

EDPS Newsletter

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EUROPEAN DATA
PROTECTION SUPERVISOR



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SPEECHES AND PUBLICATIONS



NEW DATA PROTECTION OFFICERS

- HIGHLIGHT -

EDPS publishes Annual Report 2010

Peter Hustinx, EDPS, and Giovanni Buttarelli, Assistant Supervisor, presented their Annual Report of activities for 2010 to the press and to the European Parliament on 15 June 2011. This Report covers the sixth full year of activity of the EDPS as a new, independent supervisory body.



The year 2010 saw some major trends which are driving forward a more effective protection of personal data. They include the increasingly visible impact of the Lisbon Treaty which has firmly placed data protection at the heart of the EU policy agenda, as well as the ongoing review of the EU legal data protection framework, which is raising high expectations. Also encompassed are the Stockholm programme and the EU Digital Agenda which are both highly significant for privacy and data protection.



“ 2010 has been a very busy, dynamic, but also very productive year for everyone at the EDPS and for data protection in general. This is fully in line with the need to increase efforts to ensure a more effective data protection in a changing world which is increasingly global, Internet-driven and dependent on the use of ICTs. This trend affects every single one of us, so it is crucially important for the EU as a whole and for the activities of the EU administration. ”

Peter Hustinx, EDPS.



As regards the EDPS' **supervisory role**, the main highlights include:

- a fundamental change of gear in relation to the enforcement of the Data Protection Regulation in the EU administration in order to ensure a more robust approach to enforcement;
- an increase in the scope of EDPS supervision which, since the entry into force of the Lisbon Treaty, applies to all EU institutions and bodies;
- the adoption of 55 prior-check opinions relating to processing operations of personal data in the EU administration;

- an increase in the complexity of complaints received. In 2010, admissible complaints mainly related to questions of access and rectification, misuse, excessive collection and deletion of data. In 11 cases, the EDPS concluded that data protection rules had been violated.

In his advisory role, the EDPS accorded special emphasis to:

- the modernisation of the EU legal framework for data protection: the EDPS has consistently recommended an ambitious approach to developing a modern, comprehensive framework for data protection, covering all areas of EU policy;
- the Stockholm Programme and the EU Digital Agenda: these two key policy programmes have great relevance for data protection and are therefore closely monitored as part of the EDPS' advisory role;
- a record number of 19 legislative opinions on a number of subjects including major issues concerning the EU Internal Security Agenda, the EU Counter-Terrorism Strategy, transfers of PNR data to third countries, Information Management in the Area of Freedom, Security and Justice, "Privacy by Design" in the Digital Agenda, and the ACTA Agreement;

In the area of **cooperation**, the EDPS worked closely together with national data protection authorities in the Article 29 Data Protection Working Party to focus on the interpretation of key provisions of the Data Protection Directive and to provide a common input to the review of the EU legal framework.

- ⇒ [EDPS Annual Report 2010](#) (see also the [eBook version](#) of the Report)
- ⇒ [EDPS press conference - Information materials](#)



CONSULTATION

> EDPS opinion on the Evaluation Report on the Data Retention Directive

The opinion, adopted on 31 May 2011, analyses the Commission's Report which provides an evaluation of the implementation and application of the Data Retention Directive and measures its impact on economic operators and consumers.

The EDPS takes the view that the Directive **does not meet the requirements imposed by the fundamental rights to privacy and data protection**, mainly for the following reasons:

- the necessity for data retention as provided in the Directive has not been sufficiently demonstrated;
- data retention could have been regulated in a less privacy-intrusive way;



- the Directive leaves too much scope for Member States to decide on the purposes for which the data might be used, and for determining who can access the data and under which conditions.

“The information provided by the Member States is not sufficient to draw a positive conclusion on the need for data retention as it has been developed in the Directive. Further investigation of necessity and proportionality is required, and in particular the examination of alternative, less privacy-intrusive means.”

Peter Hustinx, EDPS.

The Evaluation Report will now play a role in possible decisions on amending the Directive. The EDPS calls for the Commission to seriously consider all options in this further process, including the possibility of repealing the Directive, whether or not combined with the proposal for an alternative, more targeted EU measure.

