

Annual report

2011

Executive Summary



EUROPEAN DATA
PROTECTION SUPERVISOR



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INTRODUCTION

This is the Executive Summary of the 2011 Annual Report of the European Data Protection Supervisor (EDPS). The report covers 2011 as the seventh full year of activity of the EDPS as a new, independent supervisory authority, responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their privacy, with regard to the processing of personal data, are respected by EU institutions and bodies. It also covers the third year of the common five year mandate of Peter Hustinx, Supervisor, and Giovanni Buttarelli, Assistant Supervisor.

The main activities of the EDPS, as laid down in Regulation (EC) No 45/2001¹ (the Regulation), are to:

- monitor and ensure that the provisions of the Regulation are complied with when EU institutions and bodies process personal data (**supervision**);
- advise the EU institutions and bodies on all matters relating to the processing of personal data. This includes consultation on proposals for legislation and monitoring new developments that have an impact on the protection of personal data (**consultation**);

- cooperate with national supervisory authorities and supervisory bodies in the former third pillar of the EU with a view to improving consistency in the protection of personal data (**cooperation**).

In the course of 2011, the EDPS set new benchmarks in different areas of activity. In the supervision of EU institutions and bodies, when processing personal data, the EDPS interacted with more data protection officers in more institutions and bodies than ever before. In addition, the EDPS saw the effects of his new enforcement policy: most EU institutions and bodies are making good progress in complying with the Data Protection Regulation, while others should increase their efforts.

In the consultation of new legislative measures, the EDPS issued a record number of opinions on a range of subjects. The most prominent is the Review of the EU legal framework for data protection, which remains high on the agenda. However, the implementation of the Stockholm programme in the area of freedom, security and justice and the Digital Agenda, as the cornerstone for the Europe 2020 strategy, also had an impact on data protection. This can be said as well of issues in the internal market, public health and consumer affairs, and enforcement in a cross border context.

At the same time, the EDPS increased cooperation with other supervisory authorities and further improved the efficiency and effectiveness of his organisation.

¹ 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, 12.1.2001, p.1.

RESULTS IN 2011

The following main objectives were set out in 2010. Most of these objectives have been fully or partially realised in 2011. In some cases, work will continue in 2012.

- **Raising awareness**

The EDPS invested time and resources in awareness raising exercises for EU institutions and bodies and DPOs. This took the form of thematic guidance notably in the areas of anti-harassment procedures and staff evaluation, and workshops on data protection for DPOs or controllers.

- **Role of prior checking**

In 2011, the EDPS received 164 notifications for prior checking, the second highest number ever. This increase was due mainly to the launching of visits to agencies, on the spot inspections and the issuance of thematic guidance. The notifications received from newly created agencies also contributed to this increase. The EDPS continued to place strong emphasis on the implementation of recommendations made in prior check opinions.

- **Monitoring and reporting exercises**

The EDPS launched his third stock taking exercise, monitoring the compliance of data protection rules (2011 Survey). In addition to this general exercise, targeted monitoring exercises were carried out in cases where, as a result of supervision activities, the EDPS had cause for concern about the level of compliance in specific institutions or bodies. Some of these were correspondence based, whilst others took the form of a one day visit to the body concerned, with the aim of addressing compliance failings.

- **Inspections**

Inspections are a crucial tool, enabling the EDPS to monitor and ensure the application of the Regulation. In 2011, the EDPS launched four inspections and

continued the follow up of recommendations made in previous inspections. A security audit of the Visa Information System (VIS) was also carried out.

- **Scope of consultation**

The EDPS again increased his output, issuing a record number of 24 opinions and 12 sets of formal comments. In many cases, the Commission had already consulted the EDPS before the adoption of its proposals, leading to 41 sets of informal comments being issued. Many of the opinions were followed up by presentations in the LIBE Committee of the European Parliament or the relevant Council Working Parties. The proposals for which opinions were published were selected from a systematic inventory of relevant subjects and priorities for the EDPS. The opinions, formal comments and the inventory are published on the EDPS website.

