



## NEWSLETTER

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## **1. Data protection before the European Court of Justice**

On 18 July 2007 Advocate General Kokott submitted her Opinion on case C-275/06 (*Promusicae v Telefónica de España*). The case was brought before a Spanish Court by Promusicae, a music and audiovisual association, after telecoms and internet provider Telefónica refused to hand over names and addresses linked to computers that were used in alleged copyright infringement. Promusicae want to pursue civil actions against the users, but Telefónica insist they are only obliged to turn over this information as part of criminal investigations, for public security or national defence.

The referring national judge has submitted a preliminary question to the ECJ on whether excluding disclosure of this information in civil litigation is compatible with European law generally.

The Advocate General concludes that refusing access to information on internet users in civil cases involving intellectual property rights violations is compatible with European law, specifically considering the ePrivacy Directive 2002/58.

This opinion is of particular interest as it discusses all the relevant issues connected to ePrivacy and intellectual property rights. Indeed, it follows similar arguments to those previously expounded by the Article 29 Working Party, such as the 2005 paper on data protection issues related to intellectual property rights.

The Advocate General's Opinion is well developed advice to the ECJ about the limits on the purposes and uses to which internet traffic data can be put, with an understanding of the notion and application of the proportionality principle when conflicting rights are involved.

The next and final step in this procedure will be the ruling of the ECJ itself.

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## **2. EDPS opinion on European Health Statistical Regulation**

On 5 September, the EDPS adopted an Opinion on a proposal for a Regulation of the European Parliament and of the Council on Community statistics on public health and health and safety at work.

It is the first time that the EDPS has been directly consulted on a proposal for a Regulation in the field of Community statistics. The proposal aims at establishing the framework for all current and foreseeable activities in the field of Public health and Health and Safety at Work statistics carried out by the European Statistical System (Eurostat), the national statistical institutes and all other national authorities responsible for the provision of official statistics in these areas.

The main recommendations refer to the necessity to address the differences between Data Protection and Statistical Confidentiality as well as the notions

which are specific to each area. Transfers of personal data to third countries as well as conservation periods of statistical data are also analysed

Finally, following a meeting between the services of Eurostat and the EDPS, a common review of the processes put in place in Eurostat when dealing with individual records for statistical purposes will be conducted and may lead to the need for prior-checking. The opinion can be accessed [here](#).

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### **3. EDPS issues opinion on Directive 95/46/EC - full implementation before considering changes**

On 25 July, the EDPS issued an opinion on the European Commission communication regarding improved implementation of the Data Protection Directive 95/46/EC. The communication raises a number of short and longer term issues on how to better ensure Europeans' fundamental right to personal data protection.

The EDPS shares the central conclusion of the Commission that the Directive should not be amended in the short term.

In the short term, energy is best spent on improvements in the implementation of the Directive. Actions needed to ensure full implementation of the Directive include:

- the effective use of infringement procedures, as well as interpretative communications on central provisions of the Directive,
- the promotion of non binding instruments, such as best practices, self-regulation, "privacy by design", privacy seals, etc.

In the longer run, changes of the Directive seem unavoidable. A clear date for a review to prepare proposals leading to such changes should already be set now. Such a date would give a clear incentive to start the thinking about future changes already now.

The Opinion lists a number of areas requiring further reflection, preceding possible proposals for amendment of the Directive. It can be accessed [here](#).

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### **4. Proposal for a Road Transport Directive - EDPS issues opinion**

On 12 September 2007, the EDPS issued his opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator.

The proposed regulation establishes conditions relating to good repute, financial standing and professional competence which road transport companies have to satisfy. The proposal introduces national electronic registers that will have to be interconnected between all member states,

facilitating the exchange of information between Member States. It contains a specific provision on data protection.

The EDPS advises that the proposed Regulation is amended to:

- ensure greater definition of terms such as "good repute";
- clarify ambiguities in the role of national authorities; and
- ensure the requirements of Directive 95/46/EC are respected.

The opinion can be accessed [here](#).

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## **5. EDPS letter on the Reform Treaty**

In a letter to the Presidency of the Intergovernmental Conference of 23 July 2007, the EDPS presented suggestions aiming to improve the provisions included in the Reform Treaty and the declarations on data protection annexed to this treaty. The suggestions are merely of a technical nature and stay within the limits of the mandate for the IGC as provided by the European Council in the conclusions of its meeting of 21-23 June.

The EDPS suggestions relate to the proposed Article 24 of the Treaty on the European Union, the proposed Article 21 of the Treaty on the Functioning of the European Union, as well as to the Declaration on personal data protection in the areas of police and judicial cooperation in criminal matters. The [letter](#) and [annex](#) are available on the EDPS website.

