

Common Market Law Review

KLUWER LAW
INTERNATIONAL

A WoltersKluwer Company

Published by:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Kluwer Law International
Prospero House
Lower Ground Floor
241 Borough High Street
London SE1 1GA
United Kingdom

Sold and distributed by:

Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
E-mail: kluwerlaw@turpin-distribution.com

Subscription enquiries and requests for sample copies should be directed to Turpin Distribution Services Ltd.

Subscription prices, including postage, for 2006 (Volume 43):

EUR 619.00 / USD 730.00 / GBP 433.00.

This journal is also available online. Online and individual subscription price are available upon request. Please contact our sales department for more information at +31 (0)172 641562 or at sales@kluwerlaw.com.

Common Market Law Review is published bimonthly.

For information or suggestions regarding the indexing and abstracting services used for this publication, please contact our rights and permissions department at permissions@kluwerlaw.com.

© 2006 Kluwer Law International

ISSN: 0165 0750

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Rights and Permissions Department, Wolters Kluwer Law & Business, 76 Ninth Avenue, Seventh Floor, New York, NY 10011, United States of America. E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com

THE EUROPEAN DATA PROTECTION SUPERVISOR: THE INSTITUTIONS OF THE EC CONTROLLED BY AN INDEPENDENT AUTHORITY

HIELKE HIJMANS*

1. Introductory remarks

Data protection was introduced in the EC Treaty by the Treaty of Amsterdam. Article 286 EC reads as follows:

1. From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.
2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.

This article starts with a literal quotation of Article 286 EC for a reason. The text of Article 286 demonstrates the impact on the regulatory framework and the impact on the institutional framework of the European Union resulting from the introduction of a new field of activities within the Community Framework:

– Article 286(1) implies that Directive 95/46/EC,¹ addressed to the Member States, and other Community acts on the protection of personal data apply automatically to the Community institutions and bodies. It is questionable whether Article 286 EC indeed has this direct effect. In any event, the Community legislator adopted Regulation No. 45/2001/EC, *inter alia* to imple-

* Administrator at the offices of the EDPS. Former Legal Secretary at the ECJ and Counselor at the Dutch Ministry of Justice. This article contains personal opinions only. The author thanks H. Kranenborg for his contributions to earlier versions of this article, as well as several colleagues at the EDPS for their comments. A. Beach contributed by improving the use of the English language.

1. Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31.

ment Article 286(1) EC.² This Regulation contains substantive rules on data protection for the Community institutions and bodies, equivalent to those of Directive 95/46.

– Article 286(2) provides for the establishment of an independent supervisory body, a new phenomenon within the institutional framework of the European Community. This provision was needed to (further) ensure that personal data are equally protected at the level of the Community as in the Member States. Article 286(2) emphasizes that independent supervision as imposed on the Member States by Directive 95/46 can be seen as an essential part of the protection itself. On the basis of Article 286(2), the European Data Protection Supervisor (EDPS) was established by Regulation 45/2001, some years later than the date foreseen in Article 286 EC. The Regulation entered into force in February 2001 and the first supervisor and the assistant supervisor took office on 17 January 2004, the date their appointment took effect.³

This article will focus on the concept of the EDPS as an independent supervisor of Community institutions and bodies. To a large extent, the role of the EDP can be compared to that of the European Ombudsman,⁴ however it will be shown in this article that the nature of the duties and powers of the EDPS differs on essential points

2. Introduction to the EDPS

2.1. Data protection

The right to data protection can be characterized as the fundamental right of an individual to the protection of personal data concerning him or her. Data protection is closely linked to privacy⁵ as is illustrated by Article 1 of Regu-

2. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 Dec. 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, O.J. 2001, L 8/1. According to its 5th recital, the Regulation is necessary, *inter alia*, to provide the individual with legally enforceable rights.

3. The delay of 3 years is due to the fact that first an agreement had to be made on the salary (etc.) and the seat of the supervisor (cf. Decision No 1247/2002/EC of the European Parliament, of the Council and of the Commission of 1 July 2002 on the regulations and general conditions governing the performance of the European Data-protection Supervisor's duties, O.J. 2002, L 183/1) and subsequently Parliament and Council needed to agree on candidates.

4. Peters, "The European Ombudsman and the European Constitution", 42 CML Rev. (2005), 697–743.

5. More comprehensive explanations can be found in Korff, *Data Protection Laws in the European Union*, (Federation of European Direct and Interactive Marketing, 2005) and in the

lation 45/2001. This article provides that all Community institutions and bodies shall *inter alia* protect the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data. However, the two rights are not identical. In the EU Charter of Fundamental Rights, data protection is introduced as a fundamental right separate from the right to privacy.⁶ The right to data protection applies to all personal data and is not limited to data related to the private or the family life of a person.⁷

The core principles of data protection were developed in the 1970s as a reaction to the growing impact of ICT. They were laid down in 1981 in Convention 108 of the Council of Europe.⁸ The essence of data protection is adequately reflected by Article 8 of the Charter of Fundamental Rights of the European Union. According to its second paragraph, “[s]uch 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.” Article 8(3) states that “[c]ompliance with these rules shall be subject to control by an independent authority”. The latter provision confirms that independent control is an essential part of the protection itself.⁹

2.2. Regulation 45/2001

Regulation 45/2001 has a wide field of application. According to its Article 3, it shall apply to the processing of personal data by all Community institutions and bodies. Chapter II of the Regulation describes how they should protect these rights and freedoms.

Article 1(2) and Chapter V of Regulation 45/2001 introduce the EDPS as a new body responsible for the monitoring of the application of the provisions of the Regulation to all processing operations carried out by a Community institution or body. This includes advising the Community institutions

EDPS background paper, *Public access to documents and data protection*, 2005 (see: www.edps.europa.eu).

6. Art. 7 of the Charter includes the right to privacy, Art. 8 the right to data protection.

7. This scope is well illustrated by the Joined Cases C-465/00, C-138/01 & C-139/01, *Österreichischer Rundfunk*, [2003] ECR I-4989, paras. 64–75. See also Case C-101/01, *Lindqvist*, [2003] ECR I-12971.

8. Convention of the Council of Europe for the Protection of Individuals with Regard to Automatic Processing of Personal Data, [1981] ETS 108.

9. As does Art. 286(2); see section 1 *supra*. To be precise: independent control was not required by Convention 108, but was later on added as an essential element of the protection, e.g. in Directive 95/46.

and bodies on all matters concerning the processing of personal data. For the fulfilment of this task, the EDPS has been given certain duties and powers (see, in particular, Arts. 46 and 47 of the Regulation). His decisions can be reviewed by the European Court of Justice (Art. 32 of the Regulation).

According to his mission statement,¹⁰ the EDPS has three tasks: supervision, consultation and cooperation. These tasks will be discussed individually.

2.3. *Supervision*

2.3.1. *A cascade*

The task of supervision by the EDPS relates exclusively to Community institutions and bodies. Supervision of organs of the Member States and of private parties is left to national and sub-national data protection authorities under Directive 95/46. The task of the EDPS under Regulation 45/2001 is fulfilled by carrying out prior checks, informing data subjects, hearing and investigating complaints, conducting other inquiries, and taking appropriate measures where needed.¹¹ The EDPS has the specific task of the supervision of the Central Unit of Eurodac (which allows the comparison of fingerprints of applicants for asylum), under Article 20 of the Eurodac Regulation.¹² Similar tasks are foreseen as regards other large scale information systems on persons in the area of freedom, security and justice.¹³

It may be self-evident, but the EDPS is not the only responsible and not even the first body responsible for the compliance of the Community institutions and bodies with data protection rules. The primary responsibility for respecting the law lies with the institutions and bodies themselves, under control of the Court of Justice. Regulation 45/2001 foresees two new layers. The system thus provides for a cascade¹⁴ formed by:

10. As included in the Annual Reports of the EDPS over 2004 and 2005 (see: www.edps.europa.eu). In this mission statement (without a legal status) the EDPS specifies his tasks under Regulation 45/2001.

11. Mission Statement, Annual Report of the EDPS 2004.

12. Council Regulation (EC) No 2725/2000 of 11 Dec. 2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention, O.J. 2000, L 316/1.

13. See the Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (COM(2004)835 final) and the three Proposals regarding the Second Generation Schengen Information System (SIS II) (COM(2005)230 final, COM(2005)236 final and COM(2005)237 final).

