



**EDPS - European Data Protection Supervisor**  
**CEPD - Contrôleur européen de la protection des données**

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# **Annual Report 2004**



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Brussels, 18 March 2005

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Dear Mr. President,

In accordance with Article 48(1) of 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, I have the honour to present to you herewith the annual report on my activities in the year 2004.

Sincerely yours,

Peter HUSTINX  
*European Data Protection Supervisor*



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## **Mission statement**

*The European Data Protection Supervisor's mission is to ensure 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 Community institutions and bodies.*

*The European Data Protection Supervisor is responsible for:*

- monitoring and ensuring the application of the provisions of Regulation (EC) No 45/2001 and other Community acts relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, by carrying out prior checks, informing data subjects, hearing and investigating complaints, conducting other inquiries, and taking appropriate measures where needed ("Supervision");*
- advising Community institutions and bodies on all matters concerning the processing of personal data, including consultation on proposals for legislation relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, and monitoring new developments that have an impact on the protection of personal data ("Consultation");*
- cooperating with national supervisory authorities and supervisory bodies in the "third pillar" of the European Union, with a view to improving consistency in the protection of personal data ("Cooperation").*

## Foreword

I have the pleasure to submit a first annual report on my activities as European Data Protection Supervisor to the European Parliament, the Council and the Commission in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council and with Article 286 of the EC Treaty.

This report 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.

This period runs from 17 January 2004 until 31 December 2004. The first date marks the entry into effect of the decision of the European Parliament and the Council appointing me as European Data Protection Supervisor and Joaquín Bayo Delgado as Assistant Supervisor. We feel fortunate in being able to lay the foundations for a new independent European authority and to guide its first steps on a mission to monitor and ensure the application of legal safeguards for the protection of the personal data of citizens of the European Union.

This report describes the "building of a new institution" from its initial stages up to the point where this new authority has developed the capacity to carry out its mission with growing effectiveness. We expect to come to "cruising speed" in the very near future. This report also outlines our first experiences in the different areas of work as well as the legal framework and the policy perspectives on main lines.

Let me take this opportunity to thank those in the Parliament, the Council and the Commission who have actively contributed to our successful start, as well as all those in different institutions and bodies with whom we closely collaborate. I also want to express thanks to the members of our staff that take part in our mission and make a major contribution to its results.

I look forward to receiving reactions to this annual report and even more to a discussion in the various institutions of our experiences and perspectives. Since more and more EU policies depend on the lawful processing of personal data, it is crucial that effective protection of personal data is regarded as a condition for the success of those policies.

Peter HUSTINX  
*European Data Protection Supervisor*

# **1. Balance and perspectives**

## **1.1 Start of the EDPS**

The establishment of an independent authority at European level to monitor and 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. Community institutions have been involved since the early 1990's in the development of legislation and policies in this area that were primarily aimed at the Member States. Being subject to the same rules and policies and having to comply with them is a different matter that requires some time for adjustment and incorporation of the consequences into Community practice. It is the role of the European Data Protection Supervisor to ensure that this process continues to take place in a satisfactory way.

This new reality has brought with it some additional complications, which have been visible from the start of the new authority. The relevant rules entered into force in February 2001 with a transitional period of one year and have therefore been fully applicable since February 2002. The appointment of the EDPS and Assistant EDPS entered into effect in January 2004. Although internal Data Protection Officers have done very useful work in a number of instances, 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. It is also relevant to note that quite a few existing ("legacy") systems have a limited capacity for amendment and could not be made fully compliant at the start.

This serves to illustrate that implementation and supervision of existing rules is an urgent matter: the European Union cannot afford not to deliver on the rules it has imposed on itself and on the Member States. At the same time, this requires some prudence, since there are no signs of any lack of willingness at Community level to comply with rules that are generally regarded as reasonable and appropriate, and indeed also apply in the Member States. Some of these have considerable experience in this area.

A further complication for the new authority is that it had to be developed from scratch, including the adoption of a starting budget, almost two months after its first steps, since only a limited number of preparations had been feasible before, partly due to the late appointment of the officeholders. However, we have been very pleased with the spirit of cooperation from the Parliament, the Council and the Commission that we have encountered and benefited from. Chapter 2 of this annual report will set out in more detail how the "building of a new institution" has been implemented with some degree of success.

This chapter will describe the legal framework within which the EDPS is acting and the tasks and powers that have been entrusted to him. Against this background, the report will discuss the strategic roles that have been taken as starting points for the development of the new authority during its first year and that will continue to serve as guidelines in the near future. This chapter will also state the main objectives for 2005.

## **1.2. Legal framework**

Article 286 of the EC Treaty, adopted in 1997 as part of the Treaty of Amsterdam, provides that Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data should 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) No 45/2001 of the European Parliament and of the Council, which entered into force in 2001. This Regulation also provides for an independent supervisory authority, referred to as "European Data Protection Supervisor", with a number of specific tasks and powers.

### ***Wider background***

This Regulation should not be considered by itself, but as a part of a much larger framework that reflects the work undertaken both by the European Union and the Council of Europe during a number of years. This work goes back to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and has also influenced the EU Charter of Fundamental Rights which has now been incorporated into the Constitution of the European Union as Part II.

Article 8 ECHR provides for a right to respect for private and family life and lays down the conditions under which restrictions on this right could be acceptable. In the early 1970's the Council of Europe concluded that Article 8 ECHR had a number of limitations in the light of new developments, particularly in the area of information technology: the uncertainty as to what was covered by "private life", the emphasis on protection against interference by "public authorities", and the insufficient response to the growing need for a positive and pro-active approach, also dealing with other relevant organisations and interests.

This resulted in the adoption of a separate Convention on Data Protection (1981). This Convention, also known as Convention 108, has been ratified by 31 Member States of the Council of Europe, including all EU Member States. The Convention deals with "data protection" as protection of fundamental rights and freedoms of individuals, in particular their right to privacy, with regard to the processing of personal data relating to them. This demonstrates that "data protection" is wider than "protection of privacy", since it also relates to other fundamental rights and freedoms of individuals, and at the same time more specific, since it only deals with the processing of personal data. In this context it should be realised that many activities in the public or the private sector nowadays generate personal data or use such data as input. The real objective is, for that reason, to protect individual citizens against unjustified collection, storage, use and dissemination of their personal details.

As Convention 108 was implemented in national law, the differences in detail on the national level became more apparent. The substantive provisions and procedural requirements giving effect to the same basic principles could be quite different. This threatened the development of the internal market in the EU, especially where the delivery of public or private services depends on the processing of personal data and the use of information technology, either nationally or across borders.

This triggered an initiative of the European Commission to harmonise data protection laws in the Member States. After four years of discussion, this resulted in the adoption of Directive 95/46/EC which lays down an obligation for the Member States to bring their legislation into line with the Directive and to ensure a free flow of personal data between Member States. The Directive used Convention 108 as a starting point, but clarified it in many respects and also added new elements. Among these elements were the tasks of independent supervisory authorities at national level and the cooperation between them both bilaterally and in a Working Party at European level, now widely referred to as "the Article 29 Working Party".

After 1995, another Directive was adopted in a specific area: Directive 97/66/EC, replaced by Directive 2002/58/EC on privacy and electronic communications. This Directive deals with a

number of issues ranging from security and confidentiality of communications, to the storage and use of traffic and location data, and unsolicited communications, such as "spam".

### ***Recent developments***

Directive 95/46/EC was evaluated not long ago. In its report of May 2003, the European Commission pointed to a clear lack of harmonisation, but stated that there was no reason yet to amend the Directive and that it was necessary to make better use of the existing legal framework. The Commission has adopted a programme of activities, including bilateral discussions with Member States about the way in which the Directive has been implemented in national law and a number of subjects for joint activities by national supervisory authorities in the Article 29 Working Party.

In May 2003, the European Court of Justice in Luxembourg delivered its first decision concerning Directive 95/46/EC in an Austrian case (*Österreichischer Rundfunk*)\*. The key question was whether salary data of public servants could be published with a view to restricting the level of payment. The decision of the Court makes it clear that the Directive has a wide scope and also applies to processing of personal data within the public sector of a Member State. The Court uses a number of criteria drawn from Article 8 ECHR to evaluate the lawfulness of such processing. It also points out that the Directive can be relied upon by interested parties in a national court.

A third development to be mentioned here is the adoption in October 2004 of the draft Constitutional Treaty which is subject to ratification by all Member States in the near future. The Constitution places great emphasis on the protection of fundamental rights. Respect for private and family life and protection of personal data are treated as separate fundamental rights in Articles 7 and 8 of the EU Charter, which have become Articles II-67 and II-68 of the Constitution. This is in recognition of the development that began in the early 1970's in the Council of Europe. Data protection is also mentioned in Article I-51 of the Constitution, in Title VI on the "democratic life" of the Union. This clearly indicates that data protection is now regarded as a basic ingredient of "good governance".

Finally, it should be noted that data protection is more and more regarded as a "horizontal" issue relevant to more than just the well-being of the internal market. This follows from the Constitution, but is also visible in the decisions of the Court. This is of course very timely and welcome. The policy programme of the new Commission contains quite a few points where early attention to data protection aspects will contribute to a better result. This is also the case for the subjects treated under Title VI of the EU Treaty ("third pillar") – cooperation in the field of security, police and criminal justice – which will be further integrated into the general EU framework when the Constitution enters into force.

### ***Regulation No 45/2001***

Let us now come back to Regulation No 45/2001 and the data protection rules that apply at European level. To be more precise, 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 or part of which are within the scope of Community law".

The definitions and the substance of the Regulation closely follow the approach of Directive 95/46/EC, which applies to the Member States. It could be said in fact that Regulation No 45/2001 is the implementation of that Directive at European level. This means that the Regulation 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

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\* Joined Cases C-465/00, C-138/01 and C-139/01, ECR (2003) I-4989. A second important judgment in this area was delivered a few months later (Lindqvist, C-101/01).

subject, and with supervision, enforcement and remedies. A special chapter deals with the protection of personal data and privacy in the context of internal communications networks. This chapter is in fact the implementation at European level of Directive 97/66 on privacy and communications.

An interesting feature of the Regulation is the obligation for Community institutions and bodies to appoint at least one person as Data Protection Officer. These officers have the task of ensuring the internal application of the provisions of the Regulation, and this should be done in an independent manner. All Community institutions and a number of agencies now have these officers, and some of them have been active for a number of years. This means that some important work has been done to implement the Regulation, even in the absence of a supervisory body. Another aspect is that these officers may be in a better position to advise or to intervene at an early stage and to help to develop good practice. Since the Data Protection Officer has the formal duty to cooperate with the European Data Protection Supervisor, this is a very important and highly appreciated network for the EDPS to work with and develop further.

