



Hungarian Helsinki Committee



Budapest, 3 October, 2011

JOSÉ MANUEL BARROSO
PRESIDENT OF THE EUROPEAN COMMISSION

Dear Mr President,

In this letter the three undersigned Hungarian NGOs wish to clarify an outstanding problem arising from an Act of the Parliament of Hungary, namely the independence of the Data Protection Commissioner. In our view the new Act No CXII of 2011 on informational self-determination and freedom of information fails to satisfy the fundamental requirement of independence of the national authority supervising the processing of personal data under the directive 95/46/EC. According to this Act, the current data protection commissioner will be replaced on 1 January, 2012, years before the end of the fixed six-year term. We believe that the Hungarian Republic is failing to fulfil its obligations under EU law, therefore we suggest the Commission to initiate a proceeding against Hungary for this failure.

The rationale of this belief is justified as follows.

I. The independence of national supervisory authorities under EU law

1. Directive 95/46 aims at protecting the right to privacy with respect to the processing of personal data. The member states of the European Union are obliged by Article 28 of Directive 95/46 to establish one or more public authorities responsible for monitoring the application of the provisions adopted by the Member States pursuant to the Directive. According to Article 28 (1) of Directive 95/46 such authorities “shall act with complete independence in exercising the functions entrusted to them.”

In view of Directive 95/46 national data protection authorities are not national organs exclusively governed by national law: they fulfil functions entrusted to them by the law of the European Union and their status is governed both by national law and EU law. From this it follows that national legislators are not completely free in shaping the rules pertaining to national data protection authorities. Rather, national legal systems must provide for the guarantees envisaged by the Directive. Bearing in mind the jurisprudence of the European Court of Justice on the supremacy of EC law,¹ this would even apply vis-a-vis the national constitutions. Nevertheless the supremacy of EU law over the national constitutions is not relevant in our case, since the new Basic Law of Hungary can be interpreted in harmony with relevant EU law.

2. The central guarantee applicable to national data protection authorities under Directive 95/46 is their complete independence. As the ECJ stated in *European Commission v. Federal Republic of Germany*², this independence was established “in order to strengthen the protection of individuals and bodies affected by their decisions. It follows that, when carrying

¹ C-11-70, *International Handelsgesellschaft*, 1970 ECR, 1125.

² C-518/07, *European Commission v. Federal Republic of Germany*, Judgment of 9 March 2010, Para. 25.

out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the Länder.”

In consequence the independence of national supervisory bodies “precludes not only any influence exercised by the supervised bodies, but also any directions or *any other external influence, whether direct or indirect* [emphasis added], which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data.”³

Such a broad understanding of the independence of national data protection authorities does not only exclude direct state scrutiny over the national supervisory authority, as was the case in *European Commission v. Federal Republic of Germany*.⁴ Rather, it prevents member states from any sort of external influence, should it be direct or indirect.

3. Independence in this sense presupposes also protection from dismissal from office: if a person holding an office is exposed to the danger of removal, he or she may be tempted to follow the wishes of the organ entitled to remove him or her. Further, the possibility of removing a person from an office is the strongest means to influence the activity of that office. This understanding of independence is reflected in the founding treaties and the protocols attached thereto in relation to all institutions the treaties conceive as independent.

With regard to the Court of Justice, Article 19 TEU and Article 254 TFEU stipulates the independence of the justices of the Court. This is supplemented by several provisions of the Statute of the Court of Justice of the European Union. Amongst these, Article 5 (1) provides that “[a]part from normal replacement, or death, the duties of a Judge shall end when he resigns.” Article 6 of the Statute only allows for removal from office if a justice “no longer fulfils the requisite conditions or meets the obligations arising from his office.” As a procedural safeguard, decision on the removal is reserved for a unanimous Court and Advocates General.

Similar rules apply to members of the European Commission. Article 17 (3) III TEU declares in a language almost identical to Article 28 (1) of Directive 95/46 that “in carrying out its responsibilities, the Commission shall be completely independent.” The Commission being a political organ with political responsibility, a motion of censure of the Commission in the European Parliament is possible under Article 18 (8) TEU. But the independence of individual commissioners is protected by Article 247 TFEU which only allows for the removal of individual commissioners if he or she “no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct.” Decision on this matter is reserved for the ECJ.

