

Elements of independence of the data protection authorities in the EU

Data protection authorities'
funding and staffing



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



Contents

Introduction	3
1. Data Protection Authorities' tasks	4
2. Legal framework	5
3. Principles applied to comparable institutions	7
4. Financial independence	10
4.1. Separate and independent annual budget.....	10
Promising practices	12
4.2. Adequate financial resources.....	13
Promising practices	18
5. Staffing independence.....	18
5.1. Independent recruitment procedures.....	19
Promising practices.....	21
5.2. Adequate human resources	21
Promising practices.....	22
5.3. Sufficiently qualified staff.....	23
Promising practices.....	23
Conclusions	24
Summary	25
Annex	26

Introduction

On 5 May 2012, European Commission Vice-President Viviane Reding, responsible for Justice, Fundamental Rights and Citizenship, delivered a speech on the importance of strong and independent Data Protection Authorities (DPAs). The speech followed the adoption of proposals for a reform of the EU's data protection rules by the Commission in January 2012. The proposed reform seeks to simplify the application of the data protection rules at EU level and strengthen the independent national data protection authorities in charge of its implementation.

In recognising that many data protection authorities have concerns when it comes to funding and staffing issues in light of the reform proposals, Vice-President Reding stressed the importance of “well staffed and properly resourced data protection authorities in all Member States,” reiterating that financial autonomy is “a key aspect of full independence.”¹

The need to ensure that data protection authorities are appropriately funded and staffed led to Commissioner Reding proposing a study **to assess current practices and to identify good practices** regarding funding and staffing for an effective, financially independent national data protection authority that can make a strong contribution to cooperation and coordination with other data protection authorities.

In facilitating this study, the European Commission – between July and November 2012 – sent questionnaires to the DPAs in each EU Member State. The questionnaires covered five broad topics:

1. the current situation regarding budget;
2. staff and training issues;
3. task allocations;
4. the estimated impact of data protection reform proposals; and
5. IT tools.

Individual anonymity was granted to the DPA staff members responsible for completing the Commission's questionnaires, and the responses are noted as representative of the views held by each DPA. The European Commission then requested that the European Union Agency for Fundamental Rights (FRA) process the data received and report about the current situation, identifying promising practices for Member States regarding the funding and staffing of DPAs. The DPAs of Romania and Slovakia did not respond to the questionnaire, and are not included in the analysis below.

The FRA did not take part in shaping or drafting the questionnaires, and the results presented are solely based on the responses gleaned from the individual DPAs, as well as additional exchanges between FRA and the DPAs, aimed at clarifying the answers. With regard to Germany, the responses to the questionnaire and the data used are relevant to the Federal Commissioner for Data Protection and Freedom of Information only, and do not cover the German federal states. The independence of DPAs is a broad concept incorporating a number of key principles, many of which can be found within the legal frameworks applied to other bodies and are included in an Annex to this analysis. Of these, the standards applied to National Human Rights Institutions (NHRIs) and legal frameworks of National Regulatory Authorities (NRAs) – including those from the broadcasting telecommunications, and health sectors – are of particular relevance, and provide a comparative aspect to this analysis. NHRIs benefit from a more developed structural framework that governs their composition and operation, and as “guardians” of fundamental rights – in much the same way that DPAs are – there are a number of promising practices to be drawn from the way in which they operate. FRA's report on national

¹ European Commission Vice-President Reding, *Strong and independent data protection authorities: the bedrock of the EU's data protection reform*, Speech, Luxembourg, 3 May 2012, available at www.springconference2012.lu/files/10/6/document_id32.pdf.

human rights institutions (NHRIs),² provides essential contextual background to this comparative approach.

While the concept of independence is a broad one, and not all aspects are covered within this analysis, it is also worth noting that independence incorporates both positive independence – independence *to* carry out functions in a certain manner – and negative independence – independence *from* external influence. This analysis emphasises the importance of both. Although independence and autonomy are closely linked, independence is seen as an overarching concept within which autonomy from external control is often seen as a necessary component.

Whereas the European Commission’s questionnaire refers to the *sufficiency* of resources, a number of international instruments – namely the European Commission’s draft Regulation³ of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – instead make reference to the *adequacy* of resources. In this paper, *sufficient* and *adequate* are used synonymously with regard to both the adequacy of resources, staff members and training provisions.

Only those areas addressed by the European Commission’s questionnaire fall within the remit of this analysis. From the Commission’s questionnaire, two key aspects related to independence have been identified: financial independence and staffing independence. They will be addressed in turn after a short overview of the tasks that DPAs are expected to perform based on the 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 (Data Protection Directive), the legal standards in place and the principles applied to similar institutions.

1. Data Protection Authorities’ tasks

Any assessment made of what constitutes adequate – for the purposes of assessing the adequacy of resources, staff members and training provisions – should be made with reference to the duties, tasks and powers of the DPAs. The Data Protection Directive requires Member States to endow their national supervisory authorities with the general powers specified in Articles 28(2) (power to advise legislative or administrative authorities in the process of drafting legislation or regulations relating to the protection of individuals’ rights and freedoms with regard to the processing of personal data), 28(3) (power of investigation, of intervention and of engagement in legal proceedings) and 28(4) (power to hear claims).⁴ The extent to which these provisions have been enacted varies between the Member States.⁵ Article 28(5) of the Data Protection Directive requires DPAs to draw up a report of their activities at regular intervals and to make it publicly available. DPAs also have a duty to raise the awareness of privacy and personal data rights among EU individuals. This is particularly important since the effectiveness of data protection legislation can be ensured only when individuals are aware of their fundamental rights and actively involved in securing them.

As set out in the First Report on the implementation of the General Directive, published by the European Commission in 2003⁶, all data protection authorities are charged with investigating possible breaches of the law within their jurisdiction. Such investigations can arise, in particular, out of doubts about a proposed processing operation, or out of specific complaints from individual data subjects

² FRA (European Union Agency for Fundamental Rights) (2010), *National Human Rights Institutions in the EU Member States – Strengthening the fundamental rights architecture in the EU I*, Luxembourg, Publications Office of the European Union (Publications Office), available at: http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.

³ COM (2012) 11.

⁴ Article 28 of Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data. 24 October 1995, available at http://ec.europa.eu/justice/policies/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf.

⁵ FRA (2010), *Data Protection in the European Union: The role of National Data Protection Authorities. Strengthening the fundamental rights architecture in the EU II*, Luxembourg, Publications Office, p. 20.

(see Figure 3 below). The Report goes on to assert that when investigations are carried out, they are extensive, detailed and in-depth.⁷

At the EU level, the DPAs cooperate and work jointly with each other under the framework of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, established by Article 29(1)(1) of the Data Protection Directive (also known as the “Article 29 Working Party”).

In addition, Articles 52 and 53 of the draft General Data Protection Regulation set out the duties and powers of DPAs. These provisions are more detailed than those provided by the Data Protection Directive. Any expansion of the role of DPAs has repercussions for any assessment of whether DPAs have adequate resources, with wider duties and powers potentially leading to calls for additional funds to carry out the resulting tasks.

2. Legal framework

At EU level, DPAs independence is enshrined in Article 8 (3) of the Charter of Fundamental Rights of the European Union (adopted in 2000, legally binding as EU Primary law with the entry into force of the Lisbon Treaty in 2009), which asserts that the rules laid down by the Charter “shall be subject to control by an independent authority”. Independence of DPAs at EU level is also enshrined in Article 16 (2) of the Treaty on the Functioning of the European Union, which states that “the European Parliament and the Council (...) shall lay down the rules relating to the protection of individuals with regard to the processing of personal data” and that “compliance with these rules shall be subject to the control of independent authorities.” Article 28 of Data Protection Directive certifies that DPAs “shall act with complete independence in exercising the functions entrusted to them,”⁸ but the Directive does not elaborate on the nature of this independence.

All 28 EU Member States, in compliance with the requirements of Article 28 (1) of the Data Protection Directive have appointed one national supervisory authority with the wide remit of monitoring the application of and ensuring respect for data protection legislation within their territories.

As observed by the CJEU in *European Commission v. Germany*, DPAs are “the guardians of those fundamental rights and freedoms, and their existence in the Member States are considered an essential component of the protection of individuals with regard to the processing of personal data.”⁹

In the Council of Europe context, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹⁰ (Convention 108) itself did not originally provide for the setting up of national supervisory authorities. The 2001 Additional Protocol to Convention 108, however, enhanced the data protection guarantees by setting up supervisory authorities that “shall exercise their functions in complete independence”.¹¹

⁷ European Commission, *First Report on the implementation of the General Directive (95/46/EC)*, COM(2003) 265 final, Analysis and impact on the implementation of Directive 95/46/EC in Member States, pp. 39–41

⁸ OJ 1995 L 281.

⁹ CJEU, C-518/07, *European Commission v. Germany*, 9 March 2010, para. 23.

¹⁰ Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 1981.

¹¹ Council of Europe, Article 1 (3), 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, CETS No. 181, 2001. (Additional Protocol to the Convention 108). The Additional Protocol entered into force in 2004. It is ratified by 21 EU Member States and Croatia. Belgium, Malta and Slovenia did not sign the Additional Protocol. Denmark, Greece, Italy and the United Kingdom did not ratify the Additional Protocol.

"A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions. These could include the composition of the authority, the method for appointing its members, the duration of exercise and conditions of cessation of their functions, the allocation of sufficient resources to the authority or the adoption of decisions without being subject to external orders or injunctions."

Explanatory Report, Additional Protocol to Convention 108, para. 17.

The Court of Justice of the European Union (CJEU) has so far clarified the concept of "complete independence" of data protection authorities in two landmark judgements delineating the precise requirements regarding independence in relation to influence and supervision. In the 2010 judgment *European Commission v. Germany*,¹² the CJEU interpreted Article 28 of the Data Protection Directive as a norm setting up DPAs, which "must enjoy an independence allowing them to perform their duties free from external influence".¹³ The CJEU reached this conclusion by interpreting the Directive homogeneously with the requirements in Article 44 of 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.¹⁴ Article 44 (2) of the Regulation 45/2001 states that: "the European Data Protection Supervisor shall [...] neither seek nor take instructions from anybody". This does not however mean that parliamentary influence is totally excluded, and Parliament may still play a role in appointing the management of the supervisory authorities, defining the powers of these authorities, and obligating them to report their activities to Parliament.¹⁵ In the 2012 judgment *European Commission v. Austria*, the CJEU reiterated that the independence required under EU law "precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect" which may affect the DPA's decisions.¹⁶ The most recent case - *European Commission v. Hungary* - demonstrates how the procedures in place to govern the recruitment and dismissal of staff members can also come under scrutiny, with indirect influence able to be exerted through the recruitment process. In this case, the European Commission has brought an action against Hungary before the CJEU, asking the court to declare that Hungary had failed to fulfil its obligations under the Data Protection Directive by removing the data protection supervisor from office prematurely.¹⁷ The case is currently pending before the CJEU.

