

**Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE)**

(2010/C 280/02)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular its Article 16,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in particular its Article 17,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, and in particular its Article 41,

HAS ADOPTED THE FOLLOWING OPINION:

### I. INTRODUCTION

1. On 3 December 2008 the Commission adopted a Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (hereinafter 'the Proposal')<sup>(1)</sup>. The Proposal aims to recast Directive 2002/96/EC on waste electrical and electronic equipment (WEEE) adopted on 27 January 2003 (hereinafter 'the Directive')<sup>(2)</sup> without changing either the drivers or the rationale for collecting and recycling WEEE.
2. The EDPS has not been consulted as required by Article 28(2) of Regulation (EC) No 45/2001<sup>(3)</sup>. Acting on his own initiative, the EDPS has therefore adopted the current opinion based on Article 41(2) of the same Regulation. The EDPS recommends that a reference to this opinion is included in the preamble of the Proposal.

<sup>(1)</sup> COM(2008) 810 final.

<sup>(2)</sup> OJ L 37, 13.2.2003, p. 24.

<sup>(3)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

3. The EDPS is aware that this advice comes at a late stage in the legislative process but nevertheless considers it appropriate and useful to issue this opinion, since the Proposal raises significant data protection issues not addressed in the text. This opinion is not meant to modify the main and predominant purpose and content of the Proposal, whose 'centre of gravity'<sup>(4)</sup> remains in the protection of the environment, but only to bring an additional dimension which is becoming increasingly important to our information society<sup>(5)</sup>.

4. The EDPS, also aware of the limited scope of the recasting procedure, nevertheless urges the legislator to take these recommendations into account in accordance with Article 8 of the Interinstitutional Agreement on the recasting procedure (which provides for the possibility of amending unchanged provisions)<sup>(6)</sup>.

### II. CONTEXT AND BACKGROUND OF THE PROPOSAL AND ITS RELEVANCE TO DATA PROTECTION

5. The purpose of the Proposal is to update the existing Directive relating to the disposal, reuse and recycling of WEEE. Technical, legal and administrative problems in the first years of implementation of the Directive have led to the Proposal, as was foreseen under Article 17(5) of the Directive.
6. Electric and electronic equipment (EEE) is a wide product group that includes a diverse set of media capable to store personal data — such as IT and telecommunications equipment (e.g. personal computers, laptops, electronic communication terminals) — characterised in the present techno-economic context by increasingly fast innovation cycles and, due to technological convergence, by the availability of multi-purpose devices. Developments in electronic storage media are accelerating rapidly, particularly in relation to storage capacity and size, and therefore market forces cause the turnover of EEE (containing large amounts of, often sensitive, personal data) to accelerate similarly. The results being not only that the WEEE 'is considered the fastest growing waste stream in

<sup>(4)</sup> See ECJ, 23.2.1999, C-42/97 European Parliament v Council of the European Union, [1999] ECR I-869, par. 43.

<sup>(5)</sup> See also, inter alia, ECJ, 30.1.2001, C-36/98 Spain v Council, [2001] ECR I-779, par. 59: 'If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component'.

<sup>(6)</sup> Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77, 28.3.2002, p. 1).

the EU' (7), but also, in the case of inappropriate disposal, that there is an obvious increased risk of loss and dispersion of personal data stored within this type of EEE.

amount of personal data and therefore likely to have a high 'intrinsic' value for the data subject and/or others.

