

# Annual Report

**2007**

## Executive summary



EUROPEAN DATA  
PROTECTION SUPERVISOR



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PROTECTION SUPERVISOR

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## Introduction

This is the executive summary of the fourth Annual Report on the activities of the European Data Protection Supervisor (EDPS). This Report covers 2007 as the third full year of activity in the existence of the EDPS as a new institution.

Peter Hustinx (Supervisor) and Joaquín Bayo Delgado (Assistant Supervisor) took office in January 2004 to set up the independent authority which deals with the protection of personal data at the level of the European Union (EU). As laid down in Regulation (EC) No 45/2001<sup>(1)</sup>, their main activities are to:

- supervise the EU-administration's processing of personal data, making sure that the rights and freedoms of individuals whose data are processed are not violated (supervision);
- give advice on proposals for new EU legislation with an impact on data protection (consultation);
- cooperate with other data protection authorities to ensure a high and consistent level of data protection throughout Europe (cooperation).

The report shows that substantial progress was achieved in the area of supervision. The emphasis on measuring results has led to investments in meeting data protection requirements in most Community institutions and bodies. There is reason for some satisfaction, but continued efforts are needed to reach full compliance.

In the field of consultation, much emphasis has been placed on the need for a consistent and effective framework for data protection, both in the first and in the third pillars, but not always with satisfactory results. The report also underlines that an increasing variety of policy areas benefits from the consultative activities of the EDPS.

The year 2007 saw the signing of the Treaty of Lisbon, which provides for an enhanced protection of personal data, including rules for independent supervision. The new Treaty is an important benchmark in EU history, but it should also be understood as a challenge. The fundamental safeguards that are highlighted in the Treaties have to be delivered in practice. This applies where institutions and bodies process personal data, but also where they develop rules and policies that may have an impact on the rights and freedoms of European citizens.

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<sup>(1)</sup> Regulation (EC) No. 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.01.2001, p. 1.

## Results in 2007

The Annual Report 2006 mentioned that the following main objectives had been selected for 2007. Most of these objectives have been fully or partially realised.

- **Scope of data protection officers' network**

The data protection officers' network has reached its full scope, with all Community institutions and bodies taking part in its activities. The EDPS has continued to give strong support and guidance to the development of data protection officers' functions, with an emphasis on newly appointed officers.

- **Continue prior checking**

The number of prior checks relating to existing processing operations has increased remarkably, but most institutions and bodies have still some work ahead in meeting their obligations.

- **Inspections and checks**

The EDPS has started measuring progress in the implementation of Regulation (EC) No 45/2001 as from spring 2007. All institutions and bodies have been involved in this exercise. The results have been reported, both in general and case-by-case (see chapter 2 of the Annual report).

- **Video-surveillance**

Surveys of video-surveillance practices both at EU and national levels have been completed, and different cases involving individual institutions or bodies have been dealt with. This experience will provide the basis for draft guidelines that are being prepared.

- **Horizontal issues**

Opinions on prior checks and decisions on complaints are continuously analysed for horizontal issues. The first papers with guidance for all Community institutions and bodies will be published in 2008. Issues relating to the conservation of medical or disciplinary data have been discussed with appropriate authorities.

- **Consultation on legislation**

The EDPS has continued to issue opinions on proposals for new legislation and has ensured adequate follow-up. His advisory role covers a wider area of subjects and is built on a systematic inventory and selection of priorities.

- **Data protection in third pillar**

Special attention has been given to the development of a general framework for data protection in the third pillar and proposals for the exchange of personal data across borders. In both cases, this unfortunately had only limited impact.

- **Communicating data protection**

The EDPS has given strong support to follow-up activities of the ‘London Initiative’ aimed at ‘communicating data protection and making it more effective’.

- **Rules of procedure**

Rules of procedure will be adopted in the course of 2008. The development of different internal case manuals has made good progress.