Understanding the component parts of the concept of independence is essential to any assessment of the extent to which DPAs operate free from external control. FRA's report on Data Protection in the European Union: the Role of National Data Protection Authorities highlights how autonomy with regard to both recruitment and budget is central to this broader concept of independence:

"The guarantee of independence is, in fact, primarily assured by the procedure of nomination and removal of the officers of the DPAs. The control over financial resources represents a second relevant element in ensuring the autonomy of supervisory authorities."¹⁸

On 25 January 2012 the European Commission proposed a wide-reaching reform of EU data protection legislation. Concerning independence of data protection authorities, the draft General Data

¹² Court of Justice of the European Union (CJEU), C-518/07, *European Commission v. Germany*, 9 March 2010.

¹³ CJEU, C-518/07, *European Commission v. Germany*, 9 March 2010, para. 30.

¹⁴ Council Regulation 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. OJ 2001 L 8. (hereinafter Regulation 45/2001).

¹⁵ CJEU, C-518/07, *European Commission v. Germany*, 9 March 2010, para. 43.

¹⁶ CJEU, C-614/10, *European Commission v. Republic of Austria*, 16 October 2012, para 24.

¹⁷ CJEU, C-288/12, *European Commission v. Hungary*, Action brought on 8 June 2012, pending.

¹⁸ FRA (2010), *Data Protection in the European Union: The role of National Data Protection Authorities. Strengthening the fundamental rights architecture in the EU II*, Luxembourg, Publications Office, p. 8.

Protection Regulation seeks to – among other things – strengthen the independence of DPAs. Draft Article 47 of the General Data Protection Regulation stipulates that:

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.

Once adopted by EU legislators, the General Data Protection Regulation would enshrine many of the key aspects of independence. The provisions set out in Article 47 – paragraphs 5 and 7 in particular – are discussed below.

3. Principles applied to comparable institutions

The principles set out above are also contained within other well-established and recognised European and international guidelines on independence. The frameworks applied to National Human Rights Institutions and National Regulatory Authorities – including those from the broadcasting telecommunications, and health sectors – are particularly valuable in informing any compilation of independence standards to be applied. While DPAs typically have a more focused mandate than NHRIs, they are all meant to be independent monitoring bodies with a role in the fundamental rights field.¹⁹

¹⁹ See also the discussions on the ‘Independence and powers of independent supervisory authorities’, which took place during the 3rd Annual FRA Symposium: FRA (2012), *European Union data protection reform: new fundamental rights guarantees*, 3rd Annual FRA Symposium, Vienna, 10 May 2012 (hereafter FRA Symposium Report), available at http://fra.europa.eu/sites/default/files/fra_uploads/2280-FRA-Symposium-data-protection-2012.pdf, p.10, and FRA (2010), *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I*, Luxembourg, Publications Office, available at: http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.

“NHRIs hold a special position among independent mechanisms, since the rules governing their composition, mandate and working methods – the Paris Principles – form the criteria for evaluating these mechanisms, according to an OHCHR study.”

European Union Agency for Fundamental Rights (FRA) (2012), *EU Handbook on the establishment and accreditation of National Human Rights Institutions*, p. 42²⁰

The Paris Principles provide comprehensive guidance on the effective governing and independence of NHRIs. The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) reviews and accredits NHRIs through its sub-committee in compliance with these Principles. The ICC Sub-Committee’s General Observations concerning the Paris Principles affirm that “[f]inancial systems should be such that the institution has complete financial autonomy [and it should have] a separate budget line over which it has absolute management and control.”²¹

“NHRIs must be fully independent and guaranteed a sufficient infrastructure with adequate funding so as to ensure the highest attainable level of operations irrespective of changes in the political leanings of successive governments, economic downturns, or perceived sensitivity of the matters they address. NHRIs should have a separate budget line and legislative prescription of adequate resources, with clear goals and measurement of performance.

[...] NHRIs should also be [...] sufficiently resourced to be able to collect data and conduct research and awareness-raising.”

FRA’s Opinions as published in the Report (2010) *National Human Rights Institutions in the EU Member States*

The framework applied to equality bodies calls for the need for independence but does not provide detailed principles to which the bodies must adhere to. Article 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) provides that Member States shall designate a body or bodies for the promotion of equal treatment of all persons, and that the competences of these bodies should include providing independent assistance, conducting independent surveys, and publishing independent reports.²² Further elaboration on the concept of independence is not provided.²³

In the area of broadcasting regulation, Article 30 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) only requires that Member States take appropriate measures necessary for the application of the Directive “through their competent independent

²⁰ See also Office of the United Nations High Commissioner for Human Rights (OHCHR) (2010), *National Human Rights Institutions, History, Principles, Roles and Responsibilities*, available at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

²¹ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 29 March -1 April 2010, available at [http://nhri.ohchr.org/EN/ICC/AnnualMeeting/24/2Subcommittee%20on%20Accreditation/SCA%20REPORT%20-%20March%20FINAL%20\(with%20annexes\).doc](http://nhri.ohchr.org/EN/ICC/AnnualMeeting/24/2Subcommittee%20on%20Accreditation/SCA%20REPORT%20-%20March%20FINAL%20(with%20annexes).doc).

²² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), OJ 2000 L 180, Art. 13.

²³ See however, Principle 5, Council of Europe, European Commission against Racism and Intolerance (ECRI), *ECRI General Policy Recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level*, Strasbourg, Council of Europe, 13 June 1997 and Equinet, European network of equality bodies, *Between impartiality and responsiveness – Equality bodies and practices of independence*, December 2008.

regulatory bodies,”²⁴ without further elaborating on what is to constitute an independent regulatory body. A 2011 study conducted on behalf of the European Commission stated that independence is in many ways a relative term, the definition of which depends on the purpose of independence within the given context. It notes that independence and effective functioning are closely interrelated and can hardly be separated from one another. While the report acknowledges that there is no comprehensive and consistent theory of independence that we could simply apply to derive criteria and indicators, it does identify theoretically extractable criteria and descriptors, categorised under different dimensions of independence. These comprise Status and Powers (legal provisions that establish the regulatory body and specify its tasks and powers); Autonomy of Decision Makers (an organisational structure and management board that safeguards against political influence); Financial Autonomy (adequacy of the budget and autonomy in allocating the budget so as to minimise the involvement of other actors in the budget allocation process); Knowledge (professionalism and expertise of staff and board members); and Transparency & Accountability mechanisms (checks and balances to ensure that the regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient).²⁵ In March 2013, the European Commission launched a public consultation to assess whether the independence of regulatory bodies should be strengthened. The questions asked in the consultation sought – among other things – to identify key indicators of independence.²⁶

Council of Europe standards in the area of broadcasting are more detailed. In providing a Recommendation on the independence and functions of regulatory authorities for the broadcasting sector, the Council of Europe stated that the “funding of regulatory authorities should be specified in law in accordance with a clearly defined plan; [and that] public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.”²⁷

The EU framework applied to electronic communications networks and services is even more explicit, with many of the requirements directly informing the practices recommended in this paper. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services provides that the independence of the national regulatory authorities should be strengthened through express provision being made in national law to ensure that, in the exercise of its tasks, a national regulatory authority is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. It goes on to assert that rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority. It also states that it is important that national regulatory authorities should have their own budget allowing them, in particular, to recruit an adequate number of qualified staff. In order to ensure transparency, this budget should be published annually. It goes on to affirm that Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.²⁸

With regard to NRAs for the health sector, the World Health Organisation provides useful human resources recommendations. Among them, they urge governments to ensure that competitive and

²⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95, Art. 30.

²⁵ INDIREG Final Report: Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive” (SMART 2009/0001). February 2011, available at: http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf.

²⁶ European Commission Consultations on Media Freedom and Pluralism and Audiovisual Media Regulator Independence, open until 14th June 2013, available at: <https://ec.europa.eu/digital-agenda/en/public-consultation-independence-audiovisual-regulatory-bodies>.

²⁷ Council of Europe, Recommendation Rec(2000)23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, Strasbourg, adopted on 20 December 2000.

²⁸ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ 2009 L 337.

attractive salaries are available for NRA staff; merit-based staff selection and recruitment policies are in place; and that the NRAs are able to improve the knowledge and skills of their staff through in-house and external training programmes.²⁹

In several countries, normative or practical obstacles raise concerns as to the effective independence of the national supervisory bodies from the political branches of government.³⁰ An assessment of the extent to which these obstacles prevent DPAs from carrying out their functions in complete independence follows below in this report.

The key areas to be explored herein fall broadly within the first two categories addressed by the Commission's questionnaire that this FRA analysis is focusing on:

1. budget issues; the extent to which DPAs have a separate and independent annual budget along with adequate resources and the ability to use those resources free from external control (**financial independence**); and
2. staff and training issues; the extent to which DPAs are able to hire an adequate number of staff to fulfil their tasks, that they are able to recruit this staff independent of external influence, and that they are able to provide adequate training for all staff members (**staffing independence**).

4. Financial independence

Financial independence is essential for the effective functioning of the DPAs. This incorporates DPAs having a) a separate and independent annual budget – so as to ensure that influence is not exerted on the DPA by the government through the budgetary process, and b) adequate financial resources to carry out their mandate. Both of these issues will be addressed in turn, and are of particular relevance in light of the proposal for a General Data Protection Regulation, which would abolish notification requirements, thereby preventing DPAs from earning revenue through the use of notification fees.