If, on the basis of new information, the necessity for an EU instrument on data retention is demonstrated, the following basic requirements should be respected:

- it should be comprehensive and genuinely harmonise rules on the obligations to retain data, as well as on the access and further use of the data by competent authorities;
- it should be exhaustive, which means that it has a clear and precise purpose which cannot be circumvented;
- it should be proportionate and not go beyond what is necessary.

☞ EDPS opinion ([pdf](#))

> EDPS opinion on Energy Market Integrity and Transparency



On 21 June 2011, the EDPS issued an opinion on the proposal for a Regulation on energy market integrity and transparency. The main aim is to prevent market manipulation and insider trading on wholesale energy - gas and electricity - markets. The EDPS commented on several aspects of the proposal, including those on market monitoring and reporting, and investigation and enforcement.

The key concern of the EDPS is that the proposal **lacks clarity and adequate data protection safeguards** with regard to the investigatory powers granted to national regulatory authorities. The EDPS therefore recommends clarifying:

- whether **on-site inspections** would be limited to business properties or also apply to private properties of individuals. In the latter case, the necessity and proportionality of this power should be clearly justified and a judicial warrant and additional safeguards would be required;
- the **scope of the powers** to require "existing telephone and existing data traffic records". The proposal should unambiguously specify what **records** can be required and from whom. The fact that no data can be required from providers of publicly available electronic communications services should be explicitly mentioned. The proposed Regulation should also clarify whether the authorities may also request the private records of individuals (e.g. text messages sent from personal mobile devices). If this were the case, the necessity and proportionality of this power should be clearly justified and the Proposal would also require a warrant from a judicial authority.

When EU legislation requires Member States to take measures at the national level that have an effect on fundamental rights, the legislation should also require effective safeguards to ensure the protection of the fundamental rights at stake.

Giovanni Buttarelli, Assistant Supervisor.

The reporting and collection of data regarding suspicious transactions is another sensitive subject in the proposal where the EDPS calls for the clarification of the relevant provisions and adequate safeguards, such as strict purpose limitations and retention periods.

☞ EDPS opinion ([pdf](#))

> EDPS opinion on OLAF reform Regulation

On 1 June 2011, the EDPS adopted an opinion on a proposal for a Regulation which is intended to modify the current rules concerning investigations conducted by the European Anti-fraud Office (OLAF). The aim of the proposal is to increase the efficiency, effectiveness and accountability of OLAF, while safeguarding its investigative independence.

The EDPS supports the objectives of the proposed amendments and, in this respect, welcomes the proposal. Despite the overall positive impression, the EDPS considers that, from the point of view of the protection of personal data, the proposal could be further improved without jeopardising the objectives that it pursues.

The EDPS therefore makes a number of recommendations that should be addressed by the modification of the text, and in particular that the proposal should:



- clearly mention the **right to information** of the different categories of data subjects, as well as the **right of access and rectification** in relation to all the phases of the investigations carried out by OLAF;
- clarify the relationship between the need for **confidentiality of the investigations** and the data protection regime applicable during the investigations;
- clarify the general data protection principles on the basis of which OLAF can **transmit and receive information**, including personal data, with other EU bodies and agencies, and give the Director General the task of ensuring that a **strategic and comprehensive overview of the different processing operations** of OLAF is carried out, kept up to date and made transparent.

☞ EDPS opinion ([pdf](#))

> EDPS opinion on the interconnection of business registers



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On 6 May 2011, the EDPS issued an opinion on the proposal for a Directive amending three existing directives on the interconnection of business registers. The aim is to facilitate and step up cross border cooperation and information exchange among business registers in the European Union and thereby increase transparency as well as the reliability of information available across borders.

The main concern of the EDPS is that the proposal, as drafted, would leave to delegated acts key issues such as those of

governance, roles, competences, and responsibilities. In order to ensure legal certainty as to who is responsible for what, and to ensure that adequate data protection safeguards can be identified and implemented, the EDPS recommends that these key issues are addressed in the proposed Directive. The proposed Directive should therefore determine:

- whether the electronic network will be operated by the Commission or by a third party and whether it will have a centralised or decentralised structure;
- the tasks and responsibilities of each party involved in the data processing and the governance of the electronic network, including the Commission, Member State representatives, the holders of business registers in Member States and any third parties;
- the relationship between the electronic system foreseen in the Proposal and other initiatives such as the Internal Market Information System, the e-Justice portal and the European Business Register; and
- specific and unambiguous elements to clarify whether a particular actor should be regarded as a "controller" or as a "processor".

