EUROPEAN DATA PROTECTION SUPERVISOR

Note to the attention of the Supervisor

From: Unit "Supervision and Enforcement"/

Contact person: [redacted]

For Information

Brussels, 20 September 2023
CMS case number: 2023-0483

1. Scope

The note presents an interpretation of Article 16(6) of the EDPS Rules of Procedure in light of the CJEU judgment of 12 January 2023 in Case C-132/21- "Nemzeti Adatvédelmi és Információszabadság Hatóság" on the relationship between administrative and judicial remedies. It concludes that Article 16(6) of the EDPS Rules of Procedure is in line with that judgment.

2. Background

2.1. Complaint

The EDPS S&E unit received a request from a complainant that the EDPS handle his application before the CJEU against the European Commission in a data protection related case as a complaint under Article 63(1) EUDPR. We explained to the complainant that according to Article 16(6) of the EPDS Rules of Procedure (RoP) it is not possible for the EDPS to investigate a complaint while the exact same matter is pending before the CJEU.

Following the judgment in Case C-132/21, where the CJEU decided that the administrative and civil remedies provided for by the GDPR may be exercised concurrently with and independently of each other, the complainant now requests the EDPS to handle the complaint in parallel to the court proceedings, claiming that the EPDS rules of procedure on suspension are contrary to this new case law. The EDPS needs to reply to this request.

2.2. Case C-132/21

The facts of the dispute in the main proceedings in Case C-132/21 concern an individual, 'BE'. In April 2019, BE attended the general meeting of a public limited company of which he is a shareholder and, at that time, put questions to the members of the board of directors and to other participants. Subsequently, he asked the company to send him the sound

EUROPEAN DATA PROTECTION SUPERVISOR
Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30 - B-1000 Brussels
E-mail: edps@edps.europa.eu
Website: edps.europa.eu
Tel.: 32 2-283 19 00 - Fax: 32 2-283 19 50

recording made at the general meeting. However, that company made available to him only the excerpts from that recording which reproduced his own contributions, excluding those of the other participants, even though their contributions constituted answers to questions put by him.

The Hungarian DPA rejected his complaint and BE consequently brought proceedings before the referring court, the Budapest High Court, against that decision of the DPA on the basis of Article 78(1) of the GDPR, seeking, principally, that the decision be varied, and, in the alternative, that it be annulled.

At the same time as submitting his complaint to the DPA, BE had also initiated another set of proceedings, this time on the basis of Article 79(1) of the GDPR, before a civil court, the Budapest Regional Court of Appeal, against the decision of the controller.

Although the other set of proceedings were still pending before the referring court (the Budapest High Court), the Budapest Regional Court of Appeal upheld the action in the other set of proceedings, by a judgment which has become final, on the ground that the controller had infringed BE's right of access to his personal data.

The referring court stated that it has to examine the same facts and the same allegation of infringement of the GDPR as those on which the Budapest Regional Court of Appeal has already given a final ruling. It asked the CJEU how it should view the relationship between, on the one hand, a civil court's assessment of the lawfulness of a decision adopted by the personal data controller and, on the other, the administrative procedure which led to the adoption of the DPA's decision, which forms the subject matter of the action pending before the referring court and, in particular, whether one remedy might take priority over the other. According to the referring court, the parallel exercise of the remedies provided for in Articles 77 to 79 of the GDPR could give rise to contradictory decisions concerning identical facts, which would risk undermining legal certainty as regards both private persons and supervisory authorities.

In its judgment, the **Court of Justice** recalled that the GDPR offers different remedies to persons claiming that its provisions have been infringed, it being understood that each of those remedies must be capable of being exercised 'without prejudice' to the others. Thus, it does not provide for any priority or exclusive competence or jurisdiction or for any rule of precedence in respect of the assessment carried out by the supervisory authority or by a court as to whether there is an infringement of the rights concerned. Consequently, the Court noted that the administrative and civil remedies provided for by the GDPR might be exercised **concurrently with and independently of each other**.

As regards the risk of contradictory decisions by the national administrative and judicial authorities concerned, the Court emphasised that it is **for each Member State to ensure,** through adopting the procedural rules necessary for that purpose and in exercising its procedural autonomy, that the concurrent and independent remedies provided for by the GDPR **do not call into question the effectiveness and effective protection of the rights guaranteed** by that regulation, the **consistent and homogeneous application of its provisions,** or, lastly, the **right to an effective remedy before a court or tribunal**.

