

**Conference of European Data Protection Authorities
26-27 May 2016 – Budapest, Hungary**

**Accreditation Procedure for Conference of European Data Protection Authorities
Report of the Accreditation Committee on the application for accreditation by the
Gibraltar Regulatory Authority (GRA)**

Introduction

According to the Guidelines for Admission to the Conference of European Data Protection Authorities, as adopted on 23 April 2004 during the Rotterdam Spring Conference of European Data Protection Authorities, the Accreditation Committee comprises of the former, current and next organizer of the Spring Conference of European Data Protection Authorities.

The Accreditation Committee now comprises of:

- The United Kingdom Data Protection Authority (ICO)
- The Hungarian Data Protection Authority (NAIH) and
- The Cypriot Data Protection Authority

The work of the Accreditation Committee was performed by an officer of each Authority, as follows:

- The United Kingdom Data Protection Authority: Ms. Hannah McCausland
- The Hungarian Data Protection Authority: Dr. Julia Sziklay
- The Cypriot Data Protection Authority: Mr. Constantinos Georgiades

Request for accreditation as member of the Conference of European Data Protection Authorities

The applicant's membership has been pending since the 2014 conference due to the specific nature of its position and to allow the Conference to analyse Gibraltar's situation and determine its status as thoroughly as possible in line with the Conference Guidelines for Admission to the Conference of European Data Protection Authorities.

The assessment process

The case was examined together by all authorities participating in the works of the Accreditation Committee. According to the Guidelines for Admission to the Conference of European Data Protection Authorities the examination of the application focused on whether:

- the applicant DPA is a public body established on an appropriate legal basis;
- the law under which the applicant operates implements either the Council of Europe Convention 108 or European Union Directive 95/46/EC;
- the DPA has sufficient degree of independence and autonomy;
- the DPA has an appropriate array of functions combined with the power to perform these functions;
- the applicant DPA had filed an application in the correct category of membership;

Gibraltar

The Data Protection Authority of Gibraltar, known as the Gibraltar Regulatory Authority (GRA) has applied to become a sub-national member (sub-national in relation to the UK's ICO) of the European Conference of Data Protection Authorities. Its membership has been pending since the 2014 conference due to the specific nature of its position and to allow the Conference to analyse Gibraltar's situation and determine its status as thoroughly as possible in line with the Conference Guidelines for Admission to the Conference of European Data Protection Authorities.

Accreditation process history

Gibraltar's GRA has been attending and actively participating in the Spring Conference since 2007 in Larnaka with additional active and participation in the European Conference's Case Handling Workshop. The committee has no reason to find that Gibraltar's participation in the Conference has been anything but positive and it notes that no objection was raised to the GRA's participation in the Conference from any other member at previous conferences. The Accreditation Committee believes that applicant DPAs should have their accreditations assessed and decided upon within a reasonable period of time.

The GRA has made its application based on its understanding of the Application Form annexed to the Conference Guidelines for Admission to the Conference of European Data Protection Authorities. The GRA interprets the Application Form to allow it to become a sub-national member of the European Conference as a result of its existing membership of the International Conference.

In 2014, the Accreditation Committee recommended that the Conference adopt a resolution accrediting the GRA as a member of the Conference with the status of sub-national member. Upon objections raised by the Spanish data protection authority, the Conference unilaterally decided to defer the GRA's application until the next Spring Conference. Subsequently, the Accreditation Committee at the Spring Conference in 2015 declared that it hoped to be in a position to make a definitive proposal at the conference in 2016 pending information from the European Commission regarding recognition of the GRA as the data protection authority for Gibraltar.

The Accreditation Committee has consulted with all Conference member authorities known to have an interest in Gibraltar's application to the conference.

The Accreditation Committee notes that the Spanish delegation has objected on several grounds in a series of letters over the past two years to the GRA's admittance to the Conference for the following reasons:

The Spanish AEPD:

- Believes that the Conference would be taking a position contrary to international law by accepting the Gibraltar GRA as a full sub-national member;
- Recalls that Gibraltar is not a state or subnational territory of the U.K., but a territory registered as a Non-self-Governing Territory in the list of the United Nations;
- Recalls the Arrangements agreed between the UK and Spain which clarify that all EU relations of any Gibraltar authority have to be channelled through a specifically designated authority of the UK.

The GRA is a sub-national member of the International Conference of Data Protection and Privacy Commissioners since its application was accepted in 2006. There were no objections to the application.

In Gibraltar, the GRA is the responsible body to supervise data controllers' respect for data subjects' rights. The authority has enforcement powers like other DPAs who are already European Conference members. It is well-known that Gibraltar has a specific status under international law. The Accreditation Committee has analysed the status of the GRA in light of the law of the United Kingdom and the European Union. The GRA does not have any link to the ICO of the United Kingdom.

Moreover, the Constitutional law of Gibraltar (section 47(3) of the Gibraltar Constitution) provides: "Without prejudice to the United Kingdom's responsibility for Gibraltar's compliance with European Union law, matters which under this Constitution are the responsibility of Ministers shall not cease to be so even though they arise in the context of the European Union". In other words, the Gibraltar Government and the Gibraltar Parliament are responsible for the transposition and implementation of all EU measures within the internal legal order of Gibraltar in the same way as any national parliament and government does in every Member State. The UK's transposition of EU law has no effect in Gibraltar. Therefore, a practical solution at the Conference would appear to be needed.