Beyond the institutions of the EU, national data protection authorities are not the only national institutions the independence of which is of concern for EU law: national central banks as members of the European System of Central Banks also enjoy this status. Article 130 TFEU provides in clear terms that “[w]hen exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union

³ Ibid. Para. 30 of the Judgment.

⁴ Ibid. Paras. 31 et seq. of the Judgment.

institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.”

Article 7 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank repeats practically the same language. Further, Article 14 of the Statute makes it clear that independence presupposes protection from removal from office. According to Article 14.2 of the Statute a Governor of a national bank “may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct.” This protection is further enhanced by the possibility that a decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application.

3. Beyond the institutions created by the founding treaties, another good example can be found in the position of European Data Protection Supervisor as foreseen by Regulation (EC) No. 45/2001.⁵ The function and the importance of the European Data Protection Supervisor in safeguarding fundamental rights relating privacy are comparable to national supervisory authorities, even if the European institution is competent to supervise the public sector only. In that sense, the more detailed provisions of Article 42 (4)-(5) of Regulation 45/2001 are relevant in interpreting the term “complete independence” in Article 28 (1) of Directive 95/46.⁶ And Article 42 (4) of the Regulation states that “[a]part from normal replacement or death, the duties of the European Data Protection Supervisor shall end in the event of resignation or compulsory retirement in accordance with paragraph 5.” Paragraph 5 then continues by declaring in a clear language strongly resembling the above cited provisions of primary law that “[t]he European Data Protection Supervisor may be dismissed or deprived of his or her right to a pension or other benefits in its stead by the Court of Justice at the request of the European Parliament, the Council or the Commission, if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct.”

5. These examples from the primary and secondary sources of EU law aptly demonstrate the understanding that protecting an independent institution or a person holding an independent office inevitably presupposes protection from unjustified removal, and a justification can only be sought in the lack of the conditions required for the performance of the duties or in a serious misconduct. The same understanding applies to national data protection authorities, whose independence is stipulated by Article 28 (1) of Directive 95/46. The national implementation of the Directive must, accordingly, make sure that the term of office of a person acting as the supervisory authority in the sense of Article 28 of the Directive is not removed from his office unless the preconditions usually relevant for the removal in the case of other independent institutions are met.

This requirement is applicable irrespective of the level of the national law leading to the removal from office. Should it be otherwise, an important guarantee of EU law could be overridden by the member states and thus the supremacy of EU law would be challenged.

⁵ Cf. Statement in intervention in support of the form of order sought by the Applicant in Case C-518/07 lodged by the European data Protection Supervisor, 25 November 2008. para 40 et seq.

⁶ Cf. *ibid.* para 45.

6. Beyond considerations of EU law *stricto sensu*, the European Convention of Human Rights can also give guidance to interpret Article 28 (1) of Directive 95/45. Supervisory authorities under the Directive are essential for the safeguarding of fundamental rights of EU citizens. This does not necessarily lead to qualify them as tribunal in the sense of Article 6 of the European Convention of Human Rights – even if a strong argument can be made in favour of that view.⁷ But there is one point where the position of courts in the sense of Article 6 ECHR and of supervisory authorities is the same, and that is their complete independence. Supervisory authorities may not be exposed to any sort of external influence, should it be direct or indirect, and that applies to judges and courts as well. In other words: there aren't two different types of complete independence: either there is no external influence, or there is, and there is no middle ground.

Bearing that in mind the jurisprudence of the European Court of Human Rights also helps us understanding the requirements following from the complete independence of supervisory authorities regarding the termination of their office. The Court namely made it clear, that “ the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (art. 6-1).”⁸ This does not necessarily mean that this irremovability must under all circumstance be formally declared in the law. It suffices that the irremovability is recognised in fact and that the other necessary guarantees are present.⁹ From this it follows that independence presupposes a general protection from removal from office except in cases clearly and narrowly defined by law for cases relating to the misconduct or lack of capabilities of the person bearing the office.