### III. ANALYSIS OF THE PROPOSAL

#### III.1. Applicability of Directive 95/46/EC

7. For a long time the European Union's policies on the environment and sustainable development have been aimed at reducing waste of natural resources and introducing measures to prevent pollution.
8. The disposal, reuse and recycling of WEEE are included within this framework. These measures seek to prevent the disposal of electrical and electronic equipment along with mixed waste, placing an obligation on producers to provide disposal in the manner prescribed by the Directive.
9. In particular, among the various measures envisaged by the Directive, it is worth highlighting those designed to *reuse* (i.e. any operation by which WEEE or components thereof are used for the same purpose for which they were conceived, including the continued use of the equipment or components thereof which are returned to collection points, distributors, recyclers or manufacturers), *recycle* (i.e. the reprocessing in a production process of the waste materials for the original purpose or for other purposes) and find other forms of recovery of WEEE so as to reduce the disposal of waste (see Articles 1 and 3(d) and (e) of the Directive).
10. These operations, in particular the reuse and recycling of the WEEE, especially IT and telecommunications equipment, may present a risk, greater than in the past, that those collecting the WEEE or selling and purchasing the used or recycled devices might become aware of any personal data stored within. Such data can often be sensitive or refer to large numbers of individuals.
11. For all these reasons, the EDPS considers it urgent for all stakeholders (users and producers of EEE) to be made aware of the risks to personal data, especially in the final stage of the EEE life-cycle. At this stage, although the EEE are economically less valuable, they are likely to contain a large amount of personal data and therefore likely to have a high 'intrinsic' value for the data subject and/or others.
12. The EDPS has no observations on the general objective of the Proposal and fully supports the initiative taken, which is intended to improve environmental-friendly policies in the area of WEEE.
13. However, the Proposal, as well as the Directive, focuses solely on the environmental risks related to the disposal of WEEE. It does not take into account other additional risks to individuals and/or organisations that may arise from the operations of disposal, reuse or recycling of WEEE, in particular those related to the likelihood of improper acquisition, disclosure or dissemination of personal data stored in the WEEE.
14. It is important to note that Directive 95/46/EC<sup>(8)</sup> applies to 'any operation or set of operations which is performed upon personal data', including their 'erasure or destruction' (Article 2(b)). Disposal of EEE can involve data processing operations. For this reason there is an overlap between the Proposal and the just mentioned Directive, and as such data protection rules could apply to activities covered by the Proposal.

#### III.2. WEEE's disposal and security measures

15. The EDPS intends to highlight the significant risks that may affect individuals and/or organisations acting as 'data controllers' (9) where the WEEE, particularly IT and telecommunications equipments, contain personal data relating to the users of those devices and/or third parties at the time of disposal. The unlawful access to or disclosure of such personal information, sometimes consisting of special categories of data, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life (so called 'sensitive data') (10), are indeed capable of affecting the privacy and dignity of the persons to whom the information relates, as well as other legitimate interests of those individuals/organisations (e.g. economic ones).

(7) See Commission Staff working paper accompanying the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (recast). Impact Assessment, 3.12.2008 (COM(2008) 810 final) SEC(2008) 2933, p. 17.

(8) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

(9) For the definition of 'controller' see Article 2(d) of Directive 95/46/EC.

(10) See Article 8, Directive 95/46/EC.