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## **6. Article 29 Working Party issues Opinion on PNR Agreement**

Following the conclusion of the new long-term PNR agreement between the EU and the US, the Art. 29 Data Protection Working Party has issued an opinion analysing the privacy impact of the transfer of passenger data to the US on fundamental rights and freedoms and in particular the passengers' rights to data protection. The opinion states that the safeguards of the new agreement are markedly lower than those of the previous deal and serious questions and shortcomings remain unaddressed. It concludes that the level of data protection of the new agreement must be considered unsatisfactory.

The Opinion can be viewed [here](#).

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## **7. News on EDPS prior checking of personal data processing**

Processing of personal data by the EU administration that is likely to result in specific risks for the people concerned (the data subjects) is subject to a prior check by the EDPS. This procedure serves to establish whether or not the processing is in compliance with Regulation 45/2001, which lays down the data protection obligations of the EU institutions and bodies.

### Third working language - EPSO

The evaluation of an individual's capacity to work in a third language before their first promotion is provided for in Article 45 § 2 of the new Statute, which entered into force on 1 May 2004. Within this framework, *"the official is required to show, before its first promotion after recruitment, his capacity to work in third language among those referred to in Article 314 of the EC Treaty. Institutions have adopted by mutual agreement the common provisions of implementation of this paragraph (...)"*. The common regulation laying down the detailed rules for the application of Article 45 § 2 of the Statute was adopted at the end of December 2006 by all the institutions. Evaluations are done on tests or on title by EPSO and the evaluation Committees or by a processor.

The main recommendations issued by the EDPS in the framework of his opinion relating to the capacity to work in third language are dealing with transfer of data, items between EPSO and the processor and the revision of automated individual decisions.

### Medical records and time management- EIB

It is planned that the physician at the Occupation Health Centre (OHC) of the European Investment Bank (EIB) would have access to all data related to uncertified sick leave kept in the "time management" tool. The aim is to monitor staff health and to focus on early prevention of health risks. Leave without medical certificates can last up to a maximum of three consecutive days, and at present no data relating to them are accessible by the physician.

The EDPS questions the necessity and proportionality of the measure, just as the accuracy and actual usefulness of accessing those data. The EDPS expressed that the EIB would be in breach of the Regulation unless it ensures that staff members are requested to provide their freely given, unambiguous consent to the OHC physician's access to data regarding their uncertified medical leave. When requesting consent, it must be ensured that the staff member clearly understands that consent can be withheld or subsequently withdrawn at any time, without any justification, and with no adverse consequences. It must also be made clear that providing this information will only serve the purposes of prevention.

### OLAF Supervisory Committee

The purpose of the processing activity under analysis is to reinforce OLAF's independence by regular monitoring of the implementation of the investigative function. At the Request of the Director or on its own initiative, the committee shall deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress, as required by Article 11 of Regulation 1073/99. The Supervisory Committee (SC) is neither part of OLAF, nor part of an institution. It is a committee set up by the Commission under Community law (Article 4 of Commission Decision 1999/352/EC, ECSC, Euratom and Article 11 of Regulation 1073/99). Just as any other consultative committee established by the Commission, the SC

must be considered, for the purposes of Regulation 45/2001, as an emanation of the Commission and thus bound by the Regulation.

The EDPS has issued an opinion on this procedure which concludes that on a general basis the procedure complies with the principles established in the data protection regulation. However, the EDPS did make some recommendations mainly as concerns the respect for the data quality principle. Indeed, a methodology should be established describing the different steps to be followed in the access' requests from the Supervisory Committee to OLAF, previous to the access to the whole CMS (Case Management System) file. Furthermore, access to the CMS files (on-going, closed and non-cases) may only take place on a case-by-case basis. When such access is requested, a note should be included in the CMS file specifying the reasons that justify the provision of access.

Published opinions can be downloaded from the [EDPS website](#).

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## **8. Eurodac: first coordinated inspection concluded with generally satisfactory remarks**

The Eurodac Supervision Coordination Group issued a report on their first coordinated inspection on 17 July 2007. The responsible data protection authorities have investigated how the large scale database that contains fingerprints of more than 250.000 asylum seekers and illegal immigrants, has been used over the last 2,5 years. Three main issues - 'special searches', 'further use' and 'data quality' - were scrutinised. The group concluded that overall, there is no abuse of the Eurodac system. However some aspects, such as information to the people concerned, need to be improved.

