



# NEWSLETTER

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## **1. SWIFT case**

On 1 February, the European Data Protection Supervisor (EDPS) issued his opinion on the role of the European Central Bank (ECB) in the SWIFT case - US authorities accessing banking data in the fight against terrorism. The opinion focuses on the role of the ECB as an overseer, a user, and a policy maker.

- As part of the group of central banks that oversee SWIFT's activities, the ECB has moral suasion powers. Although not binding, these should be used to prevent data protection breaches that might hamper financial stability and to ensure that competent authorities are timely informed.
- The ECB bears some responsibility for the way in which its "client" data are processed by SWIFT. Acting effectively as a joint controller means that the ECB needs to ensure full compliance with data protection rules. The EDPS invited the ECB to prepare a report concerning the measures taken to comply with the opinion by April at the latest.
- As a central policy maker in shaping European payment systems, the ECB needs to ensure that the architecture of those systems does not allow that information on all European payments is transferred to third country authorities in breach of data protection law.

On 14 February, the European Parliament adopted a [joint resolution](#) on PNR and SWIFT. With regard to SWIFT, the European Parliament endorses the EDPS opinion and calls on the ECB and other relevant institutions to ensure that European payment systems fully comply with European data protection law. European data protection authorities are assessing progress and coordinating their actions in this case through the Article 29 Working Party, which adopted an [opinion](#) on 22 November 2006. At its [last plenary](#), the Working Party decided to send a letter to the main EU institutions. It recalls that any solution to this case - and in particular any international agreement that may be negotiated - shall respect the principles of EU data protection law.

Read the [opinion](#), or the [press release](#).

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## **2. Europol decision - EDPS opinion**

On 16 February, the EDPS issued an opinion on the proposed Council decision on Europol. Although the proposal has some well advanced data protection provisions, the EDPS made various recommendations on Europol's increased use of personal data. It must be ensured that exchange with other EU bodies, such as OLAF, will be based on a consistent level of data protection and good cooperation in supervision.

The objective of the proposed Council decision is to provide Europol with a new and more flexible legal basis. However, this will entail important changes to Europol's mandate, notably in terms of data exchanges. Furthermore, efforts will be taken to ensure interoperability with national and European databases. Therefore, the EDPS advises to:

- ensure that data collected from commercial activities are accurate;
- apply strict conditions and guarantees when databases are interlinked;
- harmonise rules on, and limit the exceptions to, the data subject's right of access;

- include guarantees for the independence of Europol's data protection officer (who internally ensures lawful processing of personal data).

EDPS' operational role when Europol is moved into the EU structure will be to supervise processing of staff data and transfers of data from EC institutions and bodies to Europol.

Read the [opinion](#), or the [press release](#).

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

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.

#### Use of office telephones - European Central Bank

This is the first opinion on the monitoring of the use of office phones by staff members. The ECB has established a procedure for investigation on the use of office phones (Call Charging Facility Investigation Procedures), which can be triggered either when there is a disagreement with the content of itemised private call listing or disagreement with the content of business calls statistics.

The opinion 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 conservation periods for storing the data and information on the processing of personal data to be included in the relevant administrative circular. The circular is currently in the process of modification and will reflect the EDPS recommendations.

#### Early Warning System - European Commission

The Early Warning System (EWS) principally ensures the circulation of restricted information concerning third parties (natural or legal persons) among all Commission departments. This information concerns beneficiaries of EC funds that have committed fraud, administrative errors or irregularities as well as beneficiaries who could pose a threat to the Community's financial interests. The information may also include natural persons with powers of representation, decision making or control over given legal persons.

The opinion concludes that the Commission has substantially complied with the Regulation. Nevertheless, the EDPS made recommendations regarding:

- the possibility to publish the EWS decision in the Official Journal for transparency reasons,
- the data quality (e.g. that any rectification of inaccurate or incomplete data outside the system is reflected in the EWS),

- the fact that the right of access can only be restricted as an exception, and that it should be completed by a right of rectification in case of errors or wrong evaluation, and
- the fact that, as a rule, the person concerned is informed of the warning against him/her.

Other institutions do not establish their own central database, but they use the one of the Commission. In this context, the EDPS received a notification from the European Court of Justice on its use of the EWS. In his opinion, the EDPS underlined the importance of the above mentioned principles and rights.

In relation to these cases, the EDPS issued an [Opinion](#) on the amendments to the Financial Regulation and its Implementing Rules. These amendments

1. introduce the publication of the lists of beneficiaries of Community funds,
2. adapt the regulation to the existing practice of a single EWS controlled by the Commission, and
3. extend to Member States and third countries the possibility to receive and send information.

The EDPS underlined the importance of a proactive approach in the light of the transparency principle. He also proposed the implementation of safeguards for the establishment of a central database of candidates and tenderers. Finally, he suggested modifications to time-limits for storage and budgetary controls, in order to be in line with Regulation 45/2001 regarding the conservation of traffic data.

#### Lack of professional competence - Court of Auditors

The Court of Auditors has drawn up a draft decision on the procedure to identify, deal with and remedy potential cases of professional incompetence among EC staff, following the annual evaluation report. Because it evaluates personal aspects of the data subject, including his/her ability, efficiency and conduct, this processing is subject to prior checking.

Some of the recommendations of the EDPS refer to the information that needs to be given to the data subject and the data retention period. The former would be ensured by the publication of the decision with its annexes referring to the relevant provisions of the Regulation and the latter would be respected by the insertion in the proposed decision of a retention period which respects Article 4(1)e of the Regulation.

