



European Data Protection Supervisor

ANNUAL REPORT 2004 Summary

The annual report 2004 covers the first period of the existence of the European Data Protection Supervisor (EDPS) as a new independent supervisory authority, with the task of ensuring that the fundamental rights and freedoms of natural persons, and in particular their privacy, with regard to the processing of personal data are respected by the Community institutions and bodies. It describes the "**building of a new institution**" from its initial stages up to the point where the new authority has developed the capacity to carry out its mission with growing effectiveness. The report outlines the first experiences in different areas of work as well as the legal framework and policy perspectives on main lines.

Chapter 1 - "Balance and perspectives" - describes the legal framework within which the EDPS is acting and the tasks and powers entrusted to him. Furthermore, the main objectives for 2005 are highlighted. The practical story about building a new institution can be found in Chapter 2. In Chapters 3 to 5 the duties and powers are more widely discussed. Chapter 3 on Supervision explains the EDPS' task to monitor data processing in Community institutions and bodies, in cooperation with the Data Protection Officers (DPO) which are present in each institution or body. Chapter 4 on Consultation explains that the EDPS is advising Community institutions and bodies on all matters concerning the processing of personal data. He is consulted by the Commission whenever it adopts a legislative proposal relating to the protection of personal data. Chapter 5 on Cooperation highlights the active role the EDPS plays in the activities of the Article 29 Working Party, as well as the cooperation with supervisory data protection bodies in the so-called third pillar of the Union. Chapter 6 illustrates the global nature of the issue of data protection, as it describes the international contacts made by the EDPS in 2004.

Chapter 1: Balance and perspectives

The establishment of an independent authority at European level to monitor and to ensure the application of legal safeguards for the protection of personal data is **a new experience for Community institutions and bodies**, and for the European Union as a whole.

New experiences rarely happen without complications. For instance, the relevant rules on data protection entered into force in February 2001 with a transitional period of one year. But the appointment of the EDPS and the assistant EDPS entered into effect in January 2004. This means that external supervision has been absent for a period of three years, during which the rights of data subjects could not be protected in the way intended when the rules were adopted. Although very useful work has been done by DPO's, implementation and supervision of existing rules is an urgent matter: the EU cannot afford not to deliver on the rules it has imposed on itself and on the member states. Nevertheless, some prudence is required, since there are no signs of any lack of willingness at Community level to comply with these rules that are generally regarded as reasonable and appropriate.

Article 286 of the EC Treaty provides that Community acts on the protection of individuals with regard to the processing of personal data and free movement of such data should also apply to the Community institutions and bodies, including the establishment of an independent supervisory authority. The appropriate rules referred to in that provision have been laid down in **Regulation (EC) 45/2001** of the European Parliament and of the Council.

This Regulation should not be considered by itself, but as a part of a much **larger framework** that reflects the work undertaken by the European Union and the Council of Europe during a longer period. This work goes back to Article 8 of the European Convention on Human Rights (ECHR) and has also influenced the EU Charter of Fundamental Rights which has now been incorporated in the Treaty establishing a Constitution for Europe as part II.

At European Union level, the protection of personal data is enshrined in:

- Article 6 of the EU Treaty
- Article 286 of the EC Treaty
- Article 8 of the Charter of Fundamental Rights
- Directive 95/46/EC
- Directive 2002/58/EC.

Regulation (EC) 45/2001 specifies the principles for the EU institutions and bodies. This Regulation applies to the “processing of personal data by Community institutions and bodies insofar as such processing is carried out in the exercise of activities all part of which are within the scope of Community law”. It deals with general principles like fair and lawful processing, proportionality and compatible use, special categories of sensitive data, information to be given to the data subject, the rights of the data subject and with supervision, enforcement and remedies. It also establishes an independent supervisory authority (EDPS) responsible for monitoring the processing of personal data by Community institutions and bodies. Each institution has a DPO who cooperates with the EDPS.

The tasks and powers of the EDPS are described in Articles 41, 46 and 47 of the Regulation. His duties are “supervision”, “consultation” and “cooperation”. Each of these duties is further discussed in the next chapters.

The establishment of an independent supervisory authority at European level is not only a basic ingredient of a sound data protection policy, but also an essential measure to ensure that the principles and values set out in Article 8 ECHR and Article II-68 of the Constitution are safeguarded. These provisions clearly emphasize the role of independent supervisory authorities in the delivery of these principles and values.

It is important to realise that **more and more EU policies depend on the lawful processing of personal data**. This is the case since many activities in a modern society nowadays generate personal data or use such data as input. It is also true for the European institutions and bodies in their administrative or policy-making roles, and therefore also for the implementation of their policy agendas. This means that effective **protection of personal data**, as a basic value underlying Union policies, should be seen as a **condition for their success**. The EDPS will be acting in this general spirit and is expecting a positive response in return.