- **Review of the data protection legal framework**

The EDPS issued an opinion on the Commission Communication on a comprehensive approach on personal data protection, as well as informal comments on the legislative proposals. He closely followed the process and gave input where necessary and appropriate.

- **Implementation of the Stockholm Programme**

The EDPS closely followed policy developments related to the Stockholm Programme, issuing an opinion on the proposal for a directive on the use of PNR for law enforcement purposes, as well as formal comments on the introduction of a European Terrorist Financing Tracking Programme (TFTS). While no legislative proposals were issued on the topic of smart borders, the EDPS addressed the issue in his opinion on the Commission communication on migration.

- Initiatives in the area of technology

The EDPS issued his first opinion on an EU-funded research project; the project dealt with the privacy preserving implementation of biometrics. In the context of the Digital Agenda, he published an opinion on net neutrality.

- Other initiatives

The EDPS issued a variety of opinions and comments on other initiatives that had an impact on the protection of personal data, such as the Internal Market Information System and the use of security scanners at airports.

- Cooperation with data protection authorities

The EDPS actively took part in the work of the Article 29 Data Protection Working Party, especially in the subgroups on key provisions and on borders, travel and law enforcement.

- Coordinated supervision

The EDPS provided the data protection authorities involved in the coordinated supervision of Eurodac and the Customs Information System with an efficient secretariat. For the Visa Information System, the data protection authorities represented in the supervision coordination group had a first exchange of views as part of one of the Eurodac coordinated supervision meetings, addressing implications of the system and the approach to supervision.

- Internal organisation

Following the reorganisation of the Secretariat in 2010, the institution decided to launch a strategic review of all its activities in 2011, steered by a "Strategic Review" Task Force made up of the Director and representatives from all teams and disciplines. The first phase of the review culminated in an internal meeting of the institution in October 2011, which allowed the members and staff to reflect on their tasks, values and objectives.

- Resource management

The EDPS, in cooperation with the Parliament, carried out an exhaustive examination of the market for providers of a Case Management System and chose the contractor with the most appropriate product. At the end of 2011, the contract was signed and the work of developing a customised system began. During 2011, work continued on the integration of the EDPS into IT applications in the field of human resources on the basis of Service Level Agreements: Syslog Formation was successfully introduced, work began on Sysper II and an agreement was found on the introduction of MIPS in 2012.

Some EDPS key figures in 2011

→ 71 prior-check opinions adopted, 6 non prior check opinions

→ 107 complaints received, 26 admissible

Main types of violations alleged: violation of confidentiality of data, excessive collection of data or illegal use of data by the controller
10 cases resolved where the EDPS found no breach of data protection rules

→ 34 consultations on administrative measures.

Advice was given on a wide range of legal aspects related to the processing of personal data conducted by the EU institutions and bodies

→ 4 on-the-spot inspections carried out

→ 2 guidelines published on anti-harassment procedures and evaluation of staff

→ 24 legislative opinions issued on, among others, initiatives relating to the Area of Freedom, Security and Justice, technological developments, international cooperation, data transfers, or internal market.

→ 12 sets of formal comments issued on, among others, intellectual property rights, civil aviation security, EU criminal policy, the Terrorist Finance Tracking System, energy efficiency, or the Rights and Citizenship Programme.

→ 41 sets of informal comments

→ 14 new colleagues recruited

SUPERVISION AND ENFORCEMENT

One of the main roles of the EDPS is to supervise in an independent manner, the processing operations carried out by European institutions or bodies. The legal framework is the Data Protection 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.

Supervisory tasks range from advising and supporting data protection officers through prior checking of risky data processing operations, to conducting inquiries, including on-the-spot inspections and handling complaints. Further advice to the EU administration can also take the form of consultations on administrative measures or the publication of thematic guidelines.

Data Protection Officers

All EU institutions and bodies must have at least one **data protection officer** (DPO). In 2011, the number of DPOs totalled 54. Regular interaction with them and their network is an important condition for effective supervision. The EDPS has worked closely with the 'DPO quartet' composed of four DPOs (Council, European Parliament, European Commission and the European Food Safety Agency) who coordinate the DPO network. The DPO network meetings, which the EDPS attends, are an opportunity to give updates on EDPS work, give an overview of developments in EU data protection and to discuss issues of common interest.