### 1.3. Tasks and powers

The tasks and powers of the European Data Protection Supervisor have been clearly described in Articles 41, 46 and 47 of the Regulation (see Annex A) both in general and in specific terms. Article 41 lays down the main mission of the EDPS – to ensure 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 Community institutions and bodies – and sets out some broad lines for specific elements of this mission. These general responsibilities are developed and specified in Articles 46 and 47 with a detailed list of duties and powers.

This presentation of responsibilities, duties and powers follows in essence the same pattern as those for national supervisory bodies: hearing and investigating complaints, conducting other inquiries, informing controllers and data subjects, carrying out prior checks, etc. The Regulation gives the EDPS the power to obtain access to relevant information and relevant premises, where this is necessary for inquiries. He can also impose sanctions and refer a case to the Court of Justice. These *supervisory* activities are discussed at greater length in Chapter 3 of this report.

Some tasks are of a special nature. The task of advising the Commission and other Community institutions about new legislation – emphasised in Article 28(2) by an obligation for the Commission to consult the EDPS when it adopts a legislative proposal relating to the protection of personal data – also relates to draft Directives and other measures that are designed to apply at national level and may have to be implemented in national law. This is a strategic task that allows the EDPS to have a look at privacy implications at an early stage and to discuss any possible alternatives. Monitoring relevant developments which may have an impact on the protection of personal data is also an important task. These *consultative* activities of the EDPS are more widely discussed in Chapter 4 of this report.

The duty to cooperate with national supervisory authorities and supervisory bodies in the "third pillar", like the supervisory bodies for Schengen, Customs, Europol and Eurojust, each of which has been established by a different instrument and is made up of representatives of national supervisory authorities, is similar. As a member of the Article 29 Working Party, established by Article 29 of Directive 95/46/EC to advise the Commission and to develop harmonised policies, the EDPS has the opportunity to contribute at that level. Cooperation with supervisory bodies in the "third pillar" allows him to observe developments in that context and to contribute to a more

coherent and consistent framework for the protection of personal data, regardless of the "pillar" or the specific context involved. This *cooperation* is further dealt with in Chapter 5 of this report.

The strategic roles which are visible in this presentation – to be summarised briefly as "*supervision*", "*consultation*" and "*cooperation*" – have been taken as starting points for the development of the new authority during its first year and will continue to serve as guidelines in the near future. It is obvious that the first role of the EDPS is to ensure that Community institutions and bodies process data in compliance with the applicable legal framework and continue to work at developing a "data– protection– friendly" culture. At the same time it is important to ensure that these rules and principles are adequately taken into account in the preparation of new legislation and policies, and that consistency of data protection is improved irrespective of the "pillar" or national context in which personal data are being processed. It is for these reasons, that this annual report also contains a mission statement which sets out the main strategic roles of the EDPS as envisaged in Regulation No 45/2001.

#### **1.4. Delivering values**

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 of the Charter and Article II-68 of the Constitution are safeguarded:

##### **Article II-68 – Protection of personal data**

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

This provision clearly emphasises the role of independent supervisory authorities in the delivery of these principles and values. The same is true for Article I-51 of the Constitution which also provides for their implementation at Union level. The EDPS will be active in this larger framework, together with the Commission, the Council, the Parliament, the Court of Justice, the Ombudsman and other stakeholders, each with a specific role in this respect.

The EDPS will be contributing to the delivery of these values through consistent *supervision* of the way in which European institutions and bodies deal with personal data, and where necessary by taking appropriate measures. The Court of Justice may be called upon to decide in any possible disputes on the scope or the consequences of legal obligations. Where the EDPS contributes through *consultation* on proposals for legislation, it will be up to the Commission, the Council and the Parliament to make appropriate use of any forthcoming advice. Similar mechanisms may be active where the EDPS is contributing to the delivery of values in close *cooperation* with national supervisory authorities or supervisory authorities in the third pillar. Yet in each case it will be the task of the EDPS to ensure that his mission is carried out in the best possible way. Whether this mission will be completed successfully in a given case is largely dependent on the institutions and other stakeholders that are taking part in the relevant operation. However, by contributing as appropriate the EDPS will be delivering value, at least by demonstrating the relevance of the underlying principles in a given context. This is the policy viewpoint which the EDPS will adopt in order to contribute and to further his mission.

It is important to realise at this point 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.

## 1.5. Objectives for 2005

This first chapter of the annual report 2004 will now close with the main objectives for 2005. These objectives will be revisited in the next annual report in order to check to what extent they have been accomplished. This will be a consistent element in the approach the EDPS intends to take in reporting on his activities.

- **Development of DPO network**

The EDPS will contribute to the development of the network of Data Protection Officers, particularly for those bodies that do not yet have a DPO. For this purpose, the EDPS will publish a position paper on the role of DPOs and the factors that contribute to their success.

- **Brochures, website and newsletter**

The EDPS will produce brochures in all official languages to raise awareness of the rights of data subjects and of his role on the basis of Regulation (EC) No 45/2001. The website [www.edps.eu.int](http://www.edps.eu.int) will be enhanced and take a central position in the information strategy. A newsletter will be launched to provide information on a regular basis about new developments.

- **Notifications and prior checks**

Efforts will be made to substantially increase the number of notifications with DPOs relating to existing processing operations. The EDPS will continue to invest considerable time and efforts in "prior checking" of processing operations which are likely to present specific risks for the rights and freedoms of data subjects. A policy paper will be published with criteria and procedures for prior checking.

- **Guidelines for complaints and inquiries**

The EDPS will develop guidelines for the handling of complaints, setting out conditions for admissibility, procedures for investigation, time limits and so on. These guidelines will be published on the EDPS website. A similar exercise will follow for inquiries – either "own initiative" or on the basis of a complaint.

- **Audits and investigations**

The EDPS will develop the basis for an auditing methodology in order to verify compliance with Regulation (EC) No 45/2001 by Community institutions and bodies. He will also make a number of "spot checks" at various locations to learn about current practice and to encourage voluntary compliance. Additional investigations will be undertaken where necessary.

- **Privacy and transparency**

The EDPS will publish a paper dealing with the relations between "public access to documents" and "data protection". It is designed to encourage good practice in both areas and to help



institutions and bodies to decide in cases which require the striking of a balance between these two fundamental interests.

- **E-monitoring and traffic data**

The EDPS will develop guidelines on the processing of traffic and billing data of different kinds of electronic communications (telephone, e-mail, mobile phone, internet, etc.) in the European institutions, with a view to clarifying and enhancing the safeguards currently applying to such processing operations.

- **Opinions on proposals for legislation**

The EDPS will publish a policy paper on the way in which he understands his consultative task with regard to proposals for legislation relating to the protection of personal data. This task will be developed accordingly. The EDPS will issue timely opinions on relevant proposals for legislation and follow them up where necessary.

- **Data protection in the third pillar**

The EDPS will give special attention to the development of a consistent legal framework for the protection of personal data in the third pillar. This framework should be in line with existing principles in the first pillar, taking into account the special needs of law enforcement in conformity with applicable legal safeguards.

- **Development of resources**

The EDPS will continue to develop the adequate means and conditions for effective accomplishment of his tasks. A limited increase in existing resources will be necessary to face the challenges ahead and to deliver the values which can reasonably be expected. This applies without prejudice to possible new tasks in relation to the proposed Visa Information System (VIS) and other systems like a revised Schengen Information System (SIS II).

## 2. Building a "new institution"

### 2.1. Introduction

Further to the appointment of the EDPS and Assistant EDPS in January 2004, first steps were made to prepare for a good start. This involved initial meetings with representatives from the European Parliament, the Council and the Commission to build a platform of cooperation to develop further activities. The EDPS and Assistant EDPS felt that it would be appropriate to work in the premises of the European Parliament in Brussels as from 2 February 2004.\* This opinion was communicated in letters to the relevant authorities of the European Parliament, the Council and the Commission.

2004 was the year in which the institution was started up. This process was in three stages:

#### *a. First stage: 2 February to 24 June 2004*

When they arrived in Brussels on 2 February 2004 the EDPS and the Assistant EDPS had no offices or secretarial back-up.

- Initially, the EDPS obtained the **support of the European Parliament departments**, which made it possible to:
  - install the EDPS in a Parliament building with initial equipment as from the second week;
  - establish an amending budget 10/2004 and a budget estimate for 2005;
  - publish vacancy notices as authorised in the organisation chart for the 2004 financial year;
  - draw up and conclude the administrative cooperation agreement with the relevant departments of the Parliament, the Commission and the Council.
- In May, a head of unit was **seconded by the Commission** to set up the Secretariat; a short-term work programme was drawn up setting out priorities, the greatest of which was recruitment.
- A website was created: <http://www.edps.eu.int>

#### *b. Second stage: 24 June to 1 October 2004*

- On 24 June the Secretaries-General of the Commission, the European Parliament and the Council signed, together with the EDPS, an **administrative cooperation agreement** to assist the EDPS for a start-up period of three years, renewable for two years.
- Provisions implementing the interinstitutional agreement were adopted with the Parliament.
- The various departments of the three institutions that were to assist the EDPS were contacted on several occasions with a view to putting in place the practical arrangements for such assistance.

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\* Article 4 of Decision No 1247/2002/EC of the European Parliament and of the Council of 1 July 2002 on the regulations and general conditions governing the performance of the European Data Protection Supervisor's duties, provides that the seat of EDPS and Assistant EDPS shall be in Brussels.

- The first interviews with applicants began in June, on the basis of the replies to the vacancy notices, and the first colleagues were recruited.

*c. Third stage: 1 October 2004 to the end of the year*

- The team was **entirely recruited** on the basis of the 2004 establishment plan.
- National experts were invited to join the EDPS in 2005 (it was not possible to send out this invitation any earlier because of the late adoption of the 2004 budget and the uncertainty surrounding this point).
- The EDPS adopted **internal procedures** (code of good conduct, administrative guide) and provisions implementing the Staff Regulations.