The Accreditation Committee asked the European Commission to inform us of their view on the legal status of the GRA. The Committee has received a written confirmation about the status of the GRA, signed by Bruno Gencarelli, Head of Unit within DG Justice of the European Commission. The information from the Commission confirms that as regards Gibraltar, the relevant data protection legislation is contained in the Data Protection Act of 2004 of Gibraltar and the GRA as designated under Section 21 of the Data Protection Act 2004 is the responsible UK authority for the purposes of Article 28(1) of Directive 95/46/EC. The European Commission therefore confirmed to the Committee that for the purpose of fulfilling the UK's obligation to implement Article 28(1) of Directive 95/46/EC with regard to Gibraltar, it will consider the GRA as the responsible UK public authority.

View of the Accreditation Committee

The Accreditation Committee has assessed the Gibraltar GRA's application as for other prospective membership applications on the basis of the following criteria:

- The applicant DPA is a public body established on an appropriate legal basis;
- The law under which the applicant operates implements either the Council of Europe Convention 108 or the European Union Directive 95/46/EC.
- The DPA has sufficient degree of independence and autonomy;
- The DPA has an appropriate array of functions combined with the power to perform these functions;

Most of these criteria are very clear cut for the GRA's application which it would appear to meet without further question as set out already according to the laws named above. The Committee notes that taking account of the responsibilities of the UK as Member State of the EU responsible for the external relations of Gibraltar according to Article 355(3) of the Treaty on the Functioning of the European Union, a dedicated unit of the UK Foreign and

Commonwealth Office (UK foreign ministry) formally holds the duty to communicate for Gibraltar on matters of the European affairs of Gibraltar. However, the Conference Guidelines for Admission to the Conference do not provide for a Government Ministry to intervene as a spokesperson for an authority at a European Spring Conference partly because this is unprecedented and may risk restricting the position of both the GRA and the UK's ICO in certain matters whereas the Conference is dedicated to advancement of the community of independent data protection authorities in Europe.

In the absence of any other workable membership status to the Conference for the GRA apart from sub-national membership as the Accreditation Guidelines currently stand and in view of the GRA's continued commitment and positive contribution to the conference over the last several years since the mid-2000s, it would be impractical and undesirable to exclude the GRA from the Conference or merely limit it to an Observer status¹. Moreover these other accreditation options would seem to ignore the European Commission's recent recognition that the GRA has a role to play in cooperation under the UK's obligations according to the 95/46/EC Directive, specifically that 'for the purposes of fulfilling the UK's obligation to implement Article 28(1) of Directive 95/46/EC with regard to Gibraltar, it will consider the GRA as the responsible UK public authority'. Due to the specific status of Gibraltar, several clarifications must therefore be made to more accurately define the sub-national membership status of the GRA to the Conference.

Legal analysis of the Accreditation Guidelines for the European Conference has also indicated that it should not be possible to exclude the GRA on the basis of definitions outlined in the Guidelines to the Conference because the Guidelines specifically request interpretation so that the Conference can "proceed efficiently and with a necessary degree of flexibility" which should bear ultimately in mind the aims of the Conference.

The Committee also regrets the lack of clarity surrounding the status of authorities already enjoying International Conference membership who wish to become members of the European Conference. The committee notes that the GRA was correct to point to the inclusion of the International Conference membership criteria in the 2013 Application Form of the Conference for permitting existing International Conference members to join the Conference, but the Committee also notes that this particular criteria does not appear explicitly in the 2004 Conference Guidelines for Admission to the Conference of European Data Protection Authorities.

The Conference refrains from taking positions on matters which are not within its remit of data protection law and policy and therefore remains entirely neutral on non-data protection related matters. The Accreditation Committee believes that the Conference needs to clarify the situation and refrain from prolonging Gibraltar's application for another year. Therefore, to ensure a practical resolution of the matter in a spirit of cooperation, taking into account all the facts of the case, seeing as the decisions of the Conference do not take positions on non-data protection matters the Accreditation Committee proposes two clarifications for the GRA's sub-national membership as follows:

¹ As according to the Conference Guidelines for Admission to the Conference of European Data Protection Authorities, an Observer to the Conference would consist of those authorities who have narrower functions than those of sub-national DPAs for example in a specific area of activity – the committee assesses that this is not the case for Gibraltar's GRA.

A) Confirmation that the Gibraltar GRA would be subject to the same voting regime as other sub-national members to the Conference. Sub-national members to the Conference do not have their own vote for reasons outlined in the Guidelines for Admission to the Conference. Every national delegation casts one vote, on terms to be agreed by the national delegation.

B) Confirmation that the Gibraltar GRA and the UK's ICO would maintain consultation on the UK national member positioning on items to be put to vote at the Conference. Gibraltar GRA has the possibility, just as other sub-national members do, to take the floor independently at the Conference to speak on items of interest.

The International Conference membership also indicates that the GRA is clearly able to play a role in similar cooperation work between data protection authorities from different countries and has been doing so without obstruction or objection for ten years to date.

Finally, the Committee believes that the rules of the conference must be read in the spirit of European cooperation that both the EU's relevant laws and the Council of Europe's Convention 108 expect from our authorities.

Recommendations

The Accreditation Committee wishes to recommend to the Conference that the sub-national membership application of the GRA, subject to the clarifications presented above, is approved in light of the principles of cooperation and flexibility in the interpretation of the accreditation rules.

The Hungarian Host of the 2016 Conference also proposes to launch a working group to consider the future membership criteria of the Conference, in view of the fact that the Conference Guidelines for Admission to the Conference of European Data Protection Authorities have become rather outdated and moreover to be able to cut a clearer path for resolving disputes over membership to the Conference in future.

27 May, 2016