“As with other information systems for data sharing, the Commission should ensure that privacy and data protection are "designed" into the architecture of the electronic network (privacy by design) and that adequate controls are in place to ensure data protection compliance and provide evidence thereof (accountability).

Giovanni Buttarelli, Assistant Supervisor.

☞ EDPS opinion ([pdf](#))

> EDPS opinions on the Consumer Protection Cooperation System

On 4 May 2011, the EDPS issued a prior-checking opinion on the Consumer Protection Co-operation System (CPCS). In this opinion, the EDPS assesses data protection compliance in the CPCS and recommends further improvements to be made, in particular, technical and organisational measures to be taken by the Commission. The prior-checking opinion was followed, on 5 May 2011, by a legislative opinion, which comments on the legal framework for the CPCS.

The CPCS is an information technology system designed and operated by the Commission. The CPCS facilitates co-operation among competent authorities in the EU Member States and the Commission in the area of consumer protection. In the framework of their co-operation, competent authorities exchange information including personal data.



The EDPS welcomes the fact that the CPCS Regulation has been complemented over time with an implementing Decision and a set of data protection guidelines which, combined, provide more details on the actual processing as well as specific data protection safeguards.

The key recommendations of the prior-checking opinion include the following:

- concerning **data quality**, the CPCS system architecture should continue to be configured in such a way as to facilitate compliance with data protection laws. The Commission should also continue its activities to help ensure that the users of the system should be adequately trained, guided, and empowered to take decisions concerning data protection;

- the Commission should revise and give prominence to its draft **privacy notice** on the website and raise awareness about the importance of notice provision among competent authorities to help encourage notice provision at national level;
- further measures should be taken to facilitate the exercise of **data subjects' rights** to access, rectification and deletion of their data. To facilitate coordination, a data protection module within the CPCS could be considered.

The main recommendations of the legislative opinion include the following:

- regarding the **retention period**, mutual assistance requests should be closed within specifically designated time-limits. Unless an investigation or enforcement is ongoing, alerts should be withdrawn and deleted within six months of issuance. Additionally, the Commission should clarify and reconsider the purpose and proportionality of keeping all data relating to closed cases for five additional years;
- the Commission should re-assess what additional technical and organisational measures could be taken to ensure that privacy and data protection are "designed" into the CPCS system architecture ("**privacy by design**") and that adequate controls are in place to ensure data protection compliance and provide evidence thereof ("**accountability**").

"The Commission should explore the possible synergies that might arise if data protection authorities were enabled to join the user community of CPCS to cooperate to help enforce 'consumer data protection rights'."

Giovanni Buttarelli, Assistant Supervisor.

- ☞ Prior-checking opinion ([pdf](#))
- ☞ Legislative opinion ([pdf](#))

> EDPS opinion on Over-the-Counter derivatives, central counterparties and trade repositories

The opinion, published on 19 April 2011, focussed primarily on the specific investigation powers granted to the European Securities and Markets Authority (ESMA) under the proposed Regulation, namely the power to "**require records of telephone and data traffic**".



The opinion highlights that investigatory powers directly relating to traffic data, given their potential intrusiveness, have to comply with the requirements of **necessity and proportionality**. It is therefore essential that they are clearly formulated regarding their personal and material scope, as well as the circumstances in which, and the conditions on which, they can be used. Adequate safeguards should also be provided against the risk of abuse.

The EDPS considers that these requirements are not fulfilled in the proposed Regulation as the power under consideration is **too broadly formulated**. In particular, the **personal and material scope** of the power, the **circumstances and the conditions** under which it could be used were not specified. The EDPS therefore called for more clarity and advised the legislator to:

- clearly specify the categories of telephone and data traffic records which trade repositories are required to retain and/or to provide to the competent authorities;
- limit the power to require records of telephone and data traffic to trade repositories only;

- state explicitly that accessing telephone and data traffic records directly from telecom companies is excluded.