4.1. Separate and independent annual budget

The budgets of DPAs should not be subject to influence by government. This relates to both their initial allocation – deciding on the amount to be received during budgetary preparations – and the way in which funds are subsequently spent (once the budget has been allocated), however the Commission's questionnaire only covers the budgetary preparations process and therefore discussion here is limited to this issue. It is advisable that DPAs are given a separate and independent budget, authorised by Parliament alone. The independence of DPAs is also increased by ensuring that they are involved in all aspects of the budgetary preparations, making an assessment of the amount needed in a detailed proposal, and being consulted throughout the decision making process. Such involvement further minimises the risk of influence being exerted over the budgetary process by the government.

Failing to involve the DPAs in the budgetary procedure risks placing them in a position whereby they are unable to respond to fluctuating demands due to a lack of specific resources. The CJEU has however indicated that, with regard to DPAs, budgetary independence can be achieved in the absence of a separate budget line: In the case of *European Commission v Republic of Austria* – according to the CJEU – Article 28 of the Data Protection Directive, does not oblige EU Member States

²⁹ World health organisation (WHO) 2003, Aide-Memoire: Strengthening National Regulatory Authorities, available at http://www.who.int/medical_devices/publications/en/AM_National_Regulatory_Authorities_2003.pdf.

³⁰ FRA (2010), *Data Protection in the European Union: The role of National Data Protection Authorities. Strengthening the fundamental rights architecture in the EU II*, Luxembourg, Publications Office.

to reproduce in their national legislation provisions similar to Article 43 (3) of the Regulation 45/2001 (the Data Protection Regulation which applies to EU institutions), which states that the budget of the European Data Protection Supervisor “shall be shown in a separate budget heading in [...] the general budget of the European Union”.³¹ Indeed, national legislation “can therefore provide that, from the point of view of budgetary law, the supervisory authorities are to come under a specified ministerial department”.³² In this case, the CJEU did, however, express concern that in instances where the budgetary competence of the DPA falls within a specific ministerial department, “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.”³³ As such, instances in which the executive branch of government is responsible for the DPA budget risk undermining DPA independence and risk placing the DPAs under the control of individual members of government.

Granting more control to the DPAs over their own budget would nevertheless decrease the likelihood that external interference can be imposed. A situation that offers the maximum amount of budgetary autonomy should be strived for as a way of increasing the financial independence of DPAs. As such – in the interest of ensuring greater independence – it is suggested here that DPAs should be entrusted with a separate budget line as well as control over how they allocate those funds. In the broadcasting field, Council of Europe Recommendation (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector “does not rule out financing from the state budget. However, because in this case regulatory authorities are more likely to be dependent on the budgetary favour of governments and parliaments, it states explicitly that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.”³⁴ Similar calls have been made for Member States to ensure that – with regard to NHRIs – they “provide for secure and stable funding from a central budget under a separate budget line, with parliamentary oversight.”³⁵

From the questionnaire results, the extent to which DPAs enjoy a separate and independent annual budget varies across Member States, from those that play no role in budgetary preparations, to those that are involved throughout and are answerable only to Parliament.

The responses provided indicate that the majority of DPAs are involved to some degree in the process of drafting their budget, but their ability to influence the amount of funds that they will receive is limited. In most Member States, DPAs receive their funds from the State’s budget, and often from the budget allocated to either the Ministry of Justice or Ministry of Finance. In these instances, DPAs are usually required to submit and defend proposals to the appropriate Ministry before Parliamentary approval is given. The DPAs in **Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Greece, Finland, France, Lithuania, Luxemburg, Malta, Sweden and Slovenia** all detail procedures in their responses to the questionnaire involving submitting their budgets to the relevant ministry, which is then able to propose amendments.

Other DPAs report that they are excluded from budgetary discussions altogether. In **Latvia**, the Cabinet of Ministers determines the amount of budgetary resources for all the public institutions. A ‘top-down’ approach is adopted, leaving the DPA without a say “in any preparatory work or decision making regarding its budget.”³⁶ In the **Netherlands**, the Dutch DPA reports that it is “hardly informed or involved in the [budgetary] process.”³⁷ The **Portuguese** DPA reports that a lack of budgetary control has also been combined with a yearly 5% reduction in the DPA’s funding over the last two years, which is imposed without taking in to account the needs of the DPA. While the DPA is required

³¹ CJEU, C-614/10, *Commission v. Republic of Austria*, 16 October 2012, para. 58.

³² *Ibid.*

³³ *Ibid.*

³⁴ Council of Europe, Recommendation (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector

³⁵ Recommendations from the Preparatory Meeting of National Human Rights Institutions, organised by the OSCE Office for Democratic Institutions and Human Rights, 14–15 April 2011, available at: <http://www.osce.org/odihr/84064>.

³⁶ Information from Latvian DPA.

³⁷ Information from Dutch DPA.

to submit a budget proposal, “there is no discussion at all between the DPA and the budgetary authority,”³⁸ and the DPA’s specific needs are not taken into account.

The extent to which DPAs have stable budgets and are free to spend funds as they see fit was not addressed by the Commission’s questionnaire and as such, falls outside of the remit of this analysis. It is, however, worth stressing the importance of this aspect of independence to the effective functioning of independent DPAs, distinct from the need for a separate annual budget. An example of a stable budget is provided by the DPA of the **United Kingdom**, wherein the DPA prepares its own annual budget as well as three year forecasts of income and expenditure. These are provided to the Ministry of Justice and do not require approval.³⁹ It is important to note however that the majority of the United Kingdom DPA’s budget is funded through notification fees paid by data controllers, and that these fees are subject to review by the Ministry of Justice.

Promising practices

There are a number of promising practices among EU Member States. In these instances, the DPAs are involved in the budgetary process throughout, with Parliament ultimately responsible for budgetary allocations. In **Denmark** for instance, the DPA has independent budgetary status within the state budget concerning the Ministry of justice. While the “Ministry of justice draws up a draft on the budget – and the DPA comments – in the end it is for the Parliament to decide.”⁴⁰ Similar collaborative approaches are found in **Spain**, where the DPA drafts its own budgetary proposals, which are included in the draft Budgetary Act through the Ministry of Justice.⁴¹ In **Finland**, negotiations are conducted between the DPA and the Ministry of Justice. Parliament then makes amendments before the final budget is published. The **Italian** DPA’s budgetary proposal is submitted by the DPA to the government and included directly in the State Budget – which is to be approved by Parliament. Despite the submission of a financial application to the government, the DPA interfaces with Parliament with regard to all issues relating to the final budgetary apportionment⁴²

There are also examples in which DPAs are involved in budgetary preparations throughout and are answerable only to Parliament. The **Polish** DPA drafts its own budget which is then presented to Parliament by the government. The government is unable to introduce any changes to the proposal, and the only institution that decides is Parliament. Likewise, the **Belgian** DPA files its budget with the Parliament. Parliament is the only institution able to grant the budget and the government is not involved in the budgetary process.

There are also examples in which DPAs enjoy a separate budgetary line, further strengthening the independence of their budgetary procedures. The **Hungarian** DPA reports that its budgetary independence has been strengthened. Stable state funding is guaranteed through a separate budgetary appropriation line⁴³ and the DPA’s budget constitutes an independent title within the budgetary chapter of Parliament.⁴⁴

Indeed the practice of ensuring the maximum amount of budgetary autonomy can be seen among other comparable institutions. The Paris Principles are the universally recognised primary source establishing minimum standards for the effective functioning of an NHRI. These Principles are applied to determine the accreditation status of NHRIs, whereby full compliance with the Principles warrants an A-status. There are currently 13 A-Status NHRIs across 10 Member States, each offering useful

³⁸ Information from Portuguese DPA.

³⁹ Information from UK DPA.

⁴⁰ Information from Danish DPA.

⁴¹ Information from Spanish DPA.

⁴² Information from Italian DPA.

⁴³ Information from Hungarian DPA.

⁴⁴ Information from Hungarian DPA.

examples of independent standards that could also be applied to DPAs.⁴⁵ While the absence of a separate budget line does not necessarily preclude A-Status accreditation, it is illuminating to note that the budgetary procedures of both the Scottish Commission and the Spanish Ombudsman (which have been accredited with A-status) are composed in this way. As highlighted in FRA's 2010 report on NHRIs in the EU Member States, the Scottish Commission is accountable only to the Parliament. The annual budget is subject to approval by the Scottish Parliament, and its annual accounts are scrutinised by the Scottish Parliament and the Auditor General. In the exercise of its functions, the Scottish Commission is not to be subject to the direction or control of any member of the Scottish Parliament, any member of the Scottish Executive, or of the Parliament itself. Moreover, unlike the Northern Ireland and British commissions, the Scottish Commission is not what is called a non-departmental public body, but a 'body corporate' which is entirely independent of government and accountable directly to the Scottish Parliament. The annual budget of the Scottish Commission is separate and subject to approval only by the Scottish Parliament. This is similarly the case with the budget of the Spanish Ombudsman, which has a separate budget line from the Parliamentary budget.⁴⁶

4.2. Adequate financial resources

An essential aspect of DPAs independence is that they are given adequate resources. Human, financial and technical resources are necessary to ensure that DPAs run efficiently and effectively as independent supervisory authorities.