Prior checking

Regulation (EC) No 45/2001 provides that all processing operations of personal data likely to present

specific risks to the rights and freedoms of data subjects are to be the subject of prior checking by the EDPS. The EDPS then determines whether or not the processing complies with the Regulation.

Prior checking of risky processing operations continued to be an important aspect of supervision. In 2011, the EDPS received 164 notifications for prior checking and adopted 71 prior check opinions on standard administrative procedures, such as staff evaluation, administrative inquiries, disciplinary procedures and anti-harassment procedures, but also on core business activities such as the Consumer Protection System, the Quality Management System and ex-post quality checks at OHIM and the Electronic Exchange of Social Security system at the European Commission. These opinions are published on the EDPS website and their implementation is followed up systematically.

Monitoring compliance

The **implementation of the Regulation** by institutions and bodies is also monitored systematically by regular stock taking of performance indicators, involving all EU institutions and bodies. The EDPS launched his third stock taking exercise, monitoring compliance with data protection rules (2011 Survey) leading to a report highlighting the progress made by institutions and bodies in implementing the Regulation and also underlining shortcomings. In addition to this general exercise, targeted monitoring exercises were carried out in cases where, as a result of supervision activities, the EDPS had cause to be concerned about the level of compliance in specific institutions or bodies. These took the form of correspondence with the institution or body or a one day visit notably to the European Railway Agency, the Community Plant Variety Office, the European Foundation for the Improvement of Living and Working Conditions and the European Global Navigation Satellite Systems Agency.

The EDPS also carried out an on-the-spot inspection at the CEDEFOP, OLAF and the ECB to verify compliance on specific issues.

Complaints

One of the main duties of the EDPS, as established by the Data Protection Regulation, is to hear and investigate complaints as well as to conduct inquiries either on his own initiative or on the basis of a complaint.

In 2011, the number of **complaints** received by the EDPS increased to 107; 26 of these were found to be admissible. Many inadmissible complaints involved issues at national level for which the EDPS is not competent. In 15 cases resolved during 2011, the EDPS found that either there was no breach of data protection rules or that the necessary measures to comply were undertaken by the controller. Conversely in two cases, non-compliance with data protection rules was found to have occurred and recommendations were made to the controller.

Consultation on administrative measures

Further work was also done in response to **consultations on administrative measures** by EU institutions and bodies in relation to the processing of personal data. A variety of issues were raised, including publication of employees' pictures on the Intranet, controllership when CCTV is operated on the premises of another institution, and the processing of employees' e-mails.

Horizontal guidance

The EDPS also adopted **guidelines** on anti-harassment procedures and staff evaluation and followed up on the progress made by institutions and bodies following the Video-Surveillance Guidelines.

POLICY AND CONSULTATION

The EDPS advises the European Union institutions and bodies on data protection issues in a range of policy areas. This consultative role relates to proposals for new legislation as well as other initiatives that may affect personal data protection in the EU. It usually takes the shape of a formal opinion, but the EDPS may also provide guidance in the form of comments or policy papers. Technological developments having an impact on data protection are also monitored as part of this activity.

Major trends

2011 was a busy year for consultation, leading to a record number of **24 opinions, 12 formal comments and 41 informal comments**. The EDPS continued to implement a proactive approach to consultation, based on a regularly updated inventory of legislative proposals to be submitted for consultation as well as availability for informal comments in the preparatory phases of legislative proposals. Taking advantage of this availability for informal comments, in 2011 the Commission services almost doubled the number of informal consultations compared to 2010.

The Commission's work on a modernised legal framework for data protection in Europe merits special mention. The legislative review process has been closely followed by the EDPS, who provided input at different levels, including an opinion on the Commission Communication laying down a comprehensive approach to data protection in Europe in January and informal comments on the draft legislative proposals in December.

There appears to be a general diversification in the fields touching on data protection issues: besides tra-

ditional priorities such as the Area of Freedom, Security and Justice (AFSJ) and international data transfers, new areas are emerging, as may be seen in the large number of opinions adopted relating to the internal market. The following highlights include a selection of the opinions adopted in the respective fields.

