

EDPS pleading *Commission v Hungary* (C-288/12)

Court of Justice of the EU - 15 October 2013

Mr. President, honourable members of the Court, Mr Advocate General,

Introduction

Your Court is asked to provide further clarity on what is required for a data protection supervisory authority **to act with complete independence**. Your judgment will have **consequences going beyond the Hungarian situation**. It may significantly contribute to effective and reliable data protection supervision throughout the European Union.

In *Commission v Germany* (Case C-518/07, para 30) your Court already ruled that the supervisory authorities must enjoy an independence allowing them to perform their duties **free from any external influence, whether direct or indirect**.

The key issue before the Court today is whether the termination of the mandate of the Hungarian data protection commissioner should be considered such an **'external influence'**.

I will argue today that **both 'direct' and 'indirect' 'external influence' has been exerted** on the Hungarian supervisory authority, within the meaning of your ruling in *Commission v Germany*.

First, what, if anything, can constitute more **direct external influence** over a supervisory authority than arbitrarily removing from his position the head of this authority almost three years before his mandate would otherwise lapse?

I will argue that the mandate must be **protected from being terminated before its term without adequate justification and appropriate procedural safeguards**. As I will explain further, **a legislative change** cannot, in itself, justify early termination of the mandate of the head of the authority.

Second, there is a clear risk that the events that took place may also have an **indirect external influence** on any future head of the new supervisory authority. The precedent that such an arbitrary, early termination of a mandate was allowed to happen once, **may well create an atmosphere of uncertainty, and thus may have a chilling effect on the activities of any subsequent heads of the supervisory authority.** After all, in future, what, if anything, guarantees that another head of a supervisory authority, perhaps one that expresses strong criticism of government, will not also be arbitrarily removed from office, using another reorganisation as a pretext?

For these reasons, the **EDPS supports the form of order sought by the European Commission**, namely that **Hungary has failed to fulfil its obligation** under Article 28 of Directive 95/46/EC to ensure that the national supervisory authority acts with complete independence.

Importance of organisational guarantees for independence

In this pleading, I will focus on the Hungarian situation. However, before turning to this in more detail, I would first like to make two general remarks:

1. First, the **requirement of complete independence goes beyond 'functional independence'**. After your ruling in *Commission v Austria* (Case C-614/10, para 42), this is now settled case law.
2. Second, to ensure 'complete independence', it is **crucial to adopt and adhere to certain key organisational guarantees**.

In point 27 of our Statement in Intervention, **we have listed some of the key organisational guarantees enabling a supervisory authority to act with complete independence.**

In our view, all six guarantees listed are crucial to ensure the independence of the supervisory authority. Among the six requirements listed, one in particular lies at the heart of this case: the conditions under which the mandate of the individual, who leads such a supervisory authority, may be terminated.

The mandate must be **protected from being terminated before its term without adequate justification and appropriate procedural safeguards.**

Only in exceptional circumstances, and for serious reasons that are objectively verifiable, may the mandate be terminated before its term.

Hungary failed to provide adequate justification for the need to terminate the mandate of the head of the supervisory authority ahead of its time

I now turn to the Hungarian situation. I will address the key points in the case.

As we explained in part V of our Statement in Intervention, **the Defendant failed to justify the early termination of the mandate with any convincing argument.** This makes the **conclusion inescapable: the mandate has been terminated ahead of its time without adequate justification and appropriate procedural safeguards contrary to EU data protection law.**

Let me now turn to the **four main arguments** that the Defendant raised and **let me show you that each of them is without merit.**

A change in legislation cannot, in itself, justify early termination of the mandate of the head of the supervisory authority

First, the Defendant attempts to justify early termination of the mandate by arguing that such an early termination has been required by a change in Hungary's constitution.

In the view of the EDPS, however, **a change of legislation cannot, in itself, justify early termination of the mandate.** If that were the case, then **any government would be in a position to exert external influence** on the supervisory authority by putting forward a new law. All that would be required is the necessary parliamentary majority to allow passing of such a new law.

For this reason, and even in case of a change of a nation's constitution, it should be assured that the person acting as head of the authority is not set aside for unjustified reasons and without procedural guarantees, or without an interim solution.

Hungary should have provided a transitory arrangement when changing its legal framework

Second, the Defendant alleges that Member States have discretion on the organisation of their legal framework for data protection, and may change their legislation.

