THE EDPS AS A UNIQUE STAKEHOLDER IN THE EUROPEAN DATA PROTECTION LANDSCAPE, FULFILLING THE EXPLICIT AND NON-EXPLICIT EXPECTATIONS

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The completion of the second five-year term of the first European Data Protection Supervisor finds his office a quite different organisation than the one described, or even envisaged, in its establishment document back in 2001.[1] As it will be immediately demonstrated, in particular the exercise of his consultative task (one of his three main tasks, together with supervision and co-operation) has transformed his office from a, perceivably, mostly controlling authority into an important, if not central, participant in the EU law-making process on all data protection matters. Although it is perhaps too early to assess whether this development is the result of external or internal factors, this analysis shall attempt exactly that: after briefly demonstrating the change that occurred in the EDPS office status, it shall attempt to analyse the factors that led to it. Finally, a third part shall discuss the future, particularly in view of the EU data protection reform package currently under way.

[1] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18.12.2000 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 [2001] OJ L8/1.

1. THE EDPS AS AN EU ADVISOR '*ON ALL MATTERS CONCERNING THE PROCESSING OF PERSONAL DATA*': A DECISIVE QUALITATIVE CHANGE OF COURSE

The institution[2] of the European Data Protection Supervisor (EDPS) was introduced in 2001, by means of a relevant chapter in Regulation 45/2001 (Chapter V). Its purpose is to ensure "*that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies*" (Article 41(2)). It was therefore the need to address personal data processing executed by Community institutions, that until that time remained unregulated,[3] that led to its establishment after the general legal environment (Article 286 of the Treaty of Amsterdam) required it. To this end, the newly founded institution was equipped with supervisory, co-operation and advisory functions.

Arguably, the EDPS advisory function is of a secondary nature in the text of Regulation 45/2001. Article 286 of the Treaty of Amsterdam refers only to the establishment of an "*independent supervisory body responsible for monitoring the application of such [data protection] Community acts to Community institutions and bodies*".[4] Also, no mention is made to any advisory role in Article 1 of Regulation 45/2001 (object of the Regulation): "*The independent supervisory authority established by this Regulation, hereinafter referred to as the European Data Protection Supervisor, shall monitor the application of the provisions of this Regulation to all processing operations carried out by a Community institution of body*" (1.2). No mention is to be found on consultative tasks in the preamble as well. Only in Article 41, introducing Chapter V and establishing the EDPS, some mention is made to his or her advisory role after it is expressly clarified that the EDPS is "*responsible for monitoring and ensuring the application of the provisions of this Regulation*".

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2 Technically, the EDPS is not an EU institution; on his office actual nature, ultimately adopting a *sui generis* solution, see below 2.2 and also H. Hijmans, "The European Data Protection Supervisor: The Institutions of the EC Controlled by an Independent Authority," *Common Market Law Review* 43, no. 5 (2006): 1324. However, for the purposes of this analysis reference shall be made to the EDPS office as, indeed, an EU institution.

3 In fact, it has been noted that "that Regulation 45/2001 is the implementation of that Directive [Directive 95/46] at the European level", P.J. Hustinx, "Data Protection in the European Union," *Privacy & Informatie* 2 (2005): 62–65.

4 Article 286(2). See also the relevant EU "comprehensive guide", where it is stated that "the new Article 286 will consist of two paragraphs which will provide respectively that: from 01.01.1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data apply to the Community institutions and bodies; before 01.01.1999, the Council is to establish an independent supervisory body responsible for monitoring the application of those Community acts to Community institutions and bodies", available at: <http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/index_en.htm>.

In fact, the consultative function of the EDPS is described in the Regulation in Article 28 and parts of Articles 41 and 46. Article 28 refers to his or her 'passive' consultative function, in the sense that the EDPS is to be consulted by Community institutions and bodies both at the initial stage of drawing up a new data protection measure and whenever adopting a data protection legislative proposal (par. 1 and 2 respectively). Article 46(d) of the Regulation clarifies that the EDPS has a duty to respond to such petitions for advice. However, the EDPS is also allowed to exercise his or her consultative tasks 'pro-actively': the same Article 46(d) sets that the EDPS may advise Community institutions and bodies "*at his or her own initiative […] 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*". In addition, the EDPS is to "*monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies*" (46(e)). The above provisions conclude the EDPS consultative function description in an otherwise detailed Regulation of altogether 51 articles, leaving such important issues untouched as the method of consultation, the legal status of EDPS opinions (both 'passive' and 'pro-active'), any follow-up possibilities etc.