14. The EDPS himself speaks of a "layered approach". See the Position paper on the role of Data Protection officers in ensuring effective compliance with Regulation (EC) 45/2001, 28 Nov. 2005, www.edps.europa.eu.

- the institutions or bodies themselves or organizational entities within these institutions or bodies, or, in the terms of the Regulation, “controllers”. In quite a few cases, a responsible official is designated as controller;
- the Data Protection Officers (DPOs) within the institutions or bodies. They combine two qualities: they are internal (they know the institution or body from the inside) and they are independent (they are not subject to instructions by superiors);
- the EDPS as an external authority;
- the European Court of Justice, offering legal protection in two stages.

2.3.2. DPOs and the EDPS

As regards supervision, the DPOs have an “intermediary” role between a Community institution or body and the EDPS. It is interesting to see how the DPOs and the EDPS interrelate since on the one hand the tasks of the DPOs and the EDPS have many similarities, whilst on the other hand the DPOs are subject to the authority of the EDPS.¹⁵

An important similarity can be found in the tasks of the DPOs listed in Article 24(1) of Regulation 45/2001. Their main task is mentioned under (c). The DPOs are responsible for ensuring in an independent manner the internal application of the Regulation and more specifically for ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by processing operations. Moreover, the independence of DPOs is guaranteed in similar terms to the independence of the EDPS,¹⁶ although under a somewhat “lighter” regime, laid down in Article 24 of the Regulation. The DPO is appointed for a certain period and can only be dismissed under very exceptional circumstances. The Regulation ensures that both the necessary staff and budget to do the job are provided for. The DPO may not receive any instructions.

The “subordinate” position towards the EDPS is illustrated in a number of ways. A DPO is expected to cooperate with the EDPS and to respond to his requests. He notifies cases for prior checking to the EDPS. No DPO can be dismissed without the consent of the EDPS. This difference in position between a DPO and the EDPS is justified by the fact that internal control is by nature not the same as external control. A person responsible for internal control can have an independent position, but he remains part of the institution itself.

15. Although there is no formal hierarchy. Such a hierarchy would not be compatible with the independent position of the EDPS.

16. Under Art. 42–44 of Regulation 45/2001. See section 4.1 where another similarity will be highlighted between the EDPS and the European Ombudsman.

2.3.3. *How does supervision work?*

Supervision by the EDPS is in many aspects comparable to the way in which the Ombudsman acts in cases of maladministration. The EDPS cooperates with the Community institution or body in order to improve the quality of data processing and thus enhance good governance. However, under Article 47 of Regulation 45/2001 the EDPS possesses the power to enforce his position. Acts of the EDPS can be challenged before the European Court of Justice. The task of supervision of the Community institutions and bodies can be fulfilled on the initiative of the institutions and bodies, of the data subject (the complaint procedure), or of the EDPS (or the DPO). It can be concluded from the EDPS Annual Report 2005 that in practice, the emphasis has been placed on the first two types of supervision to date.¹⁷

2.3.4. *Initiative of the institutions and bodies: prior checking*

Every new processing operation within a Community institution or a Community body has to be notified to the DPO, prior to its entry into force (Art. 25 of Regulation 45/2001). The DPO has to first evaluate the operation. If the operation presents specific risks for the data subject, it is his duty to notify the EDPS (Art. 27 of the Regulation). The EDPS carries out the prior checking and delivers his opinion, normally within two months following receipt of the notification. In 2005, the main issues of prior checking concerned medical data and other health related data, data on evaluation of the staff of the institutions and personal data relating to administrative enquiries and disciplinary proceedings.¹⁸

The Regulation does not explicitly require the institution or body to postpone the entry into force of a processing operation until the EDPS has delivered his opinion. The use of the word opinion – instead of “authorization”¹⁹ – could be an argument in favour of the absence of such an obligation. However, there is more reason to see the obligation to postpone as the logical consequence of Article 27 of Regulation 45/2001. This article provides for strict deadlines for the EDPS, including the legal consequence should the EDPS not abide by these deadlines (in which case the “opinion” is deemed to be positive). If the institution or body were not obliged to wait for the opinion of the EDPS, there would be no need for these strict deadlines.

17. This is why the third type of supervision is not dealt with explicitly in this article.

18. As the EDPS Annual Report 2005 clarifies (para 2.3.3), much of the prior checking in 2005 was done *ex post*, related to processing operations already existing before 17 Jan. 2004, the date the EDPS took office.

19. The 54th Recital of Directive 95/46 implies that – as regards prior checks on the national level – a prior checking may result in an opinion or an authorization to be determined under national law.

Moreover, the obligation results from the duty of genuine cooperation between the institutions.²⁰

This point illustrates the “double” nature of the prior checking procedure. It includes at an initial stage the rules for cooperation between two administrative bodies. One body (the EDPS) can give recommendations regarding an envisaged data processing operation of another (institution or) body. These recommendations can in turn be discussed and the institution or body can subsequently, where needed, modify the processing operation. This is how the prior checking procedure normally works. However, if the Community institution or body does not modify its processing operation according to the recommendations of the EDPS, the latter may exercise coercive powers.²¹ In those cases, cooperation ends and a second stage with a formal, legal procedure begins.

2.3.5. Initiative of the data subjects: complaints

Any natural person may lodge a complaint with the EDPS concerning the breach of Regulation 45/2001 by a Community institution or body. According to its Article 32(2), the alleged breach has to concern his substantive right to data protection.²² In other words, the breach has to concern him both directly and individually.²³ The procedure for complaints is more flexible than the system for prior checking and reflects the cascade described above to an even greater degree. The comments given here on this procedure have to do with the legal protection offered to the data subject.

Although Article 32(2) strengthens the legal protection of the data subject, it potentially opens up lengthy and complicated procedures:

- (i) The provision does not contain a time limit for the complainant. He can lodge a complaint at any time. This absence of a time limit can be explained by the fact that the complaint does not necessarily concern a *decision* of the Community institution or body, addressed to the data subject.
- (ii) The time limit for the EDPS to respond to the complaint is rather long. Whereas the EDPS has to react within two months with regard to prior

20. Not only the Member States under Art. 10 EC, but also the institutions are bound by this obligation. The Court has held that inter-institutional dialogue is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions (see e.g. Case 204/86, *Greece v. Council*, [1988] ECR 5323, para 16).

21. See Art. 27 of Regulation 45/2001.

22. Art. 33 provides for a rather specific procedure for Community Staff and does not mention this limitation. There are reasons to assume that Staff Members can complain to the EDPS about matters that do not affect them directly and individually (to allow for instance whistle blowing).

23. This is the terminology used by the Court of Justice in its case law on Art. 230(4) EC, see Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, [2002] ECR I-6677, para 44.

checking cases (with possibilities for extension), he has a period of six months in which he can react to a complaint according to the provisions in Article 32(2).

(iii) These lengthy delays only form a part of a cascade of legal (or quasi legal) protection.

As to the last point, in the event that a data subject is of the opinion that a Community institution or body is processing his personal data contrary to the provisions of Regulation 45/2001, he can act in the following ways:

a. The data subject can request the Court of First Instance (CFI) to annul the contested *decision*, provided that a contestable decision is taken. The appeal to the CFI should be lodged within two months after the contested decision was taken (Art. 230(4) and (5) EC).

b. The data subject can submit a complaint to the European Ombudsman concerning an instance of maladministration within two years (Art. 2(2) of the Statute of the European Ombudsman).

c. The data subject can lodge a complaint with the EDPS against the contested *processing* (not restricted to a decision) of his data by the Community institution or body (Art. 32(2) of Regulation 45/2001). Subsequently, the data subject can ask the CFI to annul the (explicit or implicit) decision of the EDPS (Art. 32(3) of Regulation 45/2001, and Article 230 EC). Again, this must be done within 2 months (Art. 230(5) EC). Alternatively, the data subject can lodge a complaint with the European Ombudsman (within two years). This complaint must concern an instance of maladministration by the EDPS.

d. The data subject can approach the DPO, after which procedure a, b or c can be followed.

e. The data subject can approach the Community institution or body concerned, after which procedure a, b, c or d can be followed.

For Members of Staff of the European Communities, the situation is even more complicated. For example, a Staff Member can lodge a complaint with the EDPS under Article 90b of the Staff Regulations,²⁴ as well as under Article 33 of Regulation 45/2001.

24. Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 Feb. 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, O.J. 1968, L 56/1, as amended on numerous occasions. The consolidated text can be found in www.europa.eu.int/comm/dgs/personnel_administration/statut/tocen100.pdf.

2.4. Consultation

In his mission statement,²⁵ the EDPS describes his consultative task as follows: “Advising the Community institutions and bodies on all matters relating to the processing of personal data, including consultation on proposals for legislation, and monitoring new developments that have an impact on the protection of personal data”. The EDPS understands the scope of the consultative task as being much wider than his supervisory task, which only covers the processing of personal data by Community institutions or bodies.²⁶

This wide interpretation was confirmed by the European Court of Justice in its orders in the so called *PNR* cases in which it emphasized that the advisory task does not only cover the processing of personal data by the Community institutions or bodies.²⁷ The Court explicitly referred to Article 41(2) of Regulation 45/2001, according to which the EDPS is responsible for advising Community institutions and bodies on all matters concerning the processing of personal data. This includes, according to two orders of the Court of the First Instance, the connection between the legislation relating to data protection and that relating to the preservation of other interests.²⁸

However, this result was not obvious since the legal framework on data protection is somehow contradictory. On the one hand, although Article 286(2) EC does not explicitly limit the task of the EDPS to the processing of personal data by the institutions themselves, the provision is clearly linked to Article 286(1) which does contain this limitation. Moreover, Article 3(1) of Regulation 45/2001 describes the *scope* of the Regulation: “[It] shall apply to the processing of personal data by all Community institutions and bodies ...” On the other hand, Article 1(1) of the Regulation mentions as its *object* that the Community institutions and bodies shall – in general! – protect the fundamental rights and freedoms of persons with regard to data protection. Article 41 of the Regulation – the point of reference for the Court of Justice in the *PNR* cases – describes the tasks of the EDPS in equally general terms.

According to Article 47(1)(i) of Regulation 45/2001, the EDPS may intervene in actions brought before the Court of Justice. This provision is a good

25. See *supra* note 11.

26. See more in detail the EDPS Policy Paper of 18 March 2005, “The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents”, published on www.edps.europa.eu.

27. Orders of 17 March 2005 in Joined Cases C-317 & 318/04, *European Parliament v. Council and Commission*, judgment of 30 May 2006, nyr.

28. Orders of 6 June 2006 in Case T-194/04, *Bavarian Lager v. Commission*, and of 14 June 2006 in case T-170/03, *British American Tobacco v. Commission*, granting the EDPS leave to intervene, nyr.

example of the sometimes difficult relationship between the provisions of the Regulation and other relevant provisions of Community law. Article 40(1) of the Statute of the Court of Justice lays down that (Member States and) institutions may intervene in cases before the Court.²⁹ The EDPS is not an institution in the sense of Article 7(1) EC.³⁰ For this reason, the Council and the Commission claimed in the *PNR* cases³¹ that the application for intervention should be dismissed. They stated that Article 47(1)(i) of Regulation 45/2001 – a provision of secondary law – cannot derogate from Article 40 of the Statute of the Court of Justice, which has the value of primary law on the same basis as the EC Treaty itself.

The Court did not follow the reasoning of the Council and the Commission but instead decided that the EDPS may indeed intervene, albeit within the limits deriving from the task entrusted to him. It stated: “In adopting Article 47(1)(i) of Regulation No 45/2001, the Council did not exceed the powers conferred on it by Article 286(2) EC, since that measure is intended to ensure the practical effect of that provision of the Treaty.”³² The Court qualifies Article 47(1)(i) as an autonomous basis for intervention. By doing so, it also acknowledges that Article 40 of the Statute is not limitative.

2.5. *Cooperation*

The EDPS might be a new phenomenon but he is not the only player in the European arena, as far as ensuring an adequate level of data protection is concerned. In Regulation 45/2001, the existence of these other players has been taken into account. The Regulation imposes on the EDPS the duty to “cooperate” with these other players and to “participate” in the activities of the Article 29 Data Protection Working Party.³³ This Working Party is composed of the national data protection authorities (one for each Member State) and has until now been the most active player in this area. The EDPS and the Commission also are members of the Working Party.³⁴ The EDPS has been given the right to vote in this group, whereas this right has been denied to the Commission. The Working Party positions itself as “the independent EU Ad-

29. Art. 40(2) also confers a right to intervene to others in so far as they establish an interest.

30. See section 3.2.1 *infra*.

31. Joined Cases C-317 & 318/04, see *supra* note 27.

32. Para 15 of both orders, see *supra* note 27.

33. Art. 46(f),(i) and (ii), and (g) of Regulation 45/2001. The Working Party is established under Art. 29 of Directive 95/46/EC.

34. This may come as a surprise since it is a core task of the Working Party to advise the Commission.

visory Body on Data Protection and Privacy”.³⁵ In the almost ten years of its existence, the Working Party has produced a large number of opinions and other documents.³⁶

3. The concept of an independent supervisory body

3.1. Introduction

Article 286(2) EC transposes the concept of an independent supervisory body as introduced in Community law by Directive 95/46 to the level of the Community itself. Under the Constitutional Treaty, the role of an independent supervisory body in the field of data protection was to be continued. Article I-51 CT even foresees more supervisory bodies (in the wording of the Constitutional Treaty, “independent authorities”). At the level of the Community, it is a new concept. A comparable body does not exist in other areas within the Community.

The supervisory body (the EDPS) has several different functions that can be deduced from Articles 46 and 47 of Regulation 45/2001. One can distinguish:³⁷

- Advisor to Community institutions and bodies. This function is comparable with those of other advisory bodies such as the Social Economic Committee or the Committee of the Regions.
- Handler of complaints. This function is comparable with that of the European Ombudsman.
- Centre of Expertise. This function involves, for example, the monitoring of developments and the networking functions. These functions are comparable to those carried out by agencies with monitoring functions such as the European Environment Agency.
- The function of ensuring the correct application of the Regulation and other relevant Community Acts. This function is closely related to the gen-

35. See the website of the Working Party www.europa.eu.int/comm/justice_home/fsj/privacy/workinggroup/index_en.htm.

36. The networks of national data protection agencies are also active in the third pillar (outside the competence of the Art. 29 Working Party). For more information, see Annual Reports of the EDPS over 2004 and 2005.

37. See Vos, “Agencies and the European Union” in Zwart and Verhey (Eds.), *Agencies in European and Comparative Law* (Intersentia, 2003), p. 119. She distinguishes – as to agencies – a classification based on functions and on powers and then follows a functional approach. The following list is also based on such a functional approach. The functions of the EDPS are deduced from his most important duties *and* powers (see Art. 46 and 47 of Regulation 45/2001).

eral function of the Commission under Article 211 EC (first indent), to ensure the application of the Treaty and the measures taken by the institutions. One might even conclude that Article 286(2) EC, by making the supervisory body responsible for monitoring the application of certain Community acts, assigns a part of this function of the Commission to the EDPS.

– The function of law enforcement. Article 47(c)–(f), defines powers of the EDPS that are binding on the institutions. These powers of imposing measures of enforcement on other institutions are unique under Community law, apart from powers of the Court in disputes brought before it.

– The function of offering legal protection to the citizen. On the one hand, under Articles 32 and 33 of the Regulation the EDPS can resolve disputes between data subjects and Community institutions and bodies (these powers are comparable to the powers given to the Community courts; see section 3.2.5. below) and on the other hand he can invoke legal remedies, should a Community institution or body not comply with his decisions (comparable to the powers of the institutions under Art. 230 EC).

– A regulatory function. The powers of the EDPS imply that he can issue guidelines and other communications of a (quasi-)regulatory nature. On very specific topics, the EDPS has even been given explicit powers to establish general rules (see section 3.2.3. below).

– One might say that the EDPS even has a “constitutional” function, to ensure the respect of fundamental rights which is a legal obligation for the European Union under Article 6 TEU. The power to intervene in cases before the Court of Justice, as interpreted by the Court itself in its orders in Cases C-317/04 and C-318/04,³⁸ might be seen in this perspective.

This list of functions shows that the EDPS has been given a range of functions that are in most cases comparable to functions given to existing institutions and bodies under Community law. However, such a list does not clarify the concept of a supervisory body. One way of clarifying this concept is first to define what the EDPS is not.