- **Resource management**

The management of financial and human resources has been improved (renewal of the budget structure, internal rules on staff evaluation, and development of a training policy). The implementation of an internal control system and the appointment of a data protection officer have been further improvements.

## Objectives for 2008

The following main objectives have been selected for 2008. The results achieved will be reported in the next Annual Report.

- **Support of data protection officers network**

Strong support to internal data protection officers will continue, particularly for recently established agencies. The EDPS will also encourage a further exchange of expertise and best practices among them.

- **Role of prior checking**

Prior checking of existing processing operations for most institutions and bodies will be finalised. Special emphasis will be put on implementation of recommendations.

- **Horizontal guidance**

Guidance on relevant issues common to most institutions and bodies (e.g. processing of health related data, providing access to data subjects, and dealing with video-surveillance) will be developed.

- **Measuring compliance**

Compliance with Regulation (EC) No 45/2001 will continue to be measured and inspections on the spot will increasingly be implemented. A general inspection policy will also be published.

- **Large scale systems**

The EDPS will further develop a coordinated supervision of Eurodac, together with national supervisory authorities, and develop expertise required for the supervision of other large scale systems, such as SIS II and VIS, in the near future.

- **Opinions on legislation**

The EDPS will continue to issue timely opinions or comments on proposals for new legislation, on the basis of a systematic inventory of relevant subjects and priorities, and ensure adequate follow up.

- **Treaty of Lisbon**

The EDPS will continue to follow developments with regard to the Lisbon Treaty and will closely analyze — and where necessary advise on — its impact for data protection.

- **On line information**

The EDPS intends to update and increase the information available on the website and to further improve the electronic newsletter.

- **Rules of procedure**

The EDPS will adopt and publish Rules of procedure, covering his different roles and activities. Practical tools for interested parties will be available on the website.

- **Resource management**

The EDPS will consolidate and further develop some activities relating to financial and human resources, and enhance other internal work processes.

## Supervision

One of the main roles of the EDPS is to supervise in an independent manner processing operations carried out by Community institutions or bodies. The legal framework is Regulation (EC) No 45/2001, which establishes a number of obligations for those who process data, along with a number of rights for those whose personal data are processed.

Processing operations of personal data that do not present special risks for the data subjects are notified to the data protection officer of the institution or body concerned. When personal data processing presents special risks for those whose data are processed, it needs to be prior checked by the EDPS. The EDPS then determines whether or not the processing complies with the Regulation.

The supervisory tasks, led by the Assistant Supervisor, range from providing advice and assisting data protection officers, through prior checking risky processing operations, to conducting inquiries and handling complaints. This task also consists of providing background and position papers, and of supervising the central unit of Eurodac.

In 2007, **prior checking** continued to be a major activity in the EDPS supervision task.

As mentioned both in the 2005 and 2006 Annual Reports, the EDPS has constantly encouraged data protection officers to increase the number of prior checking notifications to the EDPS. The deadline of spring 2007 for receipt of notifications to be prior checked by the EDPS — *ex post* cases — was fixed to trigger Community institutions and bodies to increase their efforts towards a complete fulfilment of their notification obligation. The effect was a significant increase of notifications.

Out of 101 notifications, **90 prior-check opinions** were issued in 2007 <sup>(2)</sup>. These 101 cases finalised with a formal opinion represent an increase of 77.19 % of work in prior checking compared with 2006. This workload is certainly linked to the ‘spring 2007’ deadline.

Only 11 of those cases were ‘**proper**’ **prior checking cases**, i.e. the institutions concerned followed the procedure involved for prior checking before implementing the processing operation. In addition to these 101 cases on which an opinion has been issued, the EDPS has also dealt with 31 cases which were found not to be subject to prior checking — 11 of them belonged to the e-monitoring category.

