



Inventory 2010

I. Introduction

This is the fourth public inventory of the EDPS as an advisor on proposals for EU legislation and related documents. Due to the publication of the Commission Work Programme 2010 and the Action Plan implementing the Stockholm Programme in March and April respectively, the EDPS inventory is published later than usual, namely in June instead of December. The inventory can be found at the website of the EDPS: www.edps.europa.eu.

The inventory forms part of the annual work cycle of the EDPS. Once a year the EDPS reports retrospectively on his activities in the Annual Report. In addition, the EDPS publishes an inventory of his intentions in the area of consultation for the next year.

The background of this inventory can be found in the Policy Paper of 18 March 2005, "The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents".¹ In this paper, the EDPS laid down his policy in the area of consultation on legislative proposals, one of his main tasks based on Articles 28(2) and 41 of Regulation (EC) No. 45/2001. The working method of the EDPS is described in Chapter 5 of the policy paper. An important part of this working method is the selection and planning (including a regular review of this selection and planning), needed in order to be effective as an advisor.

The main sources of this years' inventory are, as usual, the Commission Legislative and Work Programme 2010 and several related planning documents of the Commission, but also the aforementioned Action Plan on the Stockholm Programme. The inventory has been prepared by the Staff of the EDPS. During the preparation process, stakeholders within the Commission were given the possibility to provide input. This input is highly appreciated.

The inventory consists of two documents:

- This introductory part which includes a short analysis of the context, as well as the priorities of the EDPS for 2010.
- An annex of the relevant Commission-proposals and other documents that have been recently adopted or that are programmed, and that require the attention of the EDPS.

¹ To be found at the EDPS website under 'The EDPS' >> 'Publications' >> 'Papers'.

The annex was published for the first time in December 2006 and has been updated three times a year since then.

Once the EDPS has given his opinion (or another public reaction) on a document, the document will normally be deleted from the Annex. It has to be underlined however that the involvement of the EDPS in the legislative process does not stop once his opinion has been issued. In exceptional cases the subject can reappear in the Annex, where the EDPS issues a second opinion. The opinions of the EDPS can also be found on his website.²

II. Short analysis of the context

The EU legal landscape has changed considerably in comparison with the previous year. On the first of December 2009, the Lisbon Treaty entered into force which moved the policy area on cooperation in the field of police and judicial matters to the former Community pillar. As a consequence, the European Parliament as well as the European Court of Justice have competence in this area (in some cases subject to a transitional period).

The new legal setting after Lisbon also has consequences for the activities of the EDPS. In his role as legislative advisor, the current practice in which the EDPS advises the legislator on legislative activities with data protection relevance in all EU policy areas is confirmed. The scope of EDPS competence in his role as supervisor is, however, less obvious. In order to prevent any legal lacunae in the protection of citizens' personal data, the clarification of EDPS competence should be provided for as soon as possible in 2010.

a. Towards a new legal framework for data protection

The right to data protection has been underlined and reinforced by the Lisbon Treaty. The right to data protection is set out in Article 8 of the EU Charter on Fundamental Rights which now has the same legal value as the treaties. The right is furthermore laid down in Article 16 TFEU which now constitutes the single legal basis for the adoption of data protection legislation. This new legal basis has given important impetus to the discussion on the revision of the EU rules on data protection. A public consultation on the improvement of data protection rules was held in the second half of 2009 and a proposal for a new legal framework is expected before the end of 2010. Many improvements of the current framework have been suggested, such as the introduction of an obligation to notify security breaches, the increased empowerment of the data subject, and the introduction of the principles of 'accountability' and 'privacy-by-design'. A strong message on the independence of National Data Protection Authorities has furthermore been given by the European Court of Justice in its judgement of 9 March 2010. The EDPS encourages the idea of strengthening the current rules on data protection and supports the inclusion in the new legislative text of the area of police and judicial cooperation (which is current dealt with in the separate Framework Decision

² Under 'Consultation' >> 'Opinions'.

