Autorité de protection des données
Gegevensbeschermingsautoriteit

Opinion of 25th February 2022

To the State Secretary for Digitalisation, responsible for Administrative Simplification, Privacy and Building Management

Subject: Opinion on preliminary draft law amending the Act of 3 December 2017 establishing the Data Protection Authority (AH-2022-0020)

Mr State Secretary,

On 2 February 2022, you asked the Data Protection Authority (hereafter: "DPA") to provide its opinion on a preliminary draft law amending the Act of 3 December 2017 *establishing the Data Protection Authority* (hereinafter "the Preliminary Draft"). The Preliminary Draft is part of a broader review exercise of privacy legislation that you were carrying out.

The opinion you requested is contained in this letter and the attached annex.

I. OBJECT OF THE REQUEST FOR AN OPINION AND COMPETENCE OF THE DPA

1. Given that the Preliminary Draft does not deal with actual processing of personal data, but rather with the operation of the DPA itself, on 3 February 2022, the Executive Committee came to the determination that this request for opinion does not fall within the scope of Article 23 of the Act of 3 December 2017 establishing the Data Protection Authority (hereafter: "DPA Act")[1]. In view of this finding, the Executive Committee decided to issue the requested opinion itself[2].

2. The DPA wishes to emphasise that it already contributed extensively to the earlier preparatory work of this Preliminary Draft, but regrets that only few of our comments has been taken into account.

[1]Moreover, the request for an opinion was not submitted on the basis of the procedure provided for in Article 23 of the DPA Act, perhaps because the Preliminary Draft does not concern the processing of personal data.

[2] At her own request, Ms C. Dereppe (Director of the First Line Service) did not take part in the preparation and adoption of this opinion as she believes that the Management Board of the DPA has no authority to advise on the Preliminary Draft.

During the preparation of this opinion, the staff of the DPA was consulted.

This is all the more important as maintaining a strong and independent privacy supervisory authority is an absolute necessity in a rapidly developing digital society. This necessity is also guaranteed by the European treaties, in which the protection by an independent supervisory authority is an essential element of the right to the protection of personal data[3], as also emphasised by the European Court of Justice.

3. As this opinion emphasises, the Preliminary Draft seriously jeopardises both the efficient operation and the independence of the DPA. Moreover, this Preliminary Draft does not stand alone. A bill *for the establishment of a shared service centre for endowment institutions* currently circulating in the House of representatives and among the collateral institutions proposes to relocate several DPA staff members to this service centre. Furthermore, the DPA's requests for additional human and financial resources, substantiated by the Court of Audit and an external study, have so far been largely rejected.

4. Given the great importance of this Preliminary Draft in light of the independence requirements mentioned above, this opinion to the State Secretary is not only brought to the attention of the Court of Audit and the Council of State, but also to the attention of the European Commission and the European Data Protection Board (EDPB).

II. ESSENTIAL SHORTCOMINGS: OVERVIEW

5. The DPA endorses the main principles underlying the Preliminary Draft, insofar as it aims to **strengthen the operation and independence of the DPA**.

6. The DPA also supports the intention to bring the organisation more in line with the division of powers for the supervisory authorities in the General Data Protection Regulation (hereafter: "GDPR"), whereby – broadly speaking – the Inspection Service will carry out the powers of Section 58(1) of the GDPR, the Litigation Chamber will carry out the powers of Section 58(2) of the GDPR, and the proposed Authorisation and Advisory Service (currently General Secretariat and/or Knowledge Centre) will carry out the powers of Section 58(3) of the GDPR. In addition, the DPA is pleased to note that the Preliminary Draft provides for a principled strengthening of the role of the Executive Committee and the Chairman of the DPA, with a number of caveats in this opinion. For example, for procedural reasons and efficiency, the DPA is in favour of assigning *enforcement tasks* to only two directorates (specifically: the Litigation Chamber and Inspection Service), instead of the current three. The capacity freed up in the First Line Service could then be used to the maximum for support and assistance to citizens and awareness-raising, as proposed by the Government proposed in its Evaluation Report.

[3] See in particular Article 8 of the European Charter of Fundamental Rights and Article 16 of the Treaty on the Functioning of the EU.