As regards **timelines** of the EDPS and Community institutions and bodies, the number of days needed by the EDPS to draft opinions resulted in one day less than in 2006 (with an average of 56.9 in 2007), which can be seen as a very satisfactory figure considering the increase of numbers and complexity of the notifications. The number of extension days for the EDPS also represents nearly one day less than in 2006. In addition, although the maximum extension can reach two months, it has been normally less than a month.

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<sup>(2)</sup> Out of 101 notifications, for practical reasons and due to the fact that some cases were linked, 15 notifications of OLAF were treated jointly in four different opinions. This is why 101 notifications resulted in 90 opinions.

The EDPS is however concerned about the lengthy periods needed by the institutions and bodies to complete information. In this context, the EDPS once again reminds the institutions and bodies of their obligation to cooperate with the EDPS and to provide him with the requested information.

In 2007, the *ex-post* prior checks cases <sup>(3)</sup> mainly covered the following issues: medical data processed by institutions and bodies, recruitment of staff and selection of candidates, staff evaluation (in particular the certification and attestation procedures, as well as the early retirement procedure), OLAF procedures, social service files and e-monitoring.

As regards main issues in proper prior-checks, time management systems in the European Commission have been of significance in 2007.

Concerning the follow-up of prior-check opinions, the EDPS closed 38 cases in 2007, which represents more than double that of 2006, certainly due to the systematic follow-up of the EDPS recommendations.

Overall, the EDPS prior-check exercise during 2007 shows that the **'spring 2007' deadline** gave rise to a tremendous increase of notifications from many data protection officers, especially during the first semester of the year. However, there is still much to improve regarding the time frame used by institutions and agencies to answer the requests for further information from the EDPS.

In 2008, efforts will therefore mainly concentrate on the following points:

- institutions should finalise their *ex-post* notification process and agencies should make a substantive step towards the same goal in 2008;
- the follow-up of recommendations will continue to take place systematically through information from the controller, and will be combined with on-the-spot inspections. These will also include the full implementation of the notification process to the data protection officers and the full compliance with the obligation of notifying proper prior checks cases to the EDPS before the processing operation starts.

65 **complaints** were received in 2007, 29 of which were declared admissible and further examined by the EDPS. A large majority of the complaints received continued to fall outside of the supervisory competences of the EDPS, for instance because they dealt exclusively with processing of personal data on the level of the Member States (where national data protection authorities are competent). Cases declared admissible related in particular to the following issues: collection of excessive data relating to visitors, access to data, forwarding and copying of e-mails, requirement of credit card details, processing of sensitive data, right of rectification and obligation to provide information.

A Memorandum of Understanding with the **European Ombudsman** was signed in 2006 in order to avoid unnecessary duplication and to ensure a consistent approach to data protection issues raised by complaints. In practice, the Memorandum has led to useful sharing of information between the EDPS and the European Ombudsman whenever relevant.

<sup>(3)</sup> 'Ex post' prior checks relate to processing operations that started before the appointment of the EDPS and the Assistant Supervisor (17 January 2004), and that therefore could not be checked prior to their start.

A number of **inquiries** were conducted in different areas during 2007. Among them, two required special attention from the EDPS, namely the OLAF Security Audit and the role of the European Central Bank (ECB) in the SWIFT <sup>(4)</sup> case.

The first one concerned data processing activities which run on the same IT infrastructure. The EDPS decided to launch a security inspection and analysed OLAF's security measures in a horizontal way. After having provided guidance through recommendations, the EDPS concluded that he was very satisfied with the security measures implemented by OLAF on the IT systems and applications under its responsibility.

Regarding the second case, the EDPS issued an Opinion in February 2007 which focused on the role of the ECB as an overseer, a user, and a policy-maker. The EDPS also requested the main EC institutions to provide clarifications on payment systems used and on contractual relations with SWIFT. On the basis of the information received, the EDPS recommended to relevant Community institutions measures to ensure that they provide sufficient information to staff members and other individuals having contractual relations with them. Progress in this area will be closely monitored in 2008.

