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EUROPEAN DATA PROTECTION SUPERVISOR

Inventory 2012

Towards a more strategic approach to legislative consultation

1. ISSUES OF STRATEGIC IMPORTANCE FOR 2012

This document presents the public inventory of the EDPS in his role of advisor on proposals for EU legislation and related initiatives. The inventory forms an integrated part of the annual work cycle of the EDPS and sets out his approach in the area of consultation for the upcoming year.

The following is a non-exhaustive list of key issues on which the EDPS will concentrate in the course of 2012:

- a. Towards a new legal framework for data protection
 - Revision of EU data protection framework
- b. Technological developments and the Digital Agenda, IP rights and Internet
 - Pan European framework for electronic identification, authentication and signature
 - Internet monitoring (e.g. enforcement of IP rights, takedown procedures)
 - Cloud computing services
 - eHealth
- c. Further developing the Area of Freedom, Security and Justice
 - EU-PNR
 - EU-TFTS
 - Border controls
 - Review of Data Retention Directive
 - Negotiations on agreements with third countries on data protection
- d. Financial sector reform
 - Regulation and supervision of financial markets and actors

2. STRATEGIC FRAMEWORK

2.1. EU policies and data protection: an overview

In recent years we have witnessed a steady increase in the number of EDPS opinions issued regarding proposals for EU legislation and related documents. In the course of 2011, the EDPS issued 24 legislative opinions and 12 sets of formal comments and provided informal advice to the Commission or other Institutions in more than 40 cases. An analysis of the 2012 Commission work programme confirms that this trend will continue and that the number of EDPS opinions could potentially increase even further in future.

The need to take account of privacy and data protection implications of legislative proposals is becoming essential in all areas of EU policy. In general, three main trends can be identified as predominant in this context.

1. There is an increasing tendency of endowing administrative authorities (both EU and national) with effective information gathering and investigative tools. This is the case in particular in the area of freedom, security and justice and in relation to the revision of the legislative framework concerning financial supervision.
2. EU legislation increasingly facilitates significant exchanges of information between national authorities, quite often involving EU-bodies and large-scale databases (with or without a central part) of increasing size and processing power. This requires careful consideration by the policy makers and actors in the legislative procedure when setting out data protection requirements, because of the important consequences these exchanges can have for the privacy of citizens, e.g. by facilitating the monitoring of citizens' lives.
3. Recent years have been characterised by impressive developments in the field of technology, mainly due to the widespread use of internet and geo-location technologies (e.g. driving licences and e-call). Such developments have a significant impact on a citizen's right to privacy and data protection. The EDPS has been involved in various initiatives in this field, such as those concerning the application of RFID, behavioural advertising, net neutrality, cloud computing, e-Health and e-Justice.

In 2012, the EDPS will focus on the following trends:

- Employment of effective information gathering and investigative tools by administrative authorities (both EU and national).
- Significant exchanges of information between national authorities, quite often involving EU-bodies and large-scale data-bases (with or without a central part) of increasing size and processing power.
- Developments in the field of technology, mainly due to the widespread use of internet and geo-location technologies

Apart from policy areas in which the EDPS has already intervened in the past, the processing of personal information has become increasingly relevant in other areas as

well. New proposals regarding the banking and financial sector, public health and consumer affairs, transport policy, anti-fraud policy as well as in tax and customs cooperation constitute clear examples of this tendency.

The importance of the fundamental right to privacy and data protection in the post-Lisbon legal framework cannot be overstated and it is clearly demonstrated by the recent case law of the Court of Justice.¹ The *Schecke* judgment of the Court of Justice, demonstrates how sufficient consideration of data protection issues is needed, where relevant, before drawing up proposals for EU legislation. It is, therefore, important that EDPS advice is provided in a timely manner so that it can be fully integrated in the legislative process. A strategic approach is crucial.

2.2. A more strategic approach to legislative consultation

The EDPS faces the challenge of fulfilling his ever-increasing role in the legislative procedure while guaranteeing high-quality and well-appreciated contributions to it, to be delivered by limited resources.

In light of this, the EDPS has, therefore, identified issues of strategic importance (outlined under section 1 above and further described in section 2) that will form the cornerstones of his consultation work for 2012, while not neglecting the importance of other legislative procedures where data protection is concerned (i.e. the other initiatives highlighted in red in the Annex to the present document).

The EDPS is, therefore, committed to devoting substantial resources in 2012 to the analysis of the strategic proposals, as identified in this document. These proposals can be grouped into four categories:

- ◇ Towards a new legal framework for data protection,
- ◇ Technological developments and the Digital Agenda,
- ◇ Further developing the Area of Freedom, Security and Justice, and
- ◇ Financial sector reform.