16. In general terms, the EDPS considers it necessary to emphasise the importance of the adoption of appropriate security measures at every stage (from beginning to end) of the processing of personal data, as repeatedly stated in other opinions<sup>(11)</sup>. This applies *a fortiori* in the delicate phase in which the data controller intends to dispose of devices containing personal data.
17. Indeed, the respect of security measures is often a precondition in order to effectively guarantee the right to the protection of personal data.
18. It would therefore be inconsistent to introduce the duty to put in place (sometimes costly) security measures in the ordinary course of processing operations of personal data (as envisaged by Article 17 of Directive 95/46/EC, when applicable<sup>(12)</sup>) and then simply omit to consider the introduction of adequate safeguards regarding the disposal of the WEEE.
19. It would be similarly inconsistent to give importance to the issue of data security to the extent that data breach notification had to be introduced via Article 3 of Directive 2009/136/EC<sup>(13)</sup> and then not provide any guarantee or safeguard during the disposal of WEEE as well as in the event of WEEE reuse or recycling.
20. The EDPS regrets that the Proposal does not take into account the potentially damaging effects of the WEEE disposal on the protection of personal data stored in 'used' equipment.
21. This aspect was also not considered in the impact assessment made by the Commission<sup>(14)</sup> although experience has shown that failing to take appropriate security measures in case of WEEE disposal could jeopardise the protection of personal data<sup>(15)</sup>. Due to the complexity of the issues involved (for example the multitude of legitimate methods, technologies and stakeholders in the disposal cycle of the WEEE), the EDPS considers that it would have been appropriate to carry out a 'privacy and data protection impact assessment' on the processes related to WEEE disposal.
22. Nevertheless, the EDPS strongly advises that 'Best Available Techniques' for privacy, data protection and security in this area should be developed.
23. As further evidence, during the public consultation prior to the recast of the Directive, issues relating to the security and protection of personal data have sometimes been raised by stakeholders, particularly IT and electronic communications companies<sup>(16)</sup>.
24. Finally, it is worth highlighting that some national data protection authorities have published guidelines to minimise the risks which may result from failure to take the necessary security measures, particularly at the disposal of materials subject to the application of the Directive<sup>(17)</sup>.
- <sup>(11)</sup> See, e.g., BBC's online article 'Children's files on eBay computer', 4 May 2007, reporting that a computer containing personal data about fostering and adopting children was sold on eBay, ([http://news.bbc.co.uk/2/hi/uk\\_news/england/6627265.stm](http://news.bbc.co.uk/2/hi/uk_news/england/6627265.stm)); see also BBC's online article 'Bank customer data sold on eBay' 26 August 2008, reporting that the hard disk containing personal data of one million bank customer was sold on eBay ([http://news.bbc.co.uk/2/hi/uk\\_news/7581540.stm](http://news.bbc.co.uk/2/hi/uk_news/7581540.stm)).
- <sup>(12)</sup> See HP, Stakeholder consultation on the review of Directive 2002/96/EC of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE), pp. 7-8; DELL (draft comments), WEEE Review Policy Options of the stakeholder consultation on the review of Directive 2002/96/EC of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE), p. 2, point 1.1. and 4, point 1.3. (3.6.2008); Royal Philips Electronics Position and Proposal, Stakeholder consultation on the Revision of the WEEE Directive, p. 12 (5.6.2008) ([http://circa.europa.eu/Public/irc/env/weee\\_2008\\_review/library](http://circa.europa.eu/Public/irc/env/weee_2008_review/library)). See also WEEE Consultation Response, Summary of responses and Government response to fourth consultation on implementation of Directives 2002/96/EC and 2003/108/EC on waste electrical and electronic equipment, December 2006, p. 30: 'Data protection and security. Some waste management companies would like there to be some guidance issued on data protection and security, particularly in light of the fact they will be handling sensitive data' (<http://www.berr.gov.uk/files/file35961.pdf>).
- <sup>(13)</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337, 18.12.2009, p. 11).
- <sup>(14)</sup> Commission Staff Working Paper accompanying the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (recast), SEC(2008) 2933, 3.12.2008; but see United Nations University, 2008 Review of Directive 2002/96/EC on waste electrical and electronic equipment (WEEE), European Commission, Belgium, 2007, p. 273 ([http://ec.europa.eu/environment/waste/weee/pdf/final\\_rep\\_unu.pdf](http://ec.europa.eu/environment/waste/weee/pdf/final_rep_unu.pdf)); 'Data security is also an issue — removing personal data from a hard-drive'.
- <sup>(15)</sup> Landesbeauftragter für Datenschutz und Informationsfreiheit Bremen, Entwicklung eines Konzeptes zur Löschung und Datenträgerevernichtung durch Behörden und Unternehmen, 16. Mai 2007 (<http://www.datenschutz-bremen.de/rdf/datenloeschung.rtf>); Garante per la protezione dei dati personali, Electrical and Electronic Waste and Data Protection, 13 October 2008 (<http://www.garanteprivacy.it/garante/doc.jsp?ID=1583482>), also mentioned in the Twelfth Annual Report of the Article 29 Working Party on Data Protection, 16 June 2009, p. 57; see also International Working Group on Data Protection and Telecommunications, Recommendation on Data Protection and E-Waste, Sofia, 12-13.3.2009 (<http://www.datenschutz-berlin.de/attachments/650/675.38.14.pdf?1264671551>).