The EDPS also continued to provide advice on **administrative measures** envisaged by Community institutions and bodies in relation to the processing of personal data. A variety of challenging issues was raised, including the setting up of conservation periods for certain categories of files, Internet policy papers, investigation procedures against fraud and corruption, exchange of information, implementing rules concerning data protection and applicability of national data protection law.

The EDPS continued to work on his **video-surveillance guidelines** to provide practical guidance to institutions and bodies on compliance with data protection rules when using video-surveillance systems. In spring 2007, he carried out an international survey among the EU Member States, with the assistance of the data protection authorities. The survey covered the data protection rules applied to video-surveillance practices throughout the EU. The EDPS also advised on three consultation requests related to video-surveillance and received from the data protection officers of two institutions. All three cases involved the use of video-technology for purposes not related to security.

Joint work on the shared supervision of **Eurodac** continued together with the national data protection authorities throughout 2007. Following the launch of an in-depth security audit in September 2006, a final report of the audit was presented in November 2007.

According to an agreement between the EDPS and the European Network and Information Security Agency, the Agency provided contacts with national expert organisations, and delivered advice on the methodology of the security audit. The EDPS endorsed the conclusions and recommendations. The main conclusion was that security measures initially implemented with respect to Eurodac and the way in which they have been maintained during the first four years of activity have provided a fair level of protection to date. However, some parts of the systems and the organisational security present certain weaknesses which will have to be addressed.

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<sup>(4)</sup> Society for Worldwide Interbank Financial Telecommunication.

## Consultation

In 2007, the EDPS gave further effect to his task as an advisor on proposals for EU legislation and other related documents.

More than in previous years, the **future of the legal framework for data protection** itself was the subject of activities of the EDPS.

In the first place, the proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters continued to require much attention from the EDPS.

In the second place, in his Opinion on the Communication of the Commission on the Implementation of the Data Protection Directive, the EDPS expressed the view that changes to the Directive seem unavoidable in the longer term and suggested that thought be given to future changes as early as possible. In the third place, the Lisbon Treaty was signed with considerable implications for data protection.

The EDPS considered for the first time the possible need in the future for a specific legal framework for data protection in the area of **Radio Frequency Identification** (RFID) technology. This specific area is fundamentally new and may have a crucial impact on our society and on the protection of fundamental rights, such as privacy and data protection.

In 2007, the activities of the EDPS took place in the context of different developments having as common denominator the fact that they all contributed to the emerging of a '**Surveillance Society**'. Such developments include new instruments for law enforcement to collect and process personal information, the increased use of biometrics and RFID, as well as the growing importance of world-wide data flows.

The EDPS issued **12 opinions** on proposed EU legislation in 2007. In addition, he made more use of other instruments of intervention, such as comments. However, this choice of instruments must not be seen as a structural shift in approach.

The EDPS has clarified that the objective of his participation in the EU legislative process is to actively promote that legislative measures will only be taken after due consideration of the impact of the measures on privacy and data protection. Impact assessments conducted by the Commission must give appropriate attention to privacy and data protection.

## Inventory

In December 2007, the **Inventory 2008** (the second yearly inventory) was published on the EDPS website. It follows the main lines as set out in the Inventory 2007.

The Annex of the Inventory shows that the scope of activity of the EDPS now covers a wide range of policy areas. The proposals listed relate to 13 different Commission services (ADMIN, EMPL, ENT, ESTAT, INFOS, JLS, MARKET, OLAF, RELEX, SANCO, SG, TAXUD and TREN).

## Opinions

In the area of **freedom, security and justice** (the ‘third pillar’, a significant area of intervention for the EDPS), a major concern was the adoption of new proposals facilitating the storage by and exchange of information between law enforcement authorities, without a proper assessment of the effectiveness of existing legal instruments. New instruments are designed before existing instruments have been properly implemented. This issue was of particular relevance in relation to the transposition of the Prüm-Treaty to EU level and to the European Passenger Name Record-system.