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

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#### **4. Complaint regarding the right of access**

The EDPS has dealt with several complaints on restrictions to data subjects' right to access documents containing their personal data (Article 20 of the Regulation). In a recent case regarding harassment at work, the complainant

wanted to get the report drawn up on the alleged harassment and bad management. Initially, this request was denied with the motivation that the applicant was not considered to be a 'person concerned'. He was subsequently granted very limited access to the report.

After the inquiry, the EDPS stated that any restrictions to the data subject's right of access to his/her personal data must be interpreted strictly. The EDPS requested more parts of the report to be disclosed to the complainant, notably any outcome of the enquiry that related to him. Moreover, the EDPS accepted that certain limitations are necessary in order to protect the rights of others (e.g. witnesses, the person under investigation). However, the EDPS did not approve of any restriction on the basis of the investigator's protection. It was pointed out that the knowledge of the subsequent possible disclosure of the report should be seen as a guarantee of rigor and fairness of the procedure, and not as a condition preventing the inquirer from performing his duties properly.

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## **5. New website**

By the end of January, the EDPS launched his second generation website. The objective is to communicate data protection and EDPS' activities in a better way and to thereby promote the number of visitors and increase their use of the website.

The first version was developed during the initial setting up of the office - in summer 2004. After three years of activity, it was necessary to find a new structure that enabled the publication of documents according to the three main tasks of the authority - supervision, consultation and cooperation. A general EDPS pillar has also been introduced. Compared with the previous version, the new website contains more layered information - with summaries of opinions, etc. - as well as explicative introductions which give the setting for a particular field of work.

The French version was recently uploaded. With time, more editorial sections will be added.

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## **6. Data Protection Day: EDPS raising awareness among EU staff**

The member states of the Council of Europe celebrated the Data Protection Day for the first time on 28 January 2007. This is the anniversary of the opening for signature in 1981 of the first legally binding international instrument in the data protection field - Council of Europe's Convention 108.

The EDPS supported this initiative and focused on raising awareness among EU staff of the rights and obligations surrounding data protection by setting up a one day information stand inside the European Commission and the European Parliament. A [quiz](#) was developed.

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## **7. Workshop on data protection in international organisations**

In 2005, the EDPS was the main organiser of a workshop titled "Data protection as part of good governance in international organisations". A follow-up workshop will take place in Munich on 29 March. It will address issues of specific relevance to international organisations, which often are exempted from national laws. A few places are still available and interested staff working within an international organisation should contact the EDPS as soon as possible.

[Read more](#)

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## **8. Speeches & Articles**

### Data Protection - Are Current Standards for Police Cooperation Satisfactory?

In December 2006, Peter Hustinx (EDPS) contributed to a public seminar in the European Parliament on EU Police Cooperation. Mr Hustinx underlined the essential points raised in his two opinions on the proposed Framework Decision on data protection in the third pillar.

Firstly, the EDPS pointed out that the current standards are inadequate, since there is no common legal framework for the exchange of information between Member States. Secondly, he stated that the common standards in the proposed Framework Decision need a wide scope. They shall be applicable to all processing and not limit the protection to data that are exchanged between Member States, excluding 'purely' domestic processing. Thirdly, Mr Hustinx highlighted the need for consistency with Directive 95/46 and explained why it would be appropriate for police work, although it is a first pillar instrument. Finally, he emphasised that the development of adequate standards for data protection should be considered as a pre-condition for a better cooperation and not as a source of problems.

### The EDPS: The institutions of the EC controlled by an independent authority

This article, published in the Common Market Law Review and written by a staff member of the EDPS describes the EDPS as a new phenomenon within the institutional framework of the Community.

After some introductory remarks on Article 286 of the EC Treaty, the general mission and the three main duties of the EDPS are illustrated. The article continues with a detailed analysis of the role of the EDPS by defining what the EDPS is not (differences with other institutions and agencies) and by presenting the main reasons for his establishment and the conditions for exercising his functions, etc. Moreover, it is explained under what exceptional circumstances the EDPS can be subject to political and judicial control.

In its final remarks, the article summarises the essential characteristics of the EDPS, i.e. that he gives a face to data protection and that he provides for independence, expertise and some appropriate power. It is also concluded

that these characteristics offer several advantages to the EU system from different perspectives.

### The third pillar in practice: coping with inadequacies - information sharing between Member States

In November 2006, a staff member of the EDPS presented this discussion paper for a meeting of the Netherlands Association for European Law (NVER).

In view of the Hague Programme (strengthening freedom, security and justice in the European Union) and in spite of the lack of a Constitutional Treaty, a European criminal justice area must be built. The paper attempts to provide some guidance on how the EU can live up to the aspirations set out in the Hague programme, particularly as regards police and judicial cooperation in criminal matters.

Some of the aspects covered in the paper are the following: Information sharing presupposes mutual trust between Member States. Articles 29-32 of the EU Treaty confer general powers to legislate as a means of fostering such trust. When doing that, the fullest possible attention must be paid to third-pillar inadequacies, such as the lack of suitable (democratic) scrutiny and legal protection. Moreover, as a result of the [PNR judgment](#), there is a borderline area, between the first and the third pillars in which there may be no powers for action by the European Union.

Read [speeches and articles](#).

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## **9. 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:

- Hubert MONET, Education, Audiovisual and Culture Executive Agency (EACEA)
- Giuseppina LAURITANO, European Data Protection Supervisor
- Martin BENISCH (replacing Mr Sommerfeld), European Central Bank
- Andreas MITRAKAS, European Network and Information Security Agency - ENISA
- Jean-Marie ADJAH, European Monitoring Centre on Racism and Xenophobia
- Maria ARSENE (temporary replacing Ms Candellier), Committee of the Regions

See full list of [DPOs](#)

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## **10. 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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**EDPS - the European guardian of personal data protection**

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