General Court, Oral Hearing in Case T-557/20

(Luxembourg, 1 December 2022)

SRB v European Data Protection Supervisor

Oral intervention of the European Data Protection Supervisor

1. Dear President, honourable members of the Court,

Introduction

2. Today's hearing will allow the General Court to determine further important aspects of the fundamental right to personal data protection, in particular as regards the discretion of a supervisory authority not to take corrective action.

3. I would like to bring the following four points to your attention:

    - First, in its Revised Decision the EDPS did not make use of his corrective powers, and did not bring about a distinct change in the Applicants' legal position. The action by the Applicant is inadmissible.

    - Second, and in the event that this Court should consider it admissible, the complainants' comments, as processed by the Applicant, and then transmitted to Deloitte, were 'personal data'.

    - Third, the EDPS granted the Applicant in essence access to the file.

    - Fourth, the EDPS also granted the Applicant his right to be heard and upheld the principle of equality of arms.

1. I now turn to my first point, the EDPS Revised Decision

4. It is quite clear from the context of adoption of the EDPS' Revised Decision that it intended to repeal and replace the Original Decision fully, and from the date of its adoption. Consequently, the Original Decision no longer constitutes a reviewable act.

5. This is in line with the standing case law in *European Union Satellite Centre (SatCen)*[1]: it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. In that regard, only those acts are open to challenge which first, definitively determine the position of the EU institutions or bodies upon the conclusion of an administrative procedure. Second, those acts must be intended to produce binding legal effects, by bringing about a distinct change in their legal position.

6. The Revised Decision definitively determined the position of the EDPS upon the conclusion of the administrative procedure as regards the five complaints.

7. The Revised Decision however was not intended to bring about a distinct change in the Applicant's legal position and was drafted accordingly: contrary to the Applicant's submission[2], the Revised Decision does not contain any "orders". The conclusions in the Revised Decision contain only two findings, on the nature of the personal data, and on the infringement of Article 15(1) (d) Regulation 2018/1725, the EUDPR.

8. The EUDPR does not compel the EDPS to systematically make use of corrective powers upon finding an infringement of its provisions.

9. Articles 52(2), 57 and 58 EUDPR read in the light of recital (73) indicate that not every finding of infringement requires the use of corrective

[1] Case C-14/19 P, European Union Satellite Centre (SatCen), para. 70.
[2] in para 13 in its Reply to the Questions of the Court.

powers. Rather, the requirement that each measure must be proportionate and subject to a circumstantial assessment, necessarily affords a margin of discretion to the EDPS.

10. In the present case, the EDPS decided to make use of this discretion: the EDPS decided not to exercise any of his corrective powers under Article 58 EUDPR, in contrast to the Original Decision, where the EDPS had issued a Reprimand.

11. The Revised Decision explicitly lays down the reasoning for this significant change: only at the stage of the review procedure, the Applicant provided detailed information on all the technical and organisational measures in the context of the right to be heard process.

12. The EDPS nevertheless advised the Applicant what the data protection notice for future right to be heard processes should cover, to fully comply with the obligation to inform data subjects in accordance with Article 15.

13. This suggestion was formulated as "recommendation" by analogy with the meaning that this term has under Article 288 TFEU.

14. Furthermore, the recommendation came without any deadline mentioned or without any indication as to what might happen if the recommendation would not be followed in the future.

15. It follows that in the absence of a specific exercise of the powers explicitly conferred by the legislator to the EDPS, as in the present case, his decisions could be considered as not producing legal effects for the purposes of being reviewable under Article 263 TFEU.

2. I now turn to my second point: the comments were "Personal data"

16. Should this Court deem the action admissible, the EDPS submits that it correctly applied Article 3(1) EUDPR, since the comments provided by the complainants in the consultation phase of the right to be heard process were personal data, and they were transmitted by the Applicant as pseudonymised data to Deloitte.

17. The replies in the comments contained the complainants' personal views, reflected their thoughts and were thus information relating to them, even if they relied on publicly available information to express their views. The fact that the views are similar, though not identical, to those of other participants does not mean that their replies did not reflect their own views. Originality of opinion is not a requirement.

18. After all, it is not in dispute that the very purpose of collecting the comments was to guarantee those individuals the right to be heard on the Applicant's preliminary decision.

19. It is equally undisputed that through the alphanumeric code assigned to each individual comment, the Applicant linked those comments to the individuals' identity provided during the registration phase.

20. The Court held already in *Breyer*[3] that 'there is no requirement that all the information enabling the identification of the data subject must be in the hands of one person'. The definition of 'pseudonymisation' builds on that.

21. The definition of 'pseudonymisation' is one of the novelties of the EUDPR, which the Court of Justice has not yet had a chance to interpret.

22. Pseudonymisation does not lead to anonymisation. The Applicant confuses pseudonymisation and anonymisation and blurs completely the distinction intended by the EU legislator.