Another issue that played a central role in the opinions of the EDPS related to the third pillar was the lack of a comprehensive legal framework for data protection.

A third issue at stake is the fact that EU rules make it mandatory for Member States to establish national authorities for certain tasks, but leave them with a wide discretion in the conditions for their functioning. This hampers the exchange of information between the Member States and affects the legal certainty of the data subject whose data are transferred between the authorities of different Member States.

The exchange of information with third countries for law enforcement purposes was a separate issue, addressed in different EDPS opinions.

Two opinions were issued with regard to key Commission communications on the **future framework for data protection**. In his Opinion on the Implementation of the Data Protection Directive <sup>(5)</sup>, the EDPS identified various perspectives of a changing context, one of which being the interaction with technology. New technological developments have a clear impact on the requirements for an effective legal framework for data protection. One crucial feature of these technological developments is RFID, which was subject of a separate EDPS Opinion.

The other five opinions released in 2007 were of a varied nature and dealt with policy areas such as customs, statistics, road transport, agriculture and social security.

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<sup>(5)</sup> Opinion of 25 July 2007 on the Communication from the Commission to the European Parliament and the Council on the follow-up of the Work Programme for better implementation of the Data Protection Directive, OJ C 255, 27.10.2007, p. 1.

## New Developments

Five perspectives for future change have been identified in the EDPS Opinion on the Communication on the Implementation of the Data Protection Directive, namely:

- interaction with technology;
- impact of the Lisbon Treaty;
- law enforcement;
- global privacy and jurisdiction; and
- full implementation of the Directive.

They will serve as the agenda for future activities of the EDPS.

As to **interaction with technology**, the main following trends should be highlighted:

- the social life of individuals is increasingly digitalised through user-driven applications fed by data which are for the most part personal data;
- data centres may announce the end of the desktop where data, and more specifically personal data, have been processed until now;
- European Research and Developments (R&D) efforts constitute a very good opportunity to include privacy and data protection requirements and the principle of 'privacy by design' should represent an inherent part of these R&D initiatives.

The EU legal framework is about to change with the entry into force of the **Lisbon Treaty**. This will also have consequences for the activities of the EDPS in his role as an advisor.

Finally, the EDPS will actively participate in and, on some occasions, even initiate discussions on possible future changes of the Data Protection Directive.

## Cooperation

The main forum for cooperation between the data protection authorities in Europe is the **Article 29 Working Party**. The EDPS participates in the activities of the Working Party, which plays a crucial role in the uniform application and interpretation of the general principles of Directive 95/46.

The Working Party can issue opinions on proposals for legislation or similar documents that are very useful, particularly since they may contain special points of attention from a national perspective. The EDPS welcomes these opinions, which have been consistent with his own opinions and to which he actively contributed. Examples of good synergies between the opinions of the Working Party and the EDPS during 2007 were in the fields of common consular instructions on visas for diplomatic missions and consular posts in relation to the introductions of biometrics, as well as airline passenger data transfers to the US and the use of passenger name record for law enforcement purposes.

The EDPS and the Working Party have also closely collaborated in the analysis of two large systems in the first pillar, namely the consumer protection cooperation system and the internal market information system.

One of the most important cooperative tasks relates to **Eurodac**, where the responsibilities for data protection supervision are shared between the national data protection authorities and the EDPS. In July 2007, the Eurodac Supervision Coordination Group — composed of national data protection authorities and the EDPS — issued a report on their first coordinated inspection of Eurodac. The Group did not find indications of abuse of the Eurodac system. However, some aspects, such as information to the people concerned, need to be improved.