EDPS opinions and key issues

In the **Area of Freedom, Security and Justice**, the EDPS issued several highly critical opinions on issues such as the evaluation report on the data retention directive 2006/24/EC and the proposal for European Passenger Name Records processing. Passenger name records were also the subject of two opinions dealing with the agreements for the transfer of such data to Australia and the USA respectively. The EDPS also commented on the Commission communication on a Terrorist Finance Tracking System (TFTS), questioning its necessity.

Regarding **Information Technology and the Digital Agenda**, the EDPS published an innovative opinion on net neutrality highlighting the impact of some monitoring practices by internet service providers. He also issued his first ever opinion on an EU-funded research project which dealt with privacy-preserving ways of implementing biometrics.

In the area of the **internal market**, the EDPS issued, among others, an opinion on the Internal Market Information System (IMI), urging that new functionalities to be added in the future be clarified. Other notable opinions were issued on Energy market integrity and transparency as well as over-the-counter derivatives, central counterparties and trade repositories. In these cases, the proposals intended to grant far-reaching investigation powers that were not clearly circumscribed to regulatory authorities and so the EDPS called for greater clarity.

Several opinions were issued on **enforcement in a cross-border context**. The EDPS provided, for

instance, guidance on the proposals for the intellectual property rights enforcement directive, calling for the establishment of a clear retention period as well as for clarifying the legal basis of an associated database. Regarding the proposal for the European account preservation order, he emphasised the need to limit the personal data processed to the minimum necessary.

In **public health and consumer affairs**, the EDPS issued an opinion on the Consumer Protection Cooperation System (CPCS), urging the legislator to reconsider the retention periods and to explore ways of ensuring privacy by design.

The EDPS also intervened in other areas, such as the OLAF reform regulation, the EU financial regulation and the use of digital tachographs for professional drivers.

Court cases

In 2011, the EDPS intervened in five cases before the General Court and the Civil Service Tribunal.

One of the cases dealt with an allegedly illegal transfer of medical data between the medical services of the Parliament and the Commission. The Civil Service Tribunal – taking this initiative for the first time – invited the EDPS to intervene. In its judgment, the Tribunal followed the EDPS reasoning and awarded financial compensation to the applicant.

Three other cases dealt with access to documents of EU institutions and can be seen as follow-up to the *Bavarian Lager* ruling. In all three, the EDPS argued in favour of greater transparency. This reasoning was followed by the Court in one case; in another case, it upheld the Parliament decision not to grant access; the third case is, at the time of writing, pending.

In addition, the EDPS intervened in an infringement proceeding against Austria on the independence of DPAs. In his intervention, he argued that the organisation structure of the office of the Austrian DPA as provided for in national law, does not live up to the standard of independence required by Directive 95/46/EC. At the time of writing, this case too is pending.

COOPERATION

The EDPS cooperates with other data protection authorities in order to promote consistent data protection throughout Europe. This cooperative role also extends to cooperation with supervisory bodies established under the former EU "third pillar" and in the context of large scale IT systems.

The main platform for cooperation between data protection authorities in Europe is the **Article 29 Data Protection Working Party**. The EDPS takes part in the activities of the Working Party, which plays an important role in the uniform application of the Data Protection Directive.

The EDPS and the Article 29 Working Party have worked well together on a range of subjects, especially in the context of the subgroups on key provisions and borders, travel and law-enforcement (BTLE). In the former, the EDPS was the *rapporteur* for the opinion on the notion of 'consent'.

In addition to the Article 29 Working Party, the EDPS continued his close cooperation with the authorities established to exercise **joint supervision on EU large-scale IT systems**.

An important element of these cooperative activities is Eurodac. The **Eurodac** Supervision Coordination Group – composed of national data protection authorities and the EDPS – met in Brussels in June and October 2011. The Group completed a coordinated inspection on the issue of advance deletion, further elaborated a joint framework for the planned full security audit and scheduled another coordinated inspection, the results of which will be reported in 2012. In addition, the group informally discussed the issue of coordinated supervision of the Visa Information System (VIS), which went live in October 2011.