The above demonstrate that the EDPS was envisaged at the time of his or her office's inception and establishment more as a controlling EU instrument for personal data processing by Community institutions and less as an EU advisor to all matters pertaining to data protection.

Regulation 45/2001 was introduced in early 2001 but it took some 3 years for the first EDPS to be appointed; this happened only on 17 January 2004, when Mr Peter Hustinx was appointed first European Data Protection Supervisor.

One year after his establishment, on 18 March 2005, the newly appointed EDPS gave the first evidence of the policy he intended to apply during his term.[5] Perhaps tellingly, the first policy paper he produced referred to his consultative role – the respective policy papers for his monitoring and supervision tasks came only during his second term, in 2010 and 2012 respectively.[6] In it, the EDPS consultative task is described as follows: "*the EDPS advises Community institutions and bodies and data subjects on all matters concerning the processing of personal data*" (underlining in the original). The same approach was adopted in the EDPS mission statement.[7]

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5 EDPS Policy Paper of 18.03.2005, *The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents*, published on: <www.edps.europa.eu> (henceforth, the "2005 Policy Paper").

6 EDPS Policy Paper of 13.12.2010, *Monitoring and Ensuring Compliance with Regulation (EC) 45/2001*, EDPS Policy Paper of 23.11.2012, *Policy on Consultations in the field of Supervision and Enforcement*, respectively, both published on: <www.edps.europa.eu>.

7 Mission Statement, Annual Report of the EDPS 2004.

At the time that appeared to be a bold interpretation of the EDPS mandate.[8] Although the wording of Article 41 indeed refers to "*advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data*", the preceding phrase[9] may be perceived as a limiting wording, setting the boundaries within which these "*matters*" are to be found. Such an interpretation, that "*all matters concerning the processing of personal data*" only refers to those matters posed by the "*processing by a Community institution or body*" and not to absolutely any data processing, would after all be compatible to the general scope of Regulation 45/2001: to regulate intra-Community personal data processing. Despite the above, the EDPS adopted the broadest possible interpretation and perceived his role as a general consultant to EU bodies and institutions on all data protection matters.

The EDPS working method was laid down in the same Policy Paper. The approach adopted was a pragmatic one: in pursuit of maximized effectiveness (as well as, presumably, in lack of any relevant guidance in the text of Regulation 45/2001), attention was given to the "*timing of the interventions*", favouring early informal consultations with the Commission.[10] In addition, attention was given to his co-operation with the Article 29 Working Party, acknowledging its role, expertise and limitations in scope, and stressing the need for complementarity.[11] Finally, "*dossiers*" and "*additional activities*" had to be chosen carefully, because (explicitly) "*resources are limited*".[12] Among others, "*the EDPS endeavours to identify some strategic policy themes. When it comes to these strategic themes, the EDPS shall act more proactively. Where appropriate, advice will be given ex officio, even without a formal legislative proposal*".[13]

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8 On the, at least complex, legal construction to do so (and opposing opinions) see H. Hijmans, "The European Data Protection Supervisor," 1321. Unexpected help, however, had already arrived in the form of a Court order (see below, under 2.3).

9 The whole Article 41(2) reads as follows: "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".

10 EDPS Policy Paper, The EDPS as an advisor to the Community institutions, para. 5.2.

11 EDPS Policy Paper, The EDPS as an advisor to the Community institutions, para. 5.3. Duplication in effort, however, at times with contrasting approaches were not avoided after all (see Y. Poullet and S. Gutwirth, "The Contribution of the Article 29 Working Party to the Construction of a Harmonised European Data Protection System: An Illustration of 'Reflexive Governance'?," in *Défis Du Droit à La Protection de La Vie Privée .Challenges of Privacy and Data Protection Law – Challenges of Privacy and Data Protection Law* (Brussels: Bruylant, 2008), 570–610, <http://works.bepress.com/serge_gutwirth/63>.