They will be analysed in more detail below.

In addition to these strategic areas, the EDPS has identified a number of (non or less strategic) initiatives which may nonetheless have data protection relevance. These initiatives are listed in the Annex to this document and some are highlighted in either yellow or green. The fact that the latter are included in the Annex implies that they will be regularly monitored, but does not mean that the EDPS will issue an opinion or formal comments on such initiatives.

It should be noted that the implementation of the EDPS planning and priorities are largely dependent on the planning of the Commission. Should the adoption of any relevant proposal(s) be postponed for any reason by the Commission, this will of course have an impact on the EDPS agenda.

¹ Case C-70/10, *Scarlet Extended SA v SABAM*, judgment of 24 November 2011; Joined Cases C-92/09 and C-93/09, *Schecke*, judgment of 9 November 2010; Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi and Satamedia*, judgment of 16 December 2008; Case C-101/01, *Bodil Lindqvist*, Judgment of 6 November 2003.

2.3. Selection of key initiatives from the Commission Work Programme 2012

The EDPS has identified some key initiatives from the Commission Work Programme for 2012, on which he will concentrate in the course of 2012. The main subject areas envisaged for 2012 are the following.

2.3.1. *Towards a new legal framework for data protection*

The review process of the data protection legislative framework has now reached a crucial stage. The Commission has almost finalised its proposal for a new legislative framework, which is likely to be published in the beginning of 2012. The EDPS has been involved in the review process since 2009 and has given his advice at various stages and in different forms. In January 2011, he published a comprehensive opinion on the Commission Communication laying down the main aspects of the future reform. He will issue an Opinion on the legislative proposal(s) in early 2012, closely follow the review process and continue to fulfil his advisory role in the course of the year by intervening at the appropriate stages.

A priori, the EDPS will pay special attention to the most crucial elements of the new framework such as definitions, general principles, jurisdiction for trans-border data processing activities, third-country transfers, data subjects' rights (including the new rights to be forgotten and to data portability), data controllers' obligations (including privacy by design and accountability) and oversight mechanisms with regard to cooperation and consistency instruments.

It is important to point out that the review represents the first step in a process that is due to include proposals for the revision of Regulation 45/2001, the e-Privacy Directive and specialised instruments in the field of police and judicial cooperation.

2.3.2. *Technological developments: the Digital Agenda for Europe, Intellectual property rights and Internet*

The Commission has planned significant work in the area of the information society and new technologies for 2012. Particular emphasis will be given to the implementation of the Digital Agenda and the EU 2020 Programme. Several of these initiatives are likely to have significant data protection relevance. The EDPS will also monitor and engage in relevant European Research and Technological Development projects. He will in particular focus on the following policy issues:

- Internet monitoring, IP enforcement and takedown procedures
- Pan European framework for electronic identification, authentication and signature
- Cloud computing services
- e-Health

In these areas, the EDPS will deal with the important issues raised by digital technologies such as, *inter alia*, the balance between IP rights and privacy (internet monitoring, IP enforcement and takedown procedures), jurisdictional issues for trans-

border data processing activities (cloud computing), massive exchanges between national authorities, e-security and privacy by design (e-Health and electronic identification, authentication and signature).

2.3.3. *Further development of the Area of Freedom, Security and Justice*

The Commission Work Programme for 2012 shows that the Commission will take important initiatives in this area. There appear to be two items at the top of the agenda:

- ◇ Immigration and border control, where the Commission plans to adopt the legislative package on smart borders including an entry/exit system, Registered Travellers Programme and EUROSUR.
- ◇ Anti-terrorism and internal security strategy, in relation to which the EU PNR and TFTP initiatives will play a crucial role.

Indirectly connected to the Area of Freedom, Security and Justice is the project of reviewing the Data Retention Directive. The EDPS has already issued two opinions on this subject, in 2005 and 2011 respectively. The review of the Directive will certainly constitute one of his priorities in 2012 as well.

Overall, the EDPS will focus on the following initiatives:

- Review of Data Retention Directive
- Smart border package (Entry/Exit, RTP, Schengen Borders Code and EUROSUR)
- European TFTS
- European PNR and PNR agreements
- Negotiations on agreements with third countries on data protection

In analysing these initiatives, the EDPS will strive to ensure that the right balance is achieved between privacy and security, that data protection requirements are fulfilled when providing for massive exchanges of information between national and third country authorities (e.g. TFTP, PNR, agreements with third countries on data protection) and that monitoring of individuals, including by means of geo-localisation, for security purposes is carried out in compliance with fundamental rights (e.g. data retention, smart border package).

