security strategy, in relation to which the EU PNR and TFTP initiatives will play a crucial role

In analysing these initiatives, the EDPS will strive to ensure that the right balance is achieved between privacy and security, that data protection requirements are fulfilled when providing for massive exchanges of information between national and third country authorities (e.g. TFTP, PNR, agreements with third countries on data protection) and that monitoring of individuals, including by means of geo-localisation, for security purposes is carried out in compliance with fundamental rights.

2.3.4. *Financial sector reforms*

Since the outbreak of the economic crisis, the Commission has undertaken a comprehensive overhaul of financial regulation and supervision. The EDPS has paid considerable attention in 2012 to developments in the financial legislation.

According to the Commission, the legislation already in place and being considered for 2013 adds up to a fundamental reshaping of the EU's financial system. Agreement on banking supervision will put the European financial system on far more secure foundations and act as a springboard for confidence. In addition, the Commission will propose legislation to further enhance stability, transparency and consumer protection in the financial sector (for example, on the systemic risks related to nonbanks and shadow banking). As a result, the EDPS will, where appropriate, continue to be very active in the area of financial sector reforms in 2013.

One major proposal which will have significant data protection implications is the revision of the EU Anti Money Laundering legislation. The Commission envisages to adopt a proposal on this topic in January 2013 and the EDPS considers, apart from writing an Opinion, engaging in the debate and the legislative procedure at the appropriate level and with the appropriate actors.

2.3.5. *eHealth*

During 2012, the Commission published initiatives in the area of eHealth, most notably on Clinical Trials and Medical Devices. These proposals have data protection at the core, as they concern the processing and storage of sensitive personal data (patient health data) on a large scale in centralised EU databases.

eHealth will continue to be a focus in the Commission's work in 2013 with initiatives like an eHealth Action plan setting out targets for operational steps towards the wide roll out of interoperable electronic health records and telemedicine services.

3. METHODOLOGY

The EDPS exercises his advisory tasks in the field of legislative consultation by issuing opinions, comments (formal or informal) or other instruments.

The choice between an Opinion, comments or other instruments depends on:

- ◇ *Type of document*: as a basic rule, a proposal as meant in Article 28 (2) leads to an Opinion, which is to be regarded as an integral part of the legislative procedure². Exceptions may only be made where the EDPS has little reason for comment and/or data protection is not a highly relevant issue in the proposal, where formal comments may be issued or a decision not to engage may be made. Where relevant, the EDPS

² Article 28 (2) of Regulation 45/2001: "When it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, the Commission shall consult the European Data Protection Supervisor."

also issues opinions regarding the approval of International agreements where the protection of personal data is affected. Finally, as the role of delegated and implementing acts is increasing, the EDPS envisages drafting opinions also for these types of instruments, where relevant and at an appropriate stage of the procedure.

- ◇ The EDPS only considers issuing an opinion on non legislative texts (such as Commission working documents, communications or recommendations) if data protection is a core element of the instrument and there is sufficient material for an Opinion.
- ◇ *Stage of procedure*: in other stages of a legislative process than the adoption of a proposal (or a decision etc) by the Commission, "formal comments" (or an explanatory letter on a specific issue) are usually sufficient.

The EDPS will engage in follow-up activities after the publication of opinions or comments, such as being available for discussions with all EU institutions and bodies involved in the legislative procedure, speaking at conferences and workshops and engaging with other stakeholders.

For the issues of strategic importance as identified under chapter 1 above, the EDPS intends to adopt a more in-depth approach to his activities. He envisages organising his secretariat to work in project teams (task-forces) to ensure quality and consistency in these crucial areas of strategic importance to personal data protection in the EU.

In order to better fulfil his role of advisor, the EDPS may consider publishing guidelines in 2013 regarding important technical or societal phenomena that affect personal data protection (such as "large-scale databases") or concerning recurring data protection aspects of EU legislative initiatives (such as in the area of financial supervision). This approach may also involve the development of a Data protection toolkit for legislators, containing basic principles and checklists and the organisation of workshops with staff involved in legislative drafting regarding specific areas or specific themes.

In addition to and as an integrated part of his activities in legislative consultation, the EDPS may envisage 'prospective opinions' on technological and societal phenomena that have a significant impact on the fundamental right to data protection, in line with the Opinion which was already published on Cloud computing in November 2012. The EDPS considers issuing a prospective opinion on the integration of data protection in other policy areas of the EU, such as competition and trade. He also envisages the issuing of a second prospective opinion in the second half of 2013, on a subject still to be determined.

4. INVENTORY: BACKGROUND

The main sources of the EDPS Inventory are the Commission Legislative and Work Programme 2013 and the work programme of the Article 29 Working Party, but also 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 invited to give input. This input is highly appreciated.

The inventory should be seen as a strategic document, setting out the direction for the work in the upcoming year and identifying issues where the EDPS feels that he can provide most "added value" within the framework of legislative and non-legislative procedures.

The inventory consists of two documents:

- ◇ This introductory part which sets out the EDPS strategic priorities for legislative consultation in 2013.

- ◇ 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 (as a general rule) been updated three times a year since then.³

The EDPS would like to encourage stakeholders to monitor the inventory and its regular updates, so as to ensure that the EDPS is consulted in the appropriate manner and at the appropriate stage on initiatives included therein.

Once the EDPS has given his opinion (or another public reaction) on a document, the document will normally be deleted from the Annex. The involvement of the EDPS in the legislative process, however, does not cease once his opinion has been issued. In exceptional cases the subject can reappear in the Annex, where the EDPS intends to issue a second Opinion. The opinions of the EDPS can also be found on his website.⁴

³ Apart from December, the update takes place in principle in May and September.

⁴ Under 'Consultation' >> 'Opinions'.