II. The Act on informational self-determination and freedom of information

The Act CXII of 2011 on informational self-determination and freedom of information adopted on 11 July 2011 is in contradiction with the complete independence of the Hungarian Commissioner of Data Protection, inasmuch it abolishes this institution and thereby terminates the office of the present data protection commissioner.

This follows firstly from Section 85 (1) of the Act, that repeals Act LXIII. of 1992 on the protection of personal data and the accessibility of information of public interest. According to Section 73 (2) the repeal is effective 1 January 2012. Section 75 (1) of the Act declares that in cases pending on the basis of a petition that was submitted to the data protection commissioner before 1 January 2012 a newly established authority shall take over the procedure. Equally, Section 75 (2) of the Act orders the transfer of all personal data from the data protection commissioner to the new authority. Finally, according to Section 74 of the Act the Prime Minister shall propose the first president of the new authority by 15 November 2011, and the President of the Republic shall appoint the first president with effect on 1 January 2012.

These provisions are in clear contradiction with the independence of the data protection commissioner as understood in the above sense, since the term of office of the present data protection commissioner would end only 2014.¹⁰

⁷ Cf. Statement in intervention in support of the form of order sought by the Applicant in Case C-518/07 lodged by the European data Protection Supervisor, 25 November 2008. para 29.

⁸ Campbell and Fell v. the United Kingdom, Judgment of 26 June 1984, Series A 80, para. 80.

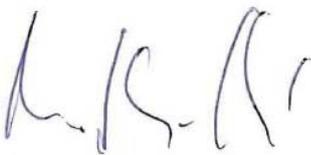
⁹ Ibid. with reference to Engel and Others v. Judgment of 8 June 1976, Series A 28, para. 68.

¹⁰ Peter Hustinx, the EU Data Protection Supervisor expressed his worries about the transitional provisions of the statute (then bill) concerned. See *Privacy Laws & Business. International Report* July 2011 (Issue 111) p. 26.

This point of the new statute is especially worrying in the context of an open and permanent conflict during the last year between in the relationship between the data protection commissioner Jóri and the government party Fidesz.¹¹

If more information is needed from the perspective of the civil society on the matter of the independence of the data protection authority, we would be happy to provide you with it in any form at your convenience.

Yours sincerely,



Dr. László Majtényi
Chairman, Eötvös Károly Policy Institute,¹² first Parliamentary Commissioner for Data Protection and Freedom of Information in Hungary (1995-2001)

On behalf of the further signatories:

Dr. András Kádár
Co-chair, Hungarian Helsinki Committee¹³

and

Dr. Balázs Dénes
Executive Director, Hungarian Civil Liberties Union¹⁴

¹¹ The conflicts concerned first the illegal publication of data on people on social benefits (resolution of the data protection ombudsman Nr ABI-3241-11/2010/K; confirmed also by the court judgments Nr 22.K.35.696/2010/4.), where the chief whip of the government party, the mayor of the town committing the named offence (in)famously declared that he is not going to obey the law because he thinks it is a bad law in contradiction with the people's sense of justice (Hungarian Parliament, Committee for Human Rights, Minorities and Religious Matters, 27 July 2010). New conflicts arose later about the government's public opinion polls which made it possible to build up a state-run database on the political sympathies of those who answered. The latter conflict is still continuing.

¹² The Eötvös Károly Policy Institute (EKINT) wishes to contribute to raising professional and general public awareness and to shaping the political agenda in issues with an impact on the quality of relations between citizens and public power. The Institute is deeply committed to the liberal interpretation of constitutionality, constitutional democracy, and individual rights.

¹³ The Hungarian Helsinki Committee (HHC) monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defense to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantees the consistent implementation of human rights norms and the proper functioning of the rule of law.

¹⁴ The Hungarian Civil Liberties Union (HCLU) is a law reform and legal defense public interest NGO in Hungary, working independently of political parties, the state or any of its institutions. HCLU's aim is to promote the case of fundamental rights and principles laid down by the Constitution of the Republic of Hungary and by international conventions.