



Brussels, 18 December 2013

EUROPEAN DATA PROTECTION SUPERVISOR

Inventory 2014

A strategic approach to legislative consultation

1. ISSUES OF STRATEGIC IMPORTANCE FOR 2014

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.

As the second mandate of the EDPS comes to an end in January 2014, the following is a non-exhaustive list of key issues on which the EDPS is very likely to concentrate his resources in the course of 2014. The way in which this will happen will depend on the new team of Supervisors taking over by early 2014.

- 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. Rebuilding trust in global data flow in the aftermath of PRISM
 - Follow up of the Commission's Communication of 27 November 2013 on rebuilding trust in EU-US data flows
 - Review on the implementation of the PNR Agreement;
 - Analysis of the functioning of Safe Harbour
- c. Initiatives to bolster the economic growth and the Digital Agenda
 - Single Market in telecommunications (e.g. IP rights, network and information security, data protection)
 - Proposals on eProcurement, eHealth, Open Data
 - Review of competition rules
 - Cyber-security
 - Cloud computing
- d. Further developing the Area of Freedom, Security and Justice
 - Post Stockholm Programme
 - Reform of agencies and bodies (e.g. Eurojust, OLAF, EPPO)
 - Initiatives against terrorism and extremism
 - Negotiations on agreements with third countries on data protection
- e. Reform of the financial sector
 - Regulation and supervision of financial markets and actors
 - Banking supervision
- f. Tax fraud and banking secrecy
 - Towards a definitive VAT system
 - Negotiations on agreements with third countries on the exchange of VAT information
 - Banking secrecy

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. This increase has stopped in 2013 and as a result, in the course of 2013, the EDPS issued 20 legislative opinions and 11 sets of formal comments and provided informal advice to the Commission or other Institutions in 33 cases. Another reason for this outcome is that efforts to concentrate on strategic priorities were successful, and that in particular many resources had to be dedicated to the reform of the data protection framework.

For 2014, much depends on the progress made in the legislative negotiations on the new data protection framework that is now at a crucial stage. In the European Parliament, the LIBE Committee has voted its report on 21 October 2013, after tough negotiations and many political compromises. Important progress has been made, but the political process within the Parliament is not over as the next and final step in the Parliament's first reading is now the plenary vote.

In Council, there is less progress. Negotiations between Member States are still on-going concerning important parts of the legislative framework such as the one-stop-shop mechanism and the package approach with a Regulation and a Directive, among other politically sensitive and legally complicated issues.

Once the Council has decided on its common position on the legislative framework a round of negotiations between the three institutions (Parliament, Commission and Council) will commence (a so called trilogue).

The outcome of these negotiations is still uncertain. The political and legislative framework is further complicated by the fact that European Parliament elections are taking place in May 2014 and that the mandate for the sitting European Commission ends later in the year.

The EDPS will of course continue to be deeply involved in these processes in 2014 giving independent advice to the institutions.

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

1. The debate following the revelations of mass surveillance has shed more light on the practices currently in use on both sides of the Atlantic. In this context, confirming and strengthening privacy and data protection as fundamental rights has become an even higher priority on the EU political agenda. Data protection has been mentioned as a key issue in the talks preparing the establishment of a EU-US Free Trade Area and the Safe Harbour agreement between the EU and the US is currently under review. In particular, the debate triggered by the revelations concerning the programmes run by both foreign and EU intelligence services has contributed to raising privacy and data protection awareness in the public eye, a trend which encourages the EDPS to provide further guidance and input to the EU legislator and other stakeholders. As a first step, he will react on the Commission's Communication of 27 November 2013 on rebuilding trust in EU-US data flows, also taking into account the outcomes of the LIBE Committee inquiry into electronic mass surveillance of EU citizens.

