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EFTA SURVEILLANCE
AUTHORITY

Icelandic Ministry of the Interior
Sölvhólsgrata 7
150 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning the incorrect implementation by Iceland of the Data Protection Directive (independence of supervisory authority)

1 Introduction

By a letter dated 18 March 2015, the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had started an examination of the independence of national supervisory authorities within the meaning 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 Directive” or “the Data Protection Directive”). As part of the examination, the Authority opened an own initiative case to assess the independence of the Icelandic Data Protection Authority (referred to hereafter as “the DPA” or “*Persónuvernd*”).

The examination was prompted by, *inter alia*, developments in recent case law¹ relating to the independence of national supervisory authorities, in which the Court of Justice of the European Union (“the Court”) defined the scope of the independence requirement as provided for in Article 28(1)(2) of the Directive.

After having examined the Icelandic legislation and the explanations received from Iceland, the Authority has now reached the conclusion that by maintaining in force the current budgetary setup, especially due to the issue of lack of funding to the DPA, as outlined in Section 5.2 of this letter, Iceland has failed to fulfil its obligation arising from Article 28(1)(2) of Directive 95/46, as will be elaborated upon in the following.

2 Correspondence

By letter dated 18 March 2015 (Doc No 747252), the Authority informed the Icelandic Government that it had opened an own initiative case, examining the independence of the Icelandic Data Protection Authority, prompted by recent developments in the case law of

¹ Most notably, *C-288/12 European Commission v Hungary* ECLI:EU:C:2014:237, *C-614/10 European Commission v Republic of Austria*, ECLI:EU:C:2012:631 and *C-518/07 European Commission v Federal Republic of Germany* ECLI:EU:C:2010:125.

the Court regarding the independence of national data protection supervisory authorities. In the same letter, the Authority requested specific information relating to the status of the Icelandic DPA, Persónuvernd.

The Icelandic Government replied to the letter by letter of 18 May 2015 (Doc No 757486).

The case was further discussed at the package meeting in Iceland in May 2015. Subsequently, the Icelandic Government submitted further information on 22 January 2016 (Doc No 789533).

Since some issues were still unclear, the Authority requested further information by letter of 9 February 2016 (Doc No 790644). After having requested an extension of the deadline to reply until 1 May 2016,² Iceland responded to this letter on 1 June 2016 (Doc No 806580), and submitted yet further information by email dated 13 June 2016.

The case was further discussed at the package meeting in Iceland in June 2016. Subsequently, more information was submitted by Iceland on 30 June 2016 (Doc No 810591)

3 Relevant national law

Articles 36 of the Data Protection Act No 77/2000 (“lög um persónuvernd og meðferð persónuupplýsinga”) provides:

Article 36. Organization and administration of the Data Protection Authority.

The Data Protection Authority is an independent authority with a specific board of directors and is administratively subject to the [Minister of the Interior].

The Data Protection Authority acts with independence in exercising its functions and its decisions according to this Act cannot be referred to a higher administrative authority.

The Minister shall appoint five persons to the Data Protection Authority's board of directors and an equal number of alternative members, for a period of four years at a time. The chairman and vice-chairman of the board are appointed without nomination and they shall be lawyers and fulfil the job requirements of district court judges. The Supreme Court of Iceland nominates one board member and the Icelandic Society for Information Processing shall nominate another and he shall be an expert in the field of computers and technology. Alternative board members shall fulfil the same requirements as the principal members.

The Minister decides the remuneration of the board members.

When the board members do not agree, the matter in question shall be decided by majority vote. If votes are equal for and against, the vote of the chairman shall be decisive.

The Minister, having received the recommendations of the board of directors, appoints the Data Protection Commissioner for a period of five years at a time. The Commissioner attends the board meetings with the right to speak and make proposals.

² By letter dated 1 February

The Commissioner is in charge of daily management and hires other employees of the Authority.

The Commissioner is responsible for the financial matters and personal management of the Data Protection Authority. The Data Protection Authority's board decides in other respects the division of duties between the board and its staff.

4 Relevant EEA law

Article 28(1)(2) of Directive 95/46/EC provides:

“Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

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

Articles 52 of Regulation 2016/679 (“**the GDPR**”, which has not yet been made part of the EEA Agreement, but is set to repeal and replace Directive 95/46) provides:

Article 52 - Independence

- 1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation.*
- 2. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.*
- 3. Member or members of each 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. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.*
- 5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned.*
- 6. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.*

5 The Authority’s assessment

5.1 Introduction

The Court of Justice of the European Union (“the CJEU”) has held that the words ‘with complete independence’ in Article 28(1)(2) of Directive 95/46 must be given an

autonomous interpretation, based on the actual wording of that provision and on the aims and scheme of Directive 95/46.³ Indeed, the CJEU held that this requirement must be interpreted as meaning that the supervisory authorities for the protection of personal data must enjoy an independence, which allows them to perform their duties free from external influence, direct or indirect, which is liable to have an effect on their decisions.⁴

Whereas the supervisory authority structure set up by Iceland seems to ensure a high degree of functional independence on the part of the DPA, in the sense that the Ministry may not issue instructions regarding or reverse their exercise of authority in individual cases, such functional independence is essential to, yet does not suffice to fulfil, the requirement set out in Article 28(1)(2) to the *complete* independence to be held by the relevant supervisory authorities.⁵

As outlined in the following, the supervisory authorities are still structurally subordinate to the Ministry, even if the Ministry cannot instruct them in specific cases pursuant to the relevant provisions of the Data Protection Act. This subordination and several aspects in relation thereto is problematic with regard to Article 28(1)(2) of Directive 95/46.⁶

5.2 The DPA's subordination to the Ministry – budgetary issues

Pursuant to Section 36(1) of the Data Protection Act, the DPA is an “*independent institution with its own management and administrative purview of the Minister*”.

