



- the European guardian of personal data protection

Annual Report 2006

Executive summary

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Introduction

This is the executive summary of the third annual report¹ of the European Data Protection Supervisor. Peter Hustinx (EDPS) and Joaquín Bayo Delgado (Assistant Supervisor) took up work in January 2004 to set up the independent authority which deals with protection of personal data on the "European level". Their main activities, as laid down in Regulation 45/2001², are to:

- supervise the EU-administration's processing of personal data, making sure that the rights and freedoms of those individuals whose data are processed are not violated;
- 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.

While the first year was one when the authority was literally built up, the second was one of consolidating its roles. This third report starts to measure results. A general impression is that the EC institutions and bodies³ have improved and increasingly make use of the EDPS to get things right in their daily practice of processing personal data, as well as when they develop new legislation for the EU.

At least two challenges still lie ahead. The first one involves the implementation of data protection rules and principles in the *whole* EU administration and to develop a 'data protection culture' as a part of 'good governance'. The EDPS will start to take stock of progress made in all institutions and bodies as from spring 2007 and will ensure appropriate feedback.

The second challenge is to accomplish an integration of data protection principles in Community legislation, and to improve the quality of EU policies, whenever effective data protection is a basic condition for their success. It is clear that this also involves successfully integrating privacy perspectives in some areas - such as public security and law enforcement policies - that sometimes seem to be at a different course.

Supervision

In today's society, modern administrations process personal data in a wide range of areas. It concerns personal data of staff, but also of visitors, recipients of funds and many other categories of people. The EC institutions and bodies treat vast amounts of personal data every day as part of their legitimate daily business.

One of the main roles of the EDPS is to supervise that the rights and freedoms of the people concerned are not violated when their personal data are processed. The legal framework is Regulation 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.

¹ The full text version is available on: <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/22>. It can be ordered free of charge in any of the three printed language versions English, French and German.

² 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

³ The terms 'institutions' and 'bodies' of Regulation (EC) 45/2001 are used throughout the report. This includes also Community agencies. For a full list, visit the following link: http://europa.eu/agencies/community_agencies/index_en.htm

Simple processing operations of personal data that do not present special risks for the data subjects are notified to the data protection officer (DPO) of the institution or body concerned. The DPO keeps a register of all such processing and ensures the internal application of the Regulation, for instance that personal data are only processed for legitimate reasons.

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. Examples of such (risky) treatment of personal data are when it relates to evaluation of staff, to someone's health, to suspected offences, etc⁴.

The supervisory tasks, led by the Assistant Supervisor, range from giving advice and assisting DPOs, through prior checking risky processing operations, to conducting inquiries and handling complaints, etc. This work also consists of elaborating background and position papers, and of supervising the central unit of Eurodac.

In 2006, 54 opinions were issued on prior checking cases, representing an increase of two-thirds compared to 2005. Only 5 of those cases were 'proper' prior checks, in the sense that they were submitted to the EDPS before they started. The prior checks dealt mostly with processing of personal data relating to staff appraisal, medical files, e-monitoring, disciplinary procedures, and social services. The backlog of 'ex-post' prior checks⁵ are expected to finish by spring 2007.

This work extends also to determining whether a prior check is needed in cases where the DPO is in doubt and consults the EDPS. Moreover, because the EDPS delivers a series of recommendations (for the processing operation not to breach the Regulation) when he has been consulted or issued a prior check opinion, it is necessary to follow-up the actions taken by the institution or body concerned.

52 complaints were received in 2006, 10 of which were declared admissible and further examined. This is close to a duplication compared to 2005. 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 (DPA) are competent).

A Memorandum of Understanding with the European Ombudsman (who deals with complaints on maladministration in institutions and bodies) was signed in November, providing a framework on how to act in cases where both authorities are competent.

A number of inquiries were conducted in different areas during 2006. Two which merit special attention are one on the European Commission's DG Competition and one on the role of the European Central Bank (ECB) in the SWIFT⁶ case. The first one concerned a large-scale sector inquiry carried out by the Commission which involved

⁴ For further details, see the full text version and Article 27 of Regulation 45/2001.