The EDPS has a duty to cooperate with the supervisory data protection bodies in the **third pillar** of the EU. The EDPS strives to ensure a high and consistent level of data protection in the works of the Joint Supervisory Bodies for Schengen, Europol, Eurojust and the Customs Information System. In 2007, attention focussed on two main subjects: the Commission proposal for a framework decision on data protection in the third pillar and the exchange of law enforcement information in accordance with the principle of availability. In addition, the EDPS actively contributed to the three meetings held by the Working Party on Police and Justice during 2007.

The EDPS also took part in the **European and International conferences** on data protection and privacy. The latter, which took place in Montreal in September 2007, focussed on the many issues data protection and privacy commissioners are dealing with, such as public safety, globalisation, law and technology, ‘ubiquitous computing’ and ‘body as data’. The EDPS chaired a closed session for commissioners on the London initiative and contributed to a workshop on globalisation.

## Communication

Information and communication activities continue to play a key part in the strategy and the daily work of the institution. Although not among the main roles of the EDPS, the crucial importance of information and communication activities for the practical impact of his main tasks can hardly be overstated.

Increasing the EDPS' **visibility** on the EU political map was a clear focus of the EDPS' communication activities during his initial years of activity. Three years after the start of work, we can now see positive results in his communication endeavours. One example of this is the selection of the Supervisor as one of the European Voices' 50 nominees for the 2007 European of the Year award.

As one of the main architects of the '**London Initiative**' designed to make communication on data protection and data protection itself more effective, the EDPS followed this up in February 2007 by actively participating in the communication workshop hosted by the French data protection authority (CNIL). One significant result was the creation of a network of communication officers that data protection authorities will be able to use to exchange best practices and to carry out specific projects.

In 2007, the EDPS continued to invest substantial time and effort in explaining his mission and raising awareness about data protection issues in **speeches** and similar contributions for different institutions and in various Member States. In addition, the EDPS gave about twenty **interviews** to journalists of newspaper, broadcast or electronic media from different Member States or third countries. He also welcomed **visits from student groups** specialised in the field of data protection and/or IT security issues.

The Press service dealt with about 160 **requests for information** and advice from a wide range of individuals and stakeholders.

With a view to giving further visibility to his ongoing activities, the EDPS continued to make use of the following information and communication tools:

- **website:** a new version of the website was launched in February 2007. It makes use of the web content management system (WCMS) technology designed to facilitate the management of a large number of documents;
- **electronic newsletter:** five issues of the EDPS newsletter were published in 2007. The number of subscribers rose from around 460 people at the end of 2006 to a total of 635 at the end of 2007;
- **press releases:** in 2007, the Press service issued fourteen press releases, most of which related to new legislative opinions which were of high general public relevance;
- **promotional events:** the EDPS again participated at the Data Protection Day and the EU Open Day; holding information stands in the main EU institutions.

## Administration, budget and staff

The EDPS as a recently established authority continued to grow, gaining additional resources in 2007, compared to 2006. The budget increased from more than 4 million to just below 5 million EUR and staff increased from 24 to 29. The administrative environment was gradually extended. In addition, new internal rules necessary for the proper functioning of the institution were adopted on the basis of annual priorities and taking into account the needs and size of the institution.

Collaboration with the European Parliament, the Council and the European Commission was further improved, allowing for considerable economies of scale and avoiding unnecessary multiplication of administrative infrastructures with a reduction of unproductive administrative expenditures.

In terms of human resources, apart from the recruitments, the traineeship programme continued to host between two and three trainees per semester. In addition, the EDPS adopted an internal training policy based on the specific activities of the institution, as well as on its strategic objectives

As a result of the first audit performed by the Internal Audit Service, the audit report received in 2007 confirmed the capacity of the EDPS internal control system to provide reasonable assurance for the achievement of the institution's objectives.

A Data Protection Officer (DPO) was appointed to ensure the internal application of the provisions of the Regulation. An inventory of operations involving processing of personal data was set up in 2007.

The EDPS started working on the implementation of a new electronic mail management system, with the support of the European Parliament's services.

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