3.2. *Not an institution, not an agency, not a regulator not an Ombudsman and not a judicial body*

3.2.1. *Not an institution*

The EDPS is not an institution *stricto sensu* since it is not listed in Article 7 EC, enumerating the Community institutions. This is important to notice since some powers provided for by the EC Treaty are exclusively conferred on institutions. On top of that it is even more important that the European

38. Orders of 17 March 2005, referred to *supra* note 27.

Community functions on the basis of an institutional balance between Council, Commission and European Parliament (and to a lesser extent the Court of Auditors). This balance is carefully watched over by the Court of Justice.³⁹ The EDPS, not being an institution itself, has to respect the institutional balance.

In addition, Part One of the EC Treaty refers to some other entities with a privileged position. Article 8 EC mentions the establishment of the European System of Central Banks and the European Central Bank and Article 9 mentions the European Investment Bank. Article 7(2) EC introduces two entities (the Economic and Social Committee and the Committee of the Regions) that assist the Council and the Commission. The EDPS is not mentioned in this part of the Treaty. This could give an indication of the importance the Treaty has conferred on the EDPS. However, this indication should not be overestimated, since Part One of the Treaty mentions two institutions with a merely consultative task (the two committees) whereas the European Ombudsman is not mentioned.

Finally, for some specific purposes the EDPS is treated in the same way as institutions. For matters relating to his own staff, he has been given the same status as institutions.⁴⁰ In budget matters, a separate section of the Community budget has been dedicated to the EDPS.⁴¹

In this article it is assumed that the EDPS – although not an institution – has many characteristics of an institution.

3.2.2. *Not an agency*

Over the years quite a number of agencies have been established within the framework of the EC Treaty.⁴² The Europa website defines a Community agency as follows: “(A) body governed by European public law; it is distinct from the Community Institutions ... and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task which is specified in the relevant Community act.” Currently, nineteen bodies answer this definition.⁴³ Only a few of them are competent to make decisions that are binding on those to whom they are addressed (in the meaning of Art. 249 EC). An illustrative ex-

39. See further in section 3.3.4.

40. See Art. 43 (6) of Regulation 45/2001, and the somewhat differently formulated Art. 1c of the Staff Regulations.

41. Section VIII of the Community budget deals with the European Ombudsman and the EDPS.

42. See for more comprehensive analyses on agencies under Community law: Yataganas, *Delegation of Regulatory Authority in the European Union*, Harvard Jean Monnet Working Paper, (2001) No. 3/01; and Vos, *op. cit. supra* note 37.

43. August 2006. Four more agencies are under preparation. See: www.europa.eu/agencies/index_en.htm.

ample is the Office for Harmonisation in the Internal Market (OHIM) in Alicante⁴⁴ that was established by Regulation 40/94 on the Community trade mark.⁴⁵

The EDPS does not qualify as an agency for three reasons. In the first place, for a formal reason: although it is set up by an act of secondary legislation, it finds its legal basis in the Treaty itself. In the second place, for substantive reasons:

- The EDPS is not established to accomplish a technical, scientific or managerial task originating in one of the institutions. Its task does not originate in an institution. On the contrary, the EDPS is established to supervise the institutions themselves.
- Agencies do not have responsibilities of supervising institutions. Insofar as powers are conferred to agencies that include supervision, this concerns supervision on the market. Again, the OHIM can serve as an example.
- Agencies can not have responsibilities of supervising institutions. Such responsibilities would affect the capacity of institutions to exercise the powers conferred to them by the Treaty and would, as a result, impair the institutional balance. It is probably for this reason that Article 286 EC was inserted in the EC Treaty.

In short, the conclusion is that the EDPS is not an agency. It may however be useful to compare the EDPS with the agencies since elements of their functions are similar.

3.2.3. *Not a regulator*

The phenomenon of regulatory authorities originated in the United States. A government body is called “regulatory” if it has the authority to regulate the manner in which private rights may be exercised.⁴⁶ In the United States, the activities of regulators include the powers to take binding decisions in individual cases, as well as the making of rules.

In Community law, the term “regulatory authority” is used for bodies of the Member States that must be established to promote liberalization and competition in specific sectors of the market where monopolies existed before such as telecommunications, electricity and gas.⁴⁷ Those bodies must be

44. Other examples of agencies that have powers to take binding decisions are the European Agency for the Evaluation of Medicinal Products in London (based on Regulation (EC) No. 2309/93) and the Community Plant Variety Office in Angers (based on Regulation (EC) No. 2100/94, *infra* note 8).

45. Council Regulation (EC) No 40/94 of 20 Dec. 1993 on the Community trade mark, O.J. 1994, L 11/1.

46. See, more in detail, Zwart, “Independent regulatory agencies in the US”, in Zwart and Verhey (Eds), *op. cit.* *supra* note 37.

47. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002

independent from the market sectors (although not necessarily from the national governments) and *inter alia* have competences including the making of rules, mostly of a technical nature. One could furthermore characterize the ECB as a regulatory authority. An essential condition for the establishment of the ECB was not only independence from the market, but also from the political institutions.⁴⁸ In this respect, there is a parallel with the EDPS (see section 3.3.2.).

In the literature on regulatory agencies within the European Union, agencies with powers to take binding decisions are often called “regulatory” even if they have competences to take decisions in individual cases but no rule-making competences.⁴⁹ If these decisions necessarily involve a certain margin of discretion, they have a “regulatory” nature.⁵⁰ Under this wider definition, the agencies with decision making powers (such as OHIM) would qualify as a regulator. This article is not the right place to enter into a discussion on the definition of a “regulator”. Independent of the scope of the definition, it is clear that the EDPS has some powers of a regulator.

He may take decisions in individual cases, for instance on a complaint of a data subject. He may enforce the application of data protection law (Art. 47(c)–(f) of Regulation 45/2001). He may – in the procedure of prior checking – deliver opinions which may have legal consequences (Art. 27 of the Regulation). As part of his activities, he will give interpretations of data protection law, which can serve as guidelines to the Community institutions and bodies and to the data subjects and may therefore be qualified as “soft law”. He may – on very specific topics – establish rules that have general application and could be qualified as (quasi-)legislative. For instance, according to Article 37(2) of the Regulation, he has to establish a list of traffic data that may be processed. More generally, one could refer to Article 46(h) of the Regulation in which it is provided that the EDPS shall determine, give reasons for and make public (some specified) exemptions, safeguards, authorizations and conditions.

on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. 2002, L 108/33; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; O.J. 2003, L 176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, O.J. 2003, L 176/57.

48. See Kapteyn and VerLoren van Themaat, *Het Recht van de Europese Unie en van de Europese Gemeenschappen*, 6th ed. (Kluwer 2003), p. 800 (in Dutch).

49. See e.g. Geradin, Mitrias and Petit, “Regulatory agencies in the European Union: A critical review”, in *The “Independence” of the Independent Regulatory Agencies – Problems and Hopes of a New Institution (Proceedings of a Conference on 29 Oct. 2002 – Athens)* (Ant.N.Sakkoulas Publishers, 2003).

50. This element of discretion is mentioned by Yataganas, op. cit. *supra* note 42, p.33.

However, the existence of these powers does not qualify the EDPS as a regulator. The powers of the EDPS mentioned above only cover a part of his activities, and, in practice, he exercises even his function of ensuring the correct application of data protection law mostly by seeking friendly settlement (see section 2.3.4). This is even clearer under a narrow definition of a “regulator”. The (quasi-)legislative powers of the EDPS only relate to very specific topics. Finally, regulators are usually established for independent control of the market. The EDPS only supervises public entities.

3.2.4. *Not an ombudsman*

The EDPS has some elements of an ombudsman, especially in his function as a handler of complaints (see section 3.1). Under the EC Treaty, the European Ombudsman has the power to conduct inquiries concerning instances of maladministration in the activities of the Community institutions or bodies. Inquiries may be conducted on the European Ombudsman’s own initiative, or on the basis of complaints from natural or legal persons. Within the scope of his mandate, the EDPS can also conduct inquiries either on his own initiative or on the basis of a complaint. The inquiries of the EDPS are similar to the inquiries of the European Ombudsman since in both cases maladministration is a starting point and out-of-court settlement an important objective.

