



**Measuring compliance with Regulation (EC) No 45/2001
in EU institutions and bodies ("Spring 2009")**

General Report

I. Introduction and Methodology

According to Article 41, paragraph 2 of Regulation (EC) No 45/2001 (the Regulation), the European Data Protection Supervisor (EDPS) is responsible for monitoring and ensuring the application of the Regulation. In March 2007, the EDPS launched a procedure known as "Spring 2007" as part of an effort to measure compliance with the Regulation in the various institutions and agencies and to take stock of the progress made so far. The first part of the operation took the form of letters addressed to the heads of institutions and agencies in their role as persons responsible for ensuring compliance with the Regulation and raised questions on various issues.

On the basis of the feedback received from the institutions and agencies, a general report on the level of compliance was drafted by the EDPS. Individual letters were also drafted and addressed to all the heads of institutions and agencies, giving precise feedback and in some cases setting specific targets in the field of compliance. The findings of the Spring 2007 led to various on the spot inspections in three institutions and one agency.

As announced, the operation was the start of an ongoing exercise by the EDPS to ensure compliance with the Regulation, with regular requests from the EDPS to the Directors of institutions and agencies in order assess further progress made in this field. This operation is referred to as "Spring 2009".

Letters were sent out in October 2008 requesting further updates on the situation in the agencies and institutions¹ in four areas:

1) Inventory of processing operations: the EDPS requested an update of the inventory of processing operations within the institution or agency and a relevant update on the level of Article 25 notifications entered in the DPO register;

2) Prior checking: the EDPS requested an update of the inventory of processing operations within the institution or agency subject to prior checking indicating whether they have been submitted to the EDPS; furthermore the EDPS requested information on the follow up of prior checking opinions;

3) Further implementation: the EDPS requested the agency or institution to proceed with the adoption of the implementing rules referred to in Article 24.8 of the Regulation if these had not yet been adopted and raised questions on requests made by data subjects as concerns access to their data;

4) Complaints to the DPO: the EDPS inquired about the number of complaints that were submitted to the DPO and on which provisions of the Regulation these complaints were based.

No distinction was made between agencies and institutions except in those newly set up agencies for which no DPO had yet been appointed and to which specific letters

¹ Letters were addressed to 13 institutions and to 27 agencies.

were sent requesting the appointment of a DPO (ECHA, F4E, REA). These will be dealt with separately at end of this report.

The EDPS received replies from all institutions and all agencies save two for which no reply was received despite reminders sent by the EDPS. The following report highlights the main outcome of the replies received.

II. Results of the reporting exercise

1) Inventory of processing operations

Article 25 of the Regulation provides that the DPO should receive a notification of processing operations involving personal data. Although not mandatory, the EDPS has underlined the usefulness of a general inventory of all processing operations involving personal data as a tool to measure compliance with this obligation and requested that the agencies and institutions send this inventory to the EDPS.

Institutions

All institutions save one have established an inventory of processing operations involving personal data within their own institution. One institution has submitted a partial inventory as the identification of processing operations is ongoing. The EDPS is therefore generally satisfied that processing operations have been identified reflecting the reality of processing operations within the institutions.

As concerns notifications of processing operations to the DPO in compliance with Article 25 of the Regulation, although this is an ongoing process as new processing operations are being developed, the general level of compliance is good. Whereas in the beginning of 2008 only two institutions could claim that all processing operations had been notified to the DPO, by the end of 2008 at least 6 institutions could claim completion of the DPO register.

In the other institutions, adequate progress has been made in the completion of the notification procedure. This is notably the case in the Commission where the level of notifications has increased from 596 notifications end of 2007 to 777 end of 2008 (bringing the level of notifications to 82% of the identified processing operations) and in the European Parliament with an increase from 130 notifications to 194 notifications end of 2008 (bringing the level of notifications to 84% of the identified processing operations). The appointment of data protection coordinators in the EP has greatly contributed to enhance the level of compliance in this field. The level of notifications to the DPOs in other institutions is generally rising but the EDPS will encourage further progress in this field so as to reach full compliance.