In spite of this, in the Commission's questionnaire, the majority of DPAs – plus the Croatian Agency for the Protection of Personal Data – report that they are under-funded and under-staffed, and that this has a negative impact on the quality and quantity of the work they are able to carry out. Many DPAs also report that a lack of resources limits their ability to control and sanction data protection breaches.⁴⁷

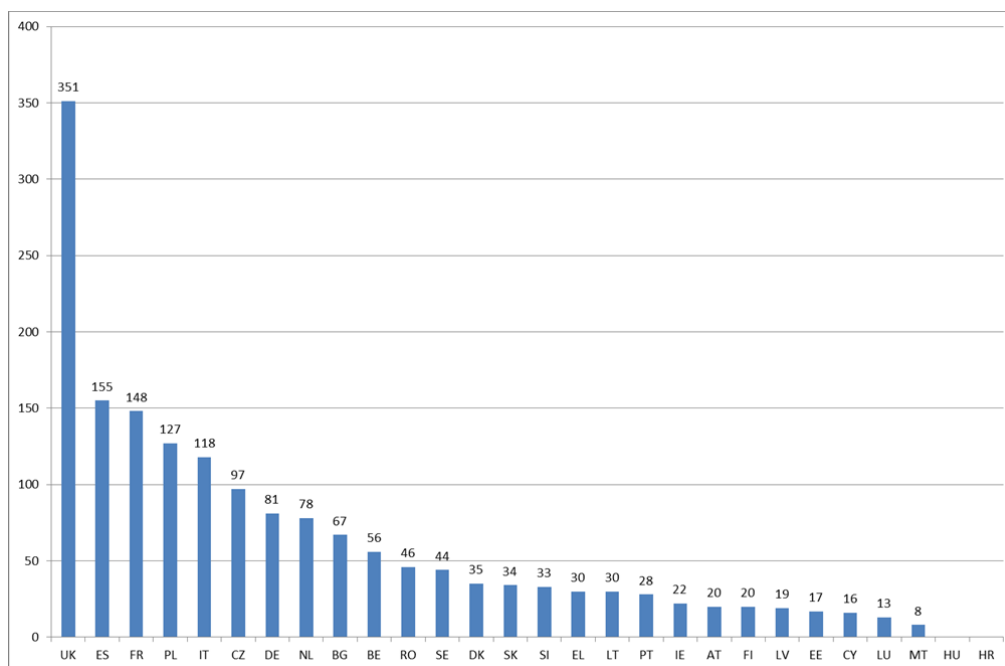
Figures 1-2 below detail the number of staff in each DPA, and the number of complaints received from individuals. The Figures offer a comparison between the DPAs, across the Member States, although in some instances incomplete statistics are held for Austria, Croatia, Denmark and Hungary. All of the data was provided by the 14th Annual Report of the Article 29 Data Protection Working party of 2010, and are correct for that year. In both Figures 1 and 2, the figures listed for Germany and Spain relate to their respective federal DPAs, and do not include data from their regional authorities. That is the Federal Commissioner for Data Protection and Freedom of Information in Germany, and the Spanish Data Protection Agency in Spain only.

⁴⁵ The accreditation of NHRIs is periodically reviewed, at least every five years ('re-accreditation'). See Chart of the Status of National Institutions accredited by the ICC, as of August 2011, available at: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

⁴⁶ FRA (2010), *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I*, Luxembourg, Publications Office, p.34.

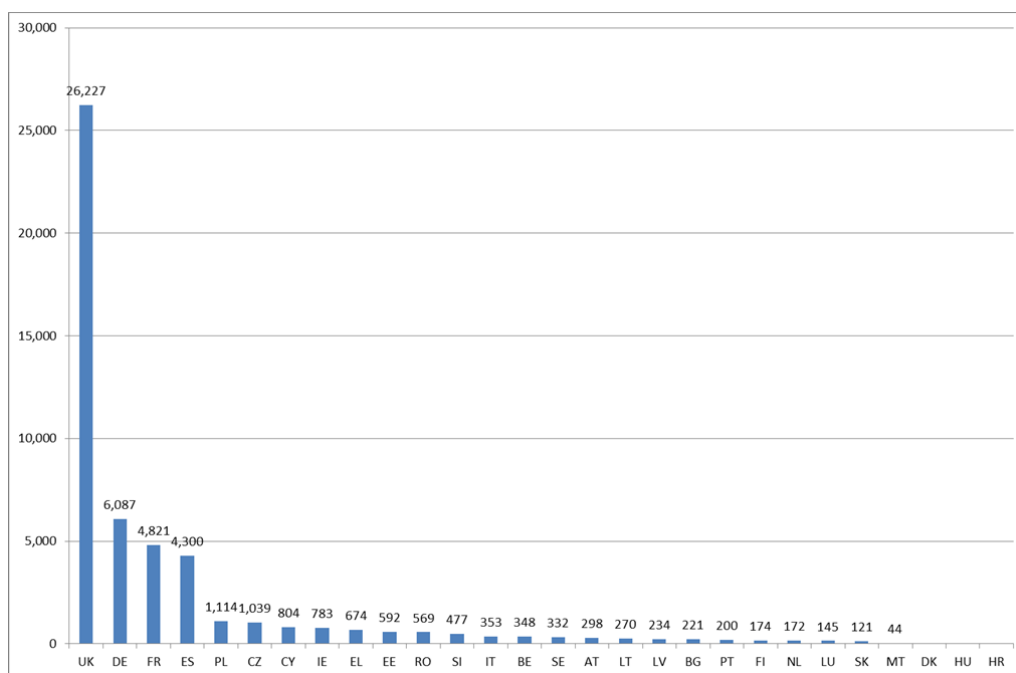
⁴⁷ FRA (2013 forthcoming), *Data protection – redress mechanisms*, Comparative report, Luxembourg, Publications Office, see Section 8.3.

Figure 1: Number of staff members at each DPA⁴⁸



Source: FRA 2013

Figure 2: Number of complaints from individuals that DPAs receive, annually⁴⁹



Source: FRA 2013

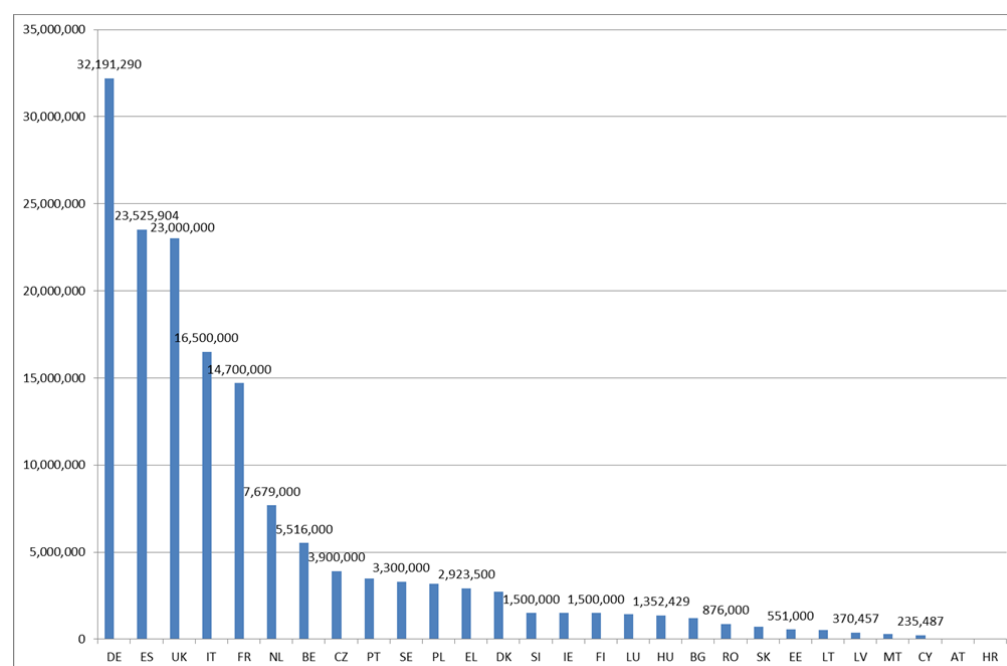
Figure 3 below details the annual budget of the DPAs in euros, and again offers a comparison between the DPAs across the Member States. All amounts are taken as Euros, having been converted

⁴⁸ Data was not available for the DPAs of Croatia and Hungary.

⁴⁹ Data was not available for the DPAs of Croatia, Denmark and Hungary.

at the time that the figures were compiled.⁵⁰ These figures were provided by the 14th Annual Report of the Article 29 Data Protection Working party of 2010, or the Annual reports of the individual DPAs from 2010. The budgets of all DPAs in Germany⁵¹ and Spain⁵² have been collated to give the full amount allocated to DPAs across that Member State. It is, however, worth noting that the budget of some DPAs – such as the United Kingdom – are calculated to include their Freedom of Information work as well, meaning that the budgets of these DPAs will necessarily be inflated in comparison to those DPAs that only carry out Data Protection work.

Figure 3: Budget of DPAs, annually (Euros)⁵³



Source: FRA 2013

⁵⁰ The figure from Hungary was converted from HUF to EUROS using Euro foreign exchange reference rates as at 1 June 2010, taken from the European Central Bank, available at: <https://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>.

⁵¹ The budget of the Federal Commissioner for Data Protection and Freedom of Information, was taken from the 14th Annual Report of the Art.29 Working Party. In addition, Baden-Wuerttemberg, available at: <http://www.statistik-bw.de/shp/2010-11/>; Bayern, available at: http://www.stmf.bayern.de/haushalt/staatshaushalt_2009/haushaltsplan/; Berlin, available at: http://www.berlin.de/sen/finanzen/dokumentendownload/haushalt/haushaltsplan/haushaltsplan-2010-2011-2010_2011_band02_epl_01_02_20_21.pdf; Brandenburg, available at: http://www.mdf.brandenburg.de/sixcms/media.php/4055/Einzelplan_01_2010.pdf; Bremen, available at: http://www.finanzen.bremen.de/sixcms/media.php/13/Landeshaushalt_2010.pdf; Hamburg, available at: <http://www.hamburg.de/contentblob/806940/data/einzelplan2.pdf>; Hessen, available at: http://verwaltung.hessen.de/irj/HMDF_Internet?cid=113bcb3f51e32a34e1691054cf4f1dfc; Mecklenburg-Vorpommern, available at: http://www.regierung-mv.de/cms2/Regierungsportal_prod/Regierungsportal/de/fm/Themen/Haushaltsplaene/Der_Haushaltsplan_20102011/index.jsp; Niedersachsen, available at: http://www.mf.niedersachsen.de/portal/live.php?navigation_id=1049&article_id=1569&psmand=5; Nordrhein-Westfalen, available at: <http://fm.fin-nrw.de/info/fachinformationen/haushalt/havinfo/hh2010.ges/daten/pdf/2010/hh03/kap630.pdf>; Rheinland-Pfalz, provided by the DPA; Saarland, available at: http://www.saarland.de/dokumente/thema_haushalt_und_finanzen_hhpl_2010/01_Landtag.pdf; Sachsen, available at: http://www.finanzen.sachsen.de/download/EPL_01_SLT.pdf; Sachsen-Anhalt, available at: http://www.sachsen-anhalt.de/fileadmin/Elementbibliothek/Bibliothek_Politik_und_Verwaltung/Bibliothek_Ministerium_der_Finanzen/Dokumente/HHPL_E_2010_2011/Einzelplan01.pdf; Schleswig-Holstein, available at: http://www.schleswig-holstein.de/FM/DE/Landeshaushalt/ArchivHaushaltsplaene/Haushaltsplaene20092010/Epl01_blob=publicationFile.pdf; and Thuringen, available at: http://www.thueringen.de/imperia/md/content/tfm/haushalt/haushalt_20102/01_bp.pdf.