7. Moreover, the DPA would underline that modifying in depth the structure of the DPA and powers of its various members halfway through their term of office, without prior evaluation or any consultation with those involved, is problematic from a European perspective. The DPA is of the opinion that a few limited and targeted adjustments would have brought more legal certainty to the authority's day-to-day operations, especially now that the acute threat of an infringement procedure from the European Commission has been removed in the short term. The Preliminary Draft creates new uncertainty or infringement proceedings from various angles, including because of:

- New problems, which are outlined below, including, in particular, an erosion of the guarantees of independence guaranteed by the European treaties.
- Uncertainty and thus risk of paralysis of the DPA for a long time, whereas most of the bodies function properly, especially considering the structural lack of resources.
- An even more intensified supervision by parliament, while the current law already goes beyond what European and international law allows (i.e. supervision of financial aspects and judicial review).
- A weakening of the legal procedures within the DPA, which raises particular risks for enforcement, with many provisions that would remove the procedures in which external parties have an interest.
- Too much focus on "reinforcing" the internal functioning of the DPA, with overly detailed rules governing relations between directors, when collegial decision-making process by the Executive Committee should be the starting point.
- The structure and functioning of the Litigation Chamber are deeply impacted, while the functioning of the Litigation Chamber is not a subject opened for discussion. This is throwing the baby out with the bathwater.

8. The DPA is of the opinion that these measures imply serious risks to its efficient operation and independence, and certain changes are also in breach of our country's obligations under European and international law. In order to avoid new infringement procedures and for the sake of legal certainty, these essential shortcomings should be remedied.

III. EUROPEAN LAW REQUIREMENTS ON INDEPENDENCE NOT GUARANTEED

9. The core of the DPA's mission is to monitor compliance with the European data protection rules. The DPA implements a system established at the European level in which the **complete independence** of the supervisor is central. The European Court of Justice formulates this as follows: "*This independence excludes not only any influence by the supervised bodies, but also any order or*

any other outside influence, whether direct or indirect, [on] the performance by those authorities of their task [...].[4]"

10. The supervisory authorities have been deliberately placed at a distance, not only from the executive, but also from the people's elected representatives. Their role is to ensure the protection of human rights, within the rule of law, even in cases where the elected representation, by a majority, would judge otherwise.

11. Of course, this does not mean that there should be no parliamentary influence on these authorities. Art. 53(1) GDPR does not preclude the appointment of the members of the national supervisory authority by the parliament (or even by the government or the head of state). Nor does the GDPR seem to preclude the national legislator from imposing an obligation on supervisory authorities to render account of their activities to parliament ex post. For example, Art. 59 GDPR stipulates that the supervisory authority must draw up an annual report on its activities and send it to parliament.[5] However, it is beyond doubt that the supervision of the supervisor must be limited to oversight of financial aspects and judicial review. A broader assessment or influence on the supervisor's prioritisation or the opportunity assessment is contrary to our country's obligations under European and international law[6].

In the DPA's opinion, the Preliminary Draft does not comply with the aforementioned Union law requirements, in particular for the following reasons.

12. **Firstly**: The removal of the term of office of the external members of the Knowledge Centre and the Litigation Chamber and the limitation of their function to that of experts (Art. 66.2 Preliminary Draft), whereby they no longer participate in the deliberations (Art. 14.5 Preliminary Draft) and, more generally, are relieved of their term of office as members. This is clearly contrary to the case law of the European Court of Justice, in particular the judgment *Commission v. Hungary*. Apart from the cases provided for in the GDPR, which are listed restrictively, a Member State may not terminate the term of office of a member of the supervisory authority before the expiry of the initially planned period. This applies even if the premature termination of the term of office is the result of a legal restructuring or a change of model.[7] What Hungary cannot do, other Member States cannot do either.

[4] CJEU, Commission v. Germany, C-518/07, paragraph 30.

[5] C-518/07 Commission v. Germany, §§ 43-45; C-718/18 Commission v. Germany, § 127

[6] See recital 118 of the GDPR.

[7] C-288/12, pt. 50. In the same sense, see e.g.. C-424/15 Ormaetxea Garai, § 52, and also consider. 87 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018: "In order to safeguard the full independence of the members of the independent supervisory authority, the terms of office of the current European Data Protection Supervisor

13. The external members of the DPA are members of the DPA according to the current DPA Act and have full protection against dismissal according to Article 44 DPA Act and Article 53(4) GDPR.

14. More generally, the system with "experts" who are not members of the DPA is especially problematic for the Litigation Chamber, since they cannot participate in decision-making as "non-members". Unlike, for example, the Competition Authority (which works with assessors), EU law guaranteeing independence at treaty level prevents citizens from being subjected to decisions made (partly) by third parties. An alternative to a Litigation Chamber with external members is certainly not excluded, but it should be based on a more thorough evaluation of the existing system, and its shortcomings. It has to be said that the design simply departs from the existing system without adequate consideration of the alternative, its workability and its consequences.

15. **Secondly**: From now on, the reappointment of a member of the DPA for a second term of office is only possible after a positive evaluation of the member by the House of Representatives (Art. 31 Preliminary Draft). In itself, an evaluation before a member can be reappointed does not seem excluded by definition, but the independence of the members of the DPA is in danger of being compromised if this evaluation is carried out by the House of Representatives, moreover without objective criteria laid down in the law. An alternative could be to provide for a more thorough and objective *assessment* before (re)appointment.

16. **Thirdly**: parliamentary interference in the setting of priorities and internal organisation. These are, in particular:

- Art. 9, §1, 13° (new, as inserted by art. 8 Preliminary Draft): The strategic plan should be submitted to the House of Representatives for approval.
- Art. 11, §3 (new, as inserted by art. 10 Preliminary Draft): The Rules of Procedure are adopted by the House. As far as internal operating rules are concerned, it is hard to see why the House needs to agree. Where the rights of citizens are concerned and the principle of legality is at stake, an alternative form of "ratification" should be provided.
- Art. 14 (new, as inserted by art. 8 Preliminary Draft): The reserve of experts should be submitted to the House. And if the DPA seeks advice from a third party, this must also be submitted to the House. In any case, the DPA should not be restricted from using other "third parties" (e.g. experts, lawyers, consultants...), whether for the partial or full implementation or support of its core tasks.

and the current Assistant Supervisor should not be affected by this Regulation. The current Assistant Supervisor should remain in place until the end of his term of office, unless one of the conditions for the premature end of term of the European Data Protection Supervisor laid down in this Regulation is met. The relevant provisions of this Regulation should apply to the Assistant Supervisor until the end of his term of office."

- Art. 9 (new, as inserted by art. 8 Preliminary Draft): The rules on the allocation of staff members to different bodies (on the basis of an annual workload measurement) conflict with the independence of the authority to determine its priorities.

17. The complete independence of the DPA implies, by definition, full autonomy to determine its own priorities, and, for example, to prioritise compliance with legislation in certain sectors or the performance of certain tasks (at the expense of others). For example, Article 57 GDPR assigns 21 different tasks to the supervisor, which – especially in view of the limited resources – cannot all be performed with the same intensity.

18. **Fourthly**: Interference by the legislator in the substantive assessment by the DPA, in particular:

- Art. 2: "*In applying this Act, account shall be taken of a guiding principle of Regulation 2016/679 which provides that the processing of personal data must be for the benefit of the individual and that the right to the protection of personal data, which is not absolute, must be considered in relation to its function in society and balanced against other fundamental rights in accordance with the principle of proportionality*".
- In this context, reference should also be made to the Explanatory Memorandum to the Preliminary Draft referring to "Strengthening the pragmatic approach and sectoral expertise" and "Emphasising the importance of taking due account of other fundamental rights in the protection of personal data."

19. It is, however, clearly the DPA's task to enforce data protection law, while of course taking due account of other fundamental rights. The European Court of Justice consistently describes national supervisory authorities as "the guardians of the right to privacy".[8]

20. It is therefore not appropriate that the Belgian legislator appears to be essentially instructing the DPA to take greater account of fundamental rights other than the right to data protection in the future. The supervisory authority's substantive room for manoeuvre is set out exhaustively in EU law.[9]

21. **Fifthly**: The extension of appointment requirements listed in the GDPR (pluridisciplinary, magistrate etc.), moreover without reference to Art 53.2 GDPR. Whereas the GDPR requires the appointment to be based on substance, the Preliminary Draft places a different emphasis.

[8] see for example C-518/07, Commission v. Germany, §§ 23 and 36; Commission v. Austria, § 52; Commission v. Hungary, § 53

[9] In a recent ruling on the independence of national regulators in the electricity and natural gas sectors, the Court of Justice ruled that interference by national political bodies is not allowed, even in the form of substantive laws (C-718/18, Commission v. Germany, § 130; see also Opinion AG Pitruzzella, § 140).

22. Art. 53(2) GDPR requires that the members of the national supervisory authorities themselves have the necessary "*qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform their duties and exercise their powers*." It seems at odds with this requirement for internal expertise that the amended DPA Act would no longer require the members of the Knowledge Centre and the Litigation Chamber to have the necessary expertise, with this loss of expertise being "compensated for" by supplementing the DPA with a reserve of experts.