Agencies

As for the agencies, out of the 22 agencies which answered the EDPS request, 18 have established an updated inventory of processing operations involving personal data. The EDPS considers this as substantial progress compared to 2008 when only half of the agencies had established such an inventory. This gives a positive message that the agencies are developing internal tools to monitor the application of the Regulation.

Only nine agencies can claim that all, or near to all, processing operations have been notified to the DPO. In the remaining agencies, very few notifications or no notifications have been sent to the DPO. Some agencies have mentioned the main reasons for the low level of compliance with Article 25 such as restructuring of the agency regulatory framework, recent establishment of the agency, lack of resources for data protection and other priorities of the agencies.

The EDPS takes note of the issue of lack of resources afforded to data protection within the agencies and will remind Directors of agencies not only of the legal obligation to respect the provisions laid down in Regulation (EC) No 45/2001 notably in the field of notifications to the DPO, but also of the obligation to provide the DPO with the necessary resources to carry out his/her functions.

2) Prior checking

Concerning operations subject to prior checking, the EDPS requested an update of the inventory of cases identified as subject to prior checking indicating whether or not they have been submitted to the EDPS for prior checking.

Prior checking procedure in the agencies and in the institutions will be dealt with separately as a new procedure has been launched for agencies.

2.1. Inventory and level of notifications

Institutions

Two institutions (OLAF, EO) can claim that all identified processing operations falling within the scope of Article 27, have been notified to the EDPS and one institution is close to full notification (ECB).

In the other cases, even though the EDPS encouraged full compliance, complete notification for prior checking of identified cases has not yet been achieved. In some institutions, the EDPS has noted positive efforts to reach full compliance and believes that this target can realistically be expected in the course of 2009. In this respect, the identification and full inventory of all ex post processing operations falling within the scope of Article 27 is already a positive step towards ensuring compliance.

In at least three institutions the EDPS takes note of a quite low level of notifications and will be closely following further progress made in this field.

Agencies

As for the agencies, if most have established an inventory of processing operations subject to prior checking, the level of notification of these operations to the EDPS varies but is generally very low. Only one agency (OHIM) claims that all identified processing operations have been notified to the EDPS and one agency all but one (EMSA).

In view of the low level of notifications received from the agencies and the existence of standard procedures common to many agencies, the EDPS launched a new procedure for the prior checking of standard administrative processing operations already in place within the agencies. In this respect, following the drafting of guidelines in the field of recruitment, a first wave of notifications has been received in this field. On the basis of the notifications received, the EDPS drafted a common opinion. The EDPS nevertheless notes that four agencies have not notified their recruitment procedures. This has been justified by the lack of resources for the DPO, restructuring exercise within the agency or the recent appointment of a new head of Human resources. The EDPS will be following up these specific cases.

For all other processing operations relating to new procedures or to core business procedures falling within the scope of Article 27, the EDPS has requested the agencies to submit these notifications accordingly. The EDPS will also remind those agencies which have not identified all processing operations subject to prior checking to proceed with the establishment of an inventory of such operations.

The EDPS notes that some inventories submitted by the agencies include processing operations which a priori do not fall within the scope of Article 27. The EDPS will invite these agencies to re-examine their inventory in the light of previous EDPS prior checking opinions and non prior checking opinions.

2.2. Follow up of recommendations

As concerns the follow up of recommendations made in prior checking opinions, the EDPS raised the question of whether there was any internal procedure put in place to ensure the implementation of these recommendations and if so, whether the DPO was involved in this procedure.

In three institutions the DPO has put into place tables of follow up of EDPS recommendations or internal procedures to ensure follow up (OLAF, EO, ECB). Two institutions envisage formalising the monitoring of implementation of EDPS recommendations, notably to help speed up the process. In all other institutions, no formal procedure has been set up.