12 EDPS Policy Paper, The EDPS as an advisor to the Community institutions, para. 5.4.

13 Ibid.

The EDPS executed his aforementioned consultative tasks methodically and systematically.[14] As evidenced in his website,[15] four different instruments are used in order to exercise his role. The first pertains to the annual inventory, a planning tool where EDPS priorities for the coming year are noted at the end of the preceding year. The second refers to 'opinions'. According to the EDPS website this is the "*most important instrument*" at his disposal: "*by issuing opinions on a regular basis, the EDPS establishes a consistent policy on data protection issues. The opinions are addressed to those involved in the legislative negotiations, but also published on the website as well as on the Official Journal of the EU*".[16] Apparently, opinions for most of their part refer to the 'passive' advisory role of the EDPS, whereby whenever a proposal for legislation has a possible impact on data protection the Commission has to submit it to the EDPS for consultation and the EDPS has to reply. This process is mandatory, part of the formal EU law-making process on all data protection matters. The third instrument refers to the EDPS 'comments'. These mostly include the 'pro-active' advisory role of the EDPS, whereby his views are formally expressed without being asked to by the Commission or another EU institution or body. Finally, perhaps surprisingly, the fourth consultation instrument employed by the EDPS while executing his advisory tasks refers to court interventions. The power to "*intervene in actions brought before the Court of Justice of the European Communities*" is conferred to the EDPS by a separate legislative provision in Regulation 45/2001[17] and shall be elaborated in detail below, under 2.3.

A point that stands out while visiting the (comprehensive) EDPS website refers to the fact that he apparently executed the aforementioned distinction in his 2005 Policy Paper to the fullest possible extent: consultations on internal EU issues (for instance, staff recruitment, staff evaluation, video surveillance, public procurement, grants and external experts) are kept away from his "*consultative*" task listings. Instead, these issues (that under another interpretation would indeed exhaust the EDPS consultative role as per the Regulation) are listed as "thematic guidelines" under his "*supervisory*" role.[18] Accordingly, all issues elaborated under his "*consultative*" function either pertain to important Commission legislative proposals[19] or comment on initiatives and policy options of a broad concern to data protection.[20]

The EDPS 'comments', in particular, embody his approach on his role as a general-scope EU advisor on all data protection matters. As per the relevant

14 Himself considering them as "strategic" P.J. Hustinx, "Data Protection in the European Union".

15 See <http://www.edps.europa.eu>.

16 See <https://secure.edps.europa.eu/EDPSWEB/edps/Consultation>.

17 Article 47(1)(i) of Regulation 45/2001.

18 See <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Guidelines>.

19 Opinions, listed at: <https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/OpinionsC>.

20 Comments, listed at: <https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Comments>.

website explanation, "*the European Commission regularly issues communications aiming at taking stock of efforts in a specific European programme, at launching initiatives, or at exploring and testing new policy options. The Commission is not legally obliged to submit these communications to the EDPS for consultation. However, because the EDPS advises on all matters relating to data protection, and because the communications strive to shape or make policy, the EDPS may formally address them in a position statement called "comments*"". In addition, "*the comments are not limited to Commission communications, but can also be issued as a reply to other instruments adopted by the EU institutions, as well as to specific EU events which require an in depth position statement*". The above make evident that the EDPS was prepared to intervene on issues of his choice regardless whether invited or not by the Commission to do so. Also, he could issue a 'comment' on any data protection matter whatsoever, despite of the fact that other EU institutions and bodies (the Commission) may have failed to identify and address it altogether. Both EDPS policy options point to a decisive approach to pan-European data protection, at EDPS initiative and will.

A brief visit on the list of issues found on the relevant webpages prove the above approach. The EDPS office for the past ten years issued a great number of 'comments' divided into the subjects of "data protection concepts", "EU policies", "functioning of the EU institutions and bodies/staff management", "law" and "technologies".[21] The same categorization is used to organize issued 'opinions' (although their number, expectedly, is higher than the 'comments' published). The corresponding inventory list has been invariably published at the EDPS website.[22] A point that should also be noted refers to the fact that the EDPS, particularly during his second term, began intervening at all stages of the legislative procedure "*from the earliest phases of policy making, by reacting to Green Papers or requests for informal consultation, until discussions in Parliament and Council at different stages, including the final stages of conciliation*";[23] this, in practice, frequently meant multiple interventions for the same text following closely the various law-making stages and amendments, a difficult but necessary task in order to add (legal) value in the EU law-making process.

In addition, an important part of the EDPS consultative role was held by public appearances, public speaking and article authoring. During the past decade the EDPS himself as well as members of his office made numerous presentations and publications on various EU data protection matters, as evidenced in the EDPS website,[24] achieving a high level of visibility for their office and work.

