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EFTA SURVEILLANCE AUTHORITY

Norwegian Ministry of Local Government and Modernisation
Postboks 8112 Dep
N-0032 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the incorrect implementation of the Data Protection Directive as regards the independence of the supervisory authority

1 Introduction and correspondence

By a letter dated 18 March 2015 (Doc No 779737), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case in order to examine the independence of national supervisory authorities within the meaning of the Data Protection Directive No 95/46[1] ("the Data Protection Directive" or "Directive 95/46") in the EEA EFTA States.

In this letter, the Authority further explained that the examination was prompted by, *inter alia*, recent developments in case law relating to the independence of national supervisory authorities, most notably C-288/12 *European Commission v Hungary*,[2] C-614/10 *European Commission v Republic of Austria*[3] and C-518/07 *European Commission v Federal Republic of Germany*.[4]

Norway responded by letter received on 17 April 2015 (Doc No 754271), in which it provided more information on the supervisory authority structure, as requested by the Authority.

Subsequently, the case was discussed at the package meeting in Norway in November 2015. Pursuant to these discussions, the Authority requested further information in the

[1] The Act referred to at point 5e of Annex XI to the EEA Agreement, *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*.
[2] Case C-288/12 *European Commission v Hungary*, judgment of 8 April 2014, ECLI:EU:C:2014:237.
[3] Case C-614/10 *European Commission v Republic of Austria*, judgment of 16 October 2012, ECLI:EU:C:2012:631.
[4] Case C-518/07 *European Commission v Federal Republic of Germany*, judgment of 9 March 2010, ECLI:EU:C:2010:125.

form of a follow-up letter to the package meeting, dated 1 December 2015 (Doc No 781498).

Norway responded by letter received on 21 January 2016 (Doc No 789419).

After having examined the Norwegian legislation and the explanations received from Norway, the Authority has now reached the conclusion that Norway has failed to correctly implement Article 28(1)(2) of Directive 95/46, by maintaining in force a supervisory authority structure, hereto Sections 42 and 43 of the Personal Data Act, pursuant to which the supervisory authorities do not appear to perform its functions with "*complete independence*", as will be elaborated upon in the following.

2 Relevant national law

Sections 42(1)-(2) and 42(3)(8) of the Personal Data Act[5] provide:

"*The Data Inspectorate is an independent administrative body subordinate to the King and the Ministry. The King and the Ministry may not issue instructions regarding or reverse the Data Inspectorate's exercise of authority in individual cases pursuant to statute.*

The Data Inspectorate is headed by a director who is appointed by the King. The King may decide that the director shall be appointed for a fixed period of time.

[…]

The Data Inspectorate shall submit an annual report on its activities to the King"

Section 43(1)-(2) and 43(4) of the Personal Data Act provide:

"*The Privacy Appeals Board shall decide appeals against the decisions of the Data Inspectorate, cf. section 42, fourth paragraph. The Board is an independent administrative body subordinate to the King and the Ministry. Section 42, first paragraph, second sentence, shall apply correspondingly*.

The Privacy Appeals Board consists of seven members who are appointed for a term of four years with the possibility of reappointment for a further four years. The chairman and deputy chairman are appointed by the Storting. The other five members are appointed by the King.

[…]

The Privacy Appeals Board shall give the King an annual report on its hearing of appeals."

[5] Act of 14 April 2000 no 31 on Personal Data (*Personopplysningsloven*).

Section 12A of the Civil Servant Act[6] provides:

"*Senior civil servants and civil servants who are not subject to the basic collective agreement for the Civil Service and whose terms and conditions of employment are laid down in a special contract are obliged to accept redeployment to other duties in the agency or to be required to be available for special tasks if the contractual requirement with regard to results is not met. This applies even if the conditions for dismissal or summary discharge pursuant to sections 9 or 10 are not present. […]*"

3 Relevant EEA law

Article 28(1)(2) of Directive 95/46 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."

4 The Authority's assessment

4.1 Introduction

In accordance with Article 28(1)(2) of Directive 95/46, EEA States are required to set up one or more supervisory authorities for the protection of personal data under that Directive, which have complete independence in exercising the functions entrusted to them.

4.2 The supervisory authorities' subordination to the Ministry

Pursuant to Sections 42(1)-(2) and 43(1) of the Norwegian Personal Data Act, the Data Inspectorate ("the DPA") and the Privacy Appeals Board ("the Board") are "*independent administrative bod[ies] subordinate to the King and the Ministry*".

