

Working Group on the Future of the Conference

Interpretation of the Autonomy and Independence Criteria

In accordance with the mandate given to the Working Group on the Future of the Conference by the *Resolution on a Roadmap on the Future of the International Conference* adopted at the 40th ICDPPC annual meeting, this paper seeks to serve as background for the interpretation of the "appropriate autonomy and independence" criteria for membership of the ICDPPC.

This paper will be presented at the 41st Conference in 2019 for members' consideration.

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1. Background

In 2017, the ICDPPC Secretariat conducted a survey of members as part of the Project on the Future Size and Membership of the Conference.¹ The survey showed, among other outcomes, that members would like the Conference to broaden its global reach and promote its regional diversity, yet that it retains its selective process when doing so by paying particular heed to the independence of data protection and privacy authorities.

Section 5.1 of the ICDPPC Rules and Procedures sets out the criteria for those Supervisory Authorities wishing to become members of the Conference:

- a. A public entity, created by an appropriate legal instrument based upon legal traditions of the country or international organisation which it belongs to;
- b. Has the supervision of the implementation of the legislation on the protection of personal data or privacy as one of its principal regulatory mandates;
- c. The legislation under which it operates is compatible with the principal international instruments dealing with data protection or privacy;
- d. Has an appropriate range of legal powers to perform its functions; and
- e. Has appropriate autonomy and independence.²

In October 2018, during the 40th International Conference of Data Protection and Privacy Commissioners held in Brussels, members adopted the *Resolution on a Roadmap on the Future of the Conference*. This Resolution lays down a series of recommendations and corresponding actions to be taken in the immediate or medium term, for the future evolution of the conference, on the basis of three guiding objectives identified as a result of the strategic consultation process.³ One of these objectives is "Identity: reaffirming members' independence while promoting diversity, openness and visibility." To address members' requests that current membership criteria be maintained and that independence from both governments and private sector be guaranteed, the ICDPPC mandated the Working Group on the Future of the Conference to "develop a background document on the interpretation of the membership and independence criteria, to be adopted at the 41st Conference in 2019."

The definitions of the other membership criteria (i.e. legal basis, consistency with international instruments and appropriate functions), are more straightforward and, for their interpretation, we recommend that the ICDPPC continues to rely on the Accreditation Features of Data Protection Authorities, adopted during the 23rd International Conference in Paris in 2001.

¹ <u>Project Page: The Future of the Conference</u>.

² <u>ICDPPC Rules and Procedures: Consolidated version</u> (October 2018), s 5.1.

³ <u>Resolution on a Roadmap on the Future of the International Conference</u>, 40th International Conference of Data Protection and Privacy Commissioners, 23 October 2018.

However, the autonomy and independence criteria continue to be the subject of debate when conducting accreditation analysis given their underlying subjectiveness. Therefore, in order to clarify and help interpreting this membership criteria and in line with the mandate mentioned above, this paper seeks to establish guiding principles for the interpretation of the "appropriate autonomy and independence" criteria.⁴

For the purpose of this paper, Data Protection Authorities (DPAs) will encompass both data protection and privacy commissioners.

2. Overview of how independence has been defined in the regulatory context

In this section, we provide a few examples of how independence has been interpreted in other instances.

The **ICDPPC's Accreditation Features of Data Protection Authorities**, adopted on 25 September 2001 during the 23rd International Conference held in Paris, provides the following guidelines regarding the "autonomy and independence" principle:

The data protection authority must be guaranteed an appropriate degree of autonomy and independence to perform its functions.

Comment: Autonomy requires that an authority be empowered, both in a legal and practical fashion, to initiate and undertake appropriate action without having to seek others' permission. Independence is important for agencies to be able to operate free from political or governmental interference and to withstand the influence of vested interests. Typical guarantees include:

- Appointment for a fixed term;
- Removal only for inability to perform the office, neglect of duty, or serious misconduct;
- The power to report directly to the head of government or legislature and to speak publically on matters of concern;
- Immunity against personal law suit for actions carried out as part of official duties;
- Power to initiate investigations.

⁴ <u>Accreditation Features of Data Protection Authorities</u>, adopted on September 25, 2001 during the 23rd ICDPPC, Paris, 24-26 September, 2001.

The matter of independence has been addressed by the United Nations in the so-called **Paris Principles**, a set of international standards adopted by the General Assembly in 1993, which define the role, composition, status and functions of National Human Rights Institutions.

Under the title "Composition and guarantees of independence and pluralism," the Paris Principles provide the following:

- The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
- 2. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Under the title "Methods of operation," the Paris Principles further affirm that the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

[...] 5

More recently, the Council of Europe adopted the Modernised Convention for the protection of individuals with regard to the processing of personal data ("Convention 108+").⁶ The

⁵ United Nations, <u>Paris Principles</u> – defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

⁶ Council of Europe, <u>Convention for the protection of individuals with regard to the processing of personal data</u>, 2018. Convention 108+ (Amending protocol to Convention 108) will, from its entry into force, repeal the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181).

Amending Protocol to Convention 108 requires that the following provisions be given effect in the law of the Parties to Convention 108+:

Article 15 – Supervisory authorities

1. Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the provisions of this Convention.