The EDPS also recommended limiting the exercise of the power to **identified and serious violations** of the proposed regulation and in cases where a **reasonable suspicion** of a breach exists. Furthermore, he suggested introducing the requirement of the prior **judicial authorisation** (at least where such authorisation is required under national law) and adequate procedural safeguards against the risk of abuse.

☞ EDPS opinion ([pdf](#))

> EDPS opinion on EU Financial Regulation

On 15 April 2011, the EDPS adopted an opinion on the Commission's proposal aimed at revising the financial rules applicable to the annual budget of the European Union ("EU Financial Regulation"). The proposal covers several matters which involve the processing of personal data by the EU institutions and by entities at Member State level.

One of the most significant new elements introduced by the proposal is the possibility to publish decisions on administrative and financial penalties. Such publication would entail the disclosure of information about the person concerned in an identifiable way. The EDPS believes that this provision does not meet the requirements of data protection law. To better comply with data protection rules, it should be improved by explicitly indicating the purpose for the disclosure and by ensuring the consistent application of the possibility, of what is in fact naming and shaming of persons, together with the use of clear criteria to demonstrate the necessity for the disclosure.



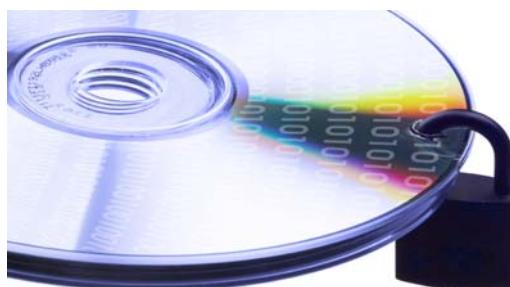
“ Transparency and data protection are two principles that strengthen each other. Synergy between these two principles in the new Regulation can only be ensured if the rules on transparency and processing of personal information are sufficiently clear and precise. ” Giovanni Buttarelli, Assistant Supervisor.

The EDPS recommendations also cover the following:

- **whistleblowers:** the legislator should ensure the confidentiality of whistleblowers' identity during investigations, except in cases where it contravenes national rules regulating judicial procedures;
- **publication of information on the recipients of funds** deriving from the budget: the Regulation should explicitly indicate the purpose and explain the necessity for the disclosure of information on the recipients of funds deriving from the budget;
- **Central Exclusion Database:** the proposal provides for the setting-up of a database containing details of individual and company candidates excluded from participation in tenders. Access to the database by third country authorities should comply with the specific data protection rules related to third country transfers.

☞ EDPS opinion ([pdf](#))

> EDPS response to the Commission's Consultation on its Report on the application of Intellectual Property Rights Enforcement Directive



On 8 April 2011, the EDPS responded to the public consultation launched by the European Commission on the application of the Intellectual Property Rights Enforcement Directive. The EDPS provided a broad overview of the data protection issues that can arise in the context of enforcing intellectual property rights on the Internet. The EDPS highlighted the fact that the enforcement of intellectual property (IP) rights on the Internet poses important challenges and requires adequate data protection safeguards. This especially applies when carrying out monitoring of Internet activity

to find alleged infringers, or when collecting personal data information (such as a subscriber name linked to a concrete IP address) from intermediaries such as Internet Service Providers.

The EDPS also stressed the importance of striking a correct balance between the fundamental right to data protection and the right to intellectual property. He is of the opinion that the current provisions in the Directive - based on striking the balance in line with the commercial scale of the infringement - are appropriate, although clarification is still necessary in some areas.

Finally the EDPS made some recommendations to assist the Commission take a more prospective view. In particular, data protection should be taken into account in the evaluation of the implementation of the current Directive, its follow up and during possible future legislative modifications.