23. In this connection, the DPA also draws particular attention to Article 30 of the Preliminary Draft, which stipulates that the President of the Litigation Chamber must be a magistrate. However, the Litigation Chamber is part of an administrative authority and is therefore not a court. Moreover, Article 33, §1, second paragraph of the DPA Act already requires that the President of the Litigation Chamber should have a thorough knowledge of administrative litigation. In addition to the general rule that a member of the DPA Executive Committee shall be appointed on the basis of his competence and experience in the field of personal data protection, his independence and his moral authority, the fulfilment of this condition already provides adequate safeguards. This does, however, require testing of whether the candidates for the position of member of the supervisory authority have the required competences, for example, after an objective and thorough assessment. According to the DPA, there are no convincing reasons why the chairman of the Litigation Chamber should be a magistrate, especially since there is always an effective possibility of appeal to the courts.

24. **Sixthly**: No guarantees for compliance with Art 52.5 GDPR, especially if a large part of the staff will soon become part of a shared service centre. Art 52.5 GDPR states that a supervisory authority selects its own staff and has its own employees, who work under exclusive instructions from the members of the supervisory authority. The DPA also points to recital 120 GDPR, which requires that every supervisor has at its disposal (among other things) the human resources necessary to perform its tasks effectively. In the same vein, recital 121 GDPR states that the supervisory authority should have "its own staff", "selected by the supervisory authority or by an independent body set up by Member State law and subject to the sole direction of the members of the supervisory authority".

25. This includes guarantees of sufficient financial and human resources. The possibility of longer-term planning should also be provided, as the annual budget cycle does not allow for longer-term planning in the field. The DPA believes that the DPA Act should also contain a provision in that respect.

26. In this regard, the DPA argues that the decrease in internal expertise aimed by the Preliminary Draft, combined with a reserve of external experts, is incompatible with the Union law requirements

of sufficient and qualified in-house staff. The question of compliance with EU law arises all the more as recital 121 GDPR additionally requires that the supervisory authority itself must be able to choose its staff. Although not strictly speaking members of staff, the reserve of external experts must nevertheless be approved by the House of Representatives (albeit at the suggestion of the DPA Executive Committee).

27. **Seventh**: Restriction of the DPA's remit by the amendment of Art. 4, § 1, subsection 1, DPA Act, as a result of which the DPA appears only to be competent to supervise compliance with the GDPR but not with national laws that guarantee the right to data protection. Under the GDPR (without prejudice to Article 2 GDPR), the DPA is competent for all data processing operations. The proposed wording creates legal uncertainty as to the extent to which the DPA can also rule on data processing operations that are laid down in special national laws, which - in view of the GDPR - is not permissible. It would be better to add that the DPA also has competence with regard to other legislation, insofar as it contains provisions on the protection of personal data.

28. **In conclusion**: The objections under European law all relate to the requirements of an independent supervisor, in accordance with Article 16 TFEU, Article 8 Charter, Articles 51-54 GDPR and the case law of the European Court of Justice.[10] At the very least, this system can lead to "anticipated obedience" to the House of Representatives and thus to the political majority of the moment, and to the interests associated with it. The European Court of Justice has already ruled that "the mere risk" of political influence is sufficient to impede the independent performance of the duties of the national supervisory authorities[11]

IV. OPERATION OF THE EXECUTIVE COMMITTEE

29. The Preliminary Draft clearly aims for **more unity and coherence** in the operation and decisions of the Executive Committee, which the DPA absolutely supports.

30. It is very important for the DPA that the Executive Committee is recognised as the highest body of the DPA and is also structured in a way that it can make effective decisions. Furthermore, the Chairman must also be assigned a clear management and administration role (e.g. representation, see below) within the lines defined by the Executive Committee. Any further deterioration or weakening in these areas is unacceptable.

[10] In particular cases C-518/07, C-614/10 and C-288/12.

[11] See for example Commission v. Hungary, § 53, and the references therein.

31. **Firstly**, this means that the Executive Committee should be able to decide by simple majority, whereby the law might stipulate that in the case of decisions of a more strategic nature, consensus of all members should be sought (but not required). In any case, any possible (additional) risk of blockage or additional difficulties in effective decision-making should be avoided.

32. **Secondly**, the Preliminary draft rightly grants residual powers to the Executive Committee, in cases where it is not clear which body is competent. In such cases, the Management Executive Committee seems to suggest), but assign it to one or more bodies. After all, the Executive Committee should have as much autonomy as possible to determine its substantive functioning on the basis of the independence requirement.

33. **Thirdly,** the Executive Committee will need to be able to take certain substantive decisions or to issue a decisive opinion, in case other bodies take positions with policy implications for several bodies ("strategic files"). For example, a service's policy papers or substantive positions that have an impact on other services. This right of the Executive Committee (sometimes also called the right of evocation) does not extend to files in individual cases before the Inspection Service or the Litigation Chamber, nor to decisions in other concrete cases in opinions on legislation or in data protection impact assessments.

