PLEADING OF THE EDPS

at the hearing in case C-413/23 P, SRB v EDPS.

The parties are invited to focus, in their oral arguments, on the second part of the first plea in law[1], by answering the following question:

What insights can be drawn from recital 16 of Regulation 2018/1725 for the purpose of assessing the 'identifiable' nature, within the meaning of Article 3(1) of that regulation, of a data subject concerned by pseudonymised data?

Mylord Vice-President, my Lords and Ladies, Mr Advocate General,

This case is about a controller of personal data, the SRB, that sends to its contractual partner, Deloitte, comments by natural persons together with a pseudonym, an alpha-numeric code associated with the identity of the author of the comments.

This controller, the SRB, claims to have processed the personal data in such a way that it had anonymised it.

The General Court annulled the EDPS decision requiring the controller to indicate in its privacy notice the fact that personal data was shared with this contractual partner.

But let us move on immediately to reply to the Court's question for the hearing.

Recital 16 of the EUDPR states that, to determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used by the controller or by another person to identify the natural person directly or indirectly.

This test is of fundamental importance. This test determines whether the protection afforded by Union data protection law has to apply or not.

However, the legislator, even before dealing with the question of the reasonable means, explains in recital 16 that personal data that have undergone pseudonymisation, which could be attributed to the natural person by the use

[1] DN note: paras 39 to 77 of the Appeal application;

of additional information, should be considered to be information on an identifiable person.

Such protection, I respectfully submit, must be triggered as soon as the risks of identification are not insignificant. In the present case identification is a reasonable possibility, as the General Court does not contest that the SRB keeps the identification information.

Therefore, in the contested decision, the EDPS focused on the SRB as the controller and on the difference between pseudonymisation and anonymisation. This because the primary perspective which needs to be taken into account is that of the controller. The processing of the data by the SRB and by Deloitte indeed serve the same purpose. Separating the relevant perspectives as done by the General Court is wholly artificial and not objective.

The first error

This allows us to underline the first error committed by the General Court in paragraphs 94 and 97 of the contested ruling. The premise of the General Court's reasoning is an error of law.

The mere fact that Deloitte would not have access to the full registration information kept by the SRB to re-identify the authors of the respective comments is totally irrelevant.

Paragraphs 45 to 47 of the *IAB* ruling (C-604/22) are very clear on that point.

As emphasised by the Court in §§46-47 of that ruling, the mere fact that Deloitte cannot itself combine the comments with the authors' identity does not mean that the data are not personal data.

As, in the present case it is undisputable that the information in possession of the SRB allows this latter to identify the authors of the comments (see para 45 of IAB), we are in the presence of personal data. This should have been the starting point of the General Court's assessment of the EDPS revised decision, which I respectfully submit is in line with the content but also with the structure of recital 16.

Continuing to apply the reasoning of this honourable Court, the nature of personal data cannot be called into question even if it had been proven (but it was not proven) that Deloitte was in the impossibility to access the identification information kept by the SRB, the correspondence table.

Paragraph 47 of the *IAB* ruling shows that this lack of access does not preclude the information in Deloitte's possession from being classified as personal data.

Sure, the expression 'does not preclude' employed by the Court indicates a provisional finding, not yet a determination that the data is personal. However in this case we start necessarily from the personal data in the hands of the controller.

The General Court stated something which besides being factually inaccurate is legally wrong and which formed an important basis of its annulment decision.

The EDPS indeed did not consider relevant whether all the information enabling identification of the data subject be in the hands of one or two entities, but the General Court did so. It invalidated the contested decision because the EDPS did not take the perspective of the recipient.

We did not have to do so because the test is one of identifiability as resulting from Article 3(1) read in the light of recital 16. It is a test assessing whether risks of identification are insignificant. Simply finding that one of two parties would normally have no access to the identification data does in any event not satisfy that test.

The second error

Much of the discussion in the written procedure concerned the 'absolute' vs 'relative' notions of personal data, although at the EDPS we would still prefer to rather refer to 'subjective' vs 'objective'. We have just seen that in *IAB* this honourable Court performed an objective test.

As it appears from the annulled decision, the EDPS believes that what needs to be objectively individuated is the nature of the data and the situation at stake in front of it, the context of the data.

In particular, looking at the relevant circumstances it is important to consider who might be an agent of the identification. 'Who' can identify (even if this agent does not actually identify, as what matters is the identifiability).

Recital 16 says that the agent of identification is the controller or another person.

In that regard, the Court has since then clarified at paragraph 56 of the *OC* ruling C-479/22, that, I quote, "*Regulation 2018/1725 does not lay down any conditions as regards the persons capable of identifying the person to whom an item of information is linked, since recital 16 of that regulation refers not only to the controller but also to 'another person'*" end quote. We would respectfully suggest to compare this quote from the OC ruling with the content of paragraph 55 of the appeal application.

To find out who is this 'another person' in recital 16, it is then useful to see how the Court dealt still in OC with the situation at stake.

The Court did so in OC by analysing the relevant context to conclude that the General Court erred in law. The context is made of the kind of data disclosed (paragraphs 59 and 60) and then the Court considered the relevant agents of identification, at paragraphs 63 and 64 of the ruling; it looked in other words at the "other persons" within the meaning of recital 16. These were the readers of that press release, which certainly include journalists.

