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EUROPEAN DATA PROTECTION SUPERVISOR

Priorities 2015

A strategic approach to legislative consultation

1. ISSUES OF STRATEGIC IMPORTANCE FOR 2015

This document presents the priorities of the EDPS for 2015 in his role of advisor on proposals for EU legislation and related initiatives¹. It sets out his approach in the area of consultation for this year, in line with the priorities identified in the EDPS Strategy 2015-2019².

The start of the third mandate of the EDPS in December 2014, with a new team of Supervisors, marks a new era for the exercise of his consultative tasks. The EDPS was requested by the co-legislators to play a more **proactive role** in the shaping of policy measures at EU level³.

As part of this proactive role, the EDPS is developing a '**policy toolkit**' to provide guidance to the legislator, for instance through thematic or sectoral guidelines. Following the release in 2014 of the first set of guidelines on data protection in EU financial services regulation, we are now working on developing new **thematic guidelines with particular focus on the area of law enforcement**.

In the course of 2015, substantial resources will be devoted to providing advice to the co-legislators in the context of the on-going data protection reform. The EDPS intends to be a pro-active partner in the discussions between the European Parliament, the Council and the Commission, including the final trilogue negotiation. We will also continue adopting **prospective opinions** to explore the privacy and data protection implications raised by certain new technologies or new trends. The first of these prospective opinions will be on **mobile health**, to be followed by one addressing the challenges of **Big Data**.

The following is a non-exhaustive list of key issues on which the EDPS will concentrate his resources on consultation in the course of 2015.

¹ The publication of the EDPS priorities was delayed this year for several reasons, owing in particular to the start of the new mandate of the Supervisors in December 2014, the adoption of the EDPS Strategy 2015-2019 in March 2015, the implementation of the Strategy into the EDPS Annual Management Plan, and the late adoption by the Commission of its work programme.

² "Leading by example, the EDPS Strategy 2015-2019", available at: <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Strategy2015>.

³ Vacancy notice for the European Data Protection Supervisor COM/2014/10354 (2014/C 163 A/02), OJ C 163 A/6 28.5.2014.

- a. Towards a new legal framework for data protection
 - Proposals for a general data protection regulation and for a directive in the area of police and justice of 25 January 2012
 - Upcoming proposals relating to data protection in EU institutions and bodies (review of Regulation 45/2001)
 - Evaluation and review of Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy directive)
- b. A connected Digital Single Market
 - Digital Single Market package
 - Modernisation of the EU copyright rules
 - Complementing the communications regulatory environment
 - Enhancing cyber-security and mainstreaming digitalisation
- c. International matters, supporting the EU becoming a Stronger Global Actor
 - Negotiations on trade agreements with third countries (eg TTIP, TISA)
 - Implementation of PNR Agreements and negotiations on new PNR Agreements
 - Monitoring developments on the legal framework governing EU-US data flows
 - Negotiations on agreements with third countries on data protection
- d. Migration, Home Affairs and Citizenship
 - European Agenda on Security
 - European Agenda on Migration
 - Agencies and bodies in ex-third pillar (e.g. Europol, Eurojust, EPPO)
 - Initiatives against terrorism and extremism
- e. A deeper and fairer Economic and Monetary Union
 - Action Plan on efforts to combat tax evasion and tax fraud
 - EU proposals and negotiations on agreements with third countries on the automatic exchange of information in the field of taxation

2. POLICY 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 been halted since 2013 and as a result, in the course of 2014, the EDPS issued 14 legislative opinions and 9 sets of formal comments and provided informal advice to the Commission or other Institutions in 33 cases. Another reason for this halt of the increase is that many resources have been dedicated to the reform of the data protection framework.

For 2015, the legislative negotiations on the new data protection framework will continue to be high on our agenda. The EDPS will issue an Opinion following the Council position in first reading and will be actively engaging with the co-legislators during the trilogue negotiations which are likely to start thereafter in July.

In general, the following main trends, already identified in 2014, continue to be predominant. The EDPS will respond to these trends through the actions proposed in this document, applying the methodology described in our Policy paper⁴.