The concept of an ombudsman has been thoroughly described by Peters.⁵¹ According to her, an “Ombudsman provides individual redress and works systematically to improve the quality of administration in general. His work is reactive and proactive, and covers both the legal and the political plane.” This explanation is illustrative since one can deduce from it the three essential objectives of an ombudsman:⁵²

– He offers a political right to the citizen to participate, by providing for individual redress. In the EU context, this right – as provided for under Article 21 EC – gives substance to citizenship of the Union. It is worth mentioning that this right is included in the EC Treaty in connection with the right to petition the European Parliament and the right to write to EC institutions and bodies (and to receive an answer).

– He offers a remedy to the citizen, also by providing for individual redress. This remedy is an alternative to legal protection as afforded by a court or a tribunal. The remedy does not offer legal protection *stricto sensu* since the

51. See op. cit. *supra* note 4, p. 699.

52. Usually, like for instance by Peters, op. cit. *supra* note 4, p. 711, only two functions of the institution of an Ombudsman are distinguished (individual redress *versus* control of the administration in general). For the sake of the comparison with the EDPS, a supplementary distinction is made, between redress as a political and as a legal right.

procedure aims at a peaceful settlement and can not lead to binding decisions.

– The Ombudsman is part of good governance, by working systematically to improve the quality of administration in general. In this context, he is not dependent on complaints and can act on own initiative. The European Ombudsman is closely linked to the European Parliament. Forwarding reports on maladministration to the European Parliament so as to contribute to the democratic control by Parliament is an important instrument for the European Ombudsman (even mentioned in Art. 195 EC).

This concept of an ombudsman – as elaborated by distinguishing these three essential objectives – can not be applied to the EDPS within the limits of his mission, not even in his function as a handler of complaints, for the following reasons:

– As to the first objective: Article 32 of Regulation 45/2001 introduces a right to complain for anyone who considers that his rights under Article 286 are infringed.⁵³ This right to lodge a complaint is included in a chapter on remedies. It is clear that it is not a political right of the citizen to participate.⁵⁴

– As to the second objective, the EDPS offers a remedy to the citizen (based on Art. 32), but the nature of the remedy is different from the remedy offered by the European Ombudsman. It is not an alternative to legal protection, but is part of the legal protection *stricto sensu* including possibilities to bring actions before the Court. This fundamental nature of a remedy has to be upheld, notwithstanding the fact that in practice the EDPS in most cases proceeds in a similar way to the Ombudsman by seeking friendly settlements between the complainants and the institutions or bodies involved.⁵⁵ The fundamental nature of a remedy is confirmed by the powers conferred to the EDPS under Article 47(c)–(f), to enforce his decisions towards the Community institutions or bodies involved.⁵⁶

– As to the third objective, it might come as a surprise but as far as this objective is concerned, the EDPS is to a large extent comparable to the Ombudsman. The EDPS works, within the area of his mission, to systematically

53. In addition, Art. 33 gives a more elaborated right to the Community staff (see note 22 *supra*).

54. This difference between the EDPS and the European Ombudsman is also illustrated by the Charter. The EDPS is mentioned in Title II (Freedoms) and the Ombudsman in Title V (Citizens rights).

55. See, on this practice, the Annual Report of the EDPS 2005 (para 2.4), *supra* note 10.

56. To avoid any misunderstandings: the EDPS can use these powers even in the absence of a dispute as meant in Art. 32 of Regulation 45/2001.

improve the quality of administration in general. However, the functions of the EDPS are more extensive and some of them have a different nature to those of the Ombudsman. Moreover, the institutional position of the EDPS is different. The position of the European Ombudsman is directly linked to the European Parliament. The EC Treaty itself deals with the European Ombudsman in the section of the Treaty on the European Parliament. On the contrary, the EDPS fulfils its functions towards all institutions in an equal way. This results from Article 286 EC as well as from Article 41 of Regulation 45/2001.

To summarize, the EDPS has many similarities with the European Ombudsman. Nevertheless, it would not be justified to qualify the EDPS as a specialized ombudsman for data protection issues. The procedure before the EDPS offers the citizen a legal remedy and not a political right to participate.

3.2.5. *Not a judicial authority*

At first sight it seems obvious that the EDPS is not a judicial authority. The EDPS has several functions that have nothing to do with judicial activities. Moreover, it was clearly not the intention of the drafters of the EC Treaty and/or of Regulation 45/2001 to establish the EDPS as a new judicial authority within the Community framework. The EDPS can intervene in Court cases and can bring cases before the Court on his own initiative. These are unusual competences for a court or tribunal (since by nature a court or tribunal only decides on cases submitted by others). If the intention had been to create a court or tribunal, it seems likely that more attention would have been paid to procedural requirements in the text of the Regulation and also, in the light of the requirements of Article 6 ECHR, to the right to a fair trial. The EDPS is not necessarily a lawyer or a judge. Article 42 of the Regulation requires experience and skills to perform the duties of the EDPS and illustrates this requirement by referring to earlier experience in national data protection authorities. Judicial review and interpretation of Community law are exclusive tasks of the Court of Justice.⁵⁷ There is no indication whatsoever supporting the point of view that Article 286 EC as implemented in Regulation 45/2001 aims to transfer part of this exclusive task to the EDPS.

However, if one looks in more depth at the *EDPS in his task of offering legal protection to the citizen*, it is less obvious that the EDPS does not qualify as a judicial authority. On the contrary, it is striking that he fulfils most of the criteria elaborated in the case law of the Court of Justice on Article 234 EC, when it had to decide on the admissibility of a request for a preliminary ruling. Applying the standard test as formulated by the Court in

57. In its institutional sense, including the CFI and the Civil Service Tribunal.

*Dorsch Consult*⁵⁸ to the EDPS leads to the following result:

- the EDPS is established by law;
- the EDPS is permanent;
- the procedure can be considered as *inter partes*. It is important that the parties to the procedure have the right to be heard. In *Gabalfrisa*⁵⁹ it played a role in that parties were allowed to lodge submissions and evidence in support of their claims. They could request a public hearing. In the proceedings of the EDPS the applicant and the institution concerned are heard;
- the EDPS applies the rule of law. This criterion means in short that decisions “must be arrived at in orderly proceedings conducted on the basis of the rule of law, i.e. proceedings enabling it to establish the legally relevant facts, and to apply pre-existing legal regulations or principles to these facts.”⁶⁰ Although Regulation 45/2001 is not precise in this regard, it can be assumed that the EDPS by establishing Rules of Procedure will comply with this requirement;⁶¹
- the EDPS is independent. This requirement means that the EDPS must be a “third party” (in proceedings *inter partes*) but also that the procedures for his appointment and dismissal guarantee his independence.⁶² Regulation 45/2001 foresees these safeguards (see section 4.1).

The fulfilment of the criterion of compulsory jurisdiction is less evident. Under Article 32 of Regulation 45/2001 a data subject is not obliged to lodge a complaint before the EDPS, but he can directly start proceedings before the Court against any decision of a Community institution or body within the scope of the Regulation. In *Denuit and Cordenier*, the Court of Justice considered that “an arbitration tribunal is not a ‘court or tribunal of a Member State’ where the parties are *under no obligation*, in law or in fact, to refer their disputes to arbitration ...”⁶³. However, it would not be logical to draw far-reaching conclusions from this judgment. The procedure before the EDPS is of a completely different nature from that of arbitration, as the

58. Case C-54/96, *Dorsch Consult*, [1997] ECR I-4961, para 23: “In order to determine whether a body making a reference is a court or tribunal [...], the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent ...”.

59. Case C-110/98 to C-147/98, *Gabalfrisa*, [2000] ECR I-1577, paras. 35 and 36.

60. App. 8790/79, *Sramek v. Austria*, 8 Dec. 1982, (1982) Series A-084, para 71.

61. According to Art. 46(k) of Regulation 45/2001, the EDPS establishes rules of procedure. Their establishment is announced by the EDPS himself in his Annual Report 2005.

62. The absence of particular safeguards in respect of the dismissal or the termination of the contract of the members of the Greek competition authority was a reason why the Court did not qualify this authority as a judicial authority in the sense of Art. 234 EC, Case C-53/03, *Syfait*, [2005] ECR I-4609, para 31.

63. Case C-125/04, *Denuit and Cordenier*, [2005] ECR I-923, para 13.

former is not an alternative to legal protection under public law but – on the contrary – embedded in the system of legal protection under the EC Treaty itself.

Finally, in his Opinion in *Syfait*,⁶⁴ Advocate General Jacobs mentions legal expertise of a body as an additional criterion. As said before, the EDPS is not necessarily a lawyer. However, in practice it will be mostly lawyers that fulfil the requirements to be nominated as EDPS. If they are not lawyers, they will have legal expertise. One can assume that the experience and skills required under Article 42 of Regulation 45/2001 implies such expertise.