⁵ Regulation 45/2001 came into force on 1 February 2001 and the appointment of the EDPS and the Assistant Supervisor entered into effect on 17 January 2004. 'Ex post' prior checks relate to processing operations that started before their appointment and that therefore could not be checked prior to their start.

⁶ Society for Worldwide Interbank Financial Telecommunication.

collection of customer data. The second one concerned the different roles of the ECB in relation to the fact that the SWIFT system (messaging network for international payments) was accessed by US authorities. The EDPS requested the ECB to ensure that European payment systems are fully compliant with European data protection laws. The SWIFT-case will be followed-up upon during 2007.

2006 also saw the EDPS giving advice on more administrative measures than previous years. On own initiative, a survey of practices concerning personal files was started. Surveys on personal data transfers to third countries and international organisations, as well as on the use of video surveillance in the institutions and bodies were also initiated by the EDPS. Work on these important dossiers will continue during 2007.

Work has also continued within the field of the paper 'Public access to documents and data protection' and the draft e-monitoring paper that deals with data generated by the use of electronic communications (phone, e-mail, Internet, etc.). The EDPS intervened in a case⁷ before the Court of First Instance which dealt with public access, in support of the applicants claim that the Commission should disclose the requested attendance list in full. A draft of the e-monitoring paper was circulated amongst DPOs to collect comments and reactions, and a workshop was organised to test the guiding principles of the document.

Joint work on the shared supervision of Eurodac continued together with the national DPAs throughout 2006. Among other things, the EDPS organised a second coordination meeting in June. Being the supervisory authority for the central unit, the EDPS also had regular meetings with the Commission which operates the system on behalf of the participating Member States. The EDPS started an in-depth security audit in September 2006, in collaboration with German and French experts, and the final report will be delivered by spring 2007.

Consultation

The EDPS' consultative role consists of providing expert advice to the institutions and bodies on all matters relating to the protection of personal data. This is especially relevant for proposals for new legislation that have data protection impact. In such cases, the EDPS opinion is a compulsory feature of the EU legislative process.

During 2006, the consultation policy⁸ was further developed. An inventory of the intentions for 2007 was published on the website in December. Moreover, the number of opinions issued almost doubled compared to 2006: 11 opinions, covering areas such as exchange of information under the principle of availability, visa (including access to the large scale Visa information system (VIS)), passports and consular instruction, and financial matters.

A major concern in the field of police and judicial cooperation in criminal matters is the order of proposals. The EDPS has opposed legislation facilitating exchange of data being adopted before an adequate level of data protection is guaranteed. The proposal for such a framework has been the subject of two opinions by the EDPS, both stressing that a framework for protection is needed before data are exchanged.

⁷ T-194/04; Bavarian Lager vs. Commission

⁸ See also the policy paper published in March 2005 and available on the website: <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/21>

The EDPS addressed the introduction of the use of biometric data in several Commission proposals. Because biometric data are highly sensitive and present special risks for the data subjects, such processing must be supported by particularly consistent and strong safeguards. Another general topic which received particular attention in several opinions during 2006 is the increasing tendency to establish central databases and large scale IT systems. The EDPS has observed a trend in that once a database has been established, access to it is extended to more authorities, for other purposes than those for which it was set up. The risk of illegitimate use is another important reason why these databases create particular risks for the people whose data are used.

Other areas of particular concern include the lack of safeguards surrounding the exchange of personal data with third countries. The EDPS insisted that such transfers are only allowed if they ensure an adequate level of protection of the personal data, or if they fall within the derogations laid down in Directive 95/46/EC⁹.

In addition to the opinions issued on proposed legislation, the EDPS also addressed other subjects of relevance, such as how to best structure supervision of the second generation Schengen Information System (SIS II), interoperability of databases and the transfer of PNR¹⁰ data to the United States.