## 2.2. Budget

- Following the Decision of the European Parliament and of the Council of 22 December 2003 appointing the EDPS and the Assistant EDPS (published in the OJ on 17 January 2004), the Commission submitted on 3 February 2004 a preliminary draft **amending budget No 2/2004** providing for the EDPS to be included in the 2004 budget (under Section VIII Part B). The amending budget was based on the same level of expenditure as the budget originally planned by the relevant Commission departments in 2002, and amounted to EUR 1 272 000; it was established in accordance with the principle of the gradual start-up of the EDPS's activities and taking account of the time needed for recruiting staff. Revenue was estimated at EUR 90 000. The preliminary draft amending budget was adopted by the budgetary authority. The Commission pointed out that "the Supervisor himself could present another amending budget in the course of 2004 to fine-tune the budget and/or establishment plan in Section VIII Part B".
- An amending estimate was proposed by the EDPS and included in the preliminary draft **amending budget No 10/2004** submitted by the Commission on 26 July 2004. The estimate was needed because of the under-assessment of AB 2/2004, which had been incorporated as it stood in the budget established in 2002 for a period of nine months; it took no account of cost-of-living trends or operating costs either in 2004 or in a full year. The amounts in AB 10/2004 were determined using the parameters provided by the relevant departments of the European Parliament and the Commission. The amending budget for 2004 – amounting to EUR 1 942 279 – was finally adopted by the budgetary authority on 14 October 2004. This meant the 2004 budget did not become available to the EDPS until fairly late in the year, which tended to slow up certain items of expenditure.
- In its Resolution of 9 March 2004 the European Parliament requested the EDPS to submit a **report** to the budgetary authority before 30 September 2004 with a view to the first reading of the 2005 budget. In accordance with Article 2 of the Resolution a report was sent to the budgetary authority assessing the state of play as regards operational needs and the progress made between February and September 2004 in setting up the administrative structures and recruitment procedures, the cooperation agreement and financial and budgetary management.
- The **2005 budget** – amounting to EUR 2 879 305 – was adopted in December 2004. This was a 48,8% increase on the 2004 budget (calculated over 11 months). It was

calculated on the basis of the macro-economic parameters submitted by the Commission and the political guidelines issued by the budgetary authority, and also the processes that had developed throughout the current year since the EDPS began operating.

- Regarding the internal financial and budgetary management, the EDPS has given authority to the head of the Administration/Personnel/Budget unit, who acts as authorising officer by delegation. An initiator has been appointed.
- Much valuable assistance is given by the Commission (Budget DG): the Commission Accounting Officer has been appointed as the **EDPS's Accounting Officer**; the departments of the Budget DG provide the EDPS with technical assistance in establishing and implementing the budget; and the Central Financial Service helps by supplying information.
- The Commission's Internal Auditor has been appointed as the **EDPS's Auditor**; the EDPS is setting up an internal control system. Control standards are being adopted. These are very similar to those of the Commission, while taking account of the requirements and characteristics of a small, new institution.

### 2.3. Cooperation

- The **administrative cooperation** agreement with the Secretaries-General of the Commission, the European Parliament and the Council was concluded on 24 June 2004. Such assistance was acknowledged to be necessary during the initial years for three main reasons:
  - a transfer of know-how would enable the EDPS to draw on the other institutions' experience in the administrative and financial field;
  - it would give him an immediate opportunity to establish his place in the institutional context through the performance of his duties and exercise of his prerogatives;
  - it would uphold the golden rule of sound financial management by making economies of scale.
- An agreement between Parliament departments and the EDPS sets out the procedures for implementing the interinstitutional agreement; a similar agreement is in preparation with the relevant Council departments; guidelines on the subject have been adopted with the Commission departments.
- On the basis of the **interinstitutional agreement**:
  - the Commission's Accounting Officer and Internal Auditor have been appointed as the EDPS's Accounting Officer and Auditor;
  - Commission departments provide assistance for all tasks concerning the management of persons linked to the institution (recruitment of staff, determination of entitlements, payment of salaries, reimbursement of medical costs, mission payments, etc.);
  - Commission departments also help the EDPS in establishing and implementing the budget;
  - the EDPS is installed in the premises of the European Parliament; the Parliament's departments assist the EDPS as regards material facilities and know-how relating to his installation in the premises (security of the buildings, mail, computers, telephones, office layout and supplies);

- the Council assists by providing translations.
- Attention should be drawn to the highly convivial cooperation that was established from the outset with most of the departments of the three institutions. In the majority of cases such cooperation has proved very effective and certainly very useful. Regrettably, however, the agreement has not always been well publicised within the departments that are supposed to assist the EDPS, with the result that work in certain areas has been slowed down.

## 2.4. Human resources

- Given the extent of the work involved in setting up the administration of the new institution, priority was given to **recruitment**; the 15 people allowed for in the establishment plan have been recruited; the first phase of recruitment began with the staff team in August in order to create and establish the necessary administrative structure before the rest of the team arrived. Recruitment was carried out in accordance with the rules in force in the institutions: giving priority to transfers between institutions; secondly, checking reserve lists; thirdly, using outside staff. Of the 15 people currently recruited, seven are officials (two were transferred from the other institutions, five were selected from reserve lists) and eight have temporary contracts.
- The **administrative structure** provides for one unit dealing with administration, personnel and the budget (employing five people) and a unit charged with operational tasks (10 people); the latter unit comprises two departments: one responsible for supervision tasks; the other is responsible for general policy issues (chiefly legislative and advisory functions) and information. There is no head of unit for this unit, partly because of the active and direct involvement of the members of the institution in the handling of dossiers, and partly, given the institution's current size, because of a desire to encourage non-hierarchically structured team work within the departments during an initial period.
- Mention should also be made here of the extensive and effective assistance provided by Commission departments in connection with recruitment (publishing vacancies, drawing up contracts, determining entitlements, medical examinations, paying salaries, etc.) and the tasks involved in the management of persons linked to the institution: members of the institution, staff in active employment, various allowances and contributions relating to entry into service and final termination of service, missions and travel, socio-medical infrastructure, etc.

## 2.5. Office infrastructure

- The EDPS is installed and equipped in a European Parliament **building** at 63, rue Montoyer, Brussels.
- Under the administrative cooperation agreement, the relevant European Parliament departments provide the EDPS with generally very useful assistance as regards **material facilities** and know-how relating to physical installation in the premises: security of the premises, laying out of offices, furniture (a first delivery has been made), telecommunications, telephones, printers, mail, etc. Valuable assistance is provided in terms of computing infrastructure and back-up (supplying the computer park; installing

the website and electronic mail infrastructure).

- The details of this cooperation have been set down in provisions for implementing the interinstitutional agreement with the Parliament. The question has been raised of adding a rider specifying certain aspects of the assistance provided.
- Costs relating to the building, the equipment and the various operational expenses are invoiced by the Parliament to the EDPS.

## 2.6. Administrative environment

- **Rules of procedure** are in preparation, specifying the allocation of tasks and the main procedures for carrying out the institution's duties. They should be adopted during the first half of 2005.
- A first series of general provisions **implementing the Staff Regulations** has been adopted. These provisions correspond to the ones applicable to the Commission in areas where the Commission assists the EDPS.
- Provisions concerning staff are brought to staff members' attention by means of targeted notes and are available on the "S" drive, which, in a sense, is the EDPS's intranet. This drive is accessible by all EDPS staff. An **administrative guide** has been prepared, containing all administrative information of use to EDPS staff. It is issued to each new colleague. Staff receive notes or e-mails informing them of all updates to the "S" drive and the guide. Information meetings are arranged for new colleagues, who are also given a welcome pack containing the documents just mentioned.
- A **code of conduct** has been adopted on the pattern of the code adopted by the European Parliament. In line with the code, and to give explicit form to their adherence to the fundamental values of the EDPS, all colleagues give a written undertaking when taking up their duties that they will respect the confidentiality of the data to which they have access in the course of their working life.

## 2.7. Workflow

- After the first three months of setting the basics of the new institution, when the first staff members joined the EDPS, including a trainee, the first steps to develop a workflow system were taken. A first scheme of **incoming and outgoing mail** and e-mail, both on paper and in electronic format, was developed. A register of documents was also set up. Once a scanning system into *pdf* format was available, the principle of parallel paper and electronic files, with a degree of flexibility, was established. Email and shared folders are the main means of written exchange among all members of the EDPS office. An electronic library and updated charts make information available for everyone.
- The opening of **cases** (all under a general number for each year) is under control of the EDPS and the Assistant EDPS. Each unit in the office takes responsibility for a given file and distributes all cases in an equitable manner. Main projects are shared by two staff members. Drafts are discussed jointly with the EDPS and/or the Assistant EDPS and the final documents are signed by one of them. When appropriate, brain-storming sessions help to develop a common understanding of issues.

- Weekly **meetings** assure the necessary coordination, including the administrative and personnel unit; administrative matters are dealt in the "management board" (EDPS, Assistant EDPS and Head of Administration/Personnel/Budget Unit); main issues are discussed between the EDPS and the Assistant EDPS. Once a month a meeting with all the staff, both for information and training, takes place with a specific topic presented by a staff member.

## 2.8. Visibility

- A **website** was quickly set up with the aid of the Parliament. It is updated regularly and has links to the institutions and the national data-protection authorities. A second version of the website is in preparation and should be ready in the course of 2005.
- To make people aware of the institution, an **information campaign** is under way. The first stage involved the mass distribution among colleagues in all the institutions and agencies of a brochure setting out everyone's rights in the field of data protection. A further brochure has been distributed in a more targeted fashion to managerial staff in the same bodies.
- To ensure that the institution and the opinions issued by the EDPS are as well known as widely as possible, the texts are published in various languages. The Council provides very valuable assistance in terms of **translations**, which are produced within quite acceptable periods of time.

## 2.9. Institutional relations

- The EDPS takes part in several **interinstitutional committees** covering budget, personnel and administration. As regards personnel, he is a member of the Committee of the Heads of Administration. He takes part as an observer at meetings of the Staff Regulations Committee (the regulations are being amended to admit the EDPS as a member) and in the EPSO Management Board.
- Initial steps have been taken with a view to **recognition** of the institution by the Belgian authorities.

## 2.10. Conclusions

2004 was the year in which the EDPS was **started up** and established in an administrative, budgetary and personnel environment, the foundations for which were laid with the assistance of the European Parliament, the Commission and the Council, which ensured a supply of know-how, the provision of valuable aid in the performance of certain tasks, and the achievement of economies of scale.

The EDPS intends to **continue** with the construction of the environmental architecture in 2005 by recruiting four new colleagues as provided for in the establishment plan and by adopting the internal rules necessary for the smooth running of the institution. These rules will be adopted in accordance with the opinion of the Staff Regulations Committee where they touch on the application of the Staff Regulations, and after consulting the Staff Committee which will be set up during the first half of 2005.

## **3. Supervision**

### **3.1. General**

As the name of the institution shows, a fundamental task of the European Data Protection Supervisor is to supervise in an independent manner the application of the provisions of Regulation (EC) No 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 and provided that such processing is done wholly or partly by automatic means or otherwise if the personal data form part or are intended to form part of a filing system (Articles 1(2), 3 and 46(c) of Regulation No 45/2001).