☞ EDPS response to the consultation ([pdf](#))



SUPERVISION

> News on EDPS prior-checking of personal data processing

>> EDPS prior-check opinion on Consumer Protection Co-operation System

See related article in [Consultation section](#)

>> EDPS prior-check opinion on Quality Management System and ex-post quality checks at OHIM

Since 2007, the Office of Harmonization for the Internal Market (OHIM) has been conducting ex ante and ex post quality checks of trademark decisions produced by OHIM's trademark examiners for quality control purposes. The results of these checks show whether there were any mistakes and the types of mistakes made by the examiners. In September 2009, OHIM informed relevant staff that the results of ex post quality checks ("EPQC") would also be used for the purpose of their annual performance appraisal. As a result, the EPQC system was submitted to the EDPS for prior-checking.

Given the change of purpose of the processing, the EDPS recommended that OHIM adopts an internal decision setting forth appropriate data protection guarantees and ensuring that EPQC data are not the sole basis for the annual performance appraisals. The EDPS recommended that appropriate consideration be given to other defined indicators measuring the quality of the work of examiners and to the justifications provided by examiners concerning all the circumstances of a given mistake.

☞ EDPS opinion ([pdf](#))



> Enforcement

>> EDPS visits to European Railway Agency, Community Plant Variety Office and European Foundation for the Improvement of Living and Working Conditions

Between January and March 2011, as a result of a number of issues identified in the course of his activities, the EDPS visited several EU agencies in order to discuss and better understand their level of compliance with the Data Protection Regulation.

The visits had a similar structure, consisting of a meeting between the EDPS and the Director of the Agency, further meetings involving the data protection officer and controllers of processing operations, also including presentations on the data protection Regulation and the EDPS approach to monitoring and ensuring regulatory compliance.

These meetings provided an opportunity for the EDPS to raise specific concerns, and allowed the Agencies to provide updates on their progress towards compliance.

At the end of each visit, a specific roadmap was agreed upon, detailing priority actions to be undertaken by the Agencies, under EDPS monitoring, in order to ensure a better level of compliance with the Regulation.

>> EDPS Inspection at CEDEFOP

The EDPS conducted an on-the-spot inspection at the European Centre for the Development of Vocational Training (CEDEFOP) in Thessaloniki on 31 May and 1 June 2011. This inspection is part of the EDPS 2011 annual inspection plan, based on an internal risk assessment exercise.

Three main areas were inspected: the staff recruitment procedures with a focus on current and future practices, the access control to the premises managed by the security services and the registry and inventory of notifications. Background information was provided by either prior-checking cases or analysis of consultation cases.

Based on the findings, the EDPS is drafting an inspection report compiling recommendations with a view to better ensuring compliance with the EU Data Protection Regulation.



COOPERATION

3rd meeting of the CIS Supervision Coordination Group (Brussels, 7 June 2011)

On 7 June 2011, the Customs Information System (CIS) Supervision Coordination Group met in Brussels for the third time. This meeting was convened by the EDPS within the framework of the mutual assistance and cooperation policy between the administrative authorities of the Member States and the Commission to ensure the correct application of the law on customs and agricultural matters.

The meeting was attended by delegates from the national data protection authorities, the European Commission, the Council's Data Protection Secretariat and the Customs Joint Supervisory Authority.

The Group discussed future cooperation with the Customs Joint Supervisory Authority and adopted an Action Plan 2011-2012. The Action Plan, prepared by the Secretariat, sets out several actions to



be taken by the Group during the next two years in order to ensure effective supervision of the CIS. Additionally, Mr Giovanni Buttarelli, Assistant EDPS, was elected Chairman of the Group. Mr Gregor König, the Austrian delegate and Chairman of the Customs Joint Supervisory Authority, was elected as Vice-chair, both unanimously.

The next meeting is provisionally scheduled for October 2011.

14th meeting of the Eurodac Supervision Coordination Group (Brussels, 8 June 2011)

The Eurodac Supervision Coordination Group met in Brussels on 8 June 2011 in the framework of the coordinated supervision of the Eurodac system, as required by Council Regulation 2725/2000. The meeting was convened by the EDPS and was attended by delegates from the national data protection authorities and the European Commission.

The Group discussed several ongoing and planned projects, amongst others the issue of advance deletion of data.

The next meeting will be held in Autumn 2011.



E V E N T S

> EDPS workshop for data protection officers (Brussels, 8 June 2011)

This one day workshop on data protection was organised by the EDPS for data protection officers (DPOs) of the EU administration. The aim was to provide basic training for DPOs, in particular for newly-appointed ones.