The EDPS continues to monitor new technological developments, such as enabling technologies and R&D for privacy and data protection. Developments in policy and legislation were also followed, not only in relation to developments in the area of Freedom, Security and Justice, but also in other fields, such as the review of the framework privacy and electronic communications.

Cooperation

EDPS work on the substance of data protection does not stop with what is done in the two specific fields of supervision and consultation. European integration has made cooperation with other authorities an essential part of the well functioning of a free flow of personal data, built on a high level of protection for the citizens.

The main forum for cooperation between the data protection authorities in Europe is the Article 29 Working Party. It meets in plenary five times per year, but also allows for hands-on work in various subgroups as well as through a closed website that facilitates information sharing. The Working Party plays a crucial role in the uniform application and interpretation of the general principles of Directive 95/46.

Among other matters, the EDPS actively contributed to the three opinions of the Working Party on airline passenger data transfers to the United States. The EDPS also contributed to a number of Working Party opinions on proposed legislation. The Working Party can issue such opinions, bringing in arguments relating to the national perspectives. Examples of good synergies between the opinions of the Working Party and the EDPS during 2006 were in the fields of retention of telecommunications data, maintenance obligations and the review of the e-Privacy Directive.

The EDPS has a duty to cooperate with the supervisory data protection bodies in the 'third pillar' of the EU (police and judicial cooperation in criminal matters). The EDPS

⁹ This Directive is the central piece of data protection legislation in Europe. It has been implemented into national law in all Member States as well as in Iceland, Norway and Liechtenstein.

¹⁰ Passenger Name Record.

strives to ensure a high and consistent level of data protection in the works of the Joint Supervisory Bodies (JSB) for Schengen, Europol, Eurojust and the Customs Information System (CIS). The steady increase of initiatives at a European level to fight organised crime and terrorism, including different proposals for exchange of personal data has turned close cooperation into an essential need. Most of the attention during 2006 was placed on the interrelated framework decision proposals on data protection in the third pillar and on the exchange of information under the principle of availability.

The EDPS also took part in the European and International conferences on data protection and privacy. The latter was entirely devoted to the theme "The Surveillance Society" and resulted, inter alia, in a statement that received general support and which was entitled "Communicating Data Protection and Making It More Effective" (also referred to as the London initiative).

Communication

As one of the architects of the London initiative, the EDPS will actively contribute to follow-up work on how to communicate data protection better. This is essential, because the protection of citizens' privacy and personal data is vital for any democratic society. In practice, the London initiative calls for the data protection authorities to assess their efficiency; reinforce their capacities in technological areas; develop a new communication strategy; communicate data protection in a more concrete way and to promote the involvement of other stakeholders.

During 2006, the EDPS continued to centre his communication activities on the different target groups identified within each main activity. Some examples are:

- Interview in a weekly internal newspaper of the Commission which is printed in more than 50,000 copies and also distributed to staff of other institutions (informing staff members of their rights; supervision);
- Participation in the regular meetings of the network of DPOs (informing them e.g. on interpretation of the dispositions of Regulation 45/2001; supervision);
- Presenting legislative opinions to the relevant working groups and committees of the European Parliament and the Council, as well as issuing press releases and granting interviews to journalists (consultation).

The EDPS made use of other tools of communication, giving a range of speeches throughout the year, as well as issuing five issues of his Newsletter¹¹, participating in the EU Open Day, etc. Replies to more than 170 requests for information or advice from students and other interested citizens, as well as from project managers and lawyers, spanning a wide range of data protection topics were also sent during 2006.

Administration, budget and staff

The EDPS as a newly established authority continued to grow, gaining additional resources in 2006, compared to 2005. The budget increased from just below EUR 3 million to slightly more than 4 million, and staff increased from 19 to 24. The administrative environment was gradually extended, adopting various internal rules necessary for the proper functioning of the authority, creating a Staff Committee, etc.