To that effect, the Regulation describes and grants a number of duties and powers which relate to the supervisory task. Prior checks are referred to in Article 27 and Article 46 (i) – (j). The informing of data subjects, to make sure that their rights are exercised and respected, is a power referred to in Article 47(1)(a). Complaints are specifically mentioned in Articles 32(2), 33 and 46 (a) – (b). Investigations are provided for in Article 46 (b) and (e). All these instruments of supervision were used during 2004, as will be described below.

Article 46 (h) mentions some duties that are likely to become relevant in the near future. During 2004 there was no occasion to determine, give reasons for and make public the exemptions provided for in Article 10(4) (further exceptions for processing special categories of data) nor the authorisations envisaged in Article 10(2)(b) (processing in the field of employment law) and (5) (processing of data relating to offences) and Article 19 (automated individual decisions). However, in the context of a prior check (Case 2004-0196; see below) conditions for processing a personal number (Article 10(6)) and safeguards for statistical processing (Article 12(2)) were major points in the EDPS's opinion.

As regards the powers vested in the EDPS, no order, warning, ban, etc. has been issued so far. Once the opinion of the EDPS was expressed, some controllers have taken measures accordingly; in other cases, these measures are expected to be taken shortly. The necessary follow-up is being made.

The specific supervision of the Central Unit of Eurodac is entrusted to the EDPS in Article 20(11) of Council Regulation (EC) No 2725/2000. This will be discussed in paragraph 3.7 at the end of this chapter.

Before the different supervisory tasks are analysed in more detail, the crucial function of the Data Protection Officer must be mentioned.

### **3.2. Data Protection Officers**

Article 24(1) of Regulation No 45/2001 introduces into Community institutions and bodies a key figure for the achievement of effective personal data protection, namely the Data Protection Officer. Each Community institution and Community body has to appoint at least one person as data protection officer, whose basic task is to ensure in an independent manner the internal application of the provisions of the Regulation (Article 24(1)(c)). This article and the Annex to the Regulation describe the tasks, duties and powers of a DPO. Some of these are particularly important in the context of supervision: he/she shall keep a register of processing operations notified to him/her by



the controller and shall notify the EDPS of the operations subject to prior checking, and he/she shall investigate matters on his/her initiative or at request; he/she must also cooperate with the EDPS.

At present, the list of DPOs appointed by the Community institutions and bodies (see Annex C) includes fifteen DPOs, in some cases with an assistant DPO. Some of them are part-time. There are some agencies which have not yet appointed a DPO. In the course of 2005, as a follow-up to the information campaign mentioned in paragraph 2.8, they will be urged to do so.

The data protection framework of the Commission is a special case. It has a DPO and an Assistant DPO, plus a network of Data Protection Coordinators, made up of one coordinator acting as contact person in each DG. In addition, because of its special nature, OLAF has its own DPO.

Before the appointment of the EDPS and the Assistant EDPS, the DPOs of the different institutions and bodies already cooperated very closely. They used to meet three or four times per year and exchange information and experiences relating to their tasks. These meetings continued during 2004, with the EDPS joining in the second part of the meeting; thus DPOs discuss issues of common interest and afterwards they are shared with the EDPS who gives his feedback. These meetings also provided natural opportunities for the EDPS to inform DPOs of the different projects for which their collaboration was requested. Those were, basically, coordination and scheduling of *ex post* prior checks (see paragraph 3.3.3.below) and the gathering of information on current practices in the field of public access to documents and data protection and on the existing rules about the acceptable use of the electronic systems of the institutions and bodies and actual traffic data retention (see paragraph 3.6 "Investigations").

Some issues have emerged which are of great concern both to DPOs and the EDPS, namely how to guarantee that the duties of a DPO are performed in an independent manner (e.g. evaluation of DPO, available means), especially in the case of part-time DPOs, and the slow process of registering personal data processing operations. The transition period of one year provided for in Article 50 of the Regulation for bringing all current operations into conformity with the Regulation was obviously too short, but at present far too many processing operations have not yet been registered with the DPO of the institution or body involved, not to mention those agencies that are still without an appointed DPO. A substantial increase in the number of notifications of existing operations is therefore necessary and should be a priority for 2005.

Besides the joint meetings, numerous contacts and meetings, mainly with the DPOs of the largest institutions (Commission, Council and Parliament) but also with the rest took place in the course of 2004.

### **3.3. Prior checks**

#### **3.3.1. Legal base**

##### ***General principle: Article 27(1)***

Article 27(1) of Regulation (EC) No 45/2001 provides that 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 to be subject to prior checking by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list is not exhaustive. Other cases not mentioned in the list could pose specific risks to the rights and freedoms of data subjects and hence justify prior checking by the EDPS.

For example, the EDPS regarded the processing of traffic data by the European Parliament as a case for prior checking on the grounds that the proposed processing operation could have significant and serious consequences for each of the data subjects involved in the case (Case 2004-0013).

Among other reasons, the use of unique identifiers of general application (the personal identification number) justified prior checking of an operation which did not qualify as a case under Article 27(2), due to the specific risks for the data subjects (Case 2004-0196).

### ***Cases listed in Article 27(2)***

Article 27(2) lists a number of processing operations that are likely to present specific risks to the rights and freedoms of data subjects:

- (a) Processing of data relating to health and to suspected offences, offences, criminal convictions or security measures. This is justified by the sensitive nature of the data, classified as special categories of data according to Article 10 of the Regulation, and therefore subject to specific provisions.
- (b) Processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct. Clearly, processing operations intended to evaluate a person are likely to present specific risks for the rights of the data subject.
- (c) Processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes. This provision aims at preventing data collected for different purposes from being linked together. The risk is that it will be possible to deduce information from the link made between the data or to divert the data from the purpose for which they were initially collected.
- (d) Processing operations for the purpose of excluding individuals from a right, benefit or contract. Such a processing operation raises a specific risk for the data subject and calls for adequate guarantees to be put into place.

### ***Notification/consultation***

Prior checks must be carried out by the EDPS following receipt of a notification from the Data Protection Officer. A special notification form has been drawn up by the EDPS for this purpose.

Should the DPO have any doubts as to the need for prior checking, he or she may also consult the EDPS on the case (Article 27(3)).

### ***Period, suspension and extension***

The EDPS must deliver his or her opinion within two months following the receipt of the notification.

Should the EDPS make a request for further information, the period of two months may be suspended until the EDPS has obtained the relevant information.

When the complexity of the matter so requires, the initial two-month period may also be extended for a further two months by decision of the EDPS which must be notified to the controller prior to the expiry of the initial two month period.

If no decision has been delivered at the end of the two-month period or extension thereof, the opinion of the EDPS is deemed to be favourable.

### **3.3.2. Opinions and follow-up**

Pursuant to Article 27(4) of the Regulation, the final position of the EDPS takes the form of an opinion, to be notified to the controller of the processing operation and to the DPO of the institution or body concerned.

#### ***Structure of the opinion***

Opinions are structured as follows: a description of proceedings; a summary of the facts; a legal analysis; conclusions.

The legal analysis starts with an examination of whether the case actually qualifies as a prior checking case. As mentioned above, if the case does not fall within the scope of the cases listed in Article 27(2), the EDPS will look at the risks arising for the rights and freedoms of the data subject. Once the case qualifies as one for prior checking, the core of the legal analysis is an examination of whether the processing operation complies with the relevant provisions of Regulation (EC) No 45/2001. The EDPS may conclude on the basis of the evidence that the processing does not seem to involve a breach of any provision of Regulation (EC) No 45/2001. Where necessary, this statement will be subject to the condition that certain recommendations are taken into account.

To guarantee, as in other areas, that the entire team works on the same basis and that the EDPS's opinions are adopted after a complete analysis of all significant information, the structure of opinions is an essential part of the case manual on prior checking, a tool based on an accumulation of practical experience, which is currently being drafted. A checklist has been drawn up to make sure that both as regards seeking complementary information and drafting the opinion no aspect is forgotten or underestimated.

#### ***Follow-up: from opinion to decisions***

The EDPS delivers an opinion on the case submitted to him for prior checking. This opinion may contain a series of recommendations which must be taken into account in order to make the processing operation comply with Regulation (EC) No 45/2001. Should the controller not comply with these recommendations, the EDPS may exercise the powers granted to him under Article 47 of the Regulation. The EDPS may in particular refer the matter to the Community institution or body concerned. Furthermore, the EDPS may order that requests to exercise certain rights in relation to the data be complied with, if such requests have been refused in breach of Articles 13 to 19 or may warn or admonish the controller or order the rectification, blocking, erasure or destruction of all data or impose a temporary or definitive ban on processing. Should the decisions of the EDPS not be complied with, he has a right to refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty.

A workflow system has been designed to make sure that all recommendations in a particular case are followed up, and, where applicable, that all enforcement decisions are complied with.

#### ***Register***

Article 27(5) of the Regulation provides that the EDPS must keep a register of all processing operations of which he has been notified for prior checking. This register must contain the information referred to in Article 25 and be open to public inspection.

This legal description implies a rather static approach, as it only envisages the registration of the information at the starting point of the process. As a tool of transparency, the EDPS has organised a register that fulfils the requirements set in the Regulation, but adds some practical and complementary elements to it.

The EDPS has drawn up a prior check notification form to be filled in by DPOs. The experience of this first year has shown that in many cases this avoids the need to suspend the prior checking period to seek further information. The form includes all the information mentioned in Article 25, to which the EDPS has added some other information relevant in the case of prior checking, such as, *inter alia*, the grounds which justify the prior check (Article 27(2) or other grounds on the basis of Article 27(1)) and any comments the DPO would wish to add relating to qualification for prior checking. All information is included in the register. On the other hand, information on the security measures adopted will not be mentioned in the register open to public inspection. This restriction is in line with Article 26 of the Regulation, which provides that the register of processing operations held by each DPO will include the information provided in the notification form, except as regards security measures. Should Article 27(5) not be interpreted in this corrective manner, the restriction in Article 26 would be void when a prior check takes place.

Once the EDPS has delivered his opinion, the reference to the opinion, the case number and possible follow-up measures to be taken (with the same restrictions as mentioned above) are added to the register. Later on, the changes made by the controller in the light of the EDPS's opinion are also given in summary form. In this way, two goals are achieved. On the one hand, the information on a given processing operation is kept up to date and, on the other, the transparency principle is complied with.

The register is not yet accessible on-line and this will continue to be the case until the second phase of the website (see paragraph 2.7) is finished. Nevertheless, in cases where it was felt that the prior checking opinion of the EDPS was of particular interest, such as the case of Eurostat's data processing operation relating to the actuarial calculation for the European civil service pension scheme (described below in paragraph 3.3.4), the opinion was published on the EDPS website.