It was in that context, the General Court erred by considering that the risk of identification of the data subject could be regarded as insignificant.

The EDPS therefore respectfully submits that the specific circumstances of the case, i.e. the objective context and its actors, have been given importance in the most recent case law.

Now, the context of the case which the General Court had to adjudicate in the contested ruling is rather simple: a controller of personal data sends to its contractual partner comments by natural persons together with a pseudonym, an alpha-numeric code associated with the identity of the author of the comments.

By annulling the EDPS decision because the EDPS 'did not take Deloitte perspective', the General Court misunderstood not only the notion of pseudonymised data, but also the roles of the controller and that of a Supervisory authority such as the EDPS as laid down in the EUDPR. The controller must demonstrate to the supervisory authority that the data it sent to Deloitte had been anonymised. Far from being a question that concerns only the second ground of appeal, this concerns the question of identifiability and in particular how the relevant context should be objectively determined.

In the context of the present case, it is not a question of other potential faraway controllers accessing identification information that is also faraway, as it was the case for instance in *Breyer*, or *Gesamtverband- Autoteile v Scania*.

Here we have processing for a common purpose by the two entities that are the SRB and Deloitte: the exercise of the right to be heard by the affected shareholders.

In our case, this controller shares everything needed to identify the authors of the comments except the table in which every alphanumeric code of the comments is listed next to the name of the natural persons who are their author.

In such a context could the EDPS have considered the risks of identification as insignificant?

This is the test that the EDPS believes that the General Court should have applied.

If it had applied this test, it could not have annulled the decision.

To conclude, Recital (16) especially as interpreted recently by the Court in the *IAB* and *OC* rulings, provides the following important insights:

1) It is up to a controller claiming to be anonymising personal data to prove that in the applicable context the risk of identification is insignificant[2].

2) In doing so, all the means likely reasonably to be used need to be taken into consideration. I would like here to underline the broad intent of the legislator by saying 'all the means'.

3) When it comes to the words in recital (16) "By the controller or by another person", I would recall that this honourable Court has stated, in essence, that Union data protection law does not lay down any conditions as regards the persons capable of identifying the person to whom an item of information is linked. We need to go beyond that, therefore, but always keeping in mind that the aim of these provision is the protection of a fundamental right.

This last point goes to the heart of the debate that pits against each other the absolute vs relative notion of personal data.

The EDPS deliberately did not use those terms.

We believe indeed that the notion of identifiability needs to be appraised in the specific objective context. In other words, the concrete circumstances of the case.

Data protection law is not so abstract that it can be reduced to a relative vs absolute notion. Data protection law needs to achieve its aim to protect the persons, and persons live in the real world, in their actual, material context.

The EDPS has explained in his briefs that this pragmatic but predictable approach, would avoid the two extremes.

Under an absolute notion, which is not the 'objective' one advocated by the EDPS, as soon as information can be 'conceived rationally' that would lead to

[2] "A means is not reasonably likely to be used to identify the data subject where the identification of that person is prohibited by law or impossible in practice, on account of the fact that it requires a disproportionate effort in terms of time, cost and labour, so that the risk of identification appears in reality to be insignificant" OC, para. 51.

identification of natural person, every dataset, every information would be personal data. This would render data protection law borderless and unenforceable. Data protection law is not the law of everything, as asserted in certain doctrine.

Under a strict relative or subjective notion - surprisingly advocated by the Commission in this case - pseudonymised data lose all their *effet utile*. If so, why did the legislator of the GDPR introduce this notion? Can no insights be drawn from the part of recital 16 on pseudonymised data?

But not only that. This strict relative notion that results from the contested ruling, that disregards and ignores the elements of context in the EDPS decision, if not corrected, would entail the following consequences:

First, it is too easy to anonymise data: you just have to separate the identifying information from the actual identities and give these two sets of information to different entities.

Data would become 'personal' or not depending on potentially countless perspectives of potential recipients and their means which can never be foreseen in advance. This would remove the protection of the fundamental right.

Under the objective approach that the EDPS applied in the contested decision, the objective nature of the data (which in this case, was undisputably personal in the hands of the SRB) and the relevant context defined as objectively as possible are both given relevance in line with recital 16.

Second consequence, according to the General Court, the proof that the data is not anonymised should be provided by the supervisory authorities, and not by controllers. But how could Supervisory authorities completely substitute themselves to the controllers, to their software and perhaps to their Artificial Intelligence tools? This honourable Court has held the opposite, the principle of accountability imposes the burden of proof on the controller, it is the controller that must be ready to demonstrate compliance (see C-252/21 Meta v Bundeskartellamt, para 95).

The combined effect of these implications of the strict relative notion as applied by the General Court would, contrary the settled case-law, results in a very restrictive interpretation of the notion of personal data. Above all, such a restrictive notion would unacceptably reduce the scope of the protection of fundamental rights.

Mylord Vice-President, my Lady and my Lords, Mister Advocate General,

The EDPS has learned as much as possible from the contested ruling, and we have improved the drafting of our decisions and the handling of complaints.

However, we firmly believe that the General Court erred in law in annulling the decision in the present case.

Thank you for your attention, we look forward to the further discussion.