2008/977/JHA). The new legal framework on data protection is one of the top priorities of the EDPS in 2010.

b. The further development of the Area of Freedom, Security and Justice

In December 2009, the Stockholm Programme was adopted. The Programme is the successor of the The Hague Programme and sets the priorities for developing the European Area of Freedom, Security and Justice in the next five years. The Stockholm Programme emphasises the need to protect personal data in a global society which is characterised by rapid technological change and borderless information exchange. The programme does also underline the need to exchange data for the security of Europe, and introduces the development of an Internal Security Strategy. A Communication on the latter is due for October 2010. When developing the Area of Freedom, Security and Justice, the European legislator constantly has to find the right balance between the security and free movement of citizens on the one hand, and the protection of their privacy and personal data on the other hand. It goes without saying that all the steps which are announced in the Stockholm Action Plan on this matter will be closely followed by the EDPS. The EDPS wishes to mention in particular the setting up of an entry-exit system and the Registered Traveller Programme, the envisaged Directive on the use of PNR for law enforcement purposes, the possibility of an EU-ESTA and the use of body scanners at airports. Some of these initiatives are scheduled for early 2011, but are still included in the EDPS inventory of 2010 since discussion on those initiatives will start this year and because they have important data protection implications. The EDPS will furthermore analyse the Communication on policy and instruments for a reinforced network and information security, which is expected for June 2010. The EDPS will also closely follow the announced review of the Data Retention Directive and see whether the need for such a Directive and the proportionality of such a measure should be thoroughly assessed.

c. International cooperation and data transfer

In both the Commission Working Programme and the Action Plan on the Stockholm Programme, the further development of an external agenda of the EU is emphasised. In the area of Freedom, Security and Justice the internal and external policies are inextricably linked. International cooperation regarding security and law enforcement is still one of the most important issues on the global agenda. The EU and the US will discuss a general agreement on data sharing for law enforcement purposes, as well as a more focussed agreement on the exchange of financial data. The EDPS will, where possible, closely follow these negotiations. In this respect, the European Parliament's new competence in the field of EU external relations, after the entry into force of the Lisbon Treaty, is of great importance. Other international agreements which are in the pipeline and which have data protection relevance, such as the ACTA and several agreements on the exchange of PNR will also be followed and commented upon by the EDPS.

d. Technological developments: the Digital Agenda for Europe

In March 2010 the Commission published an initiative 'Europe 2020 - a strategy for smart, sustainable and inclusive growth'. The initiative is a response to the

financial and economic crisis of recent years and sets goals for the further growth of the European economy. One of the strategic initiatives set out in the Europe 2020 Communication is the Digital Agenda for Europe, which is further clarified in the Commission Work Programme 2010. The digital agenda sets out priorities to speed up the roll-out of high speed internet and tap the potential of digital technologies for households and firms. Many of the announced initiatives in relation to the digital agenda have data protection relevance, such as the framework for electronic identity (eID) and authentication and the interoperability framework for pan-European eGovernment services. In relation to the digital agenda, the EDPS will also look at the Communication on privacy and trust in the ubiquitous information society. In addition, the EDPS will follow the proposals which envisage the introduction of new technology in areas such as road transport (the e-mobility package) and energy (the use of smart grids).

III. Priorities EDPS for 2010

The policy of the EDPS as an advisor on EU-legislation and related documents will not change. The consistency of output is crucial, whereby the EDPS strives to find the right balance between data protection and other (public) interests. As in previous years, the EDPS intends to give his opinion on all legislative proposals which have a substantive impact on data protection. The main issues for EDPS comments are the following:

- a. Towards a new legal framework for data protection
 - Revision of EU data protection framework
 - Further defining the concepts of 'controller' and 'processor' and clarifying the notion of 'accountability' and the issue if applicable law and jurisdiction (also with national Data Protection Authorities, in framework of Article 29 Working Party).
- b. Further developing the Area of Freedom, Security and Justice
 - Internal Security Strategy
 - Use of body scanners at airports
 - EU-PNR
 - Communication on policy and instruments for a reinforced network and information security
 - Amendment of the FRONTEX regulation
 - Evaluation of the Data Retention Directive
 - Border management and entry-exit system
 - Registered traveller programme (RTP)
 - EU-ESTA
 - Activities relating to eJustice and the single judicial area
- c. International cooperation and data transfer
 - EU-US agreement on the exchange of personal data for law enforcement purposes
 - EU-US agreement on the transfer of financial payment messaging data to combat terrorism
 - PNR agreements with US, Canada and Australia
 - Anti Counterfeiting Trade Agreement

- d. Technological developments: the digital agenda
 - eSignature Directive
 - Interoperability framework for pan-European eGovernment services
 - eMobility package
 - Regulatory framework on smart grids
 - Communication on privacy and trust in the ubiquitous information society.

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