This leads to the following conclusion: the EDPS meets the test under *Dorsch Consult*, although it is not evident whether the criterion of compulsory jurisdiction is fulfilled. This, however, does not make the EDPS a judicial authority. Many of his functions have nothing to do with judicial functions and it is clear that the EDPS is not a court since it was not intended to be one.

3.3. *The concept of the supervisory body of Article 286 EC within the framework of the EC Treaty*

3.3.1. *Introduction*

The preceding paragraph compared the concept of a supervisory body with other categories of bodies under Community law. The conclusion of this comparison is that the EDPS has elements of all these categories, but does not fall into one of them. As a next logical step in the analysis, the nature of the EDPS is described in a concrete manner. This is by no means an easy task.

This section will address the concept of the supervising body of Article 286 EC within the framework of the EC Treaty in the following steps:

- the *main reasons for the establishment* of a supervisory body (the EDPS);
- the *essential characteristics* of the EDPS;
- the *position of the EDPS* in the framework of the EC Treaty and respect for the institutional balance;
- the *conditions for exercising his functions*. The added value of the EDPS is guaranteed by his output.

3.3.2. *Main reasons for the establishment*

The first reason for the establishment of the EDPS is the need for harmonization. In several Member States, supervision by independent authorities was already for a longer time laid down in national law as an essential element of

64. Case cited *supra* note 62, para 33 of the Opinion of the AG.

data protection. For example, the French data protection authority (CNIL)⁶⁵ started its work in 1978 and Germany also already had a structure for a number of years.⁶⁶ The Community legislator prescribed this model of supervision for all the Member States, as part of Directive 95/46 aiming to harmonize national laws on data protection. Article 286 EC has also an objective of harmonization. As said before, this article envisages ensuring that the required level of data protection in the Member States under Community law will be respected by the institutions themselves. This includes supervision by an independent authority at the Community level.

The second reason has to do with the status of data protection as a fundamental right. Under Article 6(2) TEU, the European Union must respect the fundamental rights as guaranteed by the ECHR and laid down for the European Union in Article 6(1) TEU. Persons are entitled to an effective protection of their rights. This can require the issuing of effective legal instruments to ensure that persons can enforce their rights, in respect of the public as well as the private sector. The establishment of the EDPS, who is independent of the Community institutions (and of the private sector), can be seen as the issuing of such an instrument.

The third reason is that *this* fundamental right is not respected by itself. Public as well as private organizations process many data about persons, but in many situations those persons do not know which data about them is processed (although they have a right to know under data protection law). Data processing has by nature an element of secrecy. Furthermore, data processing is difficult. Technical skills are needed to understand how the ICT environment actually works. For these reasons, there is a justification for a supervisory authority with powers to make inquiries in a pro-active way and actually find out what data is being processed: “Big Brother” needs to be controlled.

As a fourth reason, respect for the principles of good governance – as developed by the Commission in its White Paper on European Governance⁶⁷ – requires an adequate protection of personal data. The right to good governance (or the right to “good administration” or “sound administration”) has been recognized as a principle of Community law⁶⁸ and has, as such, been included in Article 41 of the EU Charter of Fundamental Rights. This article even includes a specific principle of data protection, namely the right of a person to have access to his or her file.

65. Commission Nationale de l’Informatique et des Libertés.

66. A more complicated system with “Datenschutzbeauftragter” at national level and at the level of the “Länder”.

67. White Paper on European governance, COM(2001)428 final.

There is a fifth reason for the establishment of the EDPS. Apparently, it was felt that the tasks of the EDPS can not be sufficiently treated by existing institutions or bodies. The task assigned to the EDPS includes supervision of the Commission itself. This is why in this area it was not enough that the Commission ensures the application of data protection law by the institutions, in accordance with Article 211 EC (first indent). The European Ombudsman could not fulfil this task either. The main reason is that (supervision of) data protection is more than good administration (see also section 3.2.4). Supervision by the European Court of Justice does not provide for the necessary protection of the citizen for reasons that have to do with the secrecy mentioned above. By its nature, a court can not make enquiries in a pro-active way, but is dependent on the cases submitted by third parties.

3.3.3. *Essential characteristics*

In the first place, the authority has a face. One person, the “Supervisor” is the face of data protection at the level of the European Union. He is assisted and – if needed – replaced by an Assistant Supervisor.⁶⁹ This legislative choice is not self-evident since the concept is modelled on the supervisory authorities in the Member States. In some Member States, such as Italy, France, Belgium and The Netherlands, the supervision is exercised by a collective body (a board, a committee or a commission). In other Member States such as Germany or the United Kingdom the authority is a person. The preparatory documents of Regulation 45/2001 do not clearly indicate the choice of a single person. It seems most logical to assume that this choice was made, taking into account the similarity with the European Ombudsman. In practice, it may be noted that the Supervisor and the Assistant Supervisor work together as a team. As a result, the EDPS has some elements of a collective body.

In the second place, the authority is independent. This was emphasized in Article 286 EC as well as in Chapter V of Regulation 45/2001. Its importance can be illustrated by Articles 28 and 29 of Directive 95/46, which provide for the establishment of national data protection authorities and for the Article 29 Working Party.⁷⁰ Both Article 28 and Article 29 mention independence as the main characteristic of the supervision.

In the third place, the authority is an expert. His expertise in data protection issues is the prerequisite for his appointment⁷¹ and is the essence of the

68. Case T-54/99, *Max.mobil v. Commission*, [2002] ECR II-313, para 48.

69. Art. 42 of Regulation 45/2001.

70. See section 2.5.

71. Art. 42 (2) of Regulation 45/2001; see section 4.1.

functioning of the EDPS. The functions listed in section 3.1. can only be exercised with specialized expertise on the subject.

In the fourth place, the authority is a power: he has a firm position within the institutional framework of the European Community (as illustrated in various places in this article).

3.3.4. *The position of the EDPS and respect of the institutional balance*

Much has been said over the years on the institutional balance,⁷² one of the oldest principles under Community law, recognized by the European Court of Justice as early as 1958, in *Meroni*.⁷³ The institutional balance corresponds with the distributions of powers between the institutions. The institutions must be capable of exercising the powers given to them by the Treaty and the institutions must, in their exercise of powers, respect the powers of other institutions. The Court has clarified the institutional position of the Parliament on the basis of the institutional balance in important cases like “*Chernobyl*”⁷⁴ and “*Les Verts*”.⁷⁵ This position was later confirmed in the Treaty, more in particular in Article 230 EC.⁷⁶

As was shown in section 3.2, the concept of a supervisory body like the EDPS does not fall into any established category. The position of the EDPS in the institutional framework of the EC Treaty is similar. It is not an institution, but it has certain elements of an institution. In this context:

- The EDPS must respect the powers of the institutions. The activities of the EDPS may not affect essential powers of the institutions, such as the right of initiative of the Commission, the rule-making competences of the Council and the Parliament, and the competences of the Court of Justice on the interpretation and application of the Treaty.
- The institutions must respect the powers of the EDPS. It must be remembered that these powers have not been delegated to the EDPS but are directly attributed to the EDPS by Article 286 EC.⁷⁷ For instance, the Commission

72. A good overview of this principal, particular of the legally binding character of the institutional balance can be found in: Prechal, “A fragile principle with uncertain contents”, in Heukels et al (eds.), *The European Union after Amsterdam, a legal analysis* (Kluwer, 1998), pp. 273–294.

73. Case 9/56, *Meroni*, [1958] ECR 133.

74. Case C-70/88, *European Parliament v. Council*, [1991] ECR I-2041 (on the capacity of the European Parliament to bring an action for annulment).

75. Case 294/83, “*Les Verts*” v. *European Parliament*, ECR [1986] ECR 1339 (on an action of annulment against a decision of the European Parliament).

76. Furthermore, the institutional balance played an important role in questions related to delegation of powers to committees under the procedures for comitology or to agencies.

77. Under Art. 286(1) EC, the institutions have a (highly hypothetical) possibility to de-

must respect the powers of the EDPS of ensuring the application of the Treaty and the measures taken by the institutions and bodies, as far as they relate to the processing of personal data. Control of the EDPS will be dealt with separately under section 4 below.