### **3.3.3. Ex post cases**

Regulation (EC) No 45/2001 came into force on 1 February 2001 in accordance with Article 51. Article 50 provides that Community institutions and bodies are to ensure that processing operations already under way on the date the Regulation entered into force are brought into conformity with the Regulation within one year of that date (i.e. by 1 February 2002). The appointment of the EDPS and the Assistant EDPS entered into effect on 17 January 2004.

Prior checks concern not only 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. In such situations, an Article 27 check could not be "prior" in a strict sense, but must be dealt with on an "*ex post*" basis. With this pragmatic approach the EDPS makes sure that Article 50 of the Regulation is complied with in the area of processing operations that present specific risks.

In order to deal with the backlog of cases likely to be subject to prior checking, the EDPS made a request to the DPOs to make an analysis of the situation within their institution as concerns processing operations within the scope of Article 27. Following the receipt of contributions from all DPOs, a list of cases subject to prior checking was made by the EDPS. About 100 cases were listed as cases notified to DPOs prior to February 2004. Within these cases, the EDPS identified three different categories: cases to be considered as a consultation under Article 27(3) (see paragraph 3.3.5); cases in which it is not apparent that the case qualifies for prior checking and which will be left aside unless the DPO can specify grounds why a case should be considered for prior checking and cases which clearly fall under Article 27.

Due to the number of cases which clearly fall under Article 27, and which involve *ex post* prior checking, the EDPS has decided to start work on three themes: disciplinary files, evaluation of staff

and medical files. These themes were chosen not only because they were the most recurrent within the different institutions, but also because they are particularly sensitive for staff members. The EDPS chose three specific cases per theme which were to be formally notified as prior checking cases by the DPOs of the institutions concerned. During 2005 the other cases will continue to be notified for checking.

Two notifications for "prior" checking of processing operations existing prior to the nomination of the EDPS were received at the end of 2004: a case from the Commission's Investigatory and Disciplinary Office (IDOC) (Case 2004-0187) and a case concerning disciplinary files at the Parliament (Case 2004-0198). As to IDOC, a request for further information was sent to the Commission suspending the two-month time period.

In parallel with the effort to systematise the handling of *ex post* prior checking cases, the EDPS has also dealt with other requests for *ex post* prior checking. Two *ex post* prior checking cases were received from the DPO of the Commission on 16 July 2004: "Evaluation du personnel supérieur" (Case 2004-0095) and "Rythme de travail" (Case 2004-0096). Further information on these cases was requested by the EDPS. In mid-December such information on both cases was received. In the first case, due to the complexity of the issues involved, the period for delivering the opinion was extended by one month. In January 2005 both opinions were delivered. A request for prior checking was also received from the OHIM as regards an internal selection procedure already in progress (Case 2004-0174). The opinion was issued on 6 January 2005.

As regards *ex post* prior checks the EDPS made certain recommendations to be implemented in the processing operation. This has always implied that the processing had to be adapted to those recommendations, as monitored by the EDPS. In most cases, which relate to processing operations taking place annually, those recommendations are to be implemented when the operation next takes place. As regards processing of personal data which is already completed, this would not prevent the EDPS from taking further action if a complaint were to be raised before him.

#### **3.3.4. Proper prior checks**

The EDPS should normally give his opinion prior to the start of a processing operation so as to guarantee the rights and freedoms of the data subjects from the start. This is the rationale of Article 27. In parallel with the handling of *ex post* prior checking cases, four cases of "proper" prior checking were notified to the EDPS in 2004.

##### EP processing of telecommunications traffic data for a specific investigation (Case 2004-0013)

The first notification for prior checking was received from the DPO of the Parliament concerning the processing of traffic data by the Parliament's Directorate for IT (DIT), to conduct an investigation on suspected misuse of internet and e-mail. An opinion on this case was delivered on 4 May 2004 in which the processing was accepted in principle, subject to a number of conditions.

##### TOP 50 (Case 2004-0126)

This case was also notified by the DPO of the Parliament. It concerned the monitoring of telephone bills: the list of all telephone lines that had generated overall monthly costs in excess of 50 euros was transmitted to the Directors-General and Secretaries-General of political groups for verification. The process had been suspended six months previously because doubts had arisen about the legitimacy of the processing. The EDPS qualified the case as subject to prior checking under Article 27(2)(b) since the processing of the data could lead to the adoption of disciplinary measures and examined the case accordingly. In his opinion of 21 December 2004, the EDPS made a series of recommendations notably concerning the retention period of traffic data by the DIT; the

removal of certain data before processing for statistical purposes; the modification of the information communicated to staff; the information to be given to external staff concerned, and the removal of personal calls from the threshold figure.

#### Eurostat (Case 2004-0196)

The EDPS had previously been informed that Eurostat intended to collect data on the staff of European institutions and bodies, in order to carry out the actuarial calculations for the pension scheme for officials of the European Communities. Most of the data needed by Eurostat are already processed by the Commission via the NAP ("New Payroll System"). Eurostat was seeking to obtain these data from the NAP so that institutions would not have to send them twice. Eurostat will use personal identification numbers to link data over the years or when they are collected from different sources.

The EDPS took the view that this processing operation needed prior checking, as it involves *inter alia* the use of personal identifiers, the storage of data for unlimited periods of time and the collection of a huge amount of data. The case was notified by the DPO of the Commission, after a meeting with stakeholders. The EDPS issued an opinion on 21 December 2004, in which he made some comments that he expects to be taken into account, namely with regard to informing data subjects; inclusion of data from 2003 in this processing; exclusion of the possibility of re-identifying data subjects for other than statistical purposes; informing the EDPS in the future if any significant changes are made in the data processing operations and examination by Eurostat of the possibility of erasing the personnel number once data have been validated.

#### Répertoire des compétences (2004-0319)

"Répertoire des Compétences" is a system in which the curricula vitae of the staff of the General Secretariat of the Council are stored and accessible on-line. Information is provided either by the member of staff or by the department or by two Council information systems : ARPEGE (Administration des Renseignements sur le Personnel et la Gestion des Emplois) and SPP (Service de Perfectionnement professionnel). The opinion was delivered in 2005.

In all four cases a request for further information was made to the DPO or the controller. In the first three cases the urgency of the case justified the request for information being made in the course of a meeting with all parties concerned, including a videoconference in Cases 2004-0013 and 2004-0196.

### **3.3.5. Consultation**

Should the DPO have any doubts as to the need for prior checking, he or she has to consult the EDPS on the case (Article 27(3)). Two cases were dealt with before the list mentioned in paragraph 3.3.3 was established. In both cases the conclusion was that there was a need for a prior check. One was completed (2004-0013) and the other has not yet been notified to the DPO, so the prior check will take place in due course.

In the list of prior checking cases made by the DPOs, doubts were expressed as to whether or not certain cases qualified as prior checking cases. The EDPS made a list of these cases, amounting to a total of twenty-seven, and selected nine cases in the priority themes chosen for *ex post* prior checks. Further details were requested on these cases to determine whether or not the case qualified for prior checking. For example, in many cases it was not clear whether or not the processing operation was to be considered a "processing operation intended to evaluate personal aspects relating to the data subject" under Article 27(2)(b). Once the information necessary to decide on the need for prior

checking is received, if the case does not qualify for a prior check, the case is closed. If a prior check is needed, a formal notification is asked for. The other cases will follow in due course.

### **3.3.6. Conclusions and future**

Experience in prior checking has shown so far that processing operations undertaken by Community institutions and bodies do not seem in breach of the provisions of Regulation No 45/2001 in general terms, but there are always some aspects that need to be corrected in order to satisfy such provisions fully. An issue which usually arises is the information to be given to data subjects to make the processing fair. All opinions include at least some recommendations in this area.

In most cases, when the institution or body notifies the DPO and the latter notifies the EDPS for the purpose of prior checking, not enough information is provided on the processing operation. This explains the need to obtain further information in most cases. The form which has been drawn up (see paragraph 3.3.2) aims to avoid this, among other purposes.

As to the future, some further action is envisaged:

#### Continue *ex post* checks: planning criteria

In the course of 2005 the EDPS will continue to give opinions on the *ex post* prior checks listed by the DPOs. Initially, other cases among the priority themes chosen (disciplinary files, evaluation of staff, medical files) will be examined. Once all the cases within the scope of the priority themes have been handled, other themes will be chosen and relevant cases will be examined accordingly.

#### Bodies with new DPOs

Newly appointed DPOs will be contacted so that they proceed with a list of possible prior checking cases. As for agencies without DPOs, the EDPS will urge them to appoint a DPO so that work can be started on the issue of prior checking, *inter alia*

#### Register and transparency

Public access to the register is possible following a simple request to the EDPS and, as mentioned above, the EDPS website is being used to publish the most relevant opinions. But in a second phase of the website on-line access to the register is planned.

#### Recommendations

As concerns procedure, it is important to make controllers aware of the timeframe within which the EDPS must give his opinion. Controllers should take this period into account in the planning of their work and notify operations for prior checking in due time.

The process of notification of DPOs by controllers has to be speeded up. As the list for *ex post* prior checking has shown, it is crucial that registers kept by DPOs are as complete as possible, both for the purpose of transparency of the institution or body involved and for the identification of operations needing prior checking.

### **3.4. Information**

During 2004 the EDPS received 51 "requests for information/advice". The answer was given either by phone, by e-mail or by letter, according to the nature of the request. After the initial starting-up phase of the office, the answers were in general sent within two working days. The majority of

requests received were either in English or in French; however there were also a number in other languages. Where necessary, replies were translated so as to provide the person making the request with adequate information in his or her mother tongue.

One such request on the data protection status of European Schools (Case 2004-0321) resulted in a letter to the Board of Governors of the European Schools to draw attention to a number of imperfections resulting from the applicability of national laws on data protection in conjunction with a European instrument not dealing with this subject. These imperfections could well be rectified by bringing data protection within the sphere of the Convention defining the statute of the European Schools and thus creating a legal basis for the application of Regulation (EC) No 45/2001 to the European Schools. The EDPS has suggested a modification of the General Rules as an interim solution.

The EDPS received approximately a dozen complaints outside his competence, which were dealt with under the same heading. Particular emphasis was laid on addressing those requests in a responsible manner, by providing information on the role of the EDPS and his mandate and referring to relevant secondary legislation as well as to the national implementation of such legislation. In such cases, the EDPS also provided contact details of the relevant authorities to which the complaint should be addressed.

### **3.5. Complaints**

Eight complaints within the competence of the EDPS were received during 2004: six against the Commission (in one case also against the European Environment Agency), one against the European Central Bank and one against the European Parliament.

In three cases (2004-0001, 2004-0004 and 2004-0022), after analysis of the complaint, no reason was found to investigate further. In two cases (2004-0094 and 2004-0111) further information was requested from the complainant and it was not received. In two cases (2004-0007 and 2004-0109), after investigation, some grounds for complaint were found and measures or further information were requested from the controller. In the last case (2004-0329) further information was received from the controller in 2005 and the case has been closed.