As already noted, Regulation 45/2001 does not include any detail on the binding (or non-binding) effect of such EDPS consultations. To the authors'

21 Admittedly, once results are filtered down to each subject and specific topic, certain categories have attracted the EDPS attention significantly more in relation to others.

22 See <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Priorities>.

23 EDPS 2008 annual report, p.14.

24 See <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/SpeechArticle>.

knowledge, a study on 'compliance' or 'influence' or an 'impact assessment' of the EDPS interventions into EU data protection law has not yet been published. Evidently, the lack of express wording to the contrary means that EDPS opinions and consultations are voluntary for the Commission and other EU bodies and institutions to follow. It is unlikely, however, that the Commission and other law-making bodies will choose to completely ignore the opinion of an institution established at such high level, that also holds controlling powers over the personal data processing conducted by the same.[25] From this point of view, the 'soft power' held by the EDPS in the EU law-making process on all data protection matters that he chooses to intervene ought to be taken for granted.

It is therefore submitted that the exercise by the EDPS of his consultative task constituted a substantial differentiating factor during the first decade of operation of the EDPS office. The other two tasks granted by Regulation 45/2001 (supervision and co-operation) for most of their part refer to background operations that either affect a, relatively, small number of data subjects (supervisory task) or operate behind the scenes with unobservable results to individuals (co-operation). On the contrary, the consultative task, particularly as exercised for the past decade, is the only task that is accessible to and comprehensible by the wide EU public. This comes in accordance with a declared role for the EDPS to add "*visibility, giving data protection a face*".[26] In view of the above, this role was largely accomplished. This personification of EU data protection together with the 'soft power' described above point to the EDPS office as an important player in the general EU law-making process for all data protection matters – quite an important and substantial change or re-orientation of course since the introduction of Regulation 45/2001.

2. THE FACTORS OF CHANGE

Although it is probably too early to assess whether the qualitative change described above is due to internal and/or external factors, the following analysis shall attempt to highlight certain developments that are thought central in producing this effect.

[25] The EDPS himself notes that "These opinions play a useful role in the legislative process and give rise to further interventions, particularly in Parliament" P.J. Hustinx, "Data Protection in the European Union".

[26] H. Hijmans, "A New Body in the European Institutional Landscape : the EDPS," 12.03.2007, available at: <www.amicuria.org/library/Amicale_Hijmans_EDPS_2007-03-12.ppt>.

2.1. THE REVERSAL OF THE GENERAL DATA PROTECTION ENVIRONMENT AFTER SEPTEMBER 2001

Data protection in the EU changed substantially during the past ten years. After the 9/11 terrorist attacks in the USA and, some years later, elsewhere in Europe the focus was turned decidedly towards security-related personal data processing. This constituted a decisive change since the early 1990s, when the Data Protection Directive of 1994[27] set the, EU, regulatory scene: at that time, and for the years that followed until the September 2001 attacks, regulatory efforts were almost exclusively guided towards regulation of private sector processing. Illustrative of such prioritizing is the fact that a general scope legislative text for security personal data processing in the EU, in the same way that the Data Protection Directive regulated all other processing, came as late as in 2008.[28] Until that time processing for security purposes in the EU either benefited from specialized legislation (most notably in the cases of Schengen, Europol and Eurojust) or did not attract the (EU) regulator's attention at all.

The past decade witnessed therefore an unprecedented volume of data protection texts aimed at security-related processing. These texts carried varied legal statuses, taking the form of Directives (the data retention directive,[29] the, unfortunate to-date, EU PNR directive[30]), Council Decisions (the Prüm Treaty[31]), bilateral EU agreements (with the USA, Australia and Canada on PNR processing), Framework Decisions (the Data Protection Framework Decision) etc. Monitoring, or even support, in their release from a data protection perspective became problematic, because of the inherent limitation in the Data Protection Directive scope[32] and, consequently, its off-spring, the Article 29 Working Party.

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27 Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L281/31.

28 Council Framework Decision 2008/977/JHA of 27.11.2008 on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters [2008], OJ L350/60.

29 Directive 2006/24/EC of 15.03.2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC [2006] OJ L105/54.

30 Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final.