1. The debate triggered by the revelations concerning the programmes of **mass surveillance** run by both foreign and EU intelligences has contributed to raise 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. Data protection is key in the EU-US Umbrella agreement in the field of law enforcement. Possible actions regarding the Safe Harbour agreement between the EU and the US are still being considered, and data protection is also an important issue in the talks preparing the establishment of a EU-US Free Trade Area. In this context, confirming and cementing privacy and data protection as fundamental rights has become a priority on the EU political agenda.
2. 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 2015 in the context of the **new European agenda on security**. 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.
3. 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. At the same time, the EU has started negotiations with some third countries for the conclusion of international agreements aimed at combating tax evasion 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 2015.

⁴ "The EDPS as an advisor to EU institutions on policy and legislation: building on ten years of experience", 4 June 2014, available on EDPS website at www.edps.europa.eu.

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 2015, 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 EDPS' effectiveness in providing guidance to the EU institutions and promoting a data protection culture, the EDPS will devote resources in 2015 to drafting new sectorial guidelines for policy makers, as well as in following up the outcome of the advice provided. This is part of the shift towards a more proactive and results-driven approach which has been initiated since 2014, that requires 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 2015⁵. They can be grouped into five main categories:

- ◇ Towards a new legal framework for data protection;
- ◇ A connected Digital Single Market;
- ◇ International matters, supporting the EU becoming a Stronger Global Actor;
- ◇ Migration, Home Affairs and Citizenship;
- ◇ A deeper and fairer Economic and Monetary Union.

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. Key initiatives in the Commission Work Programme 2015

The EDPS has identified some key initiatives from the Commission Work Programme, on which he will concentrate in the course of 2015. The main subject areas envisaged are the following.

2.3.1. Towards a new legal framework for data protection

This year, the review process of the data protection legislative framework is approaching its final stages: the Council is expected to reach a general common approach in June and the trilogue negotiations between the European Parliament, the Council and the Commission

⁵ COM(2014) 910 final.

should begin in the summer. The EDPS issued a comprehensive Opinion on the legislative proposals on 7 March 2012 and provided further comments in May 2013. In addition, we have closely followed the review process and continued to fulfil his advisory role in the course of 2014 by intervening at the appropriate stages and in the relevant fora, mainly in the European Parliament and in the Council working group.

In 2015, substantial resources will continue to be devoted to providing advice to the co-legislators in the context of the on-going data protection reform. The EDPS has been requested to be a pro-active partner in the discussions between the European Parliament, the Council and the Commission, including the final trilogue negotiation. To this end, the EDPS will issue a position paper on the reform once the Council position has been agreed. The position paper will pay special attention to the most crucial elements of the new General Data Protection Regulation, including data subjects rights and data processing principles; the material scope of application of GDPR vs the law enforcement Directive; the application of the GDPR to EU institutions; and EDPS role with regard to the EDPB Secretariat. It will also provide a global evaluation of the general trends in the reform proposals, and identify the improvements (or the “red lines” trespassed) compared to the current level of protection offered by Directive 95/46/EC. Effective enforcement and the future governance will also be assessed, taking into account the scope of application of the renewed legal framework.

It is important to point out that the discussions on the GDPR represent one step in an on-going process that also encompasses the other element of the reform “package”, i.e. the law enforcement Directive, as well as and specialised instruments in the field of police and judicial cooperation. In addition, review of Regulation 45/2001 and of the e-Privacy Directive is expected in the future. The EDPS has already been consulted informally at an early stage in some of these legislative procedures and will follow developments closely in 2015 in order to provide expert, timely and pragmatic advice to the EU legislator.

2.3.2. *A connected Digital Single Market*

In the Commission work programme for 2015, particular emphasis is given to the objective of bolstering the digital economy in the EU. The Commission has devised a Strategy as a first step⁶, to be followed by new initiatives, legislative and non-legislative, to bring the Digital Single Market to the level of ambition needed to respond to existing challenges. Initiatives in relation to the digital sphere are likely to have significant data protection relevance.