The main **objectives for 2005** described in the report are:

- Development of a DPO network
- Brochures, website and newsletter
- Notifications and prior checks
- Guidelines for complaints and inquiries
- Audits and investigations
- Privacy and transparency
- E-monitoring and traffic data
- Opinions on proposals for legislation
- Data protection in the third pillar
- Development of resources

Chapter 2: Building a "new institution"

In 2004, the institution was started up. The administrative environment was constructed with assistance of European Parliament, Commission and Council, which ensured a supply of know-how, the provision of valuable aid in the performance of certain tasks and the achievement of economies on scale.

The EDPS intends to continue with the development of this environment in 2005.

Chapter 3: Supervision

A fundamental task of the EDPS as a new independent authority is to supervise the application of the provisions of Regulation (EC) 45/2001 and other relevant legal instruments to all personal data processing operations carried out by a Community institution or body (except the Court of Justice acting in its judicial capacity), insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law. To that effect, the Regulation describes and grants a number of duties and powers which relate to the supervisory task.

Prior checks, informing of data subjects, dealing with complaints and investigations are instruments that were used during 2004. Opinions of the EDPS were given the necessary follow up. Controllers have taken measures accordingly.

All processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes are subject to **prior checking**. Prior checks must be carried out by the EDPS following receipt of a notification from the DPO of a Community institution or body. The final answer takes the form of an EDPS opinion, to be notified to the controller of the processing operation and to the DPO of the institution or body concerned. This opinion must be delivered within two months after the receipt of a notification. A register is kept of processing operations which have been notified for prior checking.

Prior checks not only concern operations not yet in progress ("proper prior checks") but also processing operations that started before 17 January 2004 or before the Regulation came into force. These cases are dealt with on an "ex post" basis. Four cases of "proper" prior checking were notified to the EDPS in 2004. About 100 cases were listed as "ex post" prior checks.

During 2004, the EDPS received 51 requests for **information**. Most were answered within two working days.

Moreover, 8 **complaints** within the competence of the EDPS were received: 6 against the Commission, 1 against the ECB and 1 against the Parliament. The experience gathered from the handling of these complaints is being used to draft a manual.

The first **investigations** by the EDPS have started. The relationship between public access to documents and data protection is felt as problematic by the Community institutions and bodies. Resources were set aside to develop a policy paper on how to promote public access to documents together with the protection of personal data.

At the same time, the EDPS has started work on the processing of traffic and billing data of all kinds of electronic communications in the European institutions. The objective is twofold. The EDPS aims at producing guidelines on the subject as well as at establishing the list(s) of traffic data that may be processed for the purpose of budget and traffic management, including the verification of authorised use of the telecommunication system.

The subject of **Eurodac** is discussed separately, both in view of its legal framework and its importance in a wider perspective. Regulation (EC) 2725/2000 concerning the establishment of Eurodac (comparison of fingerprints for the effective application of the Dublin Convention) provided for the setting up of a provisional Joint Supervisory Authority, to be disbanded upon the establishment of the EDPS. Since January 2004, the EDPS has become the supervisory authority for Eurodac's Central unit and also monitors the transmission of personal data to the Member States by the Central unit.

Chapter 4: Consultation

Article 41 of Regulation 45/2001 confers upon the EDPS the responsibility to advise Community institutions and bodies on all matters concerning the processing of personal data. He advises all Community institutions and bodies either on his own initiative or in response to a consultation. According to Article 28 the EDPS must be consulted whenever the Commission adopts a proposal for legislation relating to the protection of personal data.

In 2004, the EDPS started to give effect to these provisions of the Regulation. The first activities concerned **administrative measures**. In the domain of consultation on **proposals for legislation**, the first formal opinion was issued on 22 October 2004. The opinion concerned a proposal for a Regulation of the European Parliament and of the Council on mutual administrative assistance for the purpose of the financial interests of the Community against fraud and any other illegal activities. It has been published in the Official Journal and at the EDPS' website (www.edps.eu.int).

Also in 2004, the EDPS started preparing a policy paper in order to clarify how he understands his role as an advisor to the Community institutions on proposals for legislation and related documents.

Chapter 5: Cooperation

The Article 29 Working Party is the short name of the Working Party established by Article 29 of Directive 95/46/EC to provide the Commission with independent advice on data protection matters and to help in the development of harmonised policies for data protection in the Member States. It is composed of representatives of the national supervisory authorities in each Member State, the EDPS and a

representative from the Commission. The EDPS feels that this is an important platform for cooperation and has therefore played an active role in the activities of the Working Party as from mid-January 2004.

The EDPS also cooperates with the supervisory data protection bodies established under Title VI of the EU Treaty ("third pillar") with a view to improving consistency in applying the rules and procedures in this field. This concerns the Joint Supervisory Bodies of Europol, Schengen, Eurojust, and the Customs Information System. The parties involved are convinced of the need for a common, harmonised approach in this very sensitive area.

Chapter 6: International relations

In order to establish international relations, the EDPS has participated actively in the European and International Conferences on data protection. These conferences offer a very useful platform to discuss matters of common interest and to exchange information and experience on different topics.

The EDPS has also invested much time and effort in explaining his mission and raising his profile in speeches and other contributions in various Member States throughout the year.

30 March 2005