31 Council Decision 2008/615/JHA of 23.06.2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1.

32 As per the Directive's Article 3(2) "this Directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law".

The EDPS identified this 'niche' field of contribution almost immediately: in his 2005 Policy Paper he stated that "*Regulation (EC) 45/2001, that confers duties and powers to the EDPS, does not limit the advisory task to proposals for legislation within the first pillar. On the contrary, the EDPS has a general mission to ensure the respect of the fundamental rights and freedoms, which mission cannot easily be accomplished if such an important area as the third pillar is left out*".[33] He then supported this claim with a series of legal arguments, mostly based on the interpretation of Regulation 45/2001 purposes (consistency, co-operation, as well as the borderline distinction between first pillar and third pillar processing), that culminated in future developments ("*the pillar structure will come to an end under the Constitution*"). The same point of view was adopted with regard to the Article 29 Working Party: "*As a permanent body based in Brussels, and advising to the Commission, the Council and the European Parliament, he [the EDPS] can give quick and flexible reactions on proposals and can give opinions in areas where the Working Party does not have a formal role (like the third pillar) or no specific competences or interest*".[34]

Accordingly, in the years that followed, the EDPS lived up to his policy statement and participated actively in whichever occasion was raised, making thus security-related personal data processing expressly a priority of his office.[35]

Regardless of the merits of the legal argumentation behind it, the EDPS intervention in (former) third pillar regulatory initiatives assisted both the data protection purposes and his office. With regard to the former, much of personal data processing EU law-making that would otherwise remain outside data protection counsel found in the face of the EDPS an institutional participant providing the data protection point of view in, frequently, data protection unfriendly texts. With regard to the latter, the fact that the EDPS office became the *de jure* and *de facto* data protection speaker in all security-processing related matters added importance and offered it a specific role in the general EU law-making mechanism.

It was therefore a change in the data protection field that helped elevate the role of the EDPS. The shift towards security processing, caused by external facts, caught the until that time standard EU data protection mechanisms (the Data Protection Directive and its Article 29 Working Party) unprepared and underequipped. On the contrary, Regulation 45/2001, which was also introduced before September 2001, happened to profit from horizontal application; the EDPS, also applying the expansive approach on his consultative role discussed above,

33 EDPS 2005 Policy Paper, p. 5.

34 EDPS 2005 Policy Paper, p. 12.

35 According to the EDPS website, "so far, the majority of the opinions have concerned subjects related to the field of police and judicial cooperation or to the visa and immigration policy. Proposals in these areas may promote, for instance, exchange of information between authorities to fight against terrorism and other crime, possibly involving large scale databases" (see also, the EDPS 2008 annual report, p. 14).

quickly moved in to fill the gap. In this way EU data protection law-making in the security sector, that thrived during the past ten years, found a data protection speaker and participant in the face of the EDPS.

2.2. THE EDPS UNIQUE POSITION IN THE EU ESTABLISHMENT

The EDPS holds a unique position among EU institutions. Regulation 45/2001 introduced a position in the EU infrastructure with an unprecedented (a statement which is still valid today) combination of characteristics. The EDPS was envisaged both as a monitoring (in the strict sense of the term and also under a 'co-operation' context) and a consulting instrument. His office was established in order to control and to consult EU institutions, potentially even the same ones, while processing personal information for their own purposes and whenever releasing new (EU legislation). He was also given the option to bring cases or make interventions in front of the Court (see below, under 2.3). This places his office at a unique position, visible and powerful enough to promote the data protection purposes within the EU.

Even at its inception stage the introduction of the EDPS proved innovative, in the sense that it was the first time (and only, at least to-date) that the notion of an '*independent supervisory body*' appeared in EU law (in Article 286(2)). Apparently, until today no similar body exists in any other area within the Community. Furthermore, the uniqueness of the EDPS position is illustrated in the difficulty of awarding to it its proper legal status within the EU establishment. As it has been already identified,[36] the EDPS is not an EU institution *stricto sensu*, because he is not listed in the Treaty provisions enumerating the Community institutions; he is not an EU agency, because agencies do not have the power to supervise EU institutions; he is not an EU regulator, because he is only awarded quasi-legislative powers; he is not an ombudsman, because he holds far more extensive powers than the ombudsman within the data protection field; and, finally, he is not a judicial authority, because, although he holds relevant functions as well, he was never intended to operate as one. Consequently, it all adds up to a *sui generis* status for the EDPS[37] – even the breadth, however, if the above listing, where each role touched one but not all of the EDPS functions, is useful to demonstrate the uniqueness of the EDPS position within the EU establishment.