25. The EDPS reiterates that Directive 95/46/EC is applicable at the disposal stage of the WEEE containing personal data. Data controllers — in particular those using IT and communications devices — are therefore required to comply with their security obligations to prevent the improper disclosure or dissemination of personal data. To this end and in order not to be held liable for the breach of security measures, the data controller in the public or private sector, with the cooperation of the data protection officers (where present), should adopt appropriate policies for disposal of WEEE containing personal data.

26. Where data controllers disposing of EEE do not have the required skills and/or technical know-how to erase the personal data concerned, they could entrust this task to qualified processors (e.g. assistance centres, equipment manufacturers and distributors) under the conditions provided in Article 17(2), (3) and (4) of Directive 95/46/EC. These processors will in turn certify the performance of the operations in question and/or undertake them.

27. Due to these considerations, the EDPS comes to the conclusion that the recast of the Directive should add data protection principles to the provisions dedicated to the protection of the environment.

28. The EDPS therefore recommends the Council and the European Parliament to include a specific provision in the current Proposal stating that the Directive applies to the disposal of WEEE without prejudice to Directive 95/46/EC.

### III.3. WEEE's reuse or recycle and security measures

29. Being in a situation allowing autonomous decisions regarding the data held on the EEE, those in charge of disposal operations could be considered as 'data controllers'<sup>(18)</sup>. They must therefore adopt internal procedures to avoid unnecessary processing operations on

any personal data stored in the WEEE, namely other operations than those strictly necessary to verify the effective elimination of the data contained therein.

30. Moreover, they must not allow unauthorised individuals to gain knowledge of or process data stored on EEE. In particular, when storage media are recycled or reused, and thus re-enter the market, there is an increased risk of improper disclosure or dissemination of personal data, as well as a need to prevent unauthorised access to personal data.

31. The EDPS therefore recommends that the Council and the European Parliament include a specific provision in the current Proposal to prohibit the marketing of used devices which have not previously undergone appropriate security measures, in compliance with state-of-the-art technical standards (for example multi-pass overwriting), in order to erase any personal data they may contain.

### III.4. Privacy and security 'by design'

32. The forthcoming legal framework on e-waste should not only include a specific provision regarding the wider 'eco-design principle' of the equipment (see Article 4 of the Proposal regarding 'Product design') but also — as previously stated in other EDPS' opinions<sup>(19)</sup> — one regarding the principle of 'Privacy by design'<sup>(20)</sup> or, more precisely in this area, 'security by design'<sup>(21)</sup>. As far as possible, privacy and data protection should be integrated into the design of electrical and electronic equipment 'by default', in order to allow users to delete — using a simple means and free of charge — personal data that may be present on devices in the event of their disposal<sup>(22)</sup>.

<sup>(18)</sup> The concept of controller is [...] functional, in the sense that it is intended to allocate responsibilities where the factual influence is, and thus based on a *factual* rather than a formal analysis: see Article 29 Data Protection Working Party, WP 169, Opinion 1/2010 on the concepts of 'controller' and 'processor', adopted on 16 February 2010.

<sup>(19)</sup> See, e.g., The EDPS and EU Research and Technological Development. Policy paper, 28 April 2008, p. 2; Opinion of the EDPS on Intelligent Transport Systems (OJ C 47, 25.2.2010, p. 6); Opinion of the EDPS on pharmacovigilance (OJ C 229, 23.9.2009, p. 19).

<sup>(20)</sup> In favour of a wide application of the principle see Article 29 Data Protection Working Party — Working Party on Police and Justice, The Future of Privacy. Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data, WP 168, adopted on 1 December 2009, p. 3 and 12; see also Commission Recommendation on the implementation of privacy and data protection principles in applications supported by radio-frequency identification, C(2009) 3200 final, p. 8.

<sup>(21)</sup> See Communication from the Commission, A European Security Research and Innovation Agenda — Commission's initial position on ESRI's key findings and recommendations, COM(2009) 691 final, p. 6 and 14.

<sup>(22)</sup> See also EDPS, Opinion of 18 March 2010 on promoting trust in the Information Society by fostering data protection and privacy.