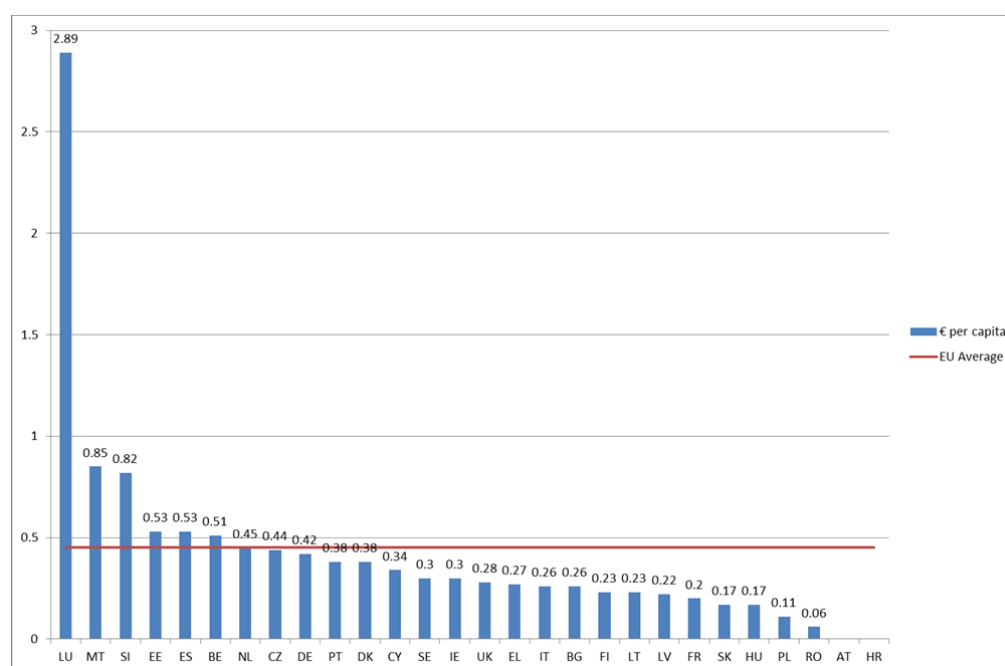
⁵² The budget of the Spanish Data Protection Agency was provided by 14th Annual Report of the Art.29 Working Party. In addition, Catalan, available at: <http://www.apd.cat/media/2592.pdf>; Basque, available at: http://www.avpd.euskadi.net/s04-5249/es/contenidos/informacion/memorias_anuales/es_memorias/r01hRedirectCont/contenidos/informacion/memorias_anuales/es_mem2010/adjuntos/cifras10.pdf; and Madrid, available at: <http://www.madrid.org/wleg/servlet/Servidor?opcion=VerHtml&nmnorma=6176&cdestado=P>.

⁵³ Data was not available for the DPAs of Austria and Croatia.

While these figures provide a useful comparison among EU Member States, in order to accurately compare the amounts allocated to the DPAs in different countries, it is also important to take into account the fact that the general price level varies from one Member State to the next, with the relative purchasing power of the Euro varying between states. This means that in some countries, a certain amount of money will go further than in others – with higher wages; resource costs etc. – distorting any comparison drawn between Member States. In order to make the amounts spent by each DPA comparable across the EU 28, Figure 4 has been compiled below, taking into account the population of each Member State, as well as a correction coefficient, which takes into account purchasing power across the Member States. As such, the budget has been divided by the correction coefficient, with the whole sum in turn divided by the population of the member state, producing the relative amount available to DPAs per capita annually.

The population figures used to calculate the per capita amount spent are provided by the EU Statistical Office (Eurostat) and are also correct as of 2010. The correction coefficient used has also been provided by Eurostat, in collaboration with the National Statistical Institutes of the Member States, which calculates the correction coefficients twice a year (for 1st July and 1st January). This coefficient was used as the best available, because: i) The surveys are done by national officials who are experienced in price surveys and at the same time know their local markets well; ii) They cover far more products than other surveys; iii) The results are officially validated by the National Statistical Institutes.⁵⁴

Figure 4: Euros Spent by DPAs per capita, annually⁵⁵



Source: FRA 2013

Neither Figures 1-2 nor Figures 3-4 provide an assessment of what constitutes adequate resources for the purpose of this paper, nor is a recommended amount provided, either annually or per capita. The Figures also do not take into account the relative needs of the DPAs, nor do they account for some DPA budgets being comprised largely from notification fees. The Figures do however prove very useful in comparing the amounts allocated to DPAs across the Member States.

⁵⁴ EU Statistical Office (Eurostat), 2010. Statistics available at: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001>.

⁵⁵ Data was not available for the DPAs of Austria, Croatia.

A lack of financial resources across Member States seriously impedes the DPA's ability to ensure gradual and progressive realisation of the improvement of their operations and the fulfilment of their mandate. With financial resources used to ensure everything from adequate premises to remuneration of staff and establishment of communication systems, DPAs are unable to conduct their activities in a comprehensive and independent manner without adequate funds.

The majority of DPAs answered the Commission questionnaire by stating that they do not have sufficient financial resources. Many DPA claim that they have suffered indiscriminate cuts on a yearly basis, with no assessment of their needs conducted beforehand. The **Portuguese** DPA reports that 5% annual cuts have been levied in each of the last two years. Despite the **United Kingdom** DPA deriving adequate resources through the use of notification fees for its data protection work, it still relies on grants from the Ministry of Justice to fund its freedom of information work, and has reported that in this area there has been a reduction of "20% year on year for three years."⁵⁶

This problem is compounded by the fact that a similar amount of DPAs consider their budget to be following a decreasing trend. The **Irish** DPA states that its resources are "not sufficient to meet [its] obligations",⁵⁷ a concern echoed among the Member States. The **Bulgarian** DPA lacks its own administrative building, which is an important aspect of ensuring that the DPA is perceived as independent by the outside world. Reliance on private or governmental institutions for the provision of premises risks projecting the image that its independence may be compromised. The **Danish** DPA points out that it will need additional funds if it is to carry out all of its duties, and the **Dutch** DPA notes a "structural shortage of resources,"⁵⁸ forcing the DPA to make "a risk-based prioritisation of work and to continuously make far-reaching choices."⁵⁹

Having financial control over the budget incorporates both control over the amount allocated, and the ability to spend that amount as the DPA sees fit. The adequacy of resources concerns the amount allocated, and even though the majority of DPAs that lack adequate financial resources attribute this to their inability to control the amount they receive, there are instances in which a lack of control over the amount received is not to blame. As such, being heavily involved in budgetary preparations does not necessarily guarantee that adequate funds will be allocated, despite both being necessary for DPAs to operate independently and effectively. The **Italian** DPA for instance – despite being heavily involved in budgetary preparations – notes that the apportionment that is envisaged for 2013 is decreasing and is noted to be absolutely insufficient to meet all of the requirements applying to the DPA.⁶⁰

A number of DPA report that a significant proportion of their funding is derived from external sources. The most notable external source of funding – which reduces dependency on governmental departments and generates an additional source of income – is the use of notification fees. By allowing DPAs to charge data controllers (those responsible for storage and use of personal information), they generate their own source of income which can be allocated as they see fit. Indeed the **United Kingdom** DPA – which as previously noted derives the entirety of the funds necessary for its data protection work in this way – asserts that "this method of funding ensures financial independence from government and removes the funding of the DPA's activities from the political agenda."⁶¹ The **Maltese** and **Portuguese** DPAs also derive a certain percentage of their budget from notification fees.

Similar practices can also be seen among other comparable institutions. With regard to the broadcasting sector, the Explanatory Memorandum of Recommendation (2000) 23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector points out that the practice in most European countries shows that funding can mainly come from fees or a levy. The Explanatory Memorandum states that "this arrangement [of

⁵⁶ Information from UK DPA.

⁵⁷ Information from Irish DPA.

⁵⁸ Information from Dutch DPA.

⁵⁹ Information from Dutch DPA.

⁶⁰ Information from Italian DPA.

⁶¹ Information from UK DPA.

funds derived from fees] would seem the best way of safeguarding financial independence inasmuch as it does not leave them reliant on the public authorities' goodwill."⁶²

Fees are also utilised to generate funds by NHRIs. The British Equality and Human Rights Commission for instance is allocated a budget from the Secretary of State, but "the Commission can also obtain funding from external sources".⁶³ It is worth noting however that the ICC Sub-Committee's General Observations recommend that "funding from external sources, such as from development partners, should not compose the core funding of the NHRI as it is the responsibility of the state to ensure the NHRI's minimum activity budget in order to allow it to operate towards fulfilling its mandate. Financial systems should be such that the NHRI has complete financial autonomy. This should be a separate budget line over which it has absolute management and control."⁶⁴

Promising practices

The DPAs that are able to function most effectively are those that are given adequate funding to carry out their tasks. It is therefore essential that Member States ensure that DPAs have adequate access to these funds. As has been demonstrated, external sources of funding are available to some of the DPAs, and this can indeed provide a useful supplement to the DPAs funds. This should not, however, be the sole source of funding, and DPAs must be supported with core funding. If the draft General Data Protection Regulation is adopted, it will no longer be possible to charge notification fees, making the provision of core funding from each member state all the more important.

Whether notification fees are utilised or not it is essential that all Member States should ensure that DPAs have adequate financial resources to fulfil their mandate. This would significantly increase both the strength and independence of DPAs. There are a number of DPAs that indicate that they have adequate financial resources without the need for additional sources of funding, most of which report that their budget is on an increasing trend. The **Hungarian** DPA, for instance, notes that they "were able to achieve a reasonable increase concerning the Authority's financial resources for the year of 2013."⁶⁵ The **Polish** DPA also notes that its budget is increased yearly in line with the rate of inflation and subsequently, the sum it receives is sufficient to meet its needs. Member States should ensure that their DPA's budget increases to meet its needs, with support from the DPA's budgetary authority even more crucial in instances where funding from additional sources is not available.