¹¹ An automatic subscription feature is available on this section of the website: <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/27>

Collaboration with the European Parliament, the Council and the European Commission was further improved, allowing for considerable economies of scale. A significant step in 2006 was the three year extension of the inter-institutional cooperation agreement with those institutions.

In terms of human resources, apart from the recruitments, the traineeship programme continued to host between two and three trainees per semester.

Results in 2006

The annual report 2005 mentioned the following main objectives for 2006 - most of which were realised.

- *Support of the DPO network*

The number of DPOs increased throughout the year. The EDPS continued to support their network and organised a workshop for new DPOs. Bilateral evaluations of progress on notifications in large institutions take place regularly.

- *Continue prior checking*

Prior checking of existing processing operations increased significantly. The relevant policies and main issues dealt with were shared with DPOs at regular meetings.

- *E-monitoring and traffic data*

The final version of the paper with guidelines on processing of personal data related to the use of electronic communication networks will be published in early 2007. The first prior check opinions in this field were issued in 2006.

- *Guidelines for personal files*

A survey on present practices concerning personal files on staff in institutions and bodies was launched and guidelines are being prepared.

- *Transfer to third countries*

Data transfers to third countries and international organisations have been analysed in a preliminary paper.

- *Supervision of Eurodac*

An in-depth security audit of Eurodac's central database is presently being conducted and will finish by mid 2007.

- *Advisory role on legislation*

The number of opinions issued almost doubled, covering a wide variety of subjects. A first inventory of relevant subjects for 2007 has been published on the website.

- *Interventions in court cases*

The EDPS was granted the right to intervene in three cases before the Court of First Instance on public access to documents and data protection and took part in one hearing. The EDPS also asked to intervene in the case before the Court of Justice on the validity of Directive 2006/24/EC on data retention.

- *Second version of website*

A completely revised website structured according to the main roles of the EDPS was launched in January 2007.

- *Development of resources*

The EDPS continued to develop the necessary resources and infrastructure to ensure an effective execution of his tasks. The administrative agreement concluded in 2004 with Commission, Parliament and Council was extended for another three years.

Objectives for 2007

The following main objectives have been selected for 2007. The results achieved will be reported in the next Annual Report.

- *Scope of DPO network*

The network of DPOs should reach its full scope, with also all bodies taking part in its activities. The EDPS will continue to give strong support and guidance to the development of DPO-functions and will encourage exchanges of best practices.

- *Continue prior checking*

Prior checking of existing processing operations will be finalised. Special attention will be given to inter-institutional systems and other situations of joint use by institutions and bodies, with a view to streamlining and simplifying procedures.

- *Inspections and checks*

The EDPS will start measuring progress on the implementation of Regulation 45/2001, with checks for all institutions and bodies as from spring 2007.

- *Video-surveillance*

Guidelines for video-surveillance by institutions and bodies, with a possible impact on the privacy of staff and visitors, will be developed and issued.

- *Horizontal issues*

Opinions on prior checks and decisions on complaints have addressed a number of common issues, which are also useful for institutions and bodies other than those involved in these cases. The EDPS will develop papers on such horizontal issues and make them widely accessible as guidance for all institutions and bodies.

- *Consultation on legislation*

The EDPS will continue to issue opinions on proposals for new legislation and ensure adequate follow up. Special attention will be given to relevant proposals for implementing decisions.

- *Data protection in third pillar*

Special attention will be given to the development and adoption of a general framework for data protection in the third pillar. The EDPS will also closely follow proposals for exchange of personal data across borders or that provide access to private or public sector data for law enforcement purposes.

- *Communicating data protection*

The EDPS will give strong support to follow up activities of the 'London Initiative'. This involves activities from 'raising awareness' to 'better implementation' and 'effective enforcement' of data protection principles.

- *Rules of procedure*

Rules of procedure covering the EDPS' different roles and activities will be adopted and made widely accessible.

- *Resource management*

The management of financial and human resources will further improve, by a renewal of the budget structure, adoption of internal rules in relevant areas (such as evaluation of staff) and the development of a training policy.