Firstly, in its reply to the initial request for information received by the Authority on 17 April 2015, the Norwegian Government informed the Authority that the Ministry issues a grant letter to the DPA each year, which highlights the priorities of the Government in the field of data protection. According to the Norwegian Government, this grant letter serves as guidelines for the DPA's work, and sets certain priorities for the next year. In the grant letter for 2016, some of the aims for the DPA set out by the Ministry were, for example, to focus on privacy by design, and to ensure that data subjects and businesses that deal with personal data know or are familiarised with the applicable rules.[7]

Secondly, in its response to the follow up letter to the package meeting received by the Authority on 21 January 2016, the Ministry explained that it is the Ministry which proposes the relevant budget for the DPA and the Board, respectively, yet "*taking due*

[6] Act of 4 March 1983 no 3 on Civil Servants (*Tjenestemannsloven*)

[7] The grant letter for 2016 is available under the following hyperlink: https://www.regjeringen.no/contentassets/8774a0bd274047478db22e206a24e2a1/2016/2016_datatilsynet.pdf

consideration" to any special needs communicated by the DPA or the Board. The proposal is subsequently subject to parliamentary approval.

Thirdly, according to the Norwegian Government's response to the request for information, there are meetings between the Ministry, the DPA and the Privacy Appeals Board, respectively twice and once a year, during which certain administrative matters and issues such as resource management are discussed. Reports are furthermore being submitted to the Ministry on an annual or bi-annual basis. The Norwegian Government has emphasised, in its letters received by the Authority in the context of this case, that instructions are not given.

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.[8] 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.[9]

Whereas the supervisory authority structure set up by Norway seems to ensure a high degree of functional independence on the part of the DPA and the Board, 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 fulfil, the requirement set out in Article 28(1)(2) to the *complete* independence to be held by the relevant supervisory authorities.[10]

As outlined above, 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 Personal Data Act. This subordination and several aspects in relation thereto is problematic with regard to Article 28(1)(2) of Directive 95/46.

The aims to be observed by the supervisory authority, set by the Ministry, in the annual grant letter, entail that the DPA is encouraged to focus on certain topics specifically decided upon by the Ministry. Furthermore, the annual or bi-annual meetings between the DPA, the Board and the Ministry encompass the discussion of certain administrative topics, including the aims set out in the grant letter. However, the Government, and thus the Ministry, may have specific interests in relation to, for example, how certain databases are operated, in order to carry out its functions or in considering the functions carried out by other Ministries, in particular for, for example, certain taxation or law enforcement purposes. Furthermore, there is a risk that certain companies or interests which are economically important to the State, are given undue priority or consideration by the Ministry when considering how to set certain priorities or aims for the supervisory authorities, as observed by the CJEU in Case C-518/07 *European Commission v Federal Republic of Germany*,[11] a risk which persists also in discussions between the Ministry and the supervisory authorities.

[8] 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.
[9] Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraphs 19 and 25.
[10] Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraph 42.
[11] Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraph 35.

Furthermore, both the DPA and the Board are required to keep the Ministry informed and submit annual reports pursuant to *inter alia* Sections 42(3)(8) and 43(4) of the Data Protection Act and Section 11 of the relevant *Instructions to the Privacy Appeals Board*.[12] As concerns the DPA, further instructions are given in Section 4.4.4 of the relevant *Instructions on economy and operations for the DPA*,[13] in which it is written that "*the Ministry expects that the DPA makes its results within its political field visible, and that the DPA is in contact with the Ministry concerning cases which the political leadership can assist in making visible. The DPA shall inform the Ministry in good time before making public important assessments or reports which the DPA has conducted or requested. This is especially the case for cases which may attract attention from the general public. The DPA shall if possible inform the Ministry of cases which may attract attention from the general public, and that it is considered as politically important to have knowledge of.* "

Such an extensive obligation to inform the Ministry, during the aforementioned meetings, and in the specific manners as outlined in *inter alia* the Instructions mentioned above, may also prevent the DPA from being perceived as operating, in all circumstances, above all suspicion of partiality.[14]

Additionally, the fact that it is the Ministry which decides on the specific budget to propose to the Parliament for the supervisory authorities, gives rise to the impression that the Ministry does indeed have an impact on the resources which the supervisory authorities are awarded on an annual basis – in addition to setting out concrete, political aims for the focus of their work in *inter alia* the grant letter and subsequent meetings in relation thereto and in relation to other, administrative matters. There is thus a risk that there could be '*prior compliance*' on the part of those authorities since the mere existence of a power, on the part of the Ministry, to instruct, for example in relation to aims to be obtained by the supervisory authorities, may influence the decisions taken by the supervisory authorities.

