Data Protection in the European Union [1]

Peter J. Hustinx
European Data Protection Supervisor

Data protection in the EU is mainly 'delivered' in the member states. However, EU institutions are involved, since they generate policies and legislation that may affect existing standards of protection. Since a few years, such standards also apply to the EU institutions and bodies themselves. The European Supervisor gives an overview and reports on his first experience.

Origins of data protection

The first steps in European data protection have been made by the Council of Europe, which is a different organisation, founded in 1949 and based in Strasbourg, with 46 member states, including 21 countries from Central and Eastern Europe. One of the first achievements of the Council of Europe was the preparation of the European Convention for the protection of human rights and fundamental freedoms (ECHR) adopted in 1950. All member states of the Council of Europe, including all member states of the EU, have ratified this Convention and are bound by its guarantees.

Article 8 ECHR provides for a right to the respect of private and family life and lays down the conditions under which restrictions of 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 uncertain scope of '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 referred to 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 object is, for that reason, to protect individual citizens against unjustified collection, storage, use and dissemination of their personal details.

Convention 108 was meant not to be self-executing: it basically contains an obligation for the contracting parties to adopt national legislation in line with its principles. An additional protocol that entered into force on 1 July 2004 requires parties to set up

[1] This article was published in: P&I 2005, p. 62-65 (in English) and Tietosuoja 1/2005, p. 22-27 (in Finnish).

supervisory authorities, exercising their functions in complete independence, as an essential element of the effective protection of individuals.

Meanwhile the European Court of Human Rights in Strasbourg has expressed the view that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 ECHR. In that context, the Court also referred to Convention 108. In the Court's view, Article 8 ECHR probably includes the obligation to give effect to the basic principles laid down in Convention 108, in any case with respect to 'sensitive data'. This puts some additional pressure on the implementation of this Convention.

EU framework

As Convention 108 was implemented into 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 European Union, 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 law 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 specified it in many respects and also added new elements. Among these elements were the tasks of independent supervisory authorities and the cooperation between them both bilaterally and in a Working Party at European level, now widely referred to as 'Article 29 Working Party'.

Since 1995 other Directives have been adopted in specific areas. A typical example is Directive 97/66/EC, which was 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 of traffic and location data, and unsolicited communications like 'spamming'. The delivery of basic or value added services using different kinds of networks is subject to the general as well as the specific Directive, or more precisely: the national laws giving effect to these two Directives.

Article 286 of the EC Treaty, adopted in 1997 as part of the Treaty of Amsterdam, provides that similar rules should apply at European level, including the establishment of an independent supervisory authority. These rules have been set out in Regulation 45/2001/EC 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'. This is the specific framework for my activities to which I will return.

Recent developments

Directive 95/46/EC has been evaluated not long ago. In its report of May 2003, the European Commission described a clear lack of harmonisation, but stated that there was no reason yet to come to an amendment of the Directive and that it was necessary

to make a better use of the existing legal framework. The Commission has adopted a work program of activities, including bilateral discussions with member states about the way in which the Directive has been implemented into national law, and a number of subjects for joint activities of national supervisory authorities in the Article 29 Working Party. Some of these subjects were the introduction of more simplification and flexibility, where possible, and the promotion of greater awareness, better compliance and active enforcement. A second evaluation is likely to follow in the near future.

In May 2003, the European Court of Justice in Luxembourg delivered its first decision concerning Directive 95/46/EC in an Austrian case (Rechnungshof). The key question was whether salary data of public servants could be published to restrict 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 used a number of criteria drawn from Article 8 ECHR to evaluate the lawfulness of that processing. It also points out that the Directive can be invoked by interested parties in a national court. This means that more decisions can be expected in the near future.

In November 2003, the Court decided in a Swedish case (Lindqvist) that the main principles of Directive 95/46/EC also apply to websites. However, it is evident from the decision that some provisions, particularly those on international data transfer do not fit well to the new realities of the internet. This will no doubt be further looked into when Directive 95/46/EC is reconsidered.

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 is putting a 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 II-67 and II-68. 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 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 considered as a "horizontal" issue of a wider relevance than 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 program of the new Commission contains quite a few points where an early attention for data protection aspects will contribute to a better result. This is also the case for the present "third pillar" - the cooperation in the field of security, police and criminal justice - which will be further integrated in the general EU framework when the Constitution enters into force.