2. There is an ever 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. 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.
3. Masses of personal information are created every day on the Internet. An enormous volume of personal data is collected by companies to preserve and enhance existing client relations and for acquisition and further development of new relationships. This personal data can be sold to other interested parties and has therefore in effect become intangible assets which are not accounted for on company balance sheets. Further use of these masses of information for law enforcement purposes may also take place. In view of these developments, issues like the relationship between data protection and competition law gain in importance. Following his Opinion on Cloud computing, the EDPS therefore plans to publish a prospective Opinion discussing the issue of the role of data protection in EU competition law and plans to do further work in the areas of Big Data and data as a currency.
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 trend is likely to continue in 2014 in the context of the new programme for the Area of Freedom, Security and Justice (Post-Stockholm). It therefore requires careful consideration by 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. In order to ease the fiscal burden imposed on EU citizens by the financial crisis, the Member States are increasingly coordinating their action against tax fraud and tax evasion at EU level, by boosting the effectiveness of the tools of administrative cooperation in the tax sector, like happened in the G20 as regards for example the initiatives against bank secrecy. At the same time, the EU has started negotiations with some third countries for the conclusion of international agreements aimed at combating VAT fraud through the exchange of tax information. Although justifiable on grounds of compelling public interest, these initiatives need to be kept aligned with the rules on data protection, especially with the principle of proportionality, and therefore they will be high on the EDPS' agenda in 2014.

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 at the right time and with ever limited resources.

In light of this, the EDPS has identified issues of strategic importance (outlined under section 1 above and further described below) that will form the cornerstones of his consultation work for 2014, 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).

Furthermore, in order to further improve his effectiveness in providing guidance to the EU institutions and promoting a data protection culture, the EDPS will devote even more resources in 2014 to drafting sectorial guidelines for policy makers, as well as following up

the outcome of the advice provided. This will lead to a shift towards a more proactive and results-driven approach, that will require the EDPS to be more selective in the choice of his priorities and to organize his secretariat's resources accordingly.

To this extent, the EDPS has identified a series of strategic proposals in the Commission Working Programme for 2014. They can be grouped into the main categories referred to in section 1 above.

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.

As has been the case in previous years the proposals in the Annex mainly come from the DGs for Communications Networks, Content and Technology (CNECT), Home Affairs (HOME), Justice (JUST) and Internal Market and Services (MARKT) but also other DGs like Health and Consumers (SANCO) and Taxation and Customs Union (TAXUD) are worth mentioning as sources of proposals for consultation.

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. Key initiatives in the Commission Work Programme 2014

The EDPS has identified some key initiatives from the Commission Work Programme, on which he will concentrate in the course of 2014. The main subject areas envisaged 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, probably soon involving negotiations between the Council, the Commission and the European Parliament. 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 and issued further comments in May 2013. In addition, he closely followed the review process and continued to fulfil his advisory role in the course of 2013 by intervening at the appropriate stages and in the appropriate fora, mainly in the European Parliament and in Council working groups.

In 2014, the EDPS will continue to interact with all relevant actors in the on-going legislative procedure, as well as with stakeholders and interested parties on different levels in order to achieve the goal of a speedy adoption of the legislative package.

As in earlier years, 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 has already been consulted informally at an early stage in some of these legislative procedures and will follow developments closely in 2014. We foresee a deep, timely and continuous involvement also regarding these initiatives.

2.3.2. Rebuilding trust in global data flow in the aftermath of PRISM

The EDPS will closely follow the developments of the *PRISM affaire*, and provide input to the initiatives undertaken by the EU Institutions, above all the EU Commission, in the context of rebuilding trust in global data flow. In this context, the following items have already been announced in 2013 and will be monitored closely as well as any other relevant initiatives that will emerge during 2014.

- ◇ Communication on rebuilding trust in EU-US data flows
- ◇ Draft report of the joint review on the implementation of the PNR Agreement
- ◇ Analysis of the functioning of Safe Harbour

2.3.3. Initiatives to bolster the economic growth and the Digital Agenda

Most of the work planned by the Commission in the area of the information society and new technologies for 2014 is carried over from 2013. Particular emphasis will be given to the objective of bolstering the economic growth in the EU. Some of the initiatives that are foreseen in this respect are likely to have significant data protection relevance. The EDPS will in particular focus on the following policy issues:

- ◇ The Single Market in telecommunications
- ◇ Proposals on eProcurement, eHealth, Open Data
- ◇ Review of competition rules
- ◇ Cyber-security
- ◇ Cloud computing

In these areas, the EDPS will continue dealing 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). He will also monitor the modernization of the rules on State Aids announced in the Commission Work Programme for 2014. On his own initiative, following a similar exercise in 2012 on Cloud Computing, the EDPS envisages publishing a prospective Opinion about the interfaces between data protection and competition law in the first half of 2014.