After a welcome speech by Mr Giovanni Buttarelli, the morning session started with an introduction to the basic principles and definitions of the EU Data Protection Regulation (45/2001). This was followed by a session moderated by the DPO of the European Commission, which included presentations on specific subjects (e.g. legal basis of data processing, rights of the data subject, transfer of data, processing on behalf of the controller). These presentations were supported by concrete examples taken from the EDPS supervision activities.

The afternoon session, moderated by the DPO of the European Parliament, was dedicated to cooperation between DPOs and the EDPS, focusing on the practical aspects of complaint handling, prior-checking procedures, and security of processing operations.

The workshop was concluded by a presentation of the former DPO of the Council of the European Union based on his 10 years of experience as DPO.

The workshop was well-attended and active participation of the DPOs led to a productive exchange of experiences and concerns. The EDPS will build on this experience and on the feedback received to organise similar workshops in the future.

> Inter-institutional meeting on Computer forensics (Brussels, 7 June 2011)

On 7 June 2011, the EDPS invited nine different services from various EU institutions to discuss protocols for the collection of digital evidence. Computer forensics is indeed increasing in importance because technology itself is changing the landscape in which the EU institutions operate: everything is being digitized, everything is being stored, and computers leave traces.



The aim of the workshop was to share and explore best practices and tools for collecting digital evidence and mitigating the risk of compromising this evidence. It provided an interesting opportunity to foster technical cooperation between those EU institutions which are involved in such activities. This initial event, as a first general approach to the theme covering topics such as procedures, tools and risks associated with computer forensics, revealed a great diversity of situations among EU institutions. It will be followed by workshops focused on specific and operational issues identified during this first session.

> International Data Protection Conference organised by the Hungarian Presidency (Budapest, 16-17 June 2011)

On 16 and 17 June 2011, the Hungarian Presidency of the Council of the European Union hosted an international data protection conference in Budapest. About 150 people attended the conference, including representatives of EU governments, data protection authorities, the European Commission, and other institutions, such as the Council of Europe.

The conference mainly focused on the revision of the current data protection framework and specific related subjects, notably cloud computing, harmonisation of data protection law and international data protection standards.

Peter Hustinx, Supervisor, Giovanni Buttarelli, Assistant Supervisor, and various EDPS staff members participated in the conference. The Supervisors' speeches that were delivered are available in the Speeches section [below](#).

A follow-up conference is due to be organised in Warsaw in September 2011 by the Polish Presidency of the Council of the European Union.



S P E E C H E S A N D P U B L I C A T I O N S

- "Data protection - a critical success factor for other important policy fields", article ([pdf](#)) by Peter Hustinx published in E&T Engineering & Technology, July 2011, p. 35 (29 June 2011)
- "General context - where we are now and where we are heading - current and future dilemma's of privacy protection", speech ([pdf](#)) delivered by Peter Hustinx at the International Data Protection Conference (Budapest, 16 June 2011)
- "Towards more comprehensive data protection in Europe including biometrics – a European perspective" speech ([pdf](#)) of Peter Hustinx at the occasion of the 12th Conference & Exhibition of Biometrics Institute Australia, (Sydney, 26 May 2011)
- Capitol Hill Briefing: Street View, Privacy, and the Security of Wireless Networks, statement ([pdf](#)) by Peter Hustinx (Washington DC, 18 May 2011)
- "What future for the Data Retention Directive", speech ([pdf](#)) of Giovanni Buttarelli at the meeting of the EU Council Working Party on Data Protection and Information Exchange (DAPIX - Data Protection), (Brussels, 4 May 2011)



NEW DATA PROTECTION OFFICERS

Each European institution and body has to appoint at least one person as a Data Protection Officer (DPO). These officers have the task of ensuring the application of the data protection obligations laid down in Regulation (EC) No 45/2001 in their institution or body in an independent manner.

- Alessandro SPINA, European Medicines Agency (as of 1 July 2011).
- Catherine COUCKE, European Insurance and Occupations Pensions Authority
- Tiziana CICCARONE, European Training Foundation (as of 1 May 2011)

☞ See full [list of DPOs](#).

About this newsletter

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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