33. This approach is clearly supported by Article 3.3(c) of Directive 1999/5/EC<sup>(23)</sup> concerning the design of radio and telecommunications terminal equipment and by Article 14(3) of the Directive 2002/58/EC<sup>(24)</sup>.

34. Therefore, producers should 'build in' privacy and security safeguards via technological solutions<sup>(25)</sup>. In this framework, initiatives aimed at advising those concerned of the need to erase any personal data before the disposal of WEEE (including producers making free software available for this purpose) should also be fostered and supported<sup>(26)</sup>.

#### IV. CONCLUSIONS

35. In consideration of the above, the EDPS recommends that data protection authorities, in particular through the Article 29 Working Party, and the EDPS are closely involved in initiatives related to the disposal of WEEE, through consultation at a sufficiently early stage before the development of relevant measures.

36. Considering the context in which personal data are processed, the EDPS advises that the Proposal should include specific provisions:

- stating that the Directive on WEEE applies without prejudice to Directive 95/46/EC,
- prohibiting the marketing of used devices which have not previously undergone appropriate security

measures, in compliance with state-of-the-art technical standards in order to erase any personal data they may contain,

- regarding the principle of 'privacy by design' or 'security by design': as far as possible, privacy and data protection should be integrated into the design of electrical and electronic equipment 'by default', in order to allow users to delete — using simple means and free of charge — personal data that may be present on devices in the event of their disposal.

37. The EDPS strongly recommends, therefore, that the Proposal is amended, in line with Directive 95/46/EC, as follows:

- recital 11: 'In addition, this Directive should apply without prejudice to the legislation on data protection, in particular Directive 95/46/EC. Since electric and electronic equipment (EEE) is a wide product group covering a diverse number of media able to store personal data (such as IT and telecommunications equipment), disposal operations relating to them, in particular reuse and recycling, may present risks of unauthorised access to personal data stored on WEEE. Therefore, as far as possible, privacy and data protection safeguards should be integrated by default into the design of electrical and electronic equipment capable of storing personal data, in order to allow users to delete — simply and without charge — any such data present at the time of disposal.'

- Article 2(3): 'This Directive shall apply without prejudice to the legislation on data protection, in particular Directive 95/46/EC.'

38. In addition, the EDPS considers it appropriate that the following amendments should be taken into consideration:

- Article 4(2): 'Member States shall encourage measures to promote the design and production of electrical and electronic equipment which facilitate the erasure of any personal data contained in the EEE at the time of their disposal',
- Article 8(7): 'Member States shall ensure that any WEEE collected containing personal data which undergoes treatment in order to be recycled or reused is not marketed unless such data has first been removed using the Best Available Techniques.'

<sup>(23)</sup> Article 3(3) of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ L 91, 7.4.1999, p. 10): '[...] the Commission may decide that apparatus within certain equipment classes or apparatus of particular types shall be so constructed that it incorporates safeguards to ensure that [...] the personal data and privacy of the user and of the subscriber are protected'.

<sup>(24)</sup> 'Where required, measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use of their personal data, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and communications'. See also recital 46 of the same Directive, mentioned in footnote 13.

<sup>(25)</sup> In favour of this policy perspective see also V. Reding, Keynote Speech at the Data Protection Day, 28 January 2010, European Parliament, Brussels, SPEECH/10/16: 'Businesses must use their power of innovation to improve the protection of privacy and personal data from the very beginning of the development cycle. Privacy by Design is a principle that is in the interest of both citizens and businesses. Privacy by Design will lead to better protection for individuals, as well as to trust and confidence in new services and products that will in turn have a positive impact on the economy. I have seen some encouraging examples, but much more needs to be done'.

<sup>(26)</sup> See, e.g., Royal Canadian Mounted Police, B2-002 — IT Media Overwrite and Secure Erase Products (05/2009), in <http://www.rcmp-grc.gc.ca/ts-st/pubs/it-ti-sec/index-eng.htm>

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- Article 14(6): 'Member States may require that users of EEE containing personal data are given information by producers and/or distributors, e.g. in the instructions for use or at the point of sale, regarding the need to erase personal data which might be contained in the EEE prior to their disposal'.

Done at Brussels, 14 April 2010.

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