This unique, binary role of, in essence, both the controller and the consultant evidently benefits the latter. The fact that the EDPS office is an office awarded with substantial powers among EU institutions, meaning that it has the power to monitor their personal data processing, either directly or through their data

[36] See H. Hijmans, "The European Data Protection Supervisor", p. 1324ff.
[37] See H. Hijmans, "A New Body in the European Institutional Landscape: the EDPS".

protection officers, examine complaints, warn or admonish the controller, and even refer the matter to the Court (and to other institutions) makes it a decisive player in the EU arena and not simply a data protection watchdog. This role is in turn important when it comes to data protection consulting (see also above, under 1); although a definitive study is not yet at hand, under said conditions the 'soft power' exercised by the EDPS consultation in the EU data protection law-making ought to be taken for granted.

Notwithstanding the above, institutional, approach, the EDPS office was apparently designed in Regulation 45/2001 to exercise *quasi*-DPA, but not *full*-DPA functions. Under the seven-role criterion developed by Bennett and Raab ("*commissioners act, variously, as ombudsmen, auditors, consultants, educators, negotiators, policy advisers and enforcers*")[38] the establishing document for the EDPS awards his or her office with certain, but never complete, powers and duties in comparison to a Member State Data Protection Authority: prior-checking functions overshadow other ombudsmen or auditing powers, consultation and policy advising possibilities are limited (at least under one interpretation of the Regulation wording), and enforcement has to be streamlined with the general EU establishment rules.[39] In this way a unique data protection office was setup, in the sense that it resembled national DPAs and even asked for its Head to originate from them;[40] once appointed, however, the EDPS would be afforded with much more limited powers than his or her colleagues at Member State level. Nevertheless, the first EDPS, assisted also by Court case law as will be immediately demonstrated, swiftly moved in order to make his office resemble a proper DPA authority, perhaps fulfilling expectations that were not covered in its establishment document.

2.3. THE COURT CASE LAW AS A *DEUS EX MACHINA* FOR THE EDPS AUTHORITY

Regulation 45/2001 provides for several ways of interaction between the EDPS and the Court of Justice. This was probably inevitable, given the fact that his office was established as a formal EU institution; the EDPS is therefore granted with the right to refer matters to the Court and, respectively, his decisions may be challenged in front of the Court. These provisions are covered in Articles 47 and 32 of the Regulation. However, it was the EDPS power to "*intervene in actions brought before the Court of Justice of the European Communities*" (Article 47(i)), and in particular the way such power was first executed in practice, that proved,

38 C.J. Bennett and Ch. D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Ashgate Publishing, Ltd., 2003), p. 134ff.

39 See Article 49 of the Regulation.

40 See Article 42(2) of the Regulation.

arguably, one of the cornerstones for the EDPS establishment within the EU infrastructure.

The case that brought such beneficial results for the EDPS powers was none other than the, famous by now, PNR case[41] – well-known to data protection scholars for others of its merits and consequences but, perhaps, little studied as to the, crucial, effect that it created with regard to the EDPS office. In short, the case pertains to the agreement for the exchange of airlines' passenger data between European airlines and the US authorities, in the aftermath of the 9/11 terrorist attacks. The European Parliament asked, successfully, for the annulment of the agreement of 2004; its case was won, and, as is known, the EU-USA PNR agreements are by now in their third (counting the interim) generation and under way for their fourth amendment. However, the above facts are of no concern to this paper: what is of concern here is the fact that this case provided an excellent opportunity for the first, and newly established at that time, EDPS to test his Court intervention powers as per Article 47(i) of Regulation 45/2001.

On 21 October 2004, only a few months after his appointment, the EDPS formally asked the Court for leave to intervene in support of the Parliament motion; the Council objected to such intervention, exactly on the grounds that "*the Supervisor's task is […] to supervise the processing of personal data by a Community institution or body, whereas the present case relates to the adoption of a legislative measure concerning the processing of data by airline companies, […], data which are not in any event processed by a Community institution or body*".[42] The issue became the object of a Court order. In it, the Court accepted the EDPS argumentation and stated that "*in accordance with the second subparagraph of Article 41(2) of Regulation No 45/2001, the Supervisor is to be responsible not only for monitoring and ensuring the application of the provisions of that 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, but also for advising Community institutions and bodies on all matters concerning the processing of personal data. That advisory task does not cover only the processing of personal data by those institutions or organs. For those purposes, the Supervisor carries out the duties provided for in Article 46 of that regulation and exercises the powers conferred on him by Article 47 of the regulation*".[43]