It is worth mentioning that in Case 2004-0109, the Ombudsman had already acted in his field of competence. The EDPS's decision on the complaint, in his own field of competence, is consistent with the findings of the Ombudsman.

The experience gathered from the handling of these complaints is being used to draft a case manual.

### **3.6. Investigations**

Already in the very first contacts with the European institutions and bodies the EDPS noted that the relationship between **public access to documents** and **data protection** was felt to be problematic by the institutions and bodies. Resources were set aside in order to develop a policy paper on how to promote public access to documents together with protection of personal data. The first phase was devoted to gathering information on the different policies and practices carried out Community-wide and to the analysis of the relevant jurisprudence. The second phase is the drafting of a paper to be issued shortly on the matter.



The paper analyses the legal framework and the political context of the respective Regulations (EC) No 1049/2001 and No 45/2001. Importantly, the document also illustrates how the Regulations overlap and it provides a list of examples of experiences from the institutions and bodies. It also contains a check-list, to be followed by officials who need to balance the two fundamental rights. Furthermore, the policy paper addresses the possibility of working proactively and clearly defining at an early stage the conditions that govern personal data contained in documents held by public authorities. In many ways the paper aims at condensing good practice from the institutions and bodies, and relating this to legislation and relevant jurisprudence, with the aim of compiling a useful and pragmatic compendium of the thinking in the field. The paper will be published during the first months of 2005.

At the same time, the EDPS has started work on the processing of **traffic and billing data** of all kinds of **electronic communications** (telephone, e-mail, mobile phone and internet, etc.) in the European institutions. The objective of this project, which fits notably within the task of the EDPS as provided for in Article 37 of Regulation No 45/2001, is twofold. The EDPS aims at producing some guidelines on the subject as well as at establishing the list(s) of traffic data – and/or the development of a methodology or guidelines for compiling these lists – that may be processed for the "purpose of telecommunications budget and traffic management, including the verification of authorised use of the telecommunications systems". A first step in this field has been to collect available information notably from the different European institutions, from the Article 29 Working Party and from the national Data Protection Authorities (DPAs). Further action in 2005 will include working sessions with some DPOs in order to submit certain questions to them, and to reflect on how to address this subject most effectively and in a manner which is in line with the practices of the institutions.

### 3.7. Eurodac

This subject deserves to be mentioned separately, both in view of its legal framework and its importance in a wider perspective.

#### ***Relevant background***

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention provides in its Article 20 for the setting up of a provisional Joint Supervisory Authority, consisting of representatives from the national Data Protection Authorities, to supervise the Central Unit of the system. Article 20(11), lays down that:

"The joint supervisory authority shall be disbanded upon the establishment of the independent supervisory body referred to in Article 286(2) of the Treaty. The independent supervisory body shall replace the joint supervisory authority and shall exercise all the powers conferred on it by virtue of the act under which that body is established".

According to Article 46 of Regulation (EC) No 45/2001, the European Data Protection Supervisor shall, *inter alia*:

- (c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body (...).

According to Article 46 (f)(i) of the Regulation, the EDPS shall cooperate with the national data protection authorities to the extent necessary for the performance of their respective duties.

The Joint Supervisory Authority referred to in Article 20(11) of Regulation No 2725/2000 was set up in 2002. The lifespan of this JSA was relatively short, since its last meeting was held on 23 January 2004 and could only take note of its dismantlement, as a consequence of the establishment of the EDPS shortly before.

### *Activities of the EDPS*

On 25 February 2004, the EDPS and Assistant EDPS had a meeting with competent officials from the Justice and Home Affairs DG in order to be informed about the state of play concerning Eurodac.

The European Parliament held a public hearing on biometrics on 2 March 2004, in which the EDPS participated. During that meeting, the EDPS gave some indications as to how he envisaged his supervisory task:

"The structure of Eurodac implies that the responsibility for supervision is distributed between the EDPS at EU level and the national supervisory authorities each in their own jurisdiction. There is not enough experience in practice yet to be sure whether this system works smoothly and efficiently. It is evident that I intend to follow this aspect with particular interest.(...) I am looking forward to the first annual report on Eurodac as well as to other annual reports and the subsequent evaluation of Eurodac's performance, with special attention for the data protection aspects of the system."\*

The EDPS is the supervisory authority for Eurodac's Central Unit and also monitors the lawfulness of the transmission of personal data to the Member States by the Central Unit. The competent authorities in the Member States, in turn, monitor the lawfulness of the processing of personal data by the Member State in question, including their transmission to the Central Unit. This means that the supervision must be exercised at both levels, in close cooperation.

The first annual report to the Council and the European Parliament on the activities of Eurodac's Central Unit was published on 13 May 2004 as a Commission staff working paper (document SEC (2004) 557). The EDPS examined it thoroughly; he considers it a valuable document with an interesting overview of the activities of the Central Unit. He also values the attention brought to data protection aspects in that report.

The EDPS also identified some issues which might benefit from further examination. Among those issues are the security measures surrounding the data processing operations at the Central Unit and the records (log files) which must be kept by the Central Unit in accordance with Article 16 of Regulation 2725/2000.

Several points must also be subject to deeper scrutiny, most of which involve national data protection authorities: the use of the data by national authorities, possibly for other purposes, right of access, blocking of data after asylum is granted, the use of "special searches", keeping of log files in the Member States, exchange of data through DubliNet and other issues.

The EDPS intends to launch an in-depth examination of Eurodac's activities in 2005, in close cooperation with national data protection authorities and in the light of the second annual report which is to be expected soon.

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\* Complete text of statement available at [www.edps.eu.int](http://www.edps.eu.int)

## **4. Consultation**

### **4.1. General**

Article 41 of Regulation (EC) 45/2001 confers upon the EDPS the responsibility to advise Community institutions and bodies and data subjects on all matters concerning the processing of personal data. More precisely, according to Article 46(d) of Regulation 45/2001, he shall advise all Community institutions and bodies either on his own initiative or in response to a consultation.

Article 28 of the Regulation contains two obligations for Community institutions to consult the EDPS:

1. Every Community institution and body shall inform the EDPS when it is drawing up administrative measures relating to the processing of personal data.
2. The Commission shall consult the EDPS when it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

In 2004 the EDPS started to give effect to these provisions in the Regulation. The first activities of the EDPS concerned administrative measures. The institutions had to draw up implementing rules for Regulation 45/2001. In several cases the EDPS was asked to give his opinion on the draft texts of these rules. In other cases, more specific internal rules were referred to the EDPS for advice.

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 protection of the financial interests of the Community against fraud and any other illegal activities. The opinion was the result of a consultation by the Commission on 28 September 2004, on the basis of Article 28(2) of the Regulation. The opinion was published in the Official Journal (C 301, 7.12.2004, p. 4) and on the website of the EDPS. The EDPS intends to publish all his formal opinions in a similar way.

A second formal opinion was prepared in 2004, but issued on 13 January 2005. This opinion was submitted at the initiative of the EDPS and concerned a proposal, in the area of the third pillar of the EU Treaty, for a Council decision on the exchange of information from criminal records.

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.

### **4.2. Legislation and policy**

It should be borne in mind that 2004 was a starting year, for the EDPS as well as for the partners in the legislative process. The consultation procedure had not yet been established. Informal and formal contacts with the institutions had to be built up and the tasks of the EDPS had to be structured and presented to a wide circle of stakeholders within the institutions. In addition (as has been stated elsewhere in this report) the staff of the EDPS was recruited in the course of the year and most members of staff started work towards the end of the year.

The Commission proposal that led to the first formal opinion by the EDPS on 22 October 2004 does not include new rules on data protection or derogations from Community legislation on data protection. On the contrary, the proposal refers explicitly to that legislation. The EDPS approved the proposal in general terms.

This case gave the EDPS an opportunity to state that the obligations on consultation apply not only to proposals dealing with personal data protection as their main subject but also to proposals which build on, supplement or amend the existing legal framework for data protection and to proposals which have a significant impact on the protection of individuals' rights and freedoms with regard to the processing of personal data.

This statement is an illustration of the fairly wide interpretation of the advisory task, as will be explained in the policy paper on consultation on proposals for legislation and related documents. This wide interpretation is essential for ensuring that a high level of data protection applies in the institutions. The EDPS understands his advisory task as follows:

- a. he gives advice to Community institutions on proposals for legislation as well as on related documents, in particular Green Papers and White Papers;
- b. he gives advice on all proposals which have a significant impact on the protection of individuals' rights and freedoms with regard to the processing of personal data;
- c. he also gives advice on legislation in the framework of the Third Pillar of the European Union (i.e. outside the scope of the EC Treaty).

The advice of the EDPS on the proposal for a Council Decision on the exchange of information from criminal records was more substantial. The EDPS advised the Council to limit the scope of the proposal to an exchange of information on convictions for serious crimes. Moreover, the proposal should specify the safeguards for the data subject to ensure that they are in conformity with the existing legal framework on data protection. It is important that the proposal has a limited time horizon. It is supposed to urgently bridge a gap in the provisions for the exchange of information until a new system of data exchange has been put in place. As a part of the development of such a new system, often referred to as the European criminal register, a thorough assessment of the consequences for data protection is needed, as has been stated by the EDPS. Work on this subject has just started. More on this subject and on the results of the efforts of the EDPS is to be expected in the annual report for 2005.

The Commission public consultation on the establishment of a Fundamental Rights Agency (Com(2004) 693 final) was also an occasion for the EDPS to give his opinion, both on the general aspects of this subject and on its relations to his mission.

Another part of his activities on proposals for legislation had a more informal status. The EDPS participated in the process leading to the adoption of several legal instruments with consequences for data protection. One of the subjects in which his involvement was requested was the draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, an initiative by four Member States under the Third Pillar. The EDPS presented his ideas within the framework of the Council and in the Committee on Civil Liberties (LIBE) of the European Parliament.

Another subject that required his attention was the elaboration of a framework for data protection for activities under the Third Pillar of the European Union. Work on the framework started in 2004 and will be continued in 2005. It goes without saying that this is an important matter for the EDPS.

Another more informal way of being involved in future legislation is a consequence of the participation of the EDPS in the Article 29 Working Party on the Protection of Individuals with Regard to Personal Data. This can be illustrated by one example of the activities of the EDPS in this group in 2004. The group worked on a general working paper on data protection issues related to RFID technology. Acknowledging the potential impact of these new technologies on data

protection, the EDPS has particularly emphasised the impact of standardisation and interoperability on the implementation of data protection principles.