2.3.4. *Financial sector reform*

Since the outbreak of the economic crisis, the Commission has undertaken a comprehensive overhaul of financial regulation and supervision. The vast bulk of key initiatives have already been adopted or are on the table, including proposed legislation on derivatives², credit rating agencies³, capital requirements⁴, sounder and

² COM (2010) 484, 11.09.2010

³ EU Regulation N°. 513/2011, OJ 2011 L 145/30, 31.05.2011

⁴ COM (2011) 452, 20.07.2011; COM (2011) 453, 20.07.2011

more transparent securities markets and tackling market abuse⁵. An assessment of the cumulative impact of the reforms will also be published.

The EDPS has paid considerable attention in 2011 to developments in the financial legislation. He expressed concerns, among others, on the data protection issues raised by the new powers of the supervisory authorities, particularly in relation to access to traffic data and inspection of private premises. The EDPS will continue to monitor relevant developments in the financial sector having regard to potential data protection implications.

In particular, the EDPS plans to issue a package of opinions on legislative proposals concerning the regulation and supervision of financial markets and actors, including: 1) the legislative package for the revision of the banking legislation 2) the market abuse regulation 3) the regulation and the directive on markets in financial instruments and 4) the revision of the credit rating agencies regulation.

3. METHODOLOGY

The EDPS exercises his advisory tasks in the field of legislative consultation by issuing opinions, comments (formal or informal) or other instruments.

The choice between an opinion, comments or other instruments depends on:

- *Type of document*: as a basic rule, a proposal as meant in Article 28 (2) leads to an Opinion, which is to be regarded as an integral part of the legislative procedure⁶. Exceptions should only be made for reasons of substance, where the EDPS has little reason for comment and/or data protection is not a highly relevant issue in the proposal. Following the extension of the European Parliament competencies regarding the approval of International agreements where the protection of personal data is affected, the EDPS also issues opinions regarding such agreements. Finally, as the role of delegated and implementing acts is increasing, the EDPS envisages drafting opinions also for these type of legislative instruments at an appropriate stage of the legislative procedure.
- The EDPS only issues an opinion on non legislative texts (such as Commission working documents, communications or recommendations) if data protection is a core element of the instrument and there is sufficient material for an opinion.
- *Stage of procedure*: in other stages of a legislative process than the adoption of a proposal (or a decision etc) by the Commission, "comments" (or an explanatory letter on a specific issue) are usually sufficient.

For the issues of strategic importance as identified under chapter 1 above, the EDPS intends to adopt a more in-depth approach to his activities. He envisages organising his secretariat to work in project teams to ensure quality and consistency in these crucial areas of strategic importance to personal data protection in the EU.

⁵ COM (2011) 656, 20.10.2011; COM (2011) 652, 20.10.2011

⁶ Article 28 (2) of Regulation 45/2001: "When it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, the Commission shall consult the European Data Protection Supervisor."

In order to better fulfil his role of advisor, the EDPS will consider publishing guidelines in 2012 regarding important technical or societal phenomena that affect personal data protection (such as "naming and shaming" practices) or concerning recurring data protection aspects of EU legislative initiatives (such as the provisions concerning exchanges of information).

4. INVENTORY: BACKGROUND

The main sources of the EDPS Inventory are the Commission Legislative and Work Programme 2012 and the work programme of the Article 29 Working Party, but also other relevant planning documents of the Commission. The inventory has been prepared by the staff of the EDPS. During the preparation process, stakeholders within the Commission were invited to give input. This input is highly appreciated.

The inventory should be seen as a strategic document, setting out the direction for the work in the upcoming year and identifying issues where the EDPS feels that he can provide most "added value" within the framework of legislative and non-legislative procedures.

The inventory consists of two documents:

- This introductory part which sets out the EDPS strategic priorities for legislative consultation in 2012.
- 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.

The annex was published for the first time in December 2006 and has (as a general rule) been updated three times a year since then.⁷

The EDPS would like to encourage stakeholders to monitor the inventory and its regular updates, so as to ensure that the EDPS is consulted in the appropriate manner and at the appropriate stage on initiatives included therein.

Once the EDPS has given his opinion (or another public reaction) on a document, the document will normally be deleted from the Annex. The involvement of the EDPS in the legislative process, however, does not cease once his opinion has been issued. In exceptional cases the subject can reappear in the Annex, where the EDPS intends to issue a second opinion. The opinions of the EDPS can also be found on his website.⁸

⁷ Apart from December, the update takes place in principle in May and September.

⁸ Under 'Consultation' >> 'Opinions'.