A similar arrangement governs the supervision of the **Customs Information System** (CIS), in the context of which the EDPS convened two meetings of the CIS Supervision Coordination Group in 2011. The meetings gathered the representatives of national data protection authorities, as well as representatives of the Customs Joint Supervisory Authority and Data Protection Secretariat. In the meeting in June, the Group adopted an action plan outlining its planned activities for 2011 and 2012, while in the December meeting, it agreed on its first two coordinated inspections. The results of these inspections will be delivered during the course of 2012.

Cooperation in **international fora** continued to attract attention, especially the European and International Conferences of Data Protection and Privacy Commissioners. In 2011, the European Conference was held in Brussels, hosted by the Article 29 Working Party and the EDPS. In Mexico City, privacy and data protection commissioners from around the world adopted a declaration calling for efficient cooperation in a world of 'big data'.

MAIN OBJECTIVES FOR 2012

The following objectives have been selected for 2012. The results achieved will be reported in 2013.

Supervision and Enforcement

In line with the Compliance and Enforcement Policy Paper adopted in December 2010, the EDPS has set the following objectives in the field of Supervision and Enforcement.

- **Raising awareness**

The EDPS will invest time and resources in providing guidance to EU institutions and agencies. Guidance is necessary to help achieve a shift towards greater accountability of Institutions and agencies. This guidance will take the form of thematic papers on standard administrative procedures and horizontal themes such as e-monitoring, transfers, and rights of data subjects. Training and workshops will also be organised for DPOs/DPCs either on request by a specific institution or agency or on the initiative of the EDPS when a need is identified. The EDPS website will be developed so as to provide useful information to DPOs. The public register of prior checking notifications will also be made accessible according to a common subject taxonomy.

- **Prior checking**

The EDPS continues to receive *ex-post* notifications either relating to standard administrative procedures or to processing operations already in operation. Action will be taken in 2012 to define appropriate procedures for handling such notifications and to ensure that notifications for checking *ex-post* are not permitted save in exceptional and justified circumstances. The follow-up of recommendations made in prior checking opinions is a crucial element of the enforcement strategy of the EDPS. The EDPS will continue to place strong emphasis on the implementation of recommendations in prior check opinions and ensure an adequate follow up.

- **General stock taking exercises**

In 2011, the EDPS launched a general stock taking exercise, providing indicators of compliance by institutions and bodies with certain obligations (e.g. appointment of a DPO, adoption of implementing rules, level of Article 25 notifications, level of Article 27 notifications). The report issued by the EDPS empha-

sised the progress made in implementing the Regulation, but also underlined shortcomings. The 2011 survey will be complemented in 2012 by a specific exercise on DPO Status: this exercise is also intended to provide support for the DPO function in line with the accountability principle. In addition, the EDPS will launch a survey specifically for the Commission in 2012, the aim of which is to collect information directly from the various DGs at the Commission.

- **Visits**

On the basis of the indicators from the 2011 survey, the EDPS has selected institutions and agencies for visits (6 planned visits). These visits are triggered either by an apparent lack of commitment or communication from management, or if an institution or agency is below the benchmark set for a peer group.

- **Inspections**

Inspections are a vital tool that enable the EDPS to monitor and ensure the application of the Regulation: an increase in the number of inspections is crucial not only as an enforcement tool, but also as a tool to raise awareness of data protection issues and the EDPS. Inspections will increase in 2012 due to the introduction of lighter, more targeted inspections in addition to full-scale inspections. Some institutions or bodies process personal data in their core business activities and data protection is, therefore, a key element. These bodies will be identified and be the object of targeted monitoring (paper based) or inspections. General inspections are also planned for large scale IT systems in 2012. These are selected on the basis of legal obligations. Thematic inspections will be launched in areas where the EDPS has provided guidance and wishes to check against reality (e.g. CCTV).