The EDPS must make sure that his assignment to enhance the level of data protection under the policies of the institutions of the European Union also works in practice. This means, in the first place, that he must become a self-evident partner in the inter-institutional legislative process. 2004 was only the beginning. Much effort has been put into the presentation of the EDPS as a visible and reliable partner. The EDPS and his staff initiated contacts with the relevant services within the institutions and strengthened existing contacts with other players in the data protection field such as national Data Protection Authorities.

### **4.3. Administrative measures**

As mentioned in paragraph 4.1, Article 28(1) of Regulation 45/2001 obliges all Community institutions and bodies to inform the EDPS when drawing up administrative measures relating to the processing of personal data. Complementing this provision, Article 46(d) makes it one of the duties of the EDPS to advise institutions and bodies in this area, either on his own initiative or in response to a consultation. It mentions specifically the drawing up of internal rules on data protection. Mandatory information therefore has the purpose of allowing the EDPS to advise where appropriate.

In 2004 the EDPS had the opportunity to advise the three main Community institutions in drawing up their implementing rules. Case 2004-0003 dealt with the implementing rules of the Council. The draft was of a high quality and two particular points were the subject of specific advice. The EDPS agreed to the idea of being consulted by the institution when evaluating the Data Protection Officer, thus developing a further guarantee of independence in the performance of his/her duties, consistent with Article 24 of the Regulation and especially in relation to the required consent of the EDPS for dismissal, as provided by Article 24(4). The second point was the possibility that the information entered in the Register by the DPO may exceptionally be limited when it is necessary to safeguard the security of a specific processing operation. The final Council Decision was published on 21 September 2004. Later on, the EDPS gave advice on the further rules and procedures regarding the notification procedure to be followed by the controllers, as part of the general recommendations issued by the DPO, with regard to the periods to be set for prior checking.

An early draft of the implementing rules of the Commission (2004-0151) provided a second opportunity to give advice in this area. Here again the consultation of the EDPS prior to the evaluation of the DPO was commented on favourably and a number of structural and substantive comments were made on the draft rules.

Just before the end of 2004, the draft implementing rules of the European Parliament were submitted for advice (2004-0333). This was given in early January 2005, in a way consistent with previous consultations. Among other issues, it stressed the need for a full-time DPO in the larger institutions.

Other advice was given during 2004 on various specific matters such as public access to Council documents and data protection (2004-0020), applicability of Regulation 45/2001 to some specific grey zones between the First and Second Pillars (2004-0078), administrative simplification with regard to information and notification requirements (2004-0124), the use of identity photos of Council's staff members (2004-0327) and the "remote desktop" utility to be implemented by the IT Department of the Court of Justice (2004-0166).

At the last meeting in 2004 with DPOs of institutions and bodies (see paragraph 3.2 of this report) guidance was given on the criteria to be followed for defining "administrative measures" on which the EDPS should be consulted. There have been several meetings with each of the DPOs of the main institutions to obtain information on general practices regarding data protection and to give advice on them. Needless to say, frequent contacts by telephone, email or mail with most DPOs have been also an efficient way to carry out the task of giving advice on administrative measures.

## 5. Cooperation

### 5.1. Article 29 Working Party

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. According to Article 29(2), the Working Party is composed of representatives of the national supervisory authorities in each Member State, a representative of the authority established for the Community institutions and bodies – now the EDPS – and a representative of the Commission. The Commission also provides the secretariat of the Working Party.

The EDPS is a regular member of the Article 29 Working Party. Article 46(g) of Regulation 45/2001 provides that the EDPS participates in the activities of the Working Party. The EDPS feels that this is an important platform for cooperation with national supervisory authorities.

According to Article 46(f)(i) of the Regulation, the EDPS must also cooperate with national supervisory authorities to the extent necessary for the performance of their duties, in particular by exchanging all useful information and requesting or delivering other assistance in the execution of their tasks. This cooperation has not taken place so far, but that is likely to change in the context of international systems like Eurodac and the proposed Visa Information System which require effective joint supervision.

The EDPS has played an active role in the activities of the Working Party as from mid-January 2004. This has led to further reflection on the respective roles of the Working Party and the EDPS at EU level. The strategy document adopted by the Working Party on 29 September 2004 (WP 98) contains the following statement as a result of that reflection:

"The European Union institutional legal framework has recently been completed by the appointment of the first European Data Protection Supervisor (EDPS) and close cooperation and coordination is crucial, mainly in the area of giving advice on new legislation that can have an influence in the protection of individuals' rights and freedoms with regard to the processing of personal data, given the respective advisory roles of both the Article 29 Working Party and the EDPS.

Even though the EDPS being a member of the Article 29 Working Party guarantees coordination between both bodies to a certain extent, it is necessary to develop synergies and common strategies to better serve their common goal of good data protection policies being developed and implemented in the European Union."

In the case of subjects that appear on the Working Party's agenda, the EDPS will seek to contribute to – and be part of – the widest possible consensus and to build on this in a wider context, while making his own comments or suggestions, where these are considered necessary. The advisory role of the EDPS on the basis of Article 28(2) of Regulation 45/2001 will not be affected. This general approach is discussed at greater length in the policy paper mentioned in paragraph 4.2 of this annual report.

Examples of good synergy between the Article 29 Working Party and the EDPS can be found in the following documents of the Working Party:

- Opinion 7/2004 on the inclusion of biometric elements in residence permits and visas taking account of the establishment of the European information system on visas (VIS), adopted on 11 August 2004 (WP 96);

- Opinion 9/2004 on a draft Framework Decision on the storage of data processed and retained for the purpose of providing electronic public communications services or data available in public communications networks with a view to the prevention, investigation, detection and prosecution of criminal acts, including terrorism. [Proposal presented by France, Ireland, Sweden and Great Britain (Council document 8958/04 of 28 April 2004)], adopted on 9 November 2004 (WP 99);
- Working document on data protection issues related to RFID technology, adopted on 19 January 2005 (WP 105).

The EDPS was actively involved in the preparation of these documents and supported the final text. This means that the EDPS intends to make use of these documents, whenever he finds this appropriate and efficient for the accomplishment of his task.

The EDPS also welcomed contributions by the Working Party to the Commission's work programme for a better implementation of Directive 95/46/EC. This relates in particular to the simplification of notification procedures in the Member States, the development of better and more harmonised information provision to data subjects, the development of more adequate instruments for the transfer of personal data to third countries, and the enhancement of enforcement activities in the Member States.

Another subject which has been high on the Article 29 Working Party's agenda and deserves to be mentioned in this report is the transmission of PNR (Passenger Name Record) data from airlines to third countries. The Working Party has basically accepted the conditions for transfers of PNR data to Australia and Canada (Opinions 1/2004 and 1/2005), and repeatedly criticised the terms for transfers to the United States (Opinions 6/2002, 4/2003 and 2/2004).

The Commission has taken the position that the terms for transfers to the US provide an adequate level of protection within the meaning of Article 25 of Directive 95/46/EC and the Council has supported that position. The European Parliament has decided to bring an appeal before the Court of Justice in two cases which are currently pending. The EDPS has submitted a request for intervention in these two cases, in support of the position of the Parliament, on the basis of his tasks and powers as provided in Regulation 45/2001. Article 47(1)(h) of the Regulation specifically allows the EDPS to intervene in actions brought before the Court of Justice. The Court will have to decide whether to grant this request.

The EDPS is looking forward to the decisions of the Court in both cases, in view of the important legal questions and great public interests that are involved at both sides, and intends to carefully examine any forthcoming decision, either on the request for intervention or on the merits of the cases.

## **5.2. Third Pillar**

According to Article 46(f)(ii) of Regulation 45/2001, the EDPS must cooperate with "the supervisory data protection bodies established under Title VI of the Treaty on European Union particularly with a view to improving consistency in applying the rules and procedures with which they are respectively responsible for ensuring compliance".

The supervisory bodies concerned by this provision are the joint supervisory bodies (JSBs) of Europol, Schengen, Eurojust, and the Customs Information System. Cooperation of the EDPS with these bodies was established rapidly, since all parties involved were convinced of the urgent need for a common, harmonised approach in this very sensitive area.



During the European Data Protection Conference in Rotterdam (21-23 April 2004; see also paragraph 6.1), it appeared that the Data Protection Authorities broadly share the opinion that there is a need for closer cooperation in Third Pillar matters alongside the existing cooperation in the First Pillar area in the framework of the Article 29 Working Party. Developments in the area of law enforcement also call for more standardised provisions in data protection legislation and for more uniform application of legal bases. As an appropriate forum for discussing issues concerning data protection matters under the Third Pillar – or indeed for both the First and Third Pillars – is lacking, it was decided to set up a working group made up of the chairs of the joint supervisory bodies, the chair of the Article 29 Working Party and the EDPS, assisted by the Secretariat of the joint supervisory bodies, which is at present a unit integrated into the General Secretariat of the Council.

This "planning group" would have the responsibility of coordinating activities and developing strategic approaches to new initiatives involving both the use of personal data for law enforcement purposes and a European dimension. The outcome of the discussions in this group would have to be reported to the European Data Protection Conference.

The first meeting of the "planning group" took place on 22 June 2004 on the premises of the EDPS. The participants were the EDPS, the Assistant EDPS, the chairpersons of the joint supervisory bodies of Schengen, Europol, Customs and Eurojust, the General Secretariat of the Council, and the Inspector-General of the Polish DPA (in her quality as host of the next International Data Protection Conference). The discussions provided an overview of relevant activities and proposals under the First and Third Pillars, with the aim of assessing the need for and possible urgency of action in those matters.

At the International Conference in Wrocław, the closed session of European Data Protection Commissioners adopted a Resolution, calling explicitly for the setting up of a joint EU forum with the task of incorporating the provision of data protection advice within the structure of the Council of the European Union. This would require a permanent secretariat and the resources for holding regular meetings in Brussels and providing the necessary translation services. The Resolution stated that "the European Data Protection Supervisor appointed in line with Article 286(2) of the EC Treaty should be actively involved in the body to be set up".

Each of the joint supervisory bodies has a specific mandate; this is why the DPAs called for a joint body in the Resolution adopted in Wrocław. However, the setting up of such a body could be a long process and, considering the urgency of the matter, it was decided that the JSBs and the EDPS would hold joint meetings, in order to address the most pressing needs. Joint meetings were held on 28 September, 23 November and 21 December 2004, the last one partly in the presence of Mr Frattini, the Commission's new Vice-President and Commissioner for Justice, Freedom and Security, who had taken office a few weeks before.

Meanwhile, on 7 December 2004, the EDPS and Assistant EDPS had a meeting with Mr Frattini, during which the latter stressed his keen interest in data protection. He also expressed his intention to work towards the adoption of a legislative instrument for data protection under the Third Pillar and his willingness to seek a productive dialogue with data protection authorities.