The EDPS does not challenge that Member States have considerable discretion.

However, **a Member State should abstain from legislative changes which would prejudice the *effet utile* of EU law.** Hungary has a duty under Directive 95/46/EC to ensure the complete independence of the supervisory authority. This derives from basic principles of EU law.

The fact that the change is made on a constitutional level should not stand in the way of the primacy of EU law. This is even more so as we are dealing with a case where the respect of a fundamental right, enshrined in the Charter of the Fundamental Rights of the European Union, is at stake.

There is no convincing justification why Hungary could not have reorganised its legal framework in such a way which would have respected the independence of its supervisory authority and thus, EU data protection law.

The EDPS therefore submits that, when changing Hungary's constitution, it would have been appropriate to define **transitory measures that respected the mandate of the head of the existing authority.**

For example, an appropriate alternative solution would have been to provide that the head of the existing authority will become the first president of the new authority, for the remaining period of his mandate. Such a solution would have been respectful of the independence of the former head of the supervisory authority. At the same time, it would have allowed Hungary to bring about the legislative and organisational changes it wished to introduce.

Press statements cannot be considered as a formal resignation

As a third argument, the Defendant submits that the former head of the supervisory authority made certain statements in the press, which suggested that he will not be willing to head the newly established supervisory authority. The Defendant then implies that by making such statements the former head of the supervisory authority has effectively resigned from his position.

The EDPS submits that Hungary cannot validly rely on public statements made in the press to justify the early termination of the mandate.

First, these statements were made at a time and in a context when the former head of the supervisory authority was criticising a future legal framework for data protection in Hungary. This framework was also under close scrutiny by the European Commission.

Second, these statements were of general, non-binding and informal nature, and their accuracy and exact scope is difficult to verify.

In short: they can by no means be considered as **an official declaration of resignation**. On the contrary, the former head of the Hungarian supervisory authority never took any official steps towards formally asking that his mandate be terminated earlier.

Incidentally, the EDPS points out that when making such press statements the former head of the supervisory authority was fulfilling his institutional tasks to advise the government on new legislation. The fact that he was exercising this task should not be held against him. The EDPS would find it highly problematic if any head of a supervisory authority were removed from office as a result of voicing critical comments on legislative changes proposed by any government.

To ensure independence, it is not sufficient that the legal framework prior to and after the termination of the mandate in itself complied with EU law

Fourth and last, the Defendant argues that **the legal framework** prior to and after the termination of the mandate in **itself complied with EU law** and therefore, no infringement has occurred.

This argumentation is **fundamentally flawed**. Indeed, whether or not Hungarian law complied with EU law before or after the termination of the mandate is not the main issue in this case. What is **at issue is the termination of the mandate itself**. It is precisely the termination of a mandate ahead of its time without adequate justification and procedural safeguards that constitutes a direct external influence.

To ensure independence, it is not sufficient that the legal framework prior to and after the termination of the mandate in itself complied with EU law.

To hold the contrary would lead to unacceptable results: **any government could cut short the mandate of any head of the supervisory authority** so long as this is done by way of a change in national law, and so long as the text of such subsequent national law itself complied with EU law. This would open the door for any government to replace the head of its supervisory authority with a new individual based on its political preferences at any time.

Conclusion

This brings me to my conclusion.

I argue that both '**direct**' and '**indirect**' '**external influence**' has been exerted on the Hungarian supervisory authority, in the meaning of your ruling in *Commission v Germany* (30).

First, the early termination of the mandate constitutes **external influence of the most direct and most severe kind**. Once his mandate has been terminated ahead of its time, the former head of the supervisory authority has been prevented from exercising his function altogether.

A **legislative change** cannot, in itself, justify early termination of the mandate.

Second, the early termination of the mandate has also more long-term and more **indirect effects**. Once a precedent has been created that a reorganisation of a supervisory authority and a legislative change is sufficient to terminate the mandate of the head of a supervisory authority, it will be possible for any government disposing of the necessary parliamentary majority to cut short of any future mandate without adequate justification and procedural safeguards.

This may have a chilling effect on the activities of any supervisory authority, in Hungary and elsewhere across the European Union.

It would therefore be the necessary consequence of primary and secondary EU law and fully in line with the *Commission v Germany and the Commission v Austria* rulings if the Court would conclude that Hungary has failed to fulfil its obligation under Article 28 of Directive 95/46/EC.

I thank you for your attention.