[...]

- 5. The supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions.
- 6. Each Party shall ensure that the supervisory authorities are provided with the resources necessary for the effective performance of their functions and exercise of their powers.

[...]⁷

The **European Union's** *General Data Protection Regulation* (GDPR)⁸, defines the independence of supervisory authorities as follows:

Article 52

Independence

1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation.

2. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.

3. Member or members of each supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.

4. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be

⁷ See also paragraphs 117 to 134 of the Explanatory Report.

⁸ European Union, <u>General Data Protection Regulation</u>, 2016.

carried out in the context of mutual assistance, cooperation and participation in the Board.

5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned.

6. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.⁹

Articles 53 and 54 (first paragraph) of the GDPR also provide requirements which guarantee the independence of supervisory authorities:

Article 53

General conditions for the members of the supervisory authority

- 1. Member States shall provide for each member of their supervisory authorities to be appointed by means of a transparent procedure by:
 - their parliament;
 - their government;
 - their head of State; or
 - an independent body entrusted with the appointment under Member State law.
- 2. Each member shall have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform its duties and exercise its powers.
- 3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement, in accordance with the law of the Member State concerned.
- 4. A member shall be dismissed only in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.

Article 54

Rules on the establishment of the supervisory authority

- 3. Each Member State shall provide by law for all of the following:
 - a) the establishment of each supervisory authority;
 - b) the qualifications and eligibility conditions required to be appointed as member of each supervisory authority;

⁹ See also GDPR Recitals <u>118</u>, <u>120</u> and <u>121</u>.

- c) the rules and procedures for the appointment of the member or members of each supervisory authority;
- d) the duration of the term of the member or members of each supervisory authority of no less than four years, except for the first appointment after 24 May 2016, part of which may take place for a shorter period where that is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure;
- e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment;
- f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.
- [...]

In a 2016 report titled *Being an Independent Regulator*, the **Organisation for Economic Co-operation and Development (OECD)** notes that, compared to multi-annual budget allocations, annual allocations to regulators can increase their risk of undue influence. The OECD also warns against the risk of "revolving doors" and conflicts of interest with industry, when no restrictions on pre-or post-employment of professional staff are established.¹⁰

In a 2017 guidance brochure titled *Creating a Culture of Independence*. *Practical Guidance Against Undue Influence*, the OECD outlines five dimensions towards a culture of independence:

- "Role clarity" to avoid undue influence;
- "Transparency" to foster credibility and trust on the regulator's decisions and processes, and "accountability" to enable responsible behavior;
- "Financial independence";
- "Independence of leadership," the head of a regulator being likely to be exposed to pressures; and
- "Staff behavior," a culture of independence helping "foster an environment that helps staff produce the needed unbiased advice" and reject undue influence. ¹¹

Finally, the **Centre for Effective Government, a non-government organization based in the US** dedicated to building an "open and accountable government that promotes fairness and

¹⁰ Organisation for Economic Co-operation and Development (OECD), <u>Being an Independent Regulator</u>, 19 July 2016.

¹¹ OECD, <u>Creating a Culture of Independence. Practical Guidance Against Undue Influence</u>, 2017.

equity," provides the following definition for "Independent Regulatory Agency" in a glossary available on its website¹²:

Independent regulatory agencies are federal agencies created by an act of Congress that are independent of the executive departments. Though they are considered part of the executive branch, these agencies are meant to impose and enforce regulations free of political influence. The Consumer Product Safety Commission, the Nuclear Regulatory Commission, the Federal Communications Commission and the Securities and Exchange Commission are examples of such agencies.

3. Recent ICDPPC interpretation of the "appropriate autonomy and independence" criteria

Over the past three years, the ICDPPC has received approximately twenty applications for membership, resulting in fourteen new members.¹³ When reviewing applications and determining that applicants had met the requirement for "appropriate autonomy and independence", members of the ICDPPC Executive Committee have looked at both functional and operational aspects.

On the one hand, in determining functional autonomy and independence, assessors have relied on specific and explicit provisions in the legislation that creates or regiments the DPA. For example, a statement in the law indicating that the authority is an independent entity or that it enjoys autonomy in the performance of its tasks. Independence in this context appears to have been interpreted as being free from direction or undue influence from other government branches or entities.

On the other hand, when evaluating the operational aspect of autonomy and independence, assessors have measured the criteria against three elements. The first relates to the procedural aspects of the appointment and removal of the head of the authority. This covers, for example, the existence in the relevant law of provisions setting forth the formal process to follow for appointment, including length of service, as well as safeguards against arbitrary removal, e.g. dismissal being allowed in adherence with due process and for specified reasons. The second element to which assessors have given consideration is the head of the authority's ability to speak publicly, to report on its work to other branches of government and to commence investigations

¹² Centre for Effective Government, "Independent Regulatory Agency," 2015.