In its letter dated 13 May 2015, the Icelandic Government stated that the DPA could be considered to be under the direct influence of the State, due to the fact that the Ministry handles the proposal of the DPA's annual budget to the Icelandic Parliament. In practice, the DPA estimates an annual budget and proposes it to the Ministry, which subsequently proposes a budget to the Parliament. It is, however, up to the Minister which budget to propose that the Parliament allocates to the DPA, since it comes under the total annual amount allocated to the Ministry of the Interior. According to the Ministry's letter, the Ministry approves the DPA's budget proposal, if it considers it to be in line with its “*vision or proposal*”.

The Icelandic Government further stated, in its letter of 13 May 2015, that it is the Ministry that finally decides which amount is to be proposed to the Parliament, since the budget of the DPA is under the budget post of the total amount allocated to the Ministry of the Interior annually. Therefore the management of the DPA, including HR issues and working conditions, depend solely on the budget allocated to the DPA by the Parliament, according to the aforementioned proposal from the Minister of the Interior. During the last few years the DPA has been allocated a limited budget, even if the Parliament allocated more to the DPA than originally foreseen in its budget for 2015, so that it would be able to fulfil its tasks as required by law.⁷

The CJEU held in case *C-614/10 Commission v Austria* that Data Protection Authorities need *not* be given a separate budget in order to satisfy the criteria of Article 28(1) of the

³ Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraphs 17 and 29 and Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraph 40.

⁴ Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraphs 19 and 25.

⁵ Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraph 42.

⁶ These same issues will equally be problematic under the GDPR when it enters into force in the EEA.

⁷ Letter from Iceland on 26 May 2016 (Doc No 810323)

Directive, comparable to that provided for in Article 43(3) in Regulation no 45/2001,⁸ which requires the European Data Protection Supervisor's budget to be shown in a separate budget of the general budget of the European Union. From the point of view of budgetary law, DPAs can therefore come under a specified ministerial department under the current Directive.⁹

However, the fact that it is the Ministry which decides on the specific budget to propose to the Parliament for the DPA, and subsequently, the allocation of budget funds to the DPA, gives rise to the impression that the Ministry does indeed have a say over the resources which the DPA is awarded on an annual basis. There is thus a risk that this budgetary influence on the part of the Ministry could give the impression that the Ministry has a direct or indirect way of influencing the DPA in its daily work, by influencing its budget insofar as it is not in line with its "*vision or proposal*". For the purposes of the role adopted by those authorities as guardians of the right to private life, it is necessary that their decisions, and therefore the authorities themselves, remain above any suspicion of partiality.¹⁰

Furthermore, the CJEU has underlined that the attribution of the necessary equipment and staff to such authorities must not prevent them from acting '*with complete independence*' in exercising the functions entrusted to them within the meaning of the second subparagraph of Article 28(1) of Directive 95/46.¹¹ Under the GDPR, Article 52(4) will require EEA States to ensure that DPAs are equipped with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.

Iceland does not seem to have adequately funded the DPA over the past few years. According to the Icelandic Government, the DPA has received a limited budget in the last years, as acknowledged by Iceland in its letter to the Authority of May 2015.

The lack of funding of the DPA appears to have been a persistent issue over the years. In 2012, the director of the DPA admitted that due to lack of funding the DPA was not be able to fulfil its legal obligations sufficiently.¹² This situation was confirmed in the 30th meeting of the 143 session of the Icelandic Parliament, during which the Minister of Interior indicated that the DPA could no longer, due to budget cuts, perform any own-initiative assessments.¹³ If the DPA is not equipped with the adequate funding and personnel which it needs in order to fulfil its tasks as laid down in the Directive, it might give rise to the impression that the DPA cannot fulfil its tasks duly, *i.e.* in line with what is foreseen in the Directive,¹⁴ and, as a consequence, that it might not be perceived as acting

⁸ 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.

⁹ C-614/10 *European Commission v Republic of Austria*, paragraph 58. Under Article 52(6) of the GDPR, the requirement will be that the supervisory authority be subject to financial control which does not affect its independence and that it has separate, public annual budgets.

¹⁰ Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraph 36.

¹¹ C-614/10 *European Commission v Republic of Austria*, paragraph 58.

¹² See the following hyperlink: <http://www.ruv.is/frett/erindum-rignir-yfir-personuvernd>.

¹³ See the following hyperlink:

<http://www.althingi.is/skodalid.php?lthing=143&lidur=lid20131202T154859>

¹⁴ See *inter alia* Chapter II, Section IX and Chapter VI of Directive 95/46.

with “*complete independence*,” as required by Article 28(1) of the Directive, due to these financial constraints.¹⁵

As of yet, the Icelandic Government has not submitted evidence to demonstrate that the DPA has indeed, over the past few years, received an adequate budget and the resources and personnel necessary to fulfil its tasks, as prescribed by Directive 95/46. A comparison of the resources requested by the DPA and the actual resources allocated could provide a suitable starting point.

In light of the above, the Authority must conclude that by maintaining in force the current budgetary setup, and in failing to establish that it has over the past few years adequately funded and is currently adequately funding the DPA, as outlined above, Iceland has failed to fulfil its obligation arising from Article 28(1)(2) of Directive 95/46.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force the current budgetary setup, and in failing to establish that it has over the past few years adequately funded and is currently adequately funding the DPA, as outlined in Section 5.2 of this letter, Iceland has failed to fulfil its obligation arising from Article 28(1)(2) of Directive 95/46.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel on 22/02/2017

¹⁵ Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraph 19.