Independence and powers of independent supervisory authorities

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Supervisory authority

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These authorities shall act with complete independence in exercising the functions entrusted to them.

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...
Regulation 45/2001/EC (Art. 44)

**Independence**

1. The European Data Protection Supervisor shall act in complete independence in the performance of his or her duties.

2. The European Data Protection Supervisor shall, in the performance of his or her duties, neither seek nor take instructions from anybody.
3. The European Data Protection Supervisor shall refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any other occupation, whether gainful or not.

4. The European Data Protection Supervisor shall, after his or her term of office, behave with integrity and discretion as regards the acceptance of appointments and benefits.
Draft Regulation (Art. 47)

**Independence**

1. The supervisory authority shall act **with complete independence** in exercising the duties and powers entrusted to it.

2. The members of the supervisory authority shall, in the performance of their duties, **neither seek nor take instructions** from anybody.

3. Members of the supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.
4. Members of the supervisory authority shall behave, after their term of office, with integrity and discretion as regards the acceptance of appointments and benefits.

5. Each Member State shall ensure that the supervisory authority is provided with the adequate human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.
6. Each Member State shall ensure that the supervisory authority has its own staff which shall be appointed by and be subject to the direction of the head of the supervisory authority.

7. Member States shall ensure that the supervisory authority is subject to financial control which shall not affect its independence. Member States shall ensure that the supervisory authority has separate annual budgets. The budgets shall be made public.
Key elements of independence

- Appointment of members and head of the DPA and termination of their function
- Powers
- Human resources and equipment
- Budget
- Financial control shall not affect the independence
- No obligation or right to follow instructions (scrutiny, technical oversight)
- No or restricted organisational supervision (e.g. staff decisions, budget, office space)
The German Case (C-518/07)

- European Commission versus Federal Republic of Germany
- Action brought before the European Court in 2007
- Support by the EDPS
- The advocate general pleaded to dismiss the action
- The European Court did not follow the opinion of the advocate general
  → Judgement against the Republic of Germany (9th of March 2010)
…the Court (Grand Chamber) hereby:

1. Declares that, by making the authorities responsible for monitoring the processing of personal data by non-public bodies and undertakings governed by public law which compete on the market (öffentlich-rechtliche Wettbewerbsunternehmen) in the different Länder subject to State scrutiny, and by thus incorrectly transposing the requirement that those authorities perform their functions ‘with complete independence’, the Federal Republic of Germany failed to fulfil its obligations under the second subparagraph of Article 28(1) of 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;…
The German Case (C-518/07) (ctd.)

The National legislation was the following

“The processing of data by public bodies is supervised, at Federal level, by the Federal representative responsible for the protection of personal data and freedom of information (‘Bundesbeauftragter für den Datenschutz und die Informationsfreiheit’) and, at regional level, by the representatives responsible for the protection of regional data ‘Landesdatenschutzbeauftragte’). Those representatives are solely responsible to their respective parliament and are not normally subject to any scrutiny, instruction or other influence from the public bodies which are the subjects of their supervision.”
The German Case (C-518/07) (ctd.)

“On the other hand, the organisation of the authorities responsible for supervising the processing of data by non-public bodies varies among the Länder. However, all the laws at Länder level expressly subject those supervisory authorities to State scrutiny.”
German Case – arguments of the Parties

- **Different interpretation** of the words ‘with complete independence’ by the Commission and the Federal Republic of Germany

- In the view of the Commission and the EDPS, which rely on a broad interpretation of the words ‘with complete independence’, the requirement that the supervisory authorities exercise their functions ‘with complete independence’ must be interpreted as meaning that a supervising authority must be free from any influence, whether that influence is exercised by other authorities or outside the administration.
The Federal Republic of Germany proposes, on the contrary, a **narrower interpretation** of the words ‘with complete independence’ and maintains that the second subparagraph of Article 28(1) of Directive 95/46 requires the supervisory authorities to have **functional independence** in the sense that those authorities must be independent of bodies outside the public sector which are under their **supervision** and that they must not be exposed to external influences. However, in the view of the Federal Republic of Germany, the State scrutiny exercised in the German *Länder* does not constitute such an external influence.
German Case - Findings of the Court

- Contrary to the position taken by the Federal Republic of Germany, the concept of ‘independence’ is complemented by the adjective ‘complete’, which implies a decision-making power independent of any direct or indirect external influence on the supervisory authority.
- The scheme of Directive 95/46 must be understood as the equivalent of Article 286 EC and Regulation No 45/2001.
In view of the fact that Article 44 of Regulation No 45/2001 and Article 28 of Directive 95/46 are based on the same general concept, those two provisions should be interpreted homogeneously, so that not only the independence of the EDPS, but also that of the national authorities, involve the lack of any instructions relating to the performance of their duties.