Staff members of the EDPS have participated in ad hoc meetings of experts on the development of common standards for data protection under the Third Pillar. The DG for Justice, Freedom and Security organised such a meeting on 22 November 2004 with representatives from various Member States. Representatives of the General Secretariat of the Council, Europol and Eurojust were also invited. A further meeting with representatives of national supervisory authorities took place in January 2005.

The EDPS will continue to follow these developments very closely, with a view to encouraging closer cooperation with the Third Pillar JSBs and promoting consistency in the Third Pillar data protection framework without further delay. He has taken due note of the Commission's intention to make adequate progress in the delivery of good proposals and is ready to advise where necessary and appropriate.

Finally, it should be mentioned that the EDPS gave a presentation concerning his role for the members of the Article 36 Committee (the Council's high-level group dealing with Third Pillar matters), at a luncheon meeting on 11 November 2004.

## 6. International relations

### 6.1. European Conference

Data Protection Authorities from Member States of the EU and the Council of Europe meet annually for a spring conference to discuss matters of common interest and to exchange information and experience on different topics. The EDPS and Assistant EDPS took part in the Conference in Rotterdam on 21-23 April 2004 hosted by the Dutch Data Protection Authority (College bescherming persoonsgegevens, CBP).

The general theme of this conference was "The Navigation of Privacy" and Professor Colin J. Bennett, co-author of "The Governance of Privacy: Policy Instruments in Global Perspective" (2003) delivered an introductory speech. This was followed by sessions on the "Roles of Data Protection Authorities", "External Communication", "Compliance and Enforcement", and "Internal Organisation and Effective Privacy Governance". The results of a questionnaire on national practices in these different areas served as the background for a very useful exchange of views.

On the second day of the conference, attention was focused on various developments under the Third Pillar. This resulted in the activities discussed in paragraph 5.2, including the adoption of a Resolution by the closed session of European Data Protection Authorities at the International Conference in Wroclaw.

The next European conference will be held in Krakow on 24-26 April 2005, and will deal *inter alia* with the perspectives of Directive 95/46/EC ten years after its adoption. The EDPS will make an introductory speech on this subject.

### 6.2. International Conference

Data Protection Authorities and Privacy Commissioners from Europe and other parts of the world, including Canada, Latin America, Australia, New Zealand, Hong Kong, Japan and other jurisdictions in the Asia-Pacific region, have been meeting annually for a conference in September for many years. The 26th International Conference on Privacy and Personal Data Protection was held in Wroclaw on 14-16 September 2004 and was attended by the EDPS and Assistant EDPS. The EDPS was formally accredited as an independent authority at international level with voting rights in the conference.

The general theme of this year's conference was "The Right to Privacy – The Right to Dignity", referring to the growing relevance of privacy-related values for a range of political and technological developments, including those in the field of genetics. A plenary session on "The Right to Privacy and the Protection of Public Security" was chaired by the EDPS, who delivered an introductory speech.\* Other plenary sessions were held on "The Individual's Privacy versus the Need to Deal with the Past" with contributions from Germany, Poland and Argentina, and on "Transborder Data Flows and Challenges of the Global Economy", with contributions from Europe and North America. Professor Stefano Rodotà, president of the Italian DPA and former chair of the Article 29 Working Party, delivered a closing speech.

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\* Complete text available at [www.edps.eu.int](http://www.edps.eu.int)

The next international conference will be held in Montreux on 14-16 September 2005, on the general theme: "The Protection of Personal Data and Privacy in a Globalised World: a Universal Right Respecting Diversities".

### **6.3. Other contacts**

The EDPS 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. This amounted to a total of twenty presentations on various subjects. The EDPS also gave a number of interviews to journalists.

On 26 May 2004, the EDPS delivered a speech in the Polish Parliament in Warsaw on "The Role of the European Data Protection Supervisor in the EU Framework for Data Protection". This was part of a visit to Poland at the invitation of the Inspector-General of the Polish DPA.

On 14 October 2004, the EDPS attended a conference in Prague on the Rights and Responsibilities of Data Subjects, organised by the Council of Europe and the Office for Personal Data Protection of the Czech Republic, at which he chaired a session and delivered an introductory speech on "Informing Data Subjects".

On 3 November 2004, the EDPS delivered a speech entitled "Towards a (more) balanced European Area of Justice" at a conference organised in The Hague by Eurojust on "The European Constitution and its consequences for the Netherlands investigation and prosecution policy". \*

The EDPS also contributed to EU Summits on Biometrics in Dublin (14 June) and The Hague (1 July), and as session chairman to a conference at the initiative of the Dutch EU Presidency on 9-10 December in Amsterdam on "Health Care Professionals Crossing Borders".

He also spoke at seminars or conferences of the British Institute of International and Comparative Law in London (28 April and 8 December), the Academy of European Law in Trier (3 June), the International Federation of Computer Law Associations in Oxford (9 July), the European Privacy Officers Forum in Brussels (5 October), the German Association for Data Protection and Data Security in Cologne (18 November) and a number of others.

The Assistant EDPS made similar presentations in Barcelona, Madrid and Berlin.

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\* Complete text of these speeches available at [www.edps.eu.int](http://www.edps.eu.int)

## **Annexes**

- A. Extract from Regulation (EC) 45/2001
- B. Composition of Secretariat
- C. List of Data Protection Officers

### **Annex A – Extract from Regulation (EC) No 45/2001**

#### **Article 41 – European Data Protection Supervisor**

1. An independent supervisory authority is hereby established referred to as the European Data Protection Supervisor.
2. With respect to the processing of personal data, the European Data Protection Supervisor shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies.  
The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data. To these ends he or she shall fulfil the duties provided for in Article 46 and exercise the powers granted in Article 47.

#### **Article 46 – Duties**

The European Data Protection Supervisor shall:

- a) hear and investigate complaints, and inform the data subject of the outcome within a reasonable period;
- b) conduct inquiries either on his or her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;
- c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity;
- d) advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;
- e) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies;
- f)
  - i) cooperate with the national supervisory authorities referred to in Article 28 of Directive 95/46/EC in the countries to which that Directive applies to the extent necessary for the performance of their respective duties, in particular by exchanging all useful information, requesting such authority or body to exercise its powers or responding to a request from such authority or body;
  - ii) also cooperate with the supervisory data protection bodies established under Title VI of the Treaty on European Union particularly with a view to improving consistency in applying the rules and procedures with which they are respectively responsible for ensuring compliance;

- g) participate in the activities of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by Article 29 of Directive 95/46/EC;
- h) determine, give reasons for and make public the exemptions, safeguards, authorisations and conditions mentioned in Article 10(2)(b),(4), (5) and (6), in Article 12(2), in Article 19 and in Article 37(2);
- i) keep a register of processing operations notified to him or her by virtue of Article 27(2) and registered in accordance with Article 27(5), and provide means of access to the registers kept by the Data Protection Officers under Article 26;
- j) carry out a prior check of processing notified to him or her;
- k) establish his or her Rules of Procedure.

#### **Article 47 – Powers**

1. The European Data Protection Supervisor may:
  - a) give advice to data subjects in the exercise of their rights;
  - b) refer the matter to the controller in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;
  - c) order that requests to exercise certain rights in relation to data be complied with where such requests have been refused in breach of Articles 13 to 19;
  - d) warn or admonish the controller;
  - e) order the rectification, blocking, erasure or destruction of all data when they have been processed in breach of the provisions governing the processing of personal data and the notification of such actions to third parties to whom the data have been disclosed;
  - f) impose a temporary or definitive ban on processing;
  - g) refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission;
  - h) refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty;
  - i) intervene in actions brought before the Court of Justice of the European Communities.
2. The European Data Protection Supervisor shall have the power:
  - a) to obtain from a controller or Community institution or body access to all personal data and to all information necessary for his or her enquiries;
  - b) to obtain access to any premises in which a controller or Community institution or body carries on its activities when there are reasonable grounds for presuming that an activity covered by this Regulation is being carried out there.

## **Annex B – Composition of Secretariat**

Sectors under the direct authority of the EDPS and Assistant EDPS

- **Supervision**

Bénédicte HAVELANGE  
*Administrator*

Sylvie LONGRÉE  
*Supervision Assistant*

Sophie LOUVEAUX  
*Administrator*

Kim Thien LÊ  
*Secretary*

Gwendolyn RUTTEN  
*Administrator*

- **Policy and information**

Hielke HIJMANS  
*Administrator*

Martine BLONDEAU  
*Documentation Assistant*

Laurent BESLAY  
*Administrator*

Delphine HAROU (1)  
*Press and Information Assistant*

Per SJÖNELL  
*Administrator*

Martine GERMEYS  
*Secretary*

### **Administration/Personnel/Budget (APB) Unit**

Monique LEENS-FERRANDO  
*Head of Unit*

Anne LÉVECQUE  
*Secretary / Human Resources*

Giuseppina LAURITANO  
*Statutory Questions and Audit*

Patrick COELHO DE SOUSA  
*Initiating agent*

Vittorio MASTROJENI  
*Human Resources Assistant*

(1) currently attached to APB Unit

## Annex C – Data Protection Officers

<i>Organisation</i>	<i>Name</i>	<i>E-mail</i>	<i>Office</i>
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<b>European Commission</b>	Dieter KÖNIG	<a href="mailto:DATA-PROTECTION-OFFICER@cec.eu.int">DATA-PROTECTION-OFFICER@cec.eu.int</a>	B2/091B
<b>Court of Justice of the European Communities</b>	Marc SCHAUSS	<a href="mailto:DataProtectionOfficer@curia.eu.int">DataProtectionOfficer@curia.eu.int</a>	GEOS 4001
<b>Court of Auditors</b>	Jan KILB	<a href="mailto:data-protection@eca.eu.int">data-protection@eca.eu.int</a>	K2 355
<b>Economic and Social Committee</b>	Vasco OLIVEIRA	<a href="mailto:data.protection@esc.eu.int">data.protection@esc.eu.int</a>	BEL 3029
<b>Committee of the Regions</b>	Petra KARLSSON	<a href="mailto:data.protection@cor.eu.int">data.protection@cor.eu.int</a>	BEL 4116
<b>European Investment Bank</b>	Jean-Philippe MINNAERT	<a href="mailto:DataProtectionOfficer@eib.org">DataProtectionOfficer@eib.org</a>	2478
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<b>European Monitoring Centre on Racism and Xenophobia</b>	Niraj NATHWANI	<a href="mailto:Niraj.Nathwani@eumc.eu.int">Niraj.Nathwani@eumc.eu.int</a>	/
<b>European Medicines Agency</b>	Marie-Cécile BERNARD	<a href="mailto:data.protection@emea.eu.int">data.protection@emea.eu.int</a>	544





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