Regulation 45/2001

Let me now come back to Regulation 45/2001 and the data protection rules that apply at the 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 terms 'Community institutions' and 'Community law' refer to

what is now the ‘first pillar’ of the European Union. Only activities that are totally within the ‘third pillar’ are not covered by the Regulation. Community institutions are for instance the European Commission, the European Parliament, and the Council of Ministers. ‘Community bodies’ refers to subordinate structures and agencies which may be located anywhere in Europe.

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 45/2001 is the implementation of that Directive at the 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 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 the 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 to ensure 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 at least some 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 practices. 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 me to work with and to develop further.

The tasks of the European Data Protection Supervisor have been described in the Regulation. They follow the same pattern as the tasks of national supervisory bodies: hearing and investigating complaints, conducting inquiries, informing controllers and data subjects, undertaking prior checks, etc. The Regulation gives me the power to obtain access to relevant information and relevant premises, where this is necessary for inquiries. I can also impose sanctions and refer a case to the Court of Justice.

Some of my tasks have a special character. The task to advise the Commission and other Community institutions about proposals for new legislation, also relates to draft Directives and other measures that are designed to apply at the national level, and may have to be implemented into national law. I consider this as a strategic task, that allows me to look at privacy implications at an early stage and to discuss possible alternatives. Monitoring relevant developments, which might have an impact on the protection of personal data, is also an important task.

The duties to cooperate with national supervisory authorities, and with supervisory bodies in the “third pillar”, like the supervisory bodies for Schengen, Europol and Eurojust, have a similar character. As a member of the Article 29 Working Party, set up on the basis of Article 29 of Directive 95/46/EC to advise the Commission and to develop harmonised policies, I have the opportunity to contribute at that level. The cooperation with supervisory bodies under the ’third pillar’ allows me to observe

developments there, 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. Please note that our relations are strictly horizontal: it is cooperation among good colleagues.

First experience

Unfortunately, it has taken some time for Commission, Council and Parliament to prepare and adopt implementing rules, and to select and appoint a Supervisor and an Assistant Supervisor. Since our appointment in January 2004, my Spanish colleague Joaquín Bayo Delgado and me have been working very hard to provide a good basis for further development of our new independent body. My experience of more than twelve years as President of the Dutch Data Protection Authority has been a great help in that context.

At present, we have a fully equipped office in a satellite building of the European Parliament in Brussels to work in. The competent budget authorities - Council and Parliament - have adopted a starting budget and supplementary budgets for 2004 and a first complete budget for 2005. The current staff plan provides for 19 full time posts, most of which have been filled, while recruitments for some new posts are ongoing. We aim for a good balance of national and European experience and different cultural backgrounds. I also signed an agreement with Commission, Council and Parliament about a number of supporting services, which allow us to concentrate on primary tasks as much as possible. Let me say, quite openly, that we are satisfied with the spirit of cooperation that we have experienced so far.

Meanwhile, the Community institutions and bodies are having their first experiences with external supervision of data protection. A first priority in that context was to develop a close cooperation with the Data Protection Officers. There are quarterly plenary meetings and many other contacts. It was unavoidable in view of our late arrival, that a backlog has developed for prior checking of processing operations that present specific risks, and that many of these systems have been working for some time. We are dealing with this problem in a pragmatic way, concentrating on certain carefully selected categories that qualify for "ex post checking" as a matter of priority, and responding to other cases as they arise.

In addition to this, we have the usual collection of complaints and requests for advice or information. Their numbers will increase as a result of the information campaign that we have launched. Brochures have been developed in all official languages to raise awareness about the rights of the data subjects and our role as new independent body. These brochures will also be made available to national authorities, since we are potentially dealing with citizens of all member states. Relevant information will also be available at the EDPS website: www.edps.eu.int

My advisory role is highlighted by a legal obligation for the Commission to consult the EDPS whenever it adopts a proposal for new legislation that may have an impact on the protection of personal data. In March, I intend to publish a policy paper that is to describe how I intend to take this task forward. Meanwhile, the first opinions on legislative proposals have been issued and published both in the Official Journal and on the EDPS website. These opinions play a useful role in the legislative process and give rise to further interventions, particularly in Parliament.

The cooperation with national authorities in the Article 29 Working Party or with the joint supervisory bodies in the third pillar is also developing. In both cases, I seek to contribute to and be part of the widest possible consensus and build on this in a wider context, while making my own specific comments or suggestions, where necessary.

This cooperation is important in view of the many initiatives that are likely to come up in the near future, particularly in the "third pillar". There are clear signals that the Commission is prepared to play a leading role and to invest more positively in data protection. I welcome this approach and intend to contribute to good results. Since more and more Union policies seem to depend on lawful processing of personal data, effective protection of personal data will become a critical factor for their success!