It should be noted that the State scrutiny, whatever form it takes, in principle allows the government of the respective Land or an administrative body subject to that government to influence, directly or indirectly, the decisions of the supervisory authorities or, as the case may be, to cancel and replace those decisions.
However, the possibility remains that the scrutinising authorities, which are part of the general administration and therefore under the control of the government of their respective Land, are not able to act objectively when they interpret and apply the provisions relating to the processing of personal data.

…it should be pointed out that the mere risk that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter authorities’ independent performance of their tasks….
The principle of democracy does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government.

…the management of the supervisory authorities may be appointed by the parliament or the government. …. the legislator may define the powers of those authorities.

Furthermore, the legislator may impose an obligation on the supervisory authorities to report their activities to the parliament.
The Austrian Case C-614/10 (ctd.)

- Is more complex than the German case
- The Commission took action against the Republic of Austria before the Court in 2010
- The Commission was supported by the EDPS, the Republic of Austria was supported by the Republic of Germany
- The public hearing took place on 25th April 2012
- The opinion of the advocate general will be announced on 3rd July 2012
- The judgement can be expected for autumn/winter 2012
The Austrian Case C-614/10 (ctd.)

- The members of the Data Protection Commission are not bound to any instructions (constitutional provision); the work for the DPC is an „additional job“
- The office of the DPC is organisationally a part of the Federal Chancellery
- The civil servants who work for the DPC are subject to administrative/organisational supervision by the Federal Chancellery
- The Executive Member of the DPC is at the same time Director of office of the DPC and the specific Member of the DPC who is responsible for the daily work of the DPC
- The DPC itself has no budget.
The Austrian Case C-614/10 (ctd.)

**European Commission:**
- Special position of the Executive Member, underlies the administrative supervision by the Federal Chancellery
- Office of the DPC – administrative supervision
- Obligation to report to the Federal Chancellor

**EDPS:**
- Similar argumentation
- Additional argument: no specific budget line of the DPC
The Austrian Case C-614/10 (ctd.)

Austrian Government:

- Independence in the sense of Art. 267 TFEU
- Even courts have no own budget line
- The word „complete“ is not included in Art. 8 Fundamental Rights Charter and in Art.16 TFEU
- Office of the DPC is only preparing the decisions, the latter are taken (eventually changed) by the DPC itself
- The Executive Member is not necessarily the civil servant of the Federal Chancellery, it could also be another member
- Specific difference to the German case: no technical instructions, no state scrutiny
- No cases of influence have happened yet
Appointment procedure and independence of the DPA

- Draft Regulation: members must be appointed by the parliament or the government of the MS
- No other possibilities of appointment are mentioned
- Appointment by the government can also influence independence
- In Austria members of the DPC are appointed by the Federal President of the Republic on the basis of a proposal of the government
Powers of the DPA and independence

- The DPA has to be efficient $\implies$ efficiency depends on the powers
- Power to impose fines
- Binding decisions in the public and private area
- Power to engage in legal procedures
- Power to carry out inspections, to get all the information required etc.
- Political role
Independence and resources

- Crucial question → efficiency of the DPA
- The Austrian DPC is one of the smallest DPAs in comparison with population
- Insufficient staff for notification, prior checking, informal complaints, inspections, co-operation in subgroups of the Art 29 Group and international co-operation
- The new provision in the regulation is not sufficient to guarantee adequate resources; the Art 29 Group asked for more specification
Matters falling under the new proposed Directive

- The Austrian Data Protection Act applies to all areas and ex-pillars of the EU (with the necessary exceptions)
- The Austrian DPC deals with complaints in all areas
- Many formal complaints concern personal data processed by the police
- There is no justification for different powers or a different level of protection, the separation of legal instruments in the past were only justified by the lack of competence of the Council and EP to adopt directives or regulations in the area of third pillar matters
Thank you for your attention!

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