– In order to enable the EDPS to fulfil his mission, the position of the EDPS can be clarified by analogy to the “*Chernobyl*” and “*Les Verts*” case law. One could interpret the Orders of the Court in the *PNR* cases,⁷⁸ allowing the EDPS to intervene before the Court in this sense.

3.3.5. *The output of the EDPS: Guarantees for added value*

The tasks conferred to the EDPS have to be fulfilled in a satisfactory manner. The legislative framework must provide for the necessary guarantees to ensure this. It is in this respect interesting to notice that the establishment of agencies at Community level has in all cases been accompanied by checks and balances, aiming to guarantee the quality of the output of the agencies, such as:

- guarantees at the organizational level. Agencies usually have a governing or an administrative board composed of representatives of Member States and the Commission, with at least powers on all important strategic matters (such as the establishment of general guidelines and/or a yearly work programme). For example, the OHIM is headed by a president, and an Administrative Board is attached to the office, which is composed of one representative of each Member State and one representative of the Commission.⁷⁹ In more recent agencies, representatives of the Member States have been replaced by experts appointed by the Council (with participation of the European Parliament).⁸⁰ As to the EDPS, such a board does not exist;
- guarantees ensuring the quality of the specialization and expertise. In quite

prive the EDPS of its powers. If Directive 95/46 (and other data protection law) was repealed, Art. 286 EC would lose its substantive meaning.

78. See *supra* note 27.

79. See in particular Arts. 119–122 of Regulation 40/94, cited *supra* note 45.

80. See e.g. Art. 25(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 Jan. 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (O.J. 2002, L 31/1): “The Management Board shall be composed of 14 members appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission which includes a number of candidates substantially higher than the number of members to be appointed, plus a representative of the Commission. Four of the members shall have their background in organizations representing consumers and other interests in the food chain.... The members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union.”

a few cases, agencies are advised by permanent scientific or advisory committees. In some other cases, the Regulation establishing the agency includes specific provisions in order to ensure the (technical) quality of the output of the agency. For example, the Regulation on Community plant variety rights⁸¹ gives precise rules on how the Community Plant Variety Office should arrange technical examinations. As to the EDPS, Regulation 45/2001 assumes that the specialization and expertise are guaranteed by choosing the EDPS from persons having the experience and skills required for the job;

– guarantees ensuring contact with the practices in the Member States. Agencies are usually embedded in networks of national agencies which undertake tasks similar to those of the agency. Those networks have advisory tasks towards a Community agency. As to the EDPS, he is embedded in networks of national data protection authorities⁸² and under Article 46(f) of Regulation 45/2001 he has the duty to cooperate with those authorities as well as with supervisory bodies established in the third pillar. However, the legal framework does not foresee any advice from any of those networks to the EDPS.

To summarize: the establishment of the EDPS has not been accompanied by checks and balances in a similar way to agencies. On the contrary, the Community legislator has chosen for an authority consisting of a single person (with an Assistant Supervisor). His independence, expertise and power must guarantee the quality of the output.

4. Control of the EDPS

4.1. Political control

Regulation 45/2001 includes the necessary provisions that should enable the EDPS to perform his task in an independent manner. Article 42 of the Regulation deals with the appointment and the dismissal of the EDPS and is similar to the provisions regarding the European Ombudsman. The EDPS can only be dismissed under exceptional circumstances, in which he or she is guilty of serious misconduct or if his or her independence is no longer beyond doubt. Only the Court of Justice can dismiss the EDPS. These guarantees are comparable to the guarantees given to a member of the Court of Justice. As Advocate General Ruiz-Jarabo Colomer states, these guarantees

81. Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, O.J. 1994, L 227/1.

82. For instance as a full member of the Art. 29 Working Party (see section 2.5).

“distance [him] from the interests at issue and make [him] immune from any kind of external suggestions, hints or pressures, whether obvious or veiled”.⁸³ Article 43 ensures that the EDPS can do his work, by ensuring he has a salary, a budget and staff. Article 44(2) of the Regulation, that has been copied from Article 195(3) EC on the European Ombudsman, prohibits the EDPS from seeking or taking instructions from anybody in the performance of his duty. A review of his performance by a political body – such as the European Parliament or the Council, which are the institutions that appoint the EDPS – in a way that could influence his future performance,⁸⁴ would be contrary to these guarantees.⁸⁵

These provisions of the Regulation ensure in a satisfactory manner that the performance of the duties by the EDPS is not subject to political control. In other words, the watchdog is not watched.⁸⁶ Indirectly, however, political control is not completely excluded; several mechanisms contain elements of control, but do not change the main conclusion.

Firstly, the institutions responsible for the appointment of the EDPS are also responsible for the renewal of the appointment. A general assessment of the performance of the EDPS – including his methods of dealing with the institutions – can thus be decisive for the renewal of his appointment. Normally, this will not have any serious impact on the independence since this mechanism is in no way different from the mechanism that applies to the members of the Court of Justice.

Secondly, the EDPS has to justify his performance in an annual report that has to be submitted to all Community institutions and bodies and at the same time has to be made public (Art. 48 of the Regulation).⁸⁷ Article 48(2) foresees a possible examination of the report in the European Parliament. If one reads this provision closely, the conclusion can be drawn that this examination is not primarily meant to evaluate the performance of the EDPS, but on the contrary, the examination serves primarily as an evaluation of the follow-

83. A.G. Ruiz-Jarabo Colomer in his Opinion delivered on 28 June 2001, Case C-17/00, *De Coster*, [2001] ECR I-9445, para 94. See Kuijjer, *The Blindfold of Lady Justice* (Wolf Legal Productions, 2004).

84. For instance, a cut of the budget.

85. See on the European Ombudsman, the Opinion of A.G. Geelhoed in Case C-234/02 P, *European Ombudsman v. Lamberts*, [2004] ECR I-2803, para 70.

86. (Mis)using the question by Peters, op. cit. *supra* note 4, p. 725, “who watches the watchdog?”.

87. Art. 48 makes the subtle difference between submitting the report to European Parliament, Council and Commission and forwarding it to the other institutions and bodies. In my view, this difference does not have a substantive consequence. All can submit comments (and, in view of the independence of the EDPS, they do not have more far-reaching powers regarding the report).

up of the interventions of the EDPS by the Community institutions and bodies. This examination is also a means of enhancing the effectiveness of the EDPS. However: the examination can also serve as an assessment of the performance of the EDPS.

Thirdly, and apart from the annual report, many activities of the EDPS result in a public document. This is essential for the EDPS. He needs visibility to be effective; but visibility can also indirectly function as a control mechanism on the EDPS itself.

4.2. *The EDPS and judicial control*

4.2.1. *As regards coercive powers of the EDPS*

The EDPS is an independent authority, but this does not in itself preclude him from being subject to judicial control by the Court of Justice. As far as the EDPS uses his coercive powers, it is clear that his activities are subject to legal review by the Courts of the European Community.

In the first place, the Court has given a broad interpretation to Article 230 EC: in “*Les Verts*”,⁸⁸ the Court considered that the EC is founded on the rule of law and that, although Article 173 EEC (the predecessor of Art. 230 EC) was at the time restricted to acts of the Council and the Commission, “the general scheme of the Treaty is to make a direct action available against ‘all measures adopted by the institutions ... which are intended to have legal effects’”.⁸⁹ The notion of “institution” is not further defined by the Court. However, in dealing with the case the Court puts all the emphasis on the binding nature of acts and not on the official classification of the institution taking the decision.

In the second place, judicial review is a requirement from the perspective of the right of the citizen to an effective legal protection. According to the case law of the Court, the right to such protection is “one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 [ECHR]”.⁹⁰

In the third place, under the EC Treaty, the European Court of Justice has to ensure the uniform interpretation of Community law. Since the EDPS has competences to give binding interpretations of Community law, within the scope of his mission, the Court of Justice must be able to ensure that the in-

88. Case cited *supra* note 75, para 25.

89. See also Geradin and Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04, p. 53.

90. Case C-50/00 P, cited *supra* note 23, para 39.

terpretation given by the EDPS is in conformity with the uniformity of interpretation of Community law.

In the fourth place, in so far as there could be any doubts on the judicial control on decisions of the EDPS (we recall that the EDPS is not an institution but a body), those doubts have been removed by Article 32(3) of Regulation 45/2001.

