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**INTERPRETATION UNDER EUROPEAN LAW
OF THE NOTION OF "COMPLETE INDEPENDENCE" OF
SUPERVISORY AUTHORITIES FOR THE PROTECTION OF PERSONAL DATA**

I. Why "complete independence"?

1. The establishment of a supervisory authority, exercising its functions with complete independence of the Government, is an essential component of the protection of individuals with regard to the processing of personal data¹. A supervisory authority cannot effectively safeguard individual rights and freedoms unless it exercises its functions in complete independence.² This applies to data protection in both the public and the non-public sectors. More than one public authority might be needed to meet the particular circumstances of different legal systems.

II. What constitutes "complete independence"?

2. "Complete independence" is to be understood as a full, comprehensive and all-encompassing independence, as an "independence in every way". Any attempt to limit or diminish such independence, be it directly or indirectly, is therefore not permitted.
3. "Complete independence" therefore comprises all of the following fundamentals:

- a. institutional independence, i.e. the supervisory authority is not subordinated to any other government authority. This allows no dependence of supervisory authorities and no possibility of instructions being given by other or higher authorities. Policy independence from other state bodies must be ensured. Full independence means that a supervisory authority is, except from the courts, the only public body entitled in matters of data protection within its competence

¹ See Article 28, Directive 95/46 and Article 1 of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, below.

² The notion of complete independence refers to the set up of the supervisory authority. It is linked to, but not identical to the powers: in addition, such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings.

(e.g. in federal states there can be more than one supervisory authority). Any external influence on the deliberations and procedures of the supervisory authority must be precluded. A Member of a supervisory authority 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.

- b. functional independence, i.e. the supervisory authority is not subject to instructions by the controlled, in relation to the contents and extent of its activity. Those to be monitored by the supervisory authority may neither exert a direct nor an indirect influence. Members of supervisory authorities cannot be relieved from their duties because of opinions or actions adopted as members. Their tenure cannot be suspended by higher political bodies.
 - c. material independence, i.e. the supervisory authority must dispose of an infrastructure which is suited to the smooth conduct of their activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect its independence.
4. A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions. These include
- a. the composition of the authority;
 - b. the method for appointing its members;
 - c. the duration of exercise and conditions of cessation of their functions;
 - d. the allocation of sufficient resources to the authority;
 - e. the adoption of decisions without being subject to external orders or injunctions.

III. References in legal texts and case law

- UNITED NATIONS

- **United Nations guidelines concerning Computerized personal data files adopted by the General Assembly on 14 December 1990 (UN guidelines)**³

"8. Supervision and sanctions: The law of every country shall designate the authority which, in accordance with its domestic legal system, is to be responsible for supervising observance of the principles set forth above. This authority shall offer guarantees of impartiality, independence vis-a-vis persons or agencies responsible for processing and establishing data, and technical competence. In the event of violation of the provisions of the national law implementing the aforementioned principles, criminal or other penalties should be envisaged together with the appropriate individual remedies."

- **Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights ["Paris Principles"] (United Nations General Assembly 20 Dec. 1993), A/RES/48/134**⁴

"Principles relating to the status of national institutions

- Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence. (...)

- Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (...)

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."

- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

- **Recommendation of the Council concerning guidelines governing the protection of privacy and transborder flows of personal data, adopted by the Council 23 September 1980**⁵

"Part 4, 19. In implementing domestically the principles set forth in Parts Two and Three, Member countries should establish legal, administrative or other procedures or institutions for the protection of privacy and individual liberties in respect of personal data. Member countries should in particular endeavour to:

³ http://ec.europa.eu/justice_home/fsj/privacy/instruments/un_en.htm

⁴ <http://www.un.org/documents/ga/res/48/a48r134.htm>; These principles have been endorsed by the Council of Europe, and the European Union.

⁵ http://ec.europa.eu/justice_home/fsj/privacy/instruments/oecdguideline_en.htm.

- * adopt appropriate domestic legislation;
- * encourage and support self-regulation, whether in the form of codes of conduct or otherwise;
- * provide for reasonable means for individuals to exercise their rights;
- * provide for adequate sanctions and remedies in case of failures to comply with measures which implement the principles set forth in Parts Two and Three; and
- * ensure that there is no unfair discrimination against data subjects.”

- COUNCIL OF EUROPE:

- **Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, Strasbourg, 28 January 1981) and the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, (Strasbourg, 8 December 2001)**⁶

“Additional Protocol Article 1 – Supervisory authorities

1. Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the measures in its domestic law giving effect to the principles stated in Chapters II and III of the Convention and in this Protocol.

2. a. To this end, the said authorities shall have, in particular, powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles mentioned in paragraph 1 of Article 1 of this Protocol.

b. Each supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence.

