



Brussels, 16 December 2015

**EUROPEAN DATA PROTECTION SUPERVISOR**

**Priorities 2016**

**Completing the Data Protection Framework**

*"Europe must not be ashamed of its basic principles: The rule of law is not up for sale. It is a matter of upholding the requirements in the European Union, of the rule of law, of fundamental rights." (Koen Lenaerts, President of the Court of Justice of the European Union, 14 October 2015<sup>1</sup>)*

*"Public security and combating crime and terrorism are important public objectives. However, unnecessary, disproportionate or even excessive surveillance by or on behalf of governments sows mistrust and undermines the efforts of lawmakers to address common security concerns." (EDPS Strategy 2015-2019: Leading by example<sup>2</sup>)*

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<sup>1</sup> "ECJ President On EU Integration, Public Opinion, Safe Harbor, Antitrust" by Valentina Pop, *The Wall Street Journal*, available at: <http://blogs.wsj.com/brussels/2015/10/14/ecj-president-on-eu-integration-public-opinion-safe-harbor-antitrust/>

Oct 14, 2015

<sup>2</sup> "EDPS Strategy 2015-2019: Leading by Example", [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Strategy/15-02-26\\_Strategy\\_2015\\_2019\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Strategy/15-02-26_Strategy_2015_2019_EN.pdf), p. 15.

## 1. POLICY FRAMEWORK

This document presents the priorities of the EDPS for 2016 in his role of advisor on proposals for EU legislation and related initiatives<sup>3</sup>. It sets out his approach in the area of consultation for this year, in line with the priorities identified in the EDPS Strategy 2015-2019<sup>4</sup>. While the list is intended to provide guidance, the EDPS will adjust his priorities throughout the year so as to be able to respond to developments as they arise. In particular, it cannot be excluded that we choose to intervene in a case where data protection does not *prima facie* appear to be an important element. As in the past, the EDPS will offer assistance to the co-legislators and to the European Commission, during and beyond the legislative process.

Building on the preparatory work performed in 2015, we intend to soon publish guidelines on proportionality in EU data protection law and a "toolbox" that should assist policy makers and the co-legislator in assessing the necessity of interference with the fundamental right to data protection. We also hope to continue working with the European Commission with a view to enhancing our cooperation, based on transparent procedural arrangements<sup>5</sup>. In this connection, the organisation of workshops devoted to specific policy areas (e.g. justice and home affairs, external relations) to train Commission staff and raise their awareness of data protection issues will be continued, in cooperation with the relevant Commission services.

## 2. POLICY FRAMEWORK 2016

### 2.1. Completing the new legal framework for data protection

At the time of writing, the three-way "trilogue" negotiations on the data protection reform "package" (comprising the General Data Protection Regulation and the Directive for data protection in the police and justice sectors) are drawing to a close. Building on his proactive approach, embodied in Opinions 3/2015 and 6/2015, supplemented by detailed recommendations for texts of both instruments<sup>6</sup>, the EDPS

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<sup>3</sup> "The EDPS as an advisor to EU institutions on policy and legislation: building on ten years of experience", Policy paper available at:

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/PolicyP/14-06-04\\_PP\\_EDPSadvisor\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/PolicyP/14-06-04_PP_EDPSadvisor_EN.pdf).

<sup>4</sup> "Leading by example, the EDPS Strategy 2015-2019", available at:

<https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Strategy2015>.

<sup>5</sup> In line with Priority 9 (Facilitating responsible and informed policymaking) of the *EDPS Strategy 2015-2019*.

<sup>6</sup> Opinion 3/2015. Europe's big opportunity: EDPS recommendations on the EU's options for data protection reform.

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2015/15-07-27\\_GDPR\\_Recommendations\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2015/15-07-27_GDPR_Recommendations_EN.pdf) - Opinion 6/2015. A further step towards comprehensive EU data protection: EDPS recommendations on the Directive for data protection in the

police and justice sectors.

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2015/15-10-28\\_Directive\\_Recommendations\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2015/15-10-28_Directive_Recommendations_EN.pdf) - See also the See EDPS Mobile App,

[https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform\\_package](https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package).

will continue to support EU institutions in the next steps towards completing a coherent legal framework for data protection in Europe<sup>7</sup>.