Data protection in the digital era is one of the key pillars of the EDPS Strategy (Strategic objective 1). The EDPS will continue dealing with the important issues raised by digital technologies such as, *inter alia*, strengthening trust in online services, the challenges of Big Data, the application of privacy by design and privacy by default, the balance between IP rights and privacy (internet monitoring, IP enforcement and takedown procedures), and jurisdictional issues for trans-border data processing activities. The EDPS will provide advice where appropriate by means of either an opinion or formal comments. In doing so, he will foster creative ideas and innovative solutions, customising existing data protection principles to fit the global digital arena.

On his own initiative, following a similar exercise in 2014 on the interfaces between data protection and competition law, the EDPS also envisages publishing prospective Opinions about mHealth and Big Data in the first half of 2015. These prospective Opinions may then be followed by workshops as a means to initiate a dialogue amongst stakeholders.

⁶ COM(2015) 192 final.

2.3.3. International matters: supporting the EU becoming a Stronger Global Actor

The international dimension is an important element of the Commission Work Programme for 2015 with particular focus on trade agreements, but also in continuation of the work of last year work programme as regards PNR agreements, the Safe Harbor, and the negotiations of the EU-US Umbrella Agreement. For the EDPS, international policies also have a high priority on his agenda and are part of Strategic objective 2 (*Forging global partnerships*) of his Strategy 2015-2019.

The EDPS will follow the negotiations and provide his advice where appropriate by means of either an opinion or formal comments.

2.3.4. Migration, Home Affairs and Citizenship

In 2015, the Commission will continue to improve the fight against cross-border crime and terrorism by putting forward a European Agenda on Security to address threats to the EU's internal security such as cross-border crime, cybercrime, terrorism, foreign fighters and radicalisation⁷.

The Commission is also developing a European Agenda on Migration⁸ and will be conducting preparatory work on future proposals on smart borders (Entry/Exit system).

Amongst others, the following initiatives will be carried over from the 2014 work programme:

- ◇ Establishment of the European Public Prosecutor's Office
- ◇ Eurojust Reform
- ◇ Europol Reform

In line with Action 10 of the Strategy, 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. 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.

As part of Action 9 of the Strategy, the EDPS will facilitate responsible and informed policymaking in this area by organising a workshop with DG HOME services to raise awareness on data protection. It will be followed by the drafting of sectoral guidelines on a specific theme, including most likely necessity and proportionality questions.

2.3.5. A deeper and fairer Economic and Monetary Union

Following a trend already started in 2013, initiatives developed at EU level in the context of the fight against tax fraud and 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 2015, the Commission has announced its commitment to combat tax evasion and tax fraud, starting from the work done at OECD and G20 levels. This may lead to an inception of new EU activities aimed at sharing tax and banking information, all of

⁷ COM(2015) 185 final.

⁸ COM(2015) 240 final.

which will be carefully scrutinized as to their impact on the protection of personal data of EU individuals.

Furthermore, the Commission will start to negotiate agreements for the automatic exchange of information in the field of taxation with several non-European countries. The EDPS will follow the negotiations and provide his advice where appropriate by means of either an opinion or formal comments.

3. PRIORITIES 2015: BACKGROUND

The main sources of the EDPS priorities for 2015 are the Commission Work Programme 2015 and the work programme of the Article 29 Working Party, but also other relevant planning documents of the Commission. The EDPS priorities have 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 priorities 2015 set out the direction for the work in the ongoing year and identify issues where the EDPS feels that he can provide most "added value" within the framework of legislative and non-legislative procedures. These priorities must be read in conjunction with the EDPS Strategy 2015-2019, which defines the EDPS strategic objectives for the next five years.

The priorities 2015 consist of two documents:

- ◇ This introductory part which sets out the EDPS strategic priorities for legislative consultation in 2015.
- ◇ 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.⁹ The annex will be next updated in September.

The EDPS would like to encourage stakeholders to monitor these priorities and their 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.¹⁰

⁹ Apart from December, the update takes place in principle in May and September.

¹⁰ Under 'Consultation' >> 'Opinions'.