3. The supervisory authorities shall exercise their functions in complete independence.”

- **European Court of Human Rights Case law (selection)**⁷

- Campbell and Fell v. The United Kingdom, judgment of 28 June 1984, Series A no. 80, § 78):

“In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case (see, inter alia, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, para. 55) -, the Court has had regard to the manner of appointment of its members and the duration of their term of office (ibid., pp. 24-25, para. 57), the existence of guarantees against outside pressures (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question whether the body presents an appearance of independence (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, para. 31).”

- Le Compte, Van Leuven and De Meyere v. Belgium, judgment of 23 June 1981, Series A no. 43, § 55 et seq.;

- Bryan v. the United Kingdom, judgment of 22 November 1995, Series A no. 335-A, § 38.

⁶ <http://conventions.coe.int/Treaty/EN/Treaties/Html/108.htm> ;

<http://conventions.coe.int/Treaty/en/Treaties/Html/181.htm>

⁷ <http://www.echr.coe.int/echr/>

- EUROPEAN UNION:

- **Charter of Fundamental Rights of the European Union**

"Article 8 Protection of personal data

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority."*

- **Treaty establishing the European Community**

"Article 286

1. *From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.*
2. *Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate."*

- **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**⁸

"Article 28 Supervisory authority

1. *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."

- **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

"Article 41 (1) European Data Protection Supervisor

1. *An independent supervisory authority is hereby established referred to as the European Data Protection Supervisor."*

"Article 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.*

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT>

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0045:EN:HTML>

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.”

- **Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters**¹⁰

“Article 30 Supervisory authority

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

- **The Europol Convention**¹¹

“Article 24: Joint Supervisory Body

1. An independent joint supervisory body shall be set up, which shall have the task of reviewing, in accordance with this Convention, the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held by Europol. In addition, the joint supervisory body shall monitor the permissibility of the transmission of data originating from Europol. The joint supervisory body shall be composed of not more than two members or representatives (where appropriate assisted by alternates) of each of the national supervisory bodies guaranteed to be independent and having the necessary abilities, and appointed for five years by each Member State. Each delegation shall be entitled to one vote.

The joint supervisory body shall appoint a chairman from among its members.

In the performance of their duties, the members of the joint supervisory body shall not receive instructions from any other body.”

- **Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime**¹²

“Article 23 (1) Joint Supervisory Body

1. An independent joint supervisory body shall be established to monitor collectively the Eurojust activities referred to in Articles 14 to 22 in order to ensure that the processing of personal data is carried out in accordance with this Decision. In order to fulfil these tasks, the Joint Supervisory Body shall be entitled to have full access to all files where such personal data are processed. Eurojust shall provide the Joint Supervisory Body with all information from such files that it requests and shall assist that body in its tasks by every other means.”

¹⁰ Commission proposal COM(2005) 475 final of 4 October 2005;
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0475:FIN:EN:HTML> .

¹¹ <http://www.europol.europa.eu/index.asp?page=legalconv#ARTICLE%2024>

¹² http://www.eurojust.eu.int/official_documents/Eurojust_Decision/1_06320020306en00010013.pdf

- **Council Decision of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the Establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)**¹³

"Article 2 Data-protection Secretary

1. The data-protection secretariat shall be headed by a data-protection secretary whose independence in the performance of his tasks shall be safeguarded, subject only to instructions from the joint supervisory bodies and their chairmen. The Deputy Secretary-General of the Council, acting on a proposal by the joint supervisory bodies, shall appoint the data-protection secretary for a period of three years. The data-protection secretary may be reappointed."

- **European Court of Justice Case law (selection)**¹⁴

– European Court of Justice, judgement of 19 September 2006, Case C-506/04, Wilson v Ordre des avocats du barreau de Luxembourg:

"49. The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision (see, to that effect, *inter alia* Case C-24/92 Corbiau [1993] ECR I-1277, paragraph 15, and Case C-516/99 Schmid [2002] ECR I-4573, paragraph 36).

50. The concept has two other aspects.

51. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (see, to that effect, Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraph 21, and Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 36; see also, to the same effect, *Eur. Court HR Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, Series A No 80, § 78). That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (Joined Cases C-9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, paragraph 20).

52. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity (see, to that effect, *Abrahamsson and Anderson*, paragraph 32) and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

53. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (see, in that regard, *Dorsch Consult*, paragraph 36; *Köllensperger and Atzwanger*, paragraphs 20 to 23; and *De Coster*, paragraphs 18 to 21; see also, to that effect, *Eur Court HR De Cubber v. Belgium*, judgment of 26 October 1984, Series A No 86, § 24)."

- Case C-24/92 Corbiau [1993] ECR I-1277, paragraph 15; - Case C-54/96 Dorsch Consult [1997] ECR I-4961; - Joined Cases C-9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, paragraph 20; - Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraph 21; - Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 36; - Case C-516/99 Schmid [2002] ECR I-4573, paragraph 36;

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¹³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0641:EN:HTML>

¹⁴ <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>