In particular, we will advise the Commission in the elaboration of a legislative proposal for the revision of Regulation (EC) No 45/2001<sup>8</sup>, the EDPS constitutive instrument defining our duties and tasks. In view of the importance of Regulation 45/2001, we will devote substantial resources to the revision process, notably in order to ensure that the principles enshrined in the GDPR are also applicable to EU institutions, bodies, offices and agencies. We will also launch an exercise on governance models for EU bodies in the former third pillar area.

In addition, we will contribute to the ongoing work related to the review of the ePrivacy Directive 2002/58/EC<sup>9</sup>, focusing, among other issues, on the need to adequately translate into secondary EU law the principle of confidentiality of electronic communications enshrined in Article 7 of the Charter of Fundamental Rights of the EU and Article 8 of the European Convention on Human Rights<sup>10</sup>. In relation to the Commission's Digital Single Market package<sup>11</sup>, new topics such as "data vaults" or "personal data stores" are likely to be addressed by EDPS.

In the light of recent developments in legislation and litigation, the EDPS will pay attention to ensuring that the legal framework for data protection is completed with full respect for its core values.

## **2.2. Ensuring adequate protection in international data transfers**

The EU-US transatlantic dialogue, and in particular the need for a legal framework ensuring transborder flows of data in the "post-Safe Harbour" context, will be one of the main focus of the EDPS. Following the CJEU judgment in *Schrems*<sup>12</sup> and the ensuing Commission Communication<sup>13</sup>, the EDPS intends to provide comments<sup>14</sup> on a Commission Implementing Decision for a new arrangement for transatlantic data transfers<sup>15</sup>. We will also take position on proposals to be tabled by the Commission

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<sup>7</sup> See also priority 3, action 7 of the *EDPS Strategy 2015-2019*.

<sup>8</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. OJ L 8, 12.1.2001, p. 1–22.

<sup>9</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). OJ L 201, 31.7.2002, p. 37–47.

<sup>10</sup> See current Article 5 of Directive 2002/58/EC.

<sup>11</sup> The relevant documents are available at: <http://ec.europa.eu/priorities/digital-single-market/>.

<sup>12</sup> Judgment of the Court (Grand Chamber) of 6 October 2015 in Case C-362/14 *Maximilian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650.

<sup>13</sup> Communication from the Commission to the European Parliament and the Council on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC following the Judgment by the Court of Justice in Case C-362/14 (*Schrems*), COM(2015) 566 final, Brussels, 6.11.2015.

<sup>14</sup> The EDPS position should be adopted in cooperation and while ensuring consistency with views of other colleagues within the Article 29 Working Party.

<sup>15</sup> See Commission Communication COM(2015) 566, note 13 above, p. 15: *'The Commission will now draw the necessary consequences from the judgment by shortly preparing a decision, to be adopted pursuant to the applicable comitology procedure, replacing that provision in all existing adequacy decisions. Also, the Commission will engage in a regular assessment of existing and future adequacy*

regarding a Commission Implementing Decision to replace Article 3 (on the limitation of powers of the DPA) of all existing adequacy decisions.

The EDPS is also following closely the process aiming at the adoption of an international agreement between the EU and the US on the "protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters" (the "umbrella agreement"), on which opinion(s) may be published. We may highlight essential data protection requirements to be taken into account by the EU legislator before proceeding to the signature of the agreement.

Finally, the negotiation process for possible PNR agreements with third countries such as Mexico and Russia will be monitored closely.

### **2.3. Protecting EU borders and enhancing security**

Like all Europeans, the EDPS has been mourning the victims of recent terrorist attacks, including those that took place in Paris on 13 November 2015. However, measures taken to counteract such threats must respect fundamental rights. European civil liberties must not be fought with means which go counter to these liberties.

In addition to measures already announced Commission in its Work Programme for 2016 (see below), the EDPS takes note of the Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism of 20 November 2015<sup>16</sup> calling for the Commission to accelerate the adoption of a number of proposals with an anti-terrorism component. Understandably in the current context, emphasis is put on strengthening controls of external borders, in particular through the following measures:

- upgrade of the Schengen Member States' border control systems (electronic connection to the relevant Interpol databases at all external border crossing points, automatic screening of travel documents);
- systematic registration, including fingerprinting, of third country nationals illegally entering the Schengen area and systematic security checks by using relevant databases, in particular SIS II, Interpol databases, VIS and national police databases, with the support of Frontex and Europol;
- targeted revision of the Schengen Borders Code providing "for systematic controls of EU nationals, including the verification of biometric information, against relevant databases at external borders of the Schengen area";

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*decisions, including through the periodic joint review of their functioning together with the competent authorities of the third country in question.'*

<sup>16</sup> Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism. 20/11/2015. 15:15. Press release 848/15. <http://www.consilium.europa.eu/en/press/press-releases/2015/11/20-jha-conclusions-counter-terrorism/>

- update of the Frontex Regulation, to provide a solid legal basis "for the contribution of Frontex to the fight against terrorism and organised crime and access to the relevant databases".