The use of 'special searches' is legally limited to the asylum seekers and illegal immigrants who want to access their own personal data. The number of searches varied greatly between countries and there was concern about the high figures in some countries. The group concluded that there had been initial mistakes in the use of special searches which have now been corrected. It also highlighted the need for raising awareness of the data subjects' rights.

Eurodac fingerprints may only be used to determine the country responsible for an asylum application. No abuses were detected, despite the fact that some national Eurodac units are operated by police forces and despite the general increase of law enforcement authorities' access to various databases. The group also found that in some countries, there were difficulties in identifying the entity responsible for the personal data processing and the report recommends that steps are taken to resolve that.

The quality of the fingerprints is a basic data protection requirement. The European Commission has expressed concerns about the fact that 6% of the fingerprints have been rejected due to low quality. The group concluded that the countries involved should take every step to ensure better quality, in terms

of technology (live scans) as well as in terms of training. The report can be viewed [here](#).

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## **9. Data Protection Framework Decision**

The Portuguese Presidency of the Council is making serious efforts in order to make progress in the negotiations on the Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. These efforts are needed to respond to the request of the European Council of June 2007, to reach agreement on this Framework Decision by the end of 2007.

The Commission Proposal dates from October 2005 and has given rise to three opinions of the EDPS. In his opinions, the EDPS has in particular warned for a watering down of the level of protection and insisted on a broad scope, including application to law enforcement data within the jurisdiction of one Member State.

The Portuguese presidency is now seeking an agreement on two general issues:

- the scope: domestic v. cross-border data processing. The Presidency asks for agreement on a limited scope, excluding domestic processing (contrary to the point view of the EDPS).
- the basic principle that data transmitted or made available by the competent authority of another Member State may be transferred to third States or international bodies or organisations only if a number of conditions (including the adequacy requirement) are met.

The JHA-Council, in its meeting of 18 September 2007, accepted the proposals of the presidency on these two general issues.

The Framework Decision will further be dealt with and possibly finalised by the Council's Multi Disciplinary Group (MDG).

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## **10. Update on developments with the Portuguese Presidency**

On 11 June, Peter Hustinx (EDPS) sent letters to the Portuguese Ministers for Justice and the Interior. He asked the upcoming presidency to ensure sufficient consideration of data protection implications before Council initiatives are adopted.

On 17 September 2007, the Portuguese Minister for Justice had a meeting with the EDPS. The EDPS used this meeting as an opportunity to discuss various first and third pillar issues that the Presidency will be dealing with during the second half of 2007 in the hope of improving the efficacy and legitimacy of new legislation from a data protection perspective.

One of the subjects for discussion was the intention of the Portuguese Presidency relating to the Proposal for a Council Framework Decision on the

protection of personal data. The meeting was fruitful and must be seen as the start of a number of contacts with the Presidency The EDPS intends having similar meetings with the upcoming presidencies, starting with Slovenia that will take over in January 2008.

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## **11. 29th International Conference of Data Protection and Privacy Commissioners**

The 29th International Conference of Data Protection and Privacy Commissioners takes place in Montreal from 26 to 28 September 2007. Peter Hustinx will be chairing one of the closed sessions for the Privacy and Data Protection Commissioners and Joaquín Bayo Delgado (Assistant Supervisor) will be attending. The theme of the conference is "*Privacy Horizons: Terra Incognita*", pointing to the challenge for privacy guardians in tackling the "unknowns" transforming the field of data protection, such as technology, terrorism, information outsourcing, the exponential growth of transborder data flows and illicit data trafficking.

In addition to the main conference, there are four related conferences taking place in various cities in Canada:

- 20 to 21 September (Vancouver) - *Private Sector Privacy in a Changing World*.
- 24 September (Montreal) – *Conférence des commissaires à la protection des données de la francophonie*.
- 24 September (Toronto) – *Health Information Privacy Day*.
- 25 September (Montreal) – *The Public Voice*.

For more information, visit the conference website at:

[www.privacyconference2007.gc.ca](http://www.privacyconference2007.gc.ca)

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## **12. New Data Protection Officers**

Each EC institution and body has to appoint at least one person as Data Protection Officer (DPO). These officers have the task of ensuring in an independent manner the internal application of Regulation 45/2001.

### Recent appointments:

- Elizabeth Robino, European Centre for Disease Prevention and Control (ECDC)
- Gordon McInnes, European Environment Agency (EEA)
- Véronique Doreau, Community Plant Variety Office (CPVO).

See full list of [DPOs](#).

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### **13. Colophon**

This newsletter is issued by the European Data Protection Supervisor - an independent EU authority established in 2004 to:

- monitor the EU administration's processing of personal data;
- give advice on data protection legislation;
- co-operate with similar authorities to ensure consistent data protection.

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