Policy and Consultation

The main objectives of the EDPS for his advisory role are set out in the inventory and the accompanying memo as published on the website. The EDPS faces the challenge of fulfilling his ever-increasing role in the legislative procedure, guaranteeing high-quality and well-appreciated contributions to it, delivered by limited resources. In light of this, the EDPS has identified issues of strategic importance that will form the cornerstones of his consultation work for 2012, while not neglecting the importance of other legislative procedures where data protection is concerned.

- **Towards a new legal framework for data protection**

The EDPS will give priority to the work on a new legal framework for data protection in the EU. He will issue an opinion on the legislative proposals for the framework and contribute to the debates in the next steps of the legislative procedure where necessary and appropriate.

- **Technological developments and the Digital Agenda, IP rights and Internet**

Technological developments, especially those connected to the Internet and the associated policy responses will be another area of focus for the EDPS in 2012. Subjects range from the plans for a Pan-European framework for electronic identification, authentication and signature, the issue of Internet monitoring (e.g. enforcement of IP rights, takedown procedures) to cloud computing services and eHealth. The EDPS will also strengthen his technological expertise and engage in research on privacy-enhancing technologies..

- **Further developing the Area of Freedom, Security and Justice**

The Area of Freedom, Security and Justice will remain one of the key policy areas for the EDPS to address. Relevant upcoming proposals include EU-TFTS and smart borders. Additionally, the EDPS will continue to follow the review of the data retention directive. He will also closely monitor negotiations with third countries on data protection agreements.

- **Financial sector reform**

The EDPS will continue to follow and scrutinise new proposals for the regulation and supervision of financial markets and actors, insofar as they affect the right to privacy and data protection.

- **Other initiatives**

The EDPS will also follow proposals in other policy areas that have a significant impact on data protection. He will continue to be available for formal and informal consultations on proposals affecting the right to privacy and data protection.

Cooperation

The EDPS will continue to fulfil his responsibilities in the field of coordinated supervision. Additionally, he will reach out to national data protection authorities as well as to international organisations.

- **Coordinated supervision**

The EDPS will play his role in the coordinated supervision of Eurodac, the Customs Information System and the Visa Information System (VIS). Coordinated supervision of the VIS, which went live in October 2011, is still in its infancy. After informal discussions in the framework of the Eurodac supervision coordination meetings, the target for 2012 is to gradually establish supervision in this area. When SIS II is launched, it will also be subject to coordinated supervision; it is scheduled to go live in 2013 and the preparations will be followed closely. The EDPS will also carry out inspections of the central units of these systems where necessary or legally required.

- **Cooperation with data protection authorities**

As before, the EDPS will actively contribute to the activities and success of the Article 29 Data Protection Working Party, ensuring consistency and synergies between the Working Party and the positions of the EDPS in line with respective priorities and maintaining a constructive relationship with national data protection authorities. As rapporteur for some specific dossiers, he will steer and prepare the adoption of WP29 opinions.

- **Data protection in international organisations**

International organisations are usually not subject to data protection legislation in their host countries; however, not all of them have appropriate rules for data protection in place. The EDPS will reach out to international organisations by organising a workshop aimed at raising awareness and spreading good practices.

Other fields

- **Information and communication**

Information, communication and press activities will continue to be developed and improved, with special focus on awareness-raising, publications and online information. The EDPS will also start implementing the review of his Information and Communication Strategy, after the consultation of his main stakeholders. The re-organisation of some important parts of the EDPS website is planned in order to increase the user friendly character of the website and facilitate search and navigation through the available information.

- **Internal organisation**

The EDPS strategic review will continue through 2012, with an external consultation of stakeholders by means of online surveys, interviews, focus groups and workshops. Immediate results of the review launched in 2011 led to decisions to develop a more strategic approach to supervision and consultation activities and to create a new IT policy sector in 2012. Once the review has been concluded and the results analysed, the EDPS will finalise his mid-term strategy and draw up the performance measuring tools (KPI) necessary to evaluate key elements of that strategy.

- **Resource management**

The work of developing a customised Case Management System at the EDPS will continue in 2012. IT applications in the field of human resources on the basis of Service Level Agreements will also be developed further, especially with the implementation of Sysper II, which will be completed in 2012, and with the introduction of MIPS.

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