5. Staffing independence

Issues regarding human resources are closely linked to those regarding financial management, with staff costs accounting for a significant part of any institutional costs. The extent to which DPAs are able to exercise and to enjoy independence with regard to all aspects of their own staff is also an important component of the overall ability of a DPA to carry out its functions.

⁶² Council of Europe. Recommendation (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.

⁶³ FRA (2010), *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I*, Luxembourg, Publications Office, p. 32.

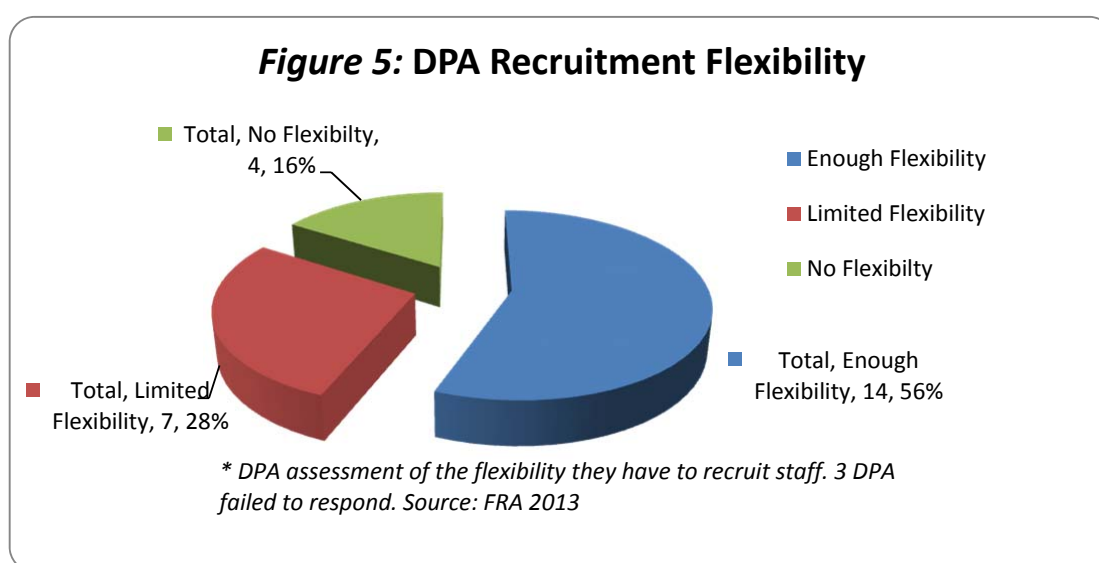
⁶⁴ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 29 March -1 April 2010, available at [http://nhri.ohchr.org/EN/ICC/AnnualMeeting/24/2Subcommittee%20on%20Accreditation/SCA%20REPORT%20-%20March%20FINAL%20\(with%20annexes\).doc](http://nhri.ohchr.org/EN/ICC/AnnualMeeting/24/2Subcommittee%20on%20Accreditation/SCA%20REPORT%20-%20March%20FINAL%20(with%20annexes).doc).

⁶⁵ Information from Romanian DPA.

“The Paris Principles recognise that fundamental to ensuring the independence and efficient functioning of an NHRI is the provision of adequate resources. An NHRI should be resourced in such a manner as to permit the employment and retention of staff with the requisite qualifications and experience to fulfil its mandate. Their terms and conditions should be equivalent to staff with similar responsibilities and qualifications employed in other independent agencies of the state.”⁶⁶

ICC SCA (2010) Accreditation report, March-April 2010

The extent to which DPAs are a) able to independently recruit staff; b) recruit an adequate number of staff; and c) adequately train those staff members will be assessed in turn in the following.



5.1. Independent recruitment procedures

Another essential aspect of DPAs independence is the need for transparent and meritocratic recruitment procedures. It is important that DPAs are empowered to appoint and govern their own staff. Ensuring that DPAs can recruit their own staff members, coupled with the ability to recruit an adequate number of staff, should also ensure that they are able to recruit adequately qualified staff members, and that appointments are made at the appropriate level. This is an important aspect of independence, with inappropriate appointments having the ability to significantly undermine the effective functioning of the DPAs.

It is worth noting that While the procedure for appointing and dismissing members of a DPA's governing body or Executive Committee has serious independence ramifications, discussion herein is confined to staff working within the DPAs, and does not deal with members of the governing bodies.⁶⁷

⁶⁶ Available at: <http://nhri.ohchr.org/EN/AboutUs/ICCACcreditation/Documents/SCA%20REPORT%20MARCH%202010%20-%20FINAL%20%28with%20annexes%29.pdf>

⁶⁷ For discussion on the ramifications of dismissal of staff members from the governing body, see: CJEU, C-288/12, *European Commission v. Hungary*, Action brought on 8 June 2012, pending. See also FRA (2010), *National Human Rights Institutions in*

From the questionnaire results, the DPAs can be placed into three broad categories based on the practices identified across the EU Member States in relation to their involvement in recruitment proceedings:

- a) those that play no part in the recruitment process and are unable to influence either the number of staff they recruit or the quality of those staff members;
- b) those that have some degree of flexibility with regard to the recruitment procedure but that are constrained due to financial restraints or national rules in place; and
- c) those with sufficient flexibility in choosing their own staff members.

As shown in Figure 5, the majority of DPAs are of the opinion that they have sufficient flexibility in the recruitment of their staff. A large number of DPAs do however, state that they either have limited or no flexibility with regard to their recruitment procedures.

Of those that noted that they had no flexibility or only limited flexibility in this regard, the **Estonian, Greek, Portuguese, Swedish** and **Croatian** DPAs, all note that the lack of funding available restricts their ability to hire staff, either partially or completely. The Estonian DPA highlights how “there is flexibility in recruitment among candidates but it is strongly subject to the budget,”⁶⁸ while the Swedish DPA notes that they have “full discretion over staff recruitment matters [...] however, the budgetary conditions naturally pose a limit in this regard.”⁶⁹ The Greek DPA maintains that its recruitment process is extremely cumbersome. It is also noted that due to the financial difficulties it is nearly impossible to increase posts or fill vacancies.⁷⁰

A number of DPAs also report how national regulations and legislation impede their ability to recruit staff. The **Bulgarian** DPA has to comply with requirements laid down in the Civil Servant Act,⁷¹ while the **Latvian** DPA, notes that there is a Cabinet of Ministers’ Regulation in place that determines the structure of state institutions and so the director of the office cannot employ any councillors or advisors for professional advice.⁷² A number of DPAs also note being restrained by recruitment procedures in place in their Member State when hiring staff, often with regard to Civil Servants. The **Spanish** DPA notes that it is subject to “the same procedural regulations on staff recruitment that apply to all public authorities in Spain and thus is not completely free to make decisions on the number of staff members.”⁷³ It goes on to point out that staff has to be recruited, with a few exceptions, from among civil servants,⁷⁴ although they have a large degree of flexibility with regard to job descriptions and selection of candidates. Similarly, the **Luxembourg** DPA recruits its staff members through a centralised recruitment procedure, although their “preferences are taken on board for the final choice [...] and] candidates may only apply if their qualifications are compatible with the careers conditions and general regulations applicable to public administration.”⁷⁵

Some DPAs report that they have no say in the recruitment procedures whatsoever. In **Ireland**, DPA “staff are Civil Servants assigned by the Department of Justice and Equality. There is no formal control over the number or quality of staff assigned.”⁷⁶ This is also the case in **Austria**, where their DPA reports that they do not recruit their own staff. This relates to a concern raised by the CJEU, wherein it ruled that the regulatory framework in force in Austria fails to satisfy the condition that “the attribution of the necessary equipment and staff to [DPAs] must not prevent them from acting ‘with complete independence’ in exercising the functions entrusted to them within the meaning of the

the EU Member States. Strengthening the fundamental rights architecture in the EU I, Luxembourg, Publications Office; and *Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package*, FRA Opinion – 2/2012, available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

⁶⁸ Information from Estonian DPA.

⁶⁹ Information from Swedish DPA.

⁷⁰ Information from Greek DPA.

⁷¹ Information from Bulgarian DPA.

⁷² Information from Latvian DPA.

⁷³ Information from Spanish DPA.

⁷⁴ Information from Spanish DPA.

⁷⁵ Information from Luxembourg DPA.

⁷⁶ Information from Irish DPA.

second subparagraph of Article 28(1)⁷⁷ of the Data Protection Directive, insofar as the staff made available to the DPA consists of officials of the Federal Chancellery who are in turn subject to supervision by the Federal Chancellery.

Promising practices

Despite deficiencies in some areas, there are examples of promising practice among the DPAs, with 14 out of the 25 respondents indicating that they have sufficient flexibility in the recruitment of staff. In the **United Kingdom**, the Information Commissioner's Office is responsible for the recruitment of its own staff and the selection process. It has in place a "Framework Agreement with the Ministry of Justice [which] states that the Commissioner has responsibility for the recruitment, direction, retention and motivation of his staff."⁷⁸ Similarly, the **French** DPA's "legal status gives it freedom in its recruitment policy, within the limits of the budget allocated to it. Thus, the practical arrangements for recruitment, allocation of staff between departments, and of course the choice of candidates finally recruited, remain the prerogative of the President of [the] Commission."⁷⁹

Such freedom is also afforded to the **Italian** DPA, in which the DPA's permanent staff is selected by public competitive examinations decided autonomously by the DPA in accordance with its own needs. The notices for these competitive examinations, organised by the DPA's Human Resources department, are published in the Italian Official Journal and posted on the DPA's website.⁸⁰ The Italian DPA affirms that "there is no external influence exerted either before or during the recruitment procedures."⁸¹

This example of full and independent control granted over recruitment matters can be considered a promising practice. It ensures that external influence is not indirectly exerted over the DPA through the recruitment procedure, and is a practice that should be replicated by DPAs in other Member States. Recruitment procedures should be in place in each Member State to ensure objective standards are applied to the recruitment process.

5.2. Adequate human resources

The supervisory authorities should have the necessary technical and human resources (lawyers, computer experts) to take prompt, effective action in a person's favour.