The Court therefore supported the EDPS viewpoint that his role is, effectively, twofold: to monitor the processing of personal data by Community institutions and to advise the same "*on all matters concerning the processing of personal data*". Such explicit and unequivocal support and at such high level constituted an undeniable victory for the EDPS. The unique timing ought also not escape us:

41 CJEU, Joined Cases C-317/04 and C-318/04 [2006] ECR I-4721.
42 Order of the Court (Grand Chamber), 17.03.2005, in Case C-317/04, para. 12.
43 Order of the Court (Grand Chamber), 17.03.2005, in Case C-317/04, para. 18.

the EDPS filed his intervention eight months after his appointment to his post; the Court order was issued on March 17, 2005; the EDPS Policy Paper where the above interpretation of Regulation 45/2001 was laid down was issued exactly one day later, on March 18, 2005. It therefore appears that the EDPS waited until the Court supported his, bold, view of his powers, before formally introducing them in writing.

From that point on the EDPS authority to speak on all data protection matters in front of EU institutions went unchallenged. After the above Court order and the publication of his 2005 Policy Paper no Community institution objected in any way to such scope-setting. It therefore appears that through careful planning, and perhaps with a little bit of luck as to the opportunity for a Court intervention in an important and high-profile case and in such short time after his appointment, the EDPS managed to establish in a single move his office presence and authority within the EU infrastructure once and for all.

2.4. THE SUCCESSFUL CHOICE OF DOSSIERS FOR EDPS INTERVENTION

The last factor of change identified in this paper pertains to an internal, rather than an external, fact: the careful, and successful, choice of dossiers for EDPS intervention over the past decade. Since the establishment of his office the EDPS identified the need to focus his resources that were, expressly, limited[44] – particularly if one kept in mind the task of advising Community institutions on all data protection matters within the EU. To this end, a planning tool was employed in order to program and phase work.[45]

Regardless, however, of the particulars of workflow organization, a feeling of ever-presence was, arguably, transmitted for the past decade from the EDPS office on all important, and less important, dossiers that data protection within the EU was confronted with. The EDPS office managed to follow closely the drafting of all major EU data protection instruments, issuing several reports that corresponded to the different phases (and wordings) of the law-making process.[46] On top of that, difficult in itself, task, the EDPS office apparently never failed to issue statements whenever an important data protection matters was raised anywhere in the EU.[47]

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44 See EDPS Policy Report 2005, p. 10.

45 The EDPS inventory (see the EDPS website, under 'consultation').

46 For instance, the EDPS issued three separate opinions while the 2008/977 Framework Decision was in the making, two opinions on the latest (2009) ePrivacy Directive amendment, and three interventions on the, yet unfinished, EU data protection reform package (see also below, under 3).

47 For instance, in 2013 the EDPS issued comments on such issues as the converged audio-visual world, the sale of counterfeit goods over the internet, European company law and corporate governance, and intelligent transport systems.

And, as if the above were not enough, work continued at more remote, but also important, areas of data protection regulation.[48]

The above feeling of ever-presence could not have been achieved without careful planning and dossier selection. The EDPS, through his multiple and repeated interventions in all crucial data protection matters that were raised in the EU within the past ten years, maintained his office's relevance and established it into public conscience, indeed providing "visibility" and a "face" to data protection.

3. THE FUTURE: THE EDPS AND THE EU DATA PROTECTION REFORM PACKAGE

Since early 2012 the EU has initiated the process of amending its basic data protection rules – most prominently, its Data Protection Directive that by now is more than fifteen years old and, more significantly, was drafted within off-line world circumstances. The amendment effort, that at the time of this paper has not yet been concluded (neither is it predictable whether it will be concluded at all), took the form of two instruments proposed by the Commission, a Regulation[49] replacing the Data Protection Directive and a Directive[50] replacing the Data Protection Framework Decision. Although the final wording of these documents (if any) is not yet available (or even foreseeable), it is submitted in this paper that, in the event that the original Commission proposal is ultimately adopted, this will constitute an upgrade for the EDPS office.