¹³ Please note that for reasons of confidentiality and the good exercise and maintenance of relationships, this sections purposely avoids providing the names and details of specific applicants. Also, the three year timeframe was chosen given it provides an adequate sample size and corresponds to the last time section 5 of the Rules was amended (at the 37th Conference).

on its own initiative. Lastly, although not consistently across time, assessors have also taken into account how the authority is provided with financial resources usually via the national budget allocation process in a manner similar to other government organizations.

In short, it is a combination of both functional and operational factors that help decide whether the autonomy and independence criteria are met. Nevertheless, a complete failure of one of the factors, such as appointment and removal at the whim of the Executive, has sufficed for an adverse determination. To a limited extent, the assessments have looked at the legal and institutional context of the applicant; that is, whether it followed a similar institutional structure as other independent regulatory bodies in that jurisdiction. It should be noted, however, that this additional information is not specifically requested in the application form and is only available by requesting further information from the applicant or using available public sources.

Of those membership applications that were not accepted in the past three years, several were instead granted observer status, in accordance with section 5.3 of the ICDPPC Rules that states that:

Public entities that do not meet [the criteria provided for in article 5.1], but are involved in dealing with the protection of personal data and/or privacy" [can take part in the Conference, with an Observer status.]

In a few instances, the criteria that was not met for membership was that of autonomy and independence. In those cases, the reporting structure of the authority and the appointment and removal process of the head(s) of the authority were determinative. Authorities entirely within the Executive branch – that is, that are part of a ministry or department or whose members serve at the pleasure and direction of a minister or President – were deemed not appropriately autonomous and independent.

4. Conclusion

When interpreting what it is to be autonomous and independent, the analysis should be mindful that, throughout the world, autonomy and independence are applied informed by local laws, institutions and governance structures as well as by socio-cultural norms. In recognition of this, it is suggested that a **contextual approach should underpin the evaluation of ICDPPC Membership applications under the autonomy and independence criterion, while relying on a set of common guiding principles**. This reflects the global nature of the Conference, its respect

for the principle of cultural and legal diversity and would support the role of the ICDPPC as a forum that encourages dialogue, cooperation and information sharing.

The analysis of this study has indeed shown that several overarching guiding principles can be discerned **to assist the Conference in the interpretation of the autonomy and independence criteria**. Autonomy requires that an authority be empowered, both in a legal and practical fashion, to initiate and undertake appropriate action without having to seek others' permission. Independence is important for agencies to be able to operate free from political or governmental interference and to withstand the influence of vested interests. Elements that demonstrate autonomy and independence include:

- The existence of the DPA and its functional and operational independence from both public institutions and the private sector are established in the legislation. This includes setting out features of independence in legislation or explicitly designating this independence.
- The head or, where more than one, the principals of the DPA are appointed by an official act for a fixed term according to rules defined in the legislation. Guarantees of autonomy and independence here include:
 - o qualifications and eligibility conditions required to be appointed;
 - o rules and procedures for the appointment;
 - o duration of the term;
 - how many terms the head or principals of the DPA are eligible for reappointment;
 - conditions governing the obligations of the head of the DPA, including refraining from any action incompatible with their duties and not engaging in any incompatible occupation during and after term;
 - o limited and reasoned conditions for removal;
 - requirements for diversity of members, such as from different sectors or appointed from or by different bodies (judiciary, legislative, trade or professional associations)
- The DPA is provided with the human, technical and financial resources, premises and *infrastructure necessary for the effective performance of its tasks*. Typical guarantees of this feature include:
 - o the DPA has dedicated, separate, annual or multi-annual budgets;
 - the funding is adequate and stable¹⁴;
 - the DPA can access other sources of funds and reimbursements;
 - the DPA has complete control over how it uses its budget; and,

¹⁴ See also Association for the Prevention of Torture, "<u>Independence and NHRIs: What do we mean?</u>" August 2015.

- the DPA chooses and has its own staff, which is subject to the exclusive direction and authority of the head of the DPA.
- *The DPA functions as an autonomous and independent body*. Features demonstrating this function include that:
 - the DPA may freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority;
 - the DPA has the power to initiate investigations;
 - the head or principals of the DPA have the power to report directly to the head of government or legislature and to speak publicly;
 - the head or principals of the DPA remain free from external influence, whether direct or indirect, and neither seek nor take instructions from anybody;
 - the head or principals of the DPA enjoys immunity against personal law suit for actions carried out as part of their official duties;
 - the DPA decides how it conducts its work: how it spends its time and money, what procedures it uses for investigations and how it plans its activities;
 - the DPA enjoys access to the information needed to conduct its works, including by summoning witnesses, administering oaths, compelling the production of evidence and visiting relevant premises;
 - the DPA is subject to financial control which does not affect its independence; and
 - The DPA staff is subject to a duty of professional secrecy and to rules governing conflicts of interests or political activities, including incompatible occupations and benefits.
- **The DPA's decisions and actions are made in a transparent way**. This includes through regular reporting to parliament, government, and the public, and opportunities for public input into its activities.

5. Next Steps

Should members at the 41st ICDPPC agree with the above guiding principles to assess the autonomy and independence criterion of applicants, it is suggested that these be applied accordingly when assessing future ICDPPC accreditation applications and due consideration be given on whether this should be further elaborated or formalized into an ICDPPC Resolution.