Furthermore, the Council envisages a number of measures to enhance information sharing in the context of law enforcement cooperation, including interconnection of several existing databases.

While public security obviously is a legitimate objective recognised in EU law, the EDPS emphasises that all measures in this field must respect fundamental rights to privacy and the protection of personal data. The Court of Justice recognised that the fight against international terrorism and serious crime constitutes an objective of general interest.<sup>17</sup> However, any limitation to fundamental rights must respect the strict test of proportionality enshrined in Article 52 of the Charter.<sup>18</sup> The EDPS will closely follow initiatives taken in this field and remains at the disposal of EU co-legislators in order to assist them in elaborating balanced and efficient legislative and policy proposals.

#### **2.4. Initiatives listed in the Commission's Work Programme for 2016**

In addition to main issues already identified above, the following initiatives falling under eight out of the total ten objectives of the Commission Work Programme (CWP 2016)<sup>19</sup> have been identified as warranting particular attention of the EDPS:

- Implementation of the Digital Single Market Strategy, and in particular proposals related to cross-border portability of online content services; review of the Audiovisual Media Services Directive; proposal to establish free flow of data within the DSM; modernisation of the EU copyright framework; proposals on digital contracts and the review of the Consumer Protection Cooperation Regulation;
- Follow-up to the Single Market Strategy, and in particular proposals related to a new approach to business failure and insolvency;
- Embedding DP in international agreements (e.g. TTIP, TISA) (as part of follow-up to the Trade and Investment Strategy);
- Comments on measures to be expected as part of the Border Management Package.

For further details, please see the Annex.

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<sup>17</sup> See Judgment of the Court of Justice (Grand Chamber) of 8 April 2014 Joint Cases C-293/12 and C-594/12, *Digital Rights Ireland* and *Seitlinger*, ECLI:EU:C:2014:238, para. 42 and case law cited there.

<sup>18</sup> *Digital Rights Ireland*, note 16 above, para. 46 and following.

<sup>19</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2016: No time for business as usual (COM(2015) 610 final), Strasbourg, 27.10.2015.

### 3. PRIORITIES 2016: BACKGROUND

In order to be able to continue providing effective advice in spite of limited resources, we adopt a selective approach. The priorities 2016 set out the direction for the work in the ongoing year and identify issues where the EDPS feels that he can provide most "added value" within the framework of legislative and non-legislative procedures. These priorities must be read in conjunction with the EDPS Strategy 2015-2019, which defines the EDPS strategic objectives for the five-year period.

The priorities 2016 consist of two documents:

- the present note, setting out the EDPS strategic priorities for legislative consultation in 2015;
- an Annex listing the relevant Commission proposals that are programmed and that require the attention of the EDPS.

The Annex to the present note includes a non-exhaustive list of key issues on which the EDPS will concentrate his resources on consultation in the course of 2016. It has been prepared on the basis of the annual Commission work programme, the latest conclusions of the Council of the EU and other programming and planning tools, as well as bilateral contacts that we maintain with Commission services. In addition, the work programme of the Article 29 Working Party is an important point of reference.

The proposals listed in the Annex are colour-coded according to their priority:

- red = EDPS will provide advice;
- yellow = EDPS may intervene, depending on the evolution of the file;
- green = EDPS will follow relevant developments and take a decision whether or not to intervene accordingly.

The Annex is, as a general rule, updated twice a year. The updates are published on the EDPS website.

All EDPS opinions are published on his website in English, French and German and an executive summary in all Community languages is published in the Official Journal. More information can be found in the 2014 policy paper "The EDPS as an advisor to EU institutions on policy and legislation: building on ten years of experience"<sup>20</sup>.

In order to increase our accountability, the EDPS plans to launch an initiative to assess the impact of our policy and legislative advice. The EDPS would also like to encourage stakeholders to monitor these priorities, as updated, so as to ensure that the EDPS is consulted in the appropriate manner and at the appropriate stage on all initiatives included therein.

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<sup>20</sup> See above, footnote 3.