According to the draft Regulation, the Article 29 Working Party of the Directive will be replaced by a European Data Protection Board. Such Board shall consist of the heads of the Data Protection Authority of each Member State and, expressly, the EDPS (Article 64(2)). Admittedly, this is also the case today, with the EDPS formally participating in the Article 29 Working Party.[51] However, the draft Regulation grants an upgraded role to the EDPS: he shall serve in the European Data Protection Board as either one of its two deputy chairpersons or its chair (Article 69(1)). In addition, the European Data Protection Board shall

48 See, for instance, EDPS Opinion of 11.07.2013 on the Community trademark draft Directive, EDPS Opinion of 30.05.2013 on the transparency of measures regulating the prices of medical products, EDPS Opinion of 27.03.2013 on insolvency proceedings, or the EDPS Opinion of 23.11.2012 on the Proposal for a Regulation establishing the European Voluntary Humanitarian Aid Corps.

49 Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

50 Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final.

51 According to Article 46(g) of Regulation 45/2001.

not have a permanent infrastructure; instead, its secretariat shall be provided by the EDPS office. The latter shall be reinforced with several new staff members and appropriate budget allocation, in order to perform its additional duties.

The above constitute a clear upgrade for the EDPS post, both formally and informally. The EDPS shall no longer be a simple member of the Board, but rather either its deputy chairperson or its chair. The Board itself shall not be a brick-and-mortar organisation, but shall instead be hosted in the EDPS office, where some of the EDPS staff shall be allocated (full time? part-time? under what circumstances?)[52] to its duties. It appears therefore that, at least in the Commission's mind, the EDPS is an important, and permanent, data protection participant, to be taken seriously into consideration (and even appeased) whenever new data protection rules and regulations are released.

CONCLUSION

When Regulation 45/2001 was introduced the data protection scene differed substantially from what is known (and even considered self-evident) today: September 11 and its aftermath had not yet occurred, technologies such as social networks, cloud computing, big data or even the Web 2.0 were yet unknown, security agencies had limited appetites to access databases, and data protection threats mostly came from private sector large-scale (off-line) personal data processing. Therefore, the Regulation came perhaps more as a technicality, amending a perceived gap in processing by EU institutions that was left unintentionally by the Data Protection Directive immediately when the legal conditions for it came into place.

The first EDPS that would be appointed under Regulation 45/2001 would conceivably face two options: either serve his or her legislative mandate *stricto sensu*, primarily warranting an adequate level of protection for intra-EU personal data processing and incidentally consulting whenever asked to, or adopt an expansive perception of the Regulation wording and his or her mission (ie advise on "*all matters concerning the processing of personal data*"). Either option would be completely acceptable and understandable: after all, intra-EU personal data processing comprised such crucial fields for all Europeans as Schengen, Europol, Eurojust and Eurodac. Monitoring them all constitutes in itself a significant task, adding value to EU data protection as a whole. However, it is critical also to note here that this dilemma belonged only to the first EDPS – given that the EDPS office was at that time a new, unique agency, the footprint of the first EDPS would expectedly set the tone for his successors as well.

[52] Article 71 of the draft Regulation sets that the Board secretariat will be "under the direction of the chair", but it is perhaps hard visualising staff that will be employed (and paid by) the EDPS being subject to the directions of a different individual (if the EDPS and the chair of the Board are not the same person).

The same applies to the fulfilment of public, explicit or implicit, expectations: as was demonstrated above, the EDPS office is by design handicapped when compared to a typical Member State DPA. Its position in the EU establishment is unique, both when viewed institutionally and practically. It was therefore up to the first EDPS to set the level of public expectations from his office, either accepting and executing as best as possible its *quasi*-DPA role, or attempting to expand it in order to resemble a proper DPA that practices at a top EU level.

Mr Hustinx apparently opted for the second option. Offered with a little bit of luck (the opportunity to cause the Court to rule on his office intervention -and hence advisory- function in a high profile case only within months since his appointment) he made good use of it, publishing a Policy Paper on the single issue of his mandate that was perhaps under dispute immediately after the Court's favourable decision. He then went on to strategically and systematically build upon it, making the EDPS consultations an indispensable item of data protection within the EU. In this way he created a relevant and central to the EU data protection process office. The results of his ten year tenure are visible today, in the draft Commission proposal for the EU data protection reform package: the future of his office is not only secured, but even reinforced and upgraded, holding a central and permanent role in the handling of the difficult data protection dossiers of the future.