Explanatory Report, Additional Protocol to the Convention 108, para. 8.

⁷⁷ CJEU, C-614/10, *European Commission v. Republic of Austria*, 16 October 2012, para. 58.

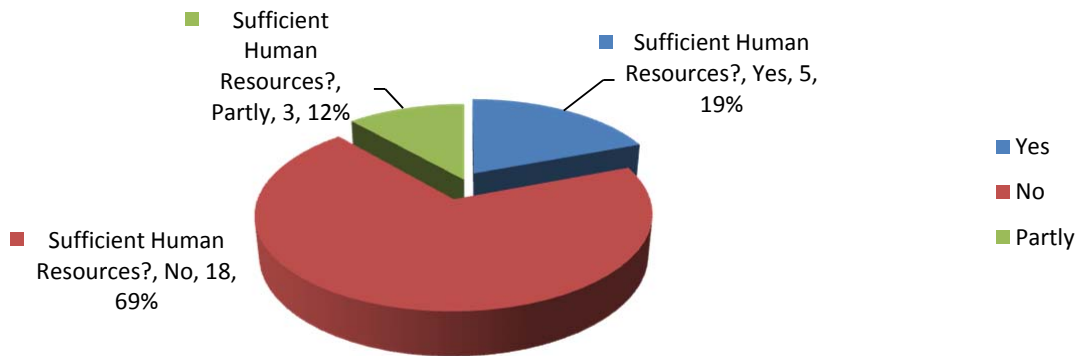
⁷⁸ Information from UK DPA.

⁷⁹ Information from French DPA.

⁸⁰ Information from Italian DPA.

⁸¹ Information from Italian DPA.

Figure 6: Sufficient Human Resources?



**DPA Assessment of the sufficiency of their human resources. 2 DPA failed to respond. Source: FRA 2013*

It is integral to the functioning of the DPAs that they are adequately staffed, with specialist staff members. As Figure 6 highlights, only five DPAs consider that they have sufficient human resources. This lack of human resources among DPAs is severely hindering their ability to operate effectively.

Many DPAs linked the insufficiency of their human resources to a lack of adequate financial resources. The **Czech** DPA expressed its concern that due to its "limited payroll resources [it is unable] to hire skilled experts from technological areas (namely ICT). Moreover, young and qualified experts have often left for better remunerated jobs, mostly in the private sector."⁸² Limited payroll resources have also led to shortages for DPAs in other areas. The **Estonian** DPA points out that they currently have "no resources for special staff for international relations."⁸³ Consequently, their DPA attends to all mandatory work but is unable to participate in all Article 29 Working Party subgroup work, where a substantial amount of work is conducted. Similarly, the **Croatian** DPA "is not able to employ the necessary number of experts in the field of data protection,"⁸⁴ and the **Latvian** DPA is unable to "carry out preventive control activities and privacy impact assessment." The Latvian DPA goes on to state that the salaries they can offer are low and therefore "it is difficult to get professional staff."⁸⁵ The **Portuguese** DPA notes that it is subject to "restraining rules for staff admission in the public administration, preventing the DPA from recruiting more people, in particular IT and legal officers."⁸⁶ The **Italian** DPA states that the amount they receive for human resources is set forth in law and was last updated by the Data Protection consolidation Code of June 2003. "Accordingly, [the amount apportioned] is becoming insufficient to fulfil the tasks committed to the DPA, which have been increasing over the years."⁸⁷

Promising practices

With almost all DPAs reporting insufficient human resources, prioritisation of tasks is essential to ensure that the basic functions of the DPAs are carried out, and in order to justify additional funding from the DPA's budgetary authority. In **Finland**, it is noted that through prioritisation, their DPA is able to manage their basic duties, and in **Sweden**, their DPA remarks that the answer to whether or not

⁸² Information from Czech DPA.

⁸³ Information from Estonian DPA.

⁸⁴ Information from Croatian DPA.

⁸⁵ Information from Latvian DPA.

⁸⁶ Information from Portuguese DPA.

⁸⁷ Information from Italian DPA.

they have sufficient resources to carry out their tasks depends on the goals that the DPA sets itself.⁸⁸ The Swedish DPA goes on to assert that they deem their “resources largely sufficient with regard to the currently set goals.”⁸⁹

While the prioritisation of tasks can assist in justifying additional funding, it is imperative that the DPAs enjoy the full support of those responsible for apportioning funds, insofar as they are given the funds necessary to carry out their work. As the **French** DPA notes, their budget has been increasing over recent years. This increase ensures that it has the capacity “to implement all of its missions [and] is the result of the unanimous support of successive governments and the French Parliament.”⁹⁰

5.3. Sufficiently qualified staff

Integral to the requirement that DPAs have access to adequate human resources is the requirement that their staff members are also sufficiently qualified. This is particularly pertinent given that the DPAs operate in a rapidly developing field, with data protection issues increasing at the same rate as technological advancements in the IT field. Having sufficient access to resources to provide adequate training is essential to ensuring that staff are up-to-date with these developments. Whereas the majority of DPAs are able to conduct training sessions, there is concern that budgetary restrictions have a detrimental effect on the provision of these training sessions. The **Irish** DPA notes for instance that while it is able to provide occasional in-house seminars on specific issues their budget does not permit them to avail of external data protection training.⁹¹ In **Greece**, due to the lack of funds “for self-organising training programmes due to a drastic reduction of the budget, no specialized training has been organised.”⁹² This is also the case in both **Croatia** and **Portugal**. The **Lithuanian** DPA is unable to provide training on legal, technical or international aspects of data protection, “including training on new developments in the field of data protection.”⁹³ The **Latvian** DPA reported that “adequate training on data protection issues [...] is not available and IT security trainings are too expensive to be affordable.”⁹⁴ It is also worth noting that the Latvian DPA must seek permission from the Minister of Justice for “training abroad regarding all the employees.”⁹⁵ Such government oversight should be avoided in the interest of increased independence.

Promising practices

There are promising practices conducted in a number of Member States. The majority of DPAs report that they are able to conduct training sessions. The **Bulgarian** DPA “carries out training for the entire staff [...] involving legal, technical and international aspects of data protection. The programmes make reference to the new developments in the area [and] the staff is given the possibility to participate in external training programmes aimed at developing their professional skills outside the data protection field.”⁹⁶ The **Czech** DPA has a “specialised training programme for newly recruited staff”⁹⁷ and follow-up is provided by external trainers. The **United Kingdom** DPA has a “dedicated team who develop, procure, deliver and manage [the] training programme.”⁹⁸

⁸⁸ Information from Swedish DPA.

⁸⁹ Information from Swedish DPA.

⁹⁰ Information from French DPA.

⁹¹ Information from Irish DPA.

⁹² Information from Greek DPA.

⁹³ Information from Lithuanian DPA.

⁹⁴ Information from Latvian DPA.

⁹⁵ Information from Latvian DPA.

⁹⁶ Information from Bulgarian DPA.

⁹⁷ Information from Czech DPA.

⁹⁸ Information from UK DPA.

As these practices demonstrate, it is possible for DPAs to conduct regular, independent training sessions when given the appropriate resources. All DPAs should strive to conduct regular training sessions in areas relevant to their work and give all staff members the opportunity to benefit from these.

Conclusions

This study looked at well-established and recognised European and international standards on independence of bodies similar to DPAs. At a time when the European Institutions are discussing the most far-reaching data protection reform in the last twenty years, analogies to similar independent bodies can be useful in order to achieve a satisfactory reform.

This FRA analysis highlighted a number of promising practices among DPAs, identifying five key principles of independence covered by the Commission's questionnaire. Falling with two broad headings of financial and staffing independence, these principles comprise: a separate and independent annual budget; adequate financial resources; independent recruitment procedures; adequate human resources; and sufficiently qualified staff.

The independence of DPAs seems to be strengthened when DPAs have a separate budget line authorised by Parliament alone. While some DPAs are not involved in budgetary preparations and most are susceptible to governmental influence, there are a number of DPAs that meet these requirements. In ensuring that DPAs are financially independent, Member States could ensure that DPAs are involved in all aspects of the budgetary preparations, further minimising the risk of influence being exerted over the authority by the government. Such involvement would also ensure budgetary stability and independence in deciding how to allocate funds.

Another essential aspect of DPAs independence is that they are given adequate resources. Human, financial and technical resources are necessary to ensure that DPAs run efficiently and effectively as independent supervisory authorities in a fast evolving technological world. Incorporated within this are the requirements that DPA be given adequate funds to carry out their mandate, to recruit an adequate number of staff members for their needs, and to be able to carry out regular training sessions to ensure that their staff members are sufficiently trained and qualified. The majority of DPA report that they are significantly underfunded, and that it curtails their ability to carry out their mandate. While the use of notification fees is one possible solution to ensure that DPAs have enough funds to meet their needs, this source should not negate the responsibility of Member States to ensure that their DPA has adequate resources. A strong funding scheme would significantly increase the strength, efficiency and independence of DPAs.

Another essential aspect of DPAs independence is the need for transparent and meritocratic recruitment procedures. It is important that DPAs are empowered to appoint and govern their own staff. The majority of DPAs report that they have sufficient flexibility and autonomy over their recruitment procedures – in terms of hiring their own staff members – which is vital in ensuring that external influence is not indirectly exerted over the DPA through the recruitment procedure. Recruitment procedures should be in place in each Member State to ensure objective standards are applied to the recruitment process.

A core element of the proposed data protection reform is to strengthen the national data protection authorities. In order to provide strong and independent DPAs, the principles identified in this study could be useful in this context to secure their implementation across the EU Member States. According to the CJEU, DPAs are the “guardians” of the fundamental right to data protection. Ensuring that they are equipped to fulfil their mandate – free from external control – will not only aid the implementation of the proposed reform, but will also improve the efficiency of the DPAs.