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

In 2014, the Programme for the Area of Freedom, Security and Justice adopted in Stockholm in 2010 will come to an end. A new multi-annual roadmap will be discussed and adopted, while some policies already initialled in 2013 will be carried over. The following items seem to be at the top of the Commission's agenda:

- ◇ Definition of future priorities in the areas of justice and home affairs (post-Stockholm programme);
- ◇ Establishment of a European Terrorist Finance Tracking System (EU TFTS);
- ◇ Reform of OLAF

The following initiatives will be carried over from the 2013 work programme:

- ◇ Eurojust Reform and establishment of a European Public Prosecutor's Office
- ◇ Initiative on fire-arms
- ◇ 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.

2.3.5. 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 2013 to developments in the financial legislation.

Apart for the envisaged "*New approach to business failure and insolvency*", on which the EDPS may write a comment or an Opinion, a large share of the measures announced in this sector for 2014 are items carried over from 2013.

- ◇ Review of the European System of Financial Supervision
- ◇ Reform of the framework for collective investment funds/UCITS VI (focus on long-term investments, product rules and depositaries)

2.3.6. Tax fraud and banking secrecy

Following a trend already started in 2013, initiatives developed at EU level in the context of the fight against tax fraud and the lifting of banking secrecy are expected to have a great impact on data protection rules. Apart from the EU legal framework on VAT, fiscal policies remain outside the competences of the EU. Nevertheless, the EU is increasingly supporting, coordinating or complementing the actions taken by Member States as regards the administrative cooperation in the fiscal field, thus exercising the competence conferred on it by article 6 TFEU.

In its work programme for 2014, the Commission has announced its commitment to fighting tax fraud and banking secrecy within the G20 along with the Member States parties to that forum. This may lead to new EU activities aimed at sharing tax and banking information, all of which will be carefully scrutinized as to their impact on the protection of personal data of EU citizens.

Furthermore, an initiative to complete the VAT system has also been foreseen by the Work Programme and in parallel the Commission will start to negotiate an agreement for the exchange of VAT information with both Russia and Norway. In 2013 the EU started working with Canada and China to adopt an agreement on the mutual recognition of economic operators. The EDPS will follow the negotiations and provide his advice where appropriate by means of either an opinion or a comment.

3. METHODOLOGY

Although our working methods in the area of consultation have developed over the years, the basic approach for interventions has not changed. It is based on our internal policy and consultation case manual and our policy paper of March 2005 'The EDPS as an advisor to the Community institutions on proposals for legislation and related documents'. This document remains relevant, although it must now be read in light of the Lisbon Treaty. Both the case manual and the policy paper are currently undergoing revision and are planned to be updated at the start of 2014.

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 procedure¹. 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 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. In 2014, he intends to increase the focus on follow up activities to ensure the effective uptake of his recommendation to the legislator.

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 2014 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

¹ 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."

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 will publish '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. In the light of the emerging trends of Big Data and the increased value of personal data, the EDPS will be issuing a prospective opinion on the role of data protection in EU competition law. He also envisages the issuing of a second prospective opinion in the second half of 2014, on a subject still to be determined.

4. INVENTORY: BACKGROUND

The main sources of the EDPS Inventory are the Commission Legislative and Work Programme 2014 and the work programme of the Article 29 Working Party, but other relevant documents of the Commission, the Council and the Parliament have been taken into account. It also builds on the result of the 2013-2014 EDPS Strategic Review. 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 EDPS will keep Article 29 Working Party timely informed about relevant steps, to better coordinate on corresponding activities.

The inventory consists of two documents:

- ◇ This introductory part which sets out the EDPS strategic priorities for legislative consultation in 2014.
- ◇ 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.²

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.³

² Apart from December, the update takes place in principle in May and September.

³ Under 'Consultation' >> 'Opinions'.