4.2.2. *Comparison to agencies such as the OHIM*

The position of the EDPS is comparable to the position of agencies, as far as they can take binding decisions. Up until now, the Court has never dealt with the admissibility of appeals against decisions of agencies substantively.⁹¹

One could also compare the position of the EDPS with that of the OHIM. The Court has already dealt with (many) cases against the OHIM.⁹² In these cases, admissibility did not constitute a problem. Under Article 63 of Regulation 40/94, any party to the proceedings adversely affected can lodge an appeal against decisions of the Board of Appeal with the Court of Justice.⁹³ This article does not add the OHIM to the institutions listed in Article 230 EC; instead, it creates its *own judicial remedy* before the Court. This is accepted by the Court. It has to be noted that Article 63 of Regulation 40/94 is a lot more elaborate than Article 32(3) of Regulation 45/2001. Since the latter provision only stipulates in very general terms that an action against the decision of the EDPS can be brought before the Court of Justice, it seems that one must rely on the remedies mentioned in the EC Treaty, more in particular Article 230(4). Again, this means a broad interpretation of Article 230, in line with the case law of “*Les Verts*”.

4.2.3. *Other functions of the EDPS*

As was shown above, most of the work of the EDPS does not result in legally binding acts. His position as regards judicial control is thus to a large extent comparable to the position of the European Ombudsman. His performance is not subject to legal review, but the EDPS can be held liable under Article 288, second indent, of the EC Treaty, in very exceptional circumstances.⁹⁴ The relation between independence of the Ombudsman and judicial control

91. E.g. in *Olivieri v. Commission and the European Agency for the Evaluation of Medicinal Products*, the CFI circumvented the issue by stating that the contested act of the agency was an intermediate measure and had to be dealt with as an integral part of the decision of the Commission, Case T-326/99, [2003] ECR II-6053, paras. 53–55.

92. See e.g. Case C-361/04 P, *Ruiz-Picasso and Others v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)*, judgment of 12 Jan. 2006, nyr.

93. See Title VII “Appeals” of Regulation 40/94, cited *supra* note 45.

94. This is the result of the judgment in *European Ombudsman v. Lamberts*, cited *supra* note 85.

of his functioning played a role in *European Ombudsman v. Lamberts*. Although the Court did not express itself on the impact of judicial control on independence, the case implied some interesting points. The Court emphasized – in relation to the independence of the Ombudsman – that a finding of liability owing to damage occasioned by the Ombudsman's activity does not concern the personal liability of the Ombudsman but that of the Community.⁹⁵ One could subsequently ask whether the independence of the Ombudsman would be at stake if the personal liability of the Ombudsman were subject to judicial review. Advocate General Geelhoed raised a similar point by linking the independence of the Ombudsman to the absence of a responsibility of the Court for reviewing the Ombudsman's performance of his duties.⁹⁶

These considerations are also valid in relation to the EDPS.

5. Final remarks

This article focused on the concept of the EDPS as an independent supervisor of Community institutions and bodies. The EDPS was described as a new phenomenon within the institutional framework of the Community. The EDPS has elements of an institution, an agency, a regulator, an ombudsman and a judicial body, but at the end of the day does not fall into any of these categories. As said before, the EDPS has four essential characteristics: he gives a face to data protection and provides for independence, expertise and power.

One can look at these characteristics of the EDPS from different perspectives:

- From *the perspective of data protection*, it is important that the EDPS is visible, or in other words gives a face to data protection. This makes it difficult to ignore that data protection is a public interest that has to be taken into account.
- For *the citizen of the Union*, or, more concretely, the data subject, the EDPS provides for independence. He offers additional legal protection and he must assure, in a more general way, the respect of a fundamental right that, as said before, he does not respect himself.
- *The quality of the administration* can profit from the expertise of the EDPS. In particular, the functions of the EDPS as an advisor, a handler of

95. Para 48 of the Judgment.

96. Paras. 74 and 75 of his Opinion.

complaints and a Centre of Expertise could affect the quality of the administration at the EU level.

– *The checks and balances* within the EU system are refined by the powers given to the EDPS. The EDPS has a function related to the correct application of (a specific part of) Community law and has enforcement powers, and as a consequence, additional checks and balances are built in the system.

Although the establishment of the EDPS does not substantially change the balance between the institutions, it has an impact on the *institutional* framework (see section 3.3.4). It was the purpose of this article to show that the EDPS has different roles, but all in all these roles must contribute to a high level of data protection within the European Union.

Since a limitation of the scope of this article was necessary, it did not go into details on the important topic of the impact of the new regulatory regime on data protection on the Community *legislative* framework. The Community legislator did not pay much attention to the impact of this new regulatory regime on the existing regulatory framework. As to this last point, Regulation 45/2001 confers a range of duties and powers to the EDPS, without specifying the relationship between the provisions of the Regulation and other relevant provisions of Community law. Some of the results of this approach can nevertheless be found in this article.

Kluwer Law International is a renowned publisher of books, journals, and looseleafs in areas of international legal practice.

We publish important and interesting titles in the following areas:

- Air & Space Law
- Arbitration
- Banking and Finance Law
- Business Law
- Commercial law
- Company/Corporate law
- Competition Law
- Environmental Law
- European Community Law
- Intellectual Property
- International Trade Law
- Labour Law
- Maritime Law
- Taxation

Please browse our website for information on all our books, journals, looseleafs and electronic products: www.kluwerlaw.com

KluwerLawOnline: One of the most complete libraries on the web

Kluwer Law Online is your online gateway to Kluwer Law International publications.

Completely revamped, the Kluwer Law Online is packed with new functionality.

Improved functionality includes:

- inclusion of product types other than journals
- regularly updated homepage texts to keep you informed about us and our products
- a homepage for every publication
- improved Browse Topics
- suggestions for related titles
- informative and regularly updated site texts (About Us, Contact Us)

At www.kluwerlawonline.com, you will find all our journals online. Feel free to browse the site and view a sample copy of the journal of your interest.

Common Market Law Review

Common Market Law Review specializes in European community law. The *Common Market Law Review* has provided a forum for the keenest legal minds in the field for 40 years. Because of the international composition of its Editorial Board, and in view of the fact that it is able to attract contributions from all over Europe, and from the United States, the *Review* is able to adopt a unique approach to capitalize Community issues.

Common Market Law Review brings you detailed, in-depth examination of the most pressing and far-reaching issues on Community Law such as:

- Regulation of public procurement
- State aid policy and practice
- Developments in market deregulation
- The single European currency
- The EU/WTO relationship
- Telecommunications
- E-commerce, and
- Community Law in National Courts

Six times a year, subscribers receive vital information and analysis on trends and developments. The *Review*'s easy-to-use format includes penetrating articles by outstanding practitioners and academics; annotations of cases from the European Court of Justice, as well as relevant cases from National Courts, the WTO, the EFTA Court, and other tribunals addressing Community Law; book reviews; and a comprehensive bibliographical survey of pertinent literature. The *Review* attracts authors from all over the world.

Editors: Alan Dashwood, University of Cambridge; Jacqueline Dutheil de la Rochère, University of Paris-II; Jean-Paul Jacqué, Council of the European Union; Pieter Jan Kuijper, European Commission; Wulf-Henning Roth, University of Bonn; Piet Jan Slot, University of Leiden; Jan A. Winter, Free University of Amsterdam.

Associate Editor: Alison McDonnell, Europa Institute, University of Leiden.

Advisory Board: Bob Baardman, Rotterdam; Ulf Bernitz, Stockholm; Laurens J. Brinkhorst, The Hague; Claus-Dieter Ehlermann, Brussels; Giorgio Gaja, Florence; Walter van Gerven, Leuven; Roger Goebel, New York; Meinhard Hilf, Hamburg; Laurence Idot, Paris; Francis Jacobs, Luxembourg; Konstantinos D. Kerameus, Athens; Ole Lando, Copenhagen; Miguel Poiares Maduro, Luxembourg; David O'Keeffe, London; James O'Reilly, Dublin; Pierre Pescatore, Luxembourg; Gil Carlos Rodriguez Iglesias, Madrid; Allan Rosas, Luxembourg; Henry G. Schermers, Leiden; Eric Stein, Ann Arbor; Christiaan W.A. Timmermans, Luxembourg; Joseph H.H. Weiler, New York; Mirosław Wyrzykowski, Warsaw.

For more information about Common Market Law Review, please visit www.kluwerlawonline.com/commonmarketlawreview