Summary

The following summary is based on the analysis carried out above, taking particular account of the promising practices highlighted:

Financial independence

- DPAs operate most effectively when they have access to adequate resources. DPAs should be given adequate human, financial and technical resources to ensure that they run efficiently and effectively as independent supervisory authorities.
- The financial independence of DPAs is strongest when they are granted a separate and independent budget, authorised by Parliament alone.
- It would be advisable if DPAs could be involved in all aspects of the budgetary preparations, making an assessment of the amount needed, and being consulted throughout the decision making process.
- Where the budget is not authorised solely by Parliament, a minimal amount of governmental influence over budgetary issues – both in terms of allocation and subsequent spending decisions – should be strived for. Where possible, the ability of governments to influence the budgets of DPAs should therefore be limited. This relates to both their initial allocation and the way in which funds are subsequently spent.
- Having access to core funding is an important part of guaranteeing financial independence. Member States should consider guaranteeing that adequate resources for the DPAs to perform their tasks are available through core funding.

Staffing independence

- The independence of DPAs is increased when they are empowered to appoint and govern their own staff, free from external influence in the recruitment procedures.
- The independence of DPAs is further increased when – in addition to having adequate resources – they are also able to make their own decisions as to what constitutes an adequate number of staff members to carry out their tasks.
- In order for DPAs to operate most effectively, they should be able to recruit sufficiently qualified staff members, with appointments made from a variety of fields, providing expertise in all aspects of the DPA's work. Where necessary, DPAs should be equipped to hire specialist staff members. Any appointments should be made at the appropriate level.
- Training is an essential part of ensuring that staff members are able to carry out their tasks adequately. DPAs should have the resources to provide adequate training to ensuring that staff members are up-to-date with developments affecting their work.
- As a guarantee of independence, Member States should ensure that objective standards are applied to ensure a fair and transparent recruitment process.

Annex

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

Official Journal L 337, 18/12/2009

(13) The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities responsible for ex-ante market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually. (...)

3. Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.";

(b) the following paragraphs shall be inserted:

"3a. Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for ex-ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities. Member States shall ensure that the head of a national regulatory authority, or where applicable, members of the collegiate body fulfilling that function within a national regulatory authority referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the national regulatory authority concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the national regulatory

authority, or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.

Member States shall ensure that national regulatory authorities referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member States shall also ensure that national regulatory authorities have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC)

Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector

(Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies)

III. FINANCIAL INDEPENDENCE

18. Another key factor for ensuring the independence of regulatory authorities is their funding arrangements, which, according to the recommendation, should be specified in law in accordance with a clearly defined plan, and with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently (cf. Appendix to the recommendation, Section III, paragraphs 9 to 11).

19. The majority of Council of Europe member states have legal provisions defining the source of funding of the regulatory body. By contrast, in at least a quarter of member states, the legal framework does not appear to be clear on this subject.

20. It is common practice among many regulatory authorities in Council of Europe member states to receive their funding directly through fees in order to be independent from public authorities' decision making. Nonetheless, the laws of a large number of member states specify that the regulatory authority is to be financed by the state budget. In some member states, the law mentions clearly that public authorities must not use their financial decision-making power to interfere with the independence of the regulatory authority; however in most countries where the regulatory authority is financed by the state budget no such precautions are laid down in the law.

21. In some member states, the law stipulates that the regulatory authority proposes its annual budget plan which then has to be automatically approved by a specific state body (or the approval of such a body being a formality). However, in at least a third of all Council of Europe member states, no clear rules exist to ensure that the approval for the regulatory authority's funding is not up to the discretion of such other state bodies.

22. It would appear that, despite the law envisaging an independent funding plan for the regulatory authority, in certain Council of Europe member states those authorities claim to feel under threat of or have experienced pressure from governments which go back on agreed funding plans and/or use funding decisions as leverage in political power struggles.

Reportedly, in more than one case, broadcasting regulatory authorities which, according to the law should be financed independently, in practice received their revenue from the state

because of a weak broadcasting market or because the licence fee collecting system was ineffective. In at least two member states, the regulatory authority did not publicly disclose the source of their revenue after the licence fee system had collapsed.

23. In addition, many regulators also complain that they are not given the means (in particular human resources) to adequately perform their duties (see below for further details).

Recommendation No. R (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector

(Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies)

III. Financial independence

9. Arrangements for the funding of regulatory authorities - another key element in their independence - should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.

10. Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Furthermore, recourse to the services or expertise of the national administration or third parties should not affect their independence.

11. Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.

Explanatory Memorandum to Recommendation No. R (2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector

(Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies)

III. Financial independence

24. The arrangements for funding regulatory authorities - like the procedures for appointing their members - have the potential to work both as levers for exerting pressure and as guarantees of independence. Experience shows that if regulatory authorities enjoy real financial independence, they will be less vulnerable to outside interference or pressure.

25. With this in mind, the Recommendation provides that arrangements for the funding of regulatory authorities should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently. As regards the question of whether regulatory authorities should only use their own human and financial resources, the Recommendation does not formally forbid national administrations or third parties from

acting on a regulatory authority's behalf, provided such action is carried out in a context that safeguards the independence of the authority.

26. The Recommendation does not indicate in a concrete manner the possible funding sources of regulatory authorities. This being said, the practice in most European countries shows that there are two main sources for the funding of regulatory authorities, which can be combined where appropriate. Funding can mainly come from concession fees - or, where appropriate, a levy on turnover - paid by licensees. Provided such licence fees or levies are fixed at a level that does not constitute an operational impediment to broadcasters, this arrangement would seem the best way of safeguarding the regulatory authorities' financial independence inasmuch as it does not leave them reliant on the public authorities' goodwill. At the same time, the Recommendation does not rule out financing from the state budget. However, because in this case regulatory authorities are more likely to be dependent on the budgetary favour of governments and parliaments, it states explicitly that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.

27. Whatever funding arrangements are adopted, account must be taken of the human, technical and other resources which regulatory authorities need in order to perform all their functions independently. Clearly, the more numerous and substantial those functions, the more important it is that the funding of the regulatory authority should match its needs.

28. Where funding levels are fixed annually, account must be taken of the estimated cost of the regulatory authorities' activities and of the fact that, in addition to the costs of regulation itself, there are related expenses essential to the effective performance of the authorities' tasks. In this respect, in order to perform those tasks competently, taking decisions based on close analyses of the current, and indeed future, situation of the broadcasting sector, regulatory authorities normally need to have recourse to consultants, carry out research, fact-finding missions and studies and issue publications, all of which clearly entails additional expenditure.

ECRI General Policy Recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level

Adopted by ECRI on 13 June 1997

Principle 5 Independence and accountability

1. Specialised bodies should be provided with sufficient funds to carry out their functions and responsibilities effectively, and the funding should be subject annually to the approval of parliament.
2. Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly.
3. Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament.

4. The terms of reference of specialised bodies should set out clearly the provisions for the appointment of their members and should contain appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm.

International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights

Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)

(Geneva, 29 March -1 April 2010)

Annex III

GENERAL OBSERVATIONS

1. Composition and guarantees of independence and pluralism

2.1 Ensuring pluralism: The Sub-Committee notes there are diverse models of ensuring the requirement of pluralism set out in the Paris Principles. However, the Sub-Committee emphasizes the importance of National Institutions to maintain consistent relationships with civil society and notes that this will be taken into consideration in the assessment of accreditation applications.

The Sub-Committee observes that there are different ways in which pluralism may be achieved through the composition of the National Institution, for example:

- a) Members of the governing body represent different segments of society as referred to in the Paris Principles;
- b) Pluralism through the appointment procedures of the governing body of the National Institution, for example, where diverse societal groups suggest or recommend candidates;
- c) Pluralism through procedures enabling effective cooperation with diverse societal groups, for example advisory committees, networks, consultations or public forums; or
- d) Pluralism through diverse staff representing the different societal groups within the society.

The Sub-Committee further emphasizes that the principle of pluralism includes ensuring the meaningful participation of women in the National Institution.

2.2 Selection and appointment of the governing body: The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasizes the following factors:

- a) A transparent process
- b) Broad consultation throughout the selection and appointment process
- c) Advertising vacancies broadly

- d) Maximizing the number of potential candidates from a wide range of societal groups
- e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent.

2.3 Government representatives on National Institutions: The Sub-Committee understands that the Paris Principles require that Government representatives on governing or advisory bodies of National Institutions do not have decision making or voting capacity.

2.4 Staffing by secondment:

In order to guarantee the independence of the NHRI, the Sub-Committee notes, as a matter of good practice, the following:

- a) Senior level posts should not be filled with secondees;
- b) The number of seconded should not exceed 25% and never be more than 50% of the total workforce of the NHRI.

2.5 IMMUNITY: *IT IS STRONGLY RECOMMENDED THAT PROVISIONS BE INCLUDED IN NATIONAL LAW* to protect legal liability for actions undertaken in the official capacity of the NHRI.

2.6 Adequate Funding: Provision of adequate funding by the state should, as a minimum include:

- a) the allocation of funds for adequate accommodation, at least its head office;
- b) salaries and benefits awarded to its staff comparable to public service salaries and conditions;
- c) remuneration of Commissioners (where appropriate); and
- d) the establishment of communications systems including telephone and internet.

Adequate funding should, to a reasonable degree, ensure the gradual and progressive realisation of the improvement of the organization's operations and the fulfilment of their mandate.

Funding from external sources, such as from development partners, should not compose the core funding of the NHRI as it is the responsibility of the state to ensure the NHRI's minimum activity budget in order to allow it to operate towards fulfilling its mandate.

Financial systems should be such that the NHRI has complete financial autonomy. This should be a separate budget line over which it has absolute management and control.

2.7 Staff of an NHRI: As a principle, NHRIs should be empowered to appoint their own staff.

2.8 Full-time Members: Members of the NHRIs should include full-time remunerated members to:

- a) Ensure the independence of the NHRI free from actual or perceived conflict of interests;
- b) Ensure a stable mandate for the members;
- c) Ensure the ongoing and effective fulfilment of the mandate of the NHRI.

2.9 Guarantee of tenure for members of governing bodies: Provisions for the dismissal of members of governing bodies in conformity with the Paris Principles should be included in the enabling laws for NHRIs.

- a) The dismissal or forced resignation of any member may result in a special review of the accreditation status of the NHRI;
- b) Dismissal should be made in strict conformity with all the substantive and procedural requirements as prescribed by law;
- c) Dismissal should not be allowed based on solely the discretion of appointing authorities.

2.10 Administrative regulation

The classification of an NHRI as a public body has important implications for the regulation of its accountability, funding, and reporting arrangements.

In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI's ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined.