EDPS Pleading before the General Court
Case C-615/13P *Client Earth and Pan Europe v EFSA*
Luxembourg, 22 January 2015

Dear Vice-President, Ms President, honorable members of the Court, Mr Advocate General,

There are three basic issues in this case:

Firstly, the **broad scope of the concept of "personal data",** enshrined in Article 2(a) of the data protection Regulation. This definition governs the scope of the fundamental right under Article 8 of the Charter, Article 16 of the Treaty on the Functioning of the European Union and of course the specific rules in Regulation 45/2001. This right is meant to apply whenever data relating to individuals are processed in our society. In this case, the original data and, even more importantly, the combined data, are undoubtedly "about" the individuals concerned.

Secondly, **the right to data protection under Article 8 of the Charter and Regulation 45/2001 is different from the right to privacy under Article 7 of the Charter**. The Appellants comments on professional rather than private activity might be relevant to whether Article 7 of the Charter is applicable, but they are irrelevant – as in this case - to the application of the data protection rules under Regulation 45/2001 and Article 8 of the Charter. Article 8 of the Charter applies to all personal data, including professional data.

Thirdly, the **right to personal data protection** is basically a sort of **checklist of safeguards to ensure that personal data are processed fairly and lawfully**. Article 8(b) of Regulation 45/2001 is one of these safeguards. That is why this Court insisted in the *Bavarian Lager* case that Article 8(b) should be respected. And that is why the General Court was right to insist on the need to respect this requirement.

Before going further, the EDPS would like to make a statement as to the values involved in the present case. In their conclusions, the Appellants state that the EDPS position does not outweigh or even refute the need for transparency. The EDPS is

well known for having strong positions in favor of transparency. This is largely shown, not only by the positions adopted in its policy papers, but also in the concrete examples of its interventions in various Court cases where transparency was at stake and where the EDPS has defended this value. The EDPS position in the present case is not against transparency, but in favor of the application of the legal obligations imposed by Article 8(b) of Regulation 45/2001.

In fact, the relationship between Regulation (EC) 45/2001 and 1049/2001 requires a case-by-case analysis. In the Dennekamp case[1], the data subjects are members of the European Parliament, as in the Társaság case of the ECHR[2], where the data subjects are members of the national parliament. In both cases, politicians are acting in their official roles. In the present case, scientific experts are not public figures, and even if they are commenting on a case with public relevance, their role cannot be assimilated to the role of an MEP. Furthermore, their independence should be preserved. Therefore, compliance with Article 8(b) when the case is about data related to scientific experts might require a different degree of development when demonstrating necessity than a case related to the activities of politicians.

The conclusion that a set of data should be considered as personal data in light of Article 2(a) of Regulation 45/2001 should not be seen as an action against transparency values as such. What would jeopardize transparency is the denial of access to personal data even if the criteria for the application of Article 8(b) have been fulfilled.

In light of the Appellants Observations, we will divide todays' submission into two main points. We will first contest the Appellants understanding of the notion of personal data and the difference between the right to privacy and the right to the protection of personal data. Secondly, we will question their understanding of the relationship between Regulation 45/2001 and Regulation 1049/2001, in particular as to whether the requisites for allowing a transfer of personal data under Article 8(b) are respected in the case at hand.

[1] T-115/13, Dennekamp v Parliament.
[2] Társaság v. Hungary, ECHR, Application no. 37374/05, 14 July 2009.

As to the first point, the Appellants have submitted in their Observations to the EDPS intervention several misleading arguments, as follows:

- In point 8 they search the case-law and the Article 29 Working Party paper[3] quoted by the EDPS for an example that would exactly fit within the category of data at stake. They do not find it. Does this invalidate *per se* the position of the EDPS? No, in our view, it does not. Indeed, the notion of personal data is defined in an abstract way and not in a case-based way. The examples mentioned by the EDPS are just that, examples, and they show that the concept is broad, and has been applied broadly by the Courts and the WP29. Thus, finding exactly the same type of data in the case-law is completely irrelevant in the identification of the data at stake as personal data.
- In point 10, they refer to the factors identified in the paper of the Article 29 Working Party on the notion of personal data to determine when data relates to an individual. They state that the "content" factor of the information at stake had already been disclosed by EFSA (that is the content of the comments made by the experts). We fully agree with that statement. And indeed, this "content" element is enough to prove that the set of data at stake is personal data.

- In point 11, the Appellants entered into the difference between the notion of private life and personal data protection. We agree with them on the consideration that the case law of the European Court of Human Rights did not say that all data of a professional nature were to be considered as covered by the notion of "private life". Notwithstanding, the connection with the notion of private life of data of a professional nature is to be evaluated *in concreto*. Even if no information is available in the present case to conduct this evaluation, a potential connection cannot be excluded.

- In point 12, the Appellants subordinate the notion of personal data to the existence of an issue about protecting the private life of an individual and the role played by the data controller (in this case EFSA). In their view, the fact

[3] Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, WP136, adopted on 20 June 2007

> that the data controller has a public function in the interest of the citizen deprives the data at stake of the character of personal data. In our view, there's nothing in the wording of Article 2(a) of Regulation 45/2001 that suggests such limitation.

Let me conclude therefore, once again, that the combination of the names of experts and their opinions constitute personal data. Furthermore, the definition of personal data does not contain an express reference to the notion of private life. Limiting the concept of personal data in the way that the appellants intend to do will certainly deprive EU data protection legislation of its *effet utile*.

As to the second point, the Appellants insist on saying that the General Court failed to weigh the various interests at stake, in their view: the right to privacy against the right of transparency. The Appellants also regret that in its written submission the EDPS did not comment in a detailed and reasoned way on how a potential balancing exercise should have taken place.

Article 8(b) of Regulation 45/2001 set the conditions to be fulfilled before any transfer of personal data takes place. The first condition is that the recipient establishes the necessity of having the data transferred. This condition was not met by the Appellants regarding the data at stake. We have already observed that, in certain cases, the proof of necessity might come from something close to a general interest in transparency. This seems to have been the case for the data already released (the names of the experts, their declaration of interests and their comments). The Appellants submitted that releasing the data at stake, that is which expert made which comment, was necessary in order to assess EFSA's performance of its regulatory duties to protect human health and the environment. They have nevertheless not demonstrated why the release of the specific data at stake was necessary to achieve this goal. Without this information the data controller was not able to evaluate and balance the interests at stake. The same applies to the General Court and the EDPS. The first step for the application of Article 8(b) is missing.

The procedural impossibility to make such a demonstration invoked in point 21 of the Appellants' Observations does not change the fact that the Appellants failed to

demonstrate necessity. The procedural events described in the mentioned point of the Observations do not change the *onus probandi* of the necessity and do not allow the data controller to conduct a balance of interests assessment without considering, in the concrete case, one of the interests to be balanced. Therefore, for a correct application of Article 8(b) in the present case, it is not legally required that the experts be asked if they object to the disclosure on the grounds of its interference with their private life. Furthermore, had the necessity been proven, the evaluation as to the legitimate interests of the data subject would certainly not be limited to their interests concerning their private life. "Legitimate interests" is a much broader concept than "privacy".

As a consequence of the points mentioned, the EDPS respectfully concludes that:

-first, the concept of personal data was not misapplied by the General Court; and

-second, Article 4(1)(b) of Regulation 1049 in combination with Article 8(b) of Regulation 45/2001 was not misapplied by the General Court.

Therefore, the first and the second ground of appeal must be rejected.

I thank you for your attention.

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Agent

EDPS