In any case, the mere risk that the Ministry could exercise political influence over the decisions of the supervisory authorities due to their subordination to the Ministry is enough to hinder the latter authorities' independent performance of their tasks, within the meaning of Article 28(1)(2) of Directive 95/46. 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.[15]

4.3 Requirements to the Data Protection Commissioner (of the DPA) and the Members of the Board

As a consequence of the subordination of the supervisory authorities to the Ministry addressed in Section 4.2 of this letter, several linked problems arise. There are, for example, requirements set out to the Data Protection Commissioner ("the Commissioner") in his employment contract with the Ministry, and further issues linked to the Ministry's appointment of both the Commissioner and the members of the Board.

In Section 6.2 of Part I of the contract of the Commissioner with the Ministry ("the contract"), it is provided that he is obliged to accept relocation pursuant to Section 12A of

[12] *Instruks for Personvernnemnda*, as last amended on 28 April 2015.
[13] *Økonomi-og virksomhetsinstruks for Datatilsynet*, as last amended on 9 March 2015.
[14] Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraphs 63-64.
[15] Case C-518/07 *European Commission v Federal Republic of Germany*, cited above, paragraphs 52-53.

the Civil Servant Act, if he does not meet *inter alia* the performance requirements, tied to for example fulfilment of the aims set out in the aforementioned annual grant letter to the DPA.

Once a year the Commissioner is obliged to attend an evaluation meeting with two representatives from the Ministry. Refusal to participate and to show a cooperative spirit during the evaluation can lead to relocation pursuant to Section 5 subsection 2 of Part I of the contract. The aforementioned performance requirements, including compliance with the aims set out in the annual grant letter, are evaluated, and also serve as a basis for determining a possible salary increase, pursuant to Section 5 subsection 3 of Part I of the contract.

In this respect, it is certainly conceivable that the evaluation of the Commissioner by his hierarchical superiors in the Ministry, which may have as a consequence certain increases in pay, or, in the other extreme, relocation in accordance with the provisions of his contract, could lead to a form of "*prior compliance*," on the part of the Commissioner, or at least a certain external perception thereof. In light of the role assumed by the supervisory authorities as guardians of the right to privacy, Article 28(1)(2) of the Directive requires that their decisions, and indeed the authorities themselves, remain above all suspicion of partiality.[16] This is not the case when the Government can, in fact, relocate the Commissioner on the grounds stipulated in this contract, for example if he fails to meet the performance requirements set by the Ministry.[17]

As concerns both the Commissioner and the Board members, several of these (with the exception of the chairman and the deputy chairman) are appointed by the King in Council, i.e. the Government, pursuant to Sections 42(2) and 43(4) of the Personal Data Act.

The Authority notes that some of the members and deputy members of the Board still hold positions in public bodies within the Government structure. At present, this appears to be the case for two members or deputy members within public bodies subordinate to the Ministry of Health. However, there does not appear to be any specific rules on whether Board members, who are at the same time public officials working for bodies subordinate to for example the Ministry of Health, will be required to disqualify themselves from cases linked to, for example, that Ministry or other bodies subordinate to that Ministry, or bodies acting under specific instructions from such bodies, such as hospitals. If any members of the Board are, at the same time, case-handlers for appealed decisions adopted by the DPA, and also, public officials within certain public bodies subordinate to specific Ministries, which, themselves are subject to the supervision of the DPA, and subsequently potentially the Board, this carries a risk of influencing the decisions of the Board, in the absence of any explicit rules regulating such situations.[18]

5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force Sections 42(1)-(2), 42(3)(8) and 43(1)-(2) and 43(4) of the Personal Data Act and linked provisions in Sections 5 and 6.2 of Part I of the Data Protection Commissioner's contract, Norway has failed to fulfil its obligation arising from Article 28(1)(2) of the Act referred to at point 5e of Annex XI to the EEA Agreement (*Directive*

[16] Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraph 52.
[17] Case C-288/12 *European Commission v Hungary*, cited above, paragraphs 53-54.
[18] Case C-614/10 *European Commission v Republic of Austria*, cited above, paragraph 61.

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).

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 Norwegian 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 Norwegian 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

For Frank Büchel
College Member

This document has been electronically signed by Helga Jonsdottir on 06/04/2016