[3] Case C-582/14.

3. I arrive now at point 3 on granting the right to access to the file

23. Contrary to what the Applicant claims, the EDPS granted the Applicant *in essence* access to the file. Consequently, no defence rights of the Applicant were infringed.

24. In the case at hand, the complainants' allegations drew the EDPS' attention to a potential violation of the EUDPR, namely that the data they submitted in the consultation phase of the Applicants' right to be heard process were shared with Deloitte without them being informed about this. The complainants did not have additional insight into the details of the processing carried out by the Applicant other than the information they received during the Registration Phase. And their only way of finding out if there had indeed been an infringement was to complain to the EDPS.

25. The EDPS carefully examined the information put forward in the five complaints, one of which mentions an EU Ombudsman report, and one the Applicant's data protection notice, and summarised the allegations in English to clarify and avoid repetition. That is the whole file. Since the Applicant already had those documents in its possession, only the relevant information was submitted to the Applicant in the letter requesting its comments. The same procedure was applied when the EDPS provided the Applicant with the complainants' comments on the Applicant's reply, and in the review procedure.

26. From then on, the only meaningful information required to allow the EDPS to establish the facts and assess them in the light of the provisions of the EUDPR, could only be provided by the Applicant, because only the Applicant was in possession of that information.

27. The EDPS' core responsibility as an independent data protection supervisory authority in accordance with Article 8(3) of the Charter is to ensure that the fundamental right to data protection is respected by Union institutions and bodies.

28. The minimum threshold required for an individual to lodge a complaint with the EDPS, and for the EDPS to investigate that complaint, is particularly low. According to the EUDPR, it is sufficient that a data subject *considers* that a processing of their personal data infringes the provisions of the EUDPR.

29. In addition, there is no systematic obligation for data subjects to submit evidence or documents to support their allegations.

30. Quite the contrary: the EUDPR's principles of accountability and responsibility entail that the controller must be able to demonstrate compliance, that is to say, that all its processing is performed in accordance with the EUDPR. As confirmed by the Court in case *SIA 'SS'*[4], this also puts the burden of proof for such compliance on the controller.

31. Contrary to what the Applicant claims, the EDPS did not base his 'conclusions and legal assessment' on the information provided by the complainants, but on the information on the processing of personal data, as provided by the Applicant as accountable controller.

32. In other words: The EDPS was not 'hiding' anything from the Applicant that the Applicant was not already aware of and for which it is legally accountable – not because of the existence of an EDPS investigation into a complaint – but because of its status as data controller.

33. Access by the Applicant to information provided by itself would therefore not have had any practical difference in the present case. The Applicant forgets that there is no right to access to documentation that

[4] Case C-175/20, SIA 'SS' v Valsts ieņēmumu dienests, ECLI:EU:C:2022:124

is irrelevant and bears no relation to the allegation of fact or law in the Revised Decision.[5] There is no element on which the EDPS based its Revised Decision which was not communicated to the Applicant.

34. It follows that by providing the summaries, the EDPS granted in essence access to the file.

4. I conclude with point 4 on the right to be heard and equality of arms:

35. The right to be heard requires that the persons concerned must be placed in a position in which they can effectively make known their view on the matter. There is no doubt that the Applicant was able to make its view on the matter known.

36. The EDPS has already demonstrated that the Applicant was given the opportunity on numerous occasions to react to the allegations by the complainants, and to provide further explanations on the processing operation at stake. And the Applicant finally did provide substantial information on its right to be heard process.

37. The right to be heard in administrative procedures, such as the EDPS' complaint handling, does not extend to a right to submit comments on the draft decision prior to its adoption. Both the complainant and the controller are invited to submit their comments on the processing of personal data at stake during the investigation phase (and during the review procedure when review is requested). As other supervisory authorities, the EDPS does not provide an opportunity to comment on the legal assessment he is about to make in a complaint decision.

38. It is therefore difficult to see how the Applicant could be said to have been 'placed at substantial disadvantage vis-à-vis the complainants'. In

[5] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland v Commission , ECLI:EU:C:2004:6, para. 126

particular, given that the Applicant as controller was in fact the only entity with full knowledge of the data processing and in possession of all the relevant information throughout the EDPS' investigation and the review procedure. In contrast, the complainants did not have access to this information.

39. The EDPS observes that the Applicant still fails to demonstrate that it had any arguments to put forward, which it was not able to present during the administrative procedure, and in what way they could have affected the outcome of the Revised Decision.

40. Consequently, even if the Applicant's right to be heard would have included a right to be given the opportunity to comment on the EDPS' assessment and legal analysis of the facts prior to the adoption of the Revised Decision, *quod non*, the EDPS submits that the outcome of the procedure would not have been different and that he would have reached the same conclusions in his decision.

41. Mr. President, Judges, I thank you for your attention.

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