Even if the implementation of the EDPS recommendations takes place at the local level of the controller, in all but one institution, the DPO is closely or at least partially involved in the follow up procedure of recommendations. One DPO has adopted the practice of sending a reminder to the controller at mid term of the three month deadline within which the controller must implement EDPS recommendations.

In most agencies the issue of follow up of EDPS recommendations has not been addressed as no prior checking opinions have yet been adopted by the EDPS. In those agencies where prior checking opinions have been adopted, even if there are generally no specific monitoring procedures established in this field, the DPO is always involved in the exercise. In one agency, the DPO notably sends a reminder to the controller requesting information on how the controller intends to implement the EDPS recommendations.

3) Further implementation

3.1. Implementing rules

Article 24(8) of the Regulation provides for the adoption of implementing rules concerning the DPO; for those institutions and agencies which had not yet adopted such rules, the EDPS raised the question as to the status of adoption of these rules.

Most institutions have adopted implementing rules in accordance with the Regulation. In the two institutions in which rules have not yet been adopted, the process of adoption is well underway and the EDPS has been consulted on the content of these rules in the framework of Article 28 of the Regulation.

As for the agencies, the EDPS notes a big increase in the number of agencies having adopted such rules. Indeed since end of 2007, 6 agencies have adopted implementing rules leaving only five agencies that have yet to adopt them. Most of these agencies have announced their adoption and will be consulting the EDPS for comments on draft rules.

The EDPS is therefore satisfied with the progress made in this field.

3.2. Data subjects rights

The EDPS also raised questions on the exercise of the data subject's rights namely how many requests had been made and whether the institution or agency kept track of these requests. A question was also raised as to whether restrictions had been applied to these requests and if so on which grounds.

In general, institutions do not keep a centralised system to track requests from data subjects. Requests are usually addressed directly to the controllers who have no obligation to inform the DPO. Having said this one DPO does keep track of requests from data subjects either in the Data protection module or in the DPO files.

As to the number of requests, since there are few centralised systems tracking the numbers and types of requests it has been difficult for the institutions to produce exact figures of the number of requests. In those cases where such figures were available most requests were in the human resources field (personnel files, appraisal forms...).

In some institutions/bodies the implementing rules provide for rules on exercise of such rights (Council, ECB, for example).

In many institutions the administrative data base of the HR unit gives data subjects the possibility to access their data directly and to request for rectification of their data if appropriate (Council, CoR, COM, Council, EP, EESC).

As to the agencies, in general there have been no or very few requests for access. Despite these few requests, the agencies have provided that their DPO has, or will consider, keeping track of these requests (for example at Frontex, FRA, GSA, OHIM, EACI). One DPO (CFCA) has already put into place such a data base to register

requests from data subjects wishing to exercise their rights and has instructed staff to always inform DPO if such requests are made so as to be able to register these requests. Again, this gives a positive message that the agencies are developing internal tools to monitor the application of the Regulation. As in the institutions, the requests which have been filed in the agencies mainly concern the human resources area.

4) Complaints to DPO

The EDPS also raised the question on whether there had been any data protection complaints submitted to the DPO and if so on which provisions of the Regulation these complaints were based.

In the institutions, there have been few formal complaints in the field of data protection, but rather informal requests addressed to the DPO. Some institutions (for example, OLAF, EO, EIF, EDPS) can claim that they have received no formal complaints on the processing of personal data by them. In those institutions in which there have been formal complaints these mainly concern alleged excessive collection of data, excessive publication of information on the internet, retention of telephone traffic data, abuse of staff data by commercial companies, leaking of documents, data quality and lack of respect of the rights of the data subject.

In most agencies there have been no complaints lodged with the DPO concerning data protection issues. In some cases, if a complaint was filed it was also submitted to the EDPS who dealt with the issue.