34. **Fourthly,** the DPA believes that the adoption of recommendations – which is currently a competence of the Knowledge Centre and which does not change as a result of the Preliminary Draft – should be a competence of the Executive Committee, albeit at the initiative and recommendation of the Authorisation and Advisory Service. To this end, the DPA proposes that the Executive Committee "decide on the recommendations concerning the social, ethical, economic and technological developments that could have an impact on the processing of personal data prepared at the initiative of the Authorisation and Advisory Service;" (new paragraph to be added to Article 9 DPA Act (new)).

V. ESSENTIAL PROCEDURAL PROVISIONS BELONG IN THE LAW

35. The DPA, especially the Inspection Service and the Litigation Chamber, needs more procedures in the formal law rather than fewer procedures. The DPA therefore calls for a reconsideration of the principles of the Preliminary Draft in which procedural provisions are removed protecting citizens and controllers. The reasons for for the need of more procedures in the formal law are as follows:

- For the benefit of the DPA itself: to prevent procedural disputes in procedures before the Inspection Service, at the Litigation Chamber and – on appeal – before the Market Court. The deletion from the DPA Act of the procedural provisions relating to the Litigation Chamber is expected to lead to numerous disagreements before the Market Court, especially given the

Court's strong focus on compliance with procedural requirements and its great willingness to quash on procedural grounds.

- For the benefit of the parties (especially complainants and data controllers), with regard to the principles of legality and legal certainty, foreseeability and essential standards in formal law, see articles 47 of the EU Charter of Fundamental Rights and 6 ECHR. Minimum requirements belong in the law itself ("fair trial").

36. In this regard, the DPA proposes to regulate at least the following procedural aspects in the DPA Act.

37. **Firstly**, a provision relating to the use of language in the context of DPA procedures. The current Article 57 DPA Act is very general and this leads in practice to problems with multilingual procedures for the Inspection Service and the Litigation Chamber. Moreover, there is ambiguity and disagreement about the applicability of other language legislation to the Litigation Chamber.

38. **Secondly**, provisions related to the filtering and admissibility of complaints: the DPA refers in this regard to the previously submitted proposals for amending the DPA Act. The admissibility conditions for complaints included in the current DPA Act (Art. 58-60) are very limited and result in very many complaints passing this filter and being transferred to the Litigation Chamber for processing, where they must later be dismissed. To this end, it would be appropriate to:

- Insert some additional admissibility conditions in the DPA Act.
- Provide the First Line Service or – preferably – the Inspection Service with a broader filtering competence and a low-threshold handling (possibility of converting a complaint into mediation, sending notices of default, proposing settlements, etc.) (see proposal for reforming the complaints procedure as previously submitted by the DPA).

39. **Thirdly,** for reasons of efficiency, the complaints procedure should be housed in two directorates (Inspection Service and Litigation Chamber) instead of three as is the case today. Unnecessary fragmentation should be avoided.

40. **Fourthly**, a clarification of the role of the complainant in the procedure at the DPA. The complainant currently has a very active and large role in the procedure at the DPA, which makes it difficult for the files to flow smoothly.

41. **Fifthly,** the Litigation Chamber must be able to take opportunity considerations into account in its decision. This should be laid down in law to avoid discussion.

42. The earlier proposal for limited changes to the chapter on the Litigation Chamber could provide a basis (Position Paper, which was submitted to the State Secretary, the Minister of Justice and to parliament in April 2021).

VI. NEW POWERS FOR THE AUTHORISATION AND ADVISORY SERVICE

43. The Preliminary Draft assigns current tasks of existing directorates (especially: the General Secretariat and the Knowledge Centre) to the new Authorisation and Advisory Service.

44. Two new tasks of this Authorisation and Advisory Service, namely the granting of prior authorisations for data processing operations carried out by a public sector controller within the scope of its public interest mission and the authorisation of access to metadata relating to traffic or localisation communications, are problematic:

- The usefulness of entrusting such tasks to the DPA is not demonstrated;
- data controllers from both the public and the private sector can already consult the DPA in advance with regard to high-risk processing operations via a data protection impact assessment;
- these tasks are at odds with the DPA's supervisory tasks: a complainant will question the impartiality of the DPA if it turns out that the controller in question relies on an authorisation given by a body of the same DPA;
- further processing that poses a serious risk to rights and freedoms (provision of metadata) requires the legislator to regulate access to the data in an appropriate manner (principle of legality: which data for which purpose, anonymised or not, pseudonymised or not) rather than creating an authorisation system;
- the DPA currently has neither the knowledge nor the resources to perform the authorisation task.

Details of this letter and further recommendations can be found in the Annex.

On behalf of the Executive Committee

David Stevens
Chairman