5) Appointment of a DPO

For the agencies which had been newly set up at the time of the launching of the exercise, the EDPS sent specific letters requesting the appointment of a DPO in compliance with Article 24, paragraph 1 of Regulation (EC) 45/2001. The EDPS also underlined the importance of providing the DPO with adequate resources to be able to carry out his/her functions effectively. The EDPS requested notification of the appointment of a DPO as soon as possible.

On the basis of these requests the EDPS has been notified of the appointment of a DPO at the ECHA. The two other agencies (Fusion for Energy, REA) have not yet appointed a DPO but are in the course of doing so or justify the lack of appointment as they are still in the setting up phase of the agency itself.

The EDPS has also been informed of the appointment of a DPO at the ERCEA.

Conclusions and further steps

As concerns implementation of the Regulation in the institutions as examined in the frame of this exercise, the EDPS is positively satisfied that all but one institution have drafted an inventory of processing operations thereby contributing to the task of monitoring the processing of personal data. As concerns the level of notification of processing operations to the DPOs, the EDPS notes an increase in the number of institutions which have completed the process. However he does note that in some

institutions progress still has to be made and he will be encouraging further progress. In the prior checking field, only two institutions can claim that all Article 27 notifications have been sent to the EDPS. Although compliance with Article 27 is therefore not yet achieved in all institutions and agencies, there is a positive indication that in most institutions all identified processing operations will have been notified to the EDPS by end of 2009. For those institutions in which the level is particularly low, the EDPS will be closely monitoring further progress made.

As concerns the agencies, the EDPS notes that in general, positive progress has been made notably in field of identification of processing operations and the adoption of implementing rules. However, the EDPS notes that in general the level of notifications to the DPO and further notifications to the EDPS is relatively low. The EDPS will closely monitor further developments in the agencies and underline the importance of the respect of the Regulation at the level of agency management. The EDPS also notes that although there have been no or very few requests by data subjects for access to data under Regulation (EC) No 45/2001, the agencies are considering developing monitoring tools to keep track of these requests. This gives a positive signal that the agencies are developing internal tools to monitor compliance with the Regulation.

In the same way as the previous exercise, the "Spring 2009" exercise must be seen as a step in ongoing work by the EDPS to monitor and ensure the application of the Regulation. Individual letters have been sent in reply to all letters received from the institutions and bodies with particular emphasis according to the specifics of the case. The EDPS will also proceed with on the spot inspections in some institutions or bodies in view of checking the reality. Finally, further requests to measure compliance with the Regulation will also be sent at a later stage in order to assess further progress made.

Annex

List of abbreviations

Institutions and agencies subject to "Spring 2009" exercise

CdT	Translation Centre for the Bodies of the European Union
Cedefop	European Centre for the Development of Vocational Training
CFCA	Community Fisheries Control Agency
COM	European Commission
CoR	Committee of the Regions
CPVO	Community Plant Variety Office
Council	Council of the European Union
EACEA	Education, Audiovisual and Culture Executive Agency
EACI	Executive Agency for Competitiveness and Innovation
EASA	European Aviation Safety Agency
EAR	European Agency for Reconstruction
ECA	European Court of Auditors
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
ECJ	European Court of Justice
EDPS	European Data Protection Supervisor
EEA	European Environment Agency
EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
EIB	European Investment Bank
EIF	European Investment Fund
EMEA	European Medicines Agency
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMSA	European Maritime Safety Agency
ENISA	European Network and Information Security Agency
EO	European Ombudsman
EP	European Parliament
ERA	European Railway Agency
ERC EA	European Research Council Executive Agency
ETF	European Training Foundation
EU-OSHA	European Agency for Safety and Health at Work
Eurofound	European Foundation for the Improvement of Living and Working Conditions
FRA	European Union Agency for Fundamental Rights
Frontex	European Agency for the Management of Operational Cooperation at the External Border
F4E	Fusion for Energy
GSA	European GNSS Supervisory Authority
OHIM	Office of Harmonisation of the Internal Market
OLAF	European Antifraud Office
PHEA	Executive Agency for the Public Health Programme
REA	Research Executive Council