In its argumentation, the Court noted in particular:

- **The GDPR does not lay down any rules** in respect of cases where a complaint has been made to a supervisory authority, and where judicial proceedings have been brought within the same Member State concerning the same instance of processing of personal data.

- The CJEU also noted that courts seized of an action against a decision of a supervisory authority should exercise **full jurisdiction**, which should include jurisdiction to examine all questions of fact and law relevant to the dispute before them.

- The aim of the EUDPR is equally to ensure a **high level of protection** of natural persons with regard to the processing of personal data within the European Union, ensuring an equivalent level of protection of natural persons with regard to the processing of personal data and the free flow of personal data throughout the Union.[1] The CJEU concurred with the Advocate General that the EU legislature's decision to **leave to data subjects the option to exercise the remedies** provided for in Article 77(1) and Article 78(1) of Regulation 2016/679, on the one hand, and Article 79(1) thereof, on the other, concurrently with and independently of each other is consistent with that objective.

- Making several remedies available also strengthens the objective set out in recital 141 of the GDPR of guaranteeing for every data subject who considers that his or her rights under that regulation are infringed the **right to an effective judicial remedy** in accordance with Article 47 of the Charter.

- The detailed rules for the implementation of concurrent and independent remedies should not call into question the effectiveness and effective protection of the rights guaranteed by that regulation. In particular, they must not be less favourable than those governing similar domestic actions (principle of equivalence); nor must they render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). However, in a case like the present, where the system of remedies under national law is designed in such a way that the remedies provided for in Article 78(1) and Article 79(1) of the GDPR are independent of each other, it **cannot be ruled out that the decisions given by those two courts might be contradictory,** with one finding that the provisions of the GDPR have been infringed and the other that there has been no such infringement. The CJEU observed that the **existence of two contradictory decisions** would call into question the objective of ensuring a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data throughout the European Union. The result of this would be a weakening of the protection of natural persons with regard to the processing of their personal data, since such an inconsistency would create a situation of legal uncertainty. As emphasised by the Advocate General's Opinion in this case, '**the EU legislature has not put in place suitable mechanisms to counter that risk**'.[2]

3. Analysis of Article 16(6) RoP in light of Case C-132/21

Article 16(6) RoP provides that '[t]he EDPS shall suspend the investigation of a complaint pending a ruling by a court or a decision of another judicial or administrative body on the same matter.'

[1] Recital 88 EUDPR.
[2] AG Opinion in Case C-132/21, para 46.

For the purposes of answering to the complainant, it needs to be assessed a) if Article 16(6) RoP is compatible with the findings in the judgment, and b) if the judgment must be interpreted as imposing an obligation on the EDPS to investigate a complaint concerning facts that are pending before the CJEU.

3.1. Compatibility of Article 16(6) RoP with the findings in Case C-132/21

The provisions of the EUDPR as regards administrative and judicial remedies replicate those of the GDPR:

- Article 63(1) EUDPR provides every data subject with the **right to lodge a complaint with the EDPS**, "without prejudice to any judicial, administrative or non-judicial remedy".

- **Judicial actions against decisions of the EDPS** shall be brought before the Court of Justice (Article 64(2)).

- At the same time, the **Court of Justice has jurisdiction** to hear **all** disputes relating to the EUDPR provisions, including claims for damages (Article 64(1)). In particular, the Court shall have **"unlimited jurisdiction"** to review administrative fines referred to in Article 66. It may cancel, reduce or increase those fines within the limits of Article 66. (Article 64(3)).

In that sense, the situation between GDPR and the EUDPR is **comparable**:

- The EUDPR offers **different remedies** to persons claiming that its provisions have been infringed, it being understood that each of those remedies must be capable of being exercised 'without prejudice' to the others. These remedies provided for by the EUDPR may be exercised **concurrently with and independently of each other**.

- **The EUDPR does not lay down any rules** in respect of cases where a complaint has been made to the EDPS, and where judicial proceedings have been brought before the Court of Justice concerning the same instance of processing of personal data.

- Also, where the Court of Justice is seized of an action against a decision of the EDPS, it exercises **full jurisdiction**, which should include jurisdiction to examine all questions of fact and law relevant to the dispute before them: nothing in the EUDPR suggests otherwise.

- The aim of the EUDPR is equally to ensure a **high level of protection** of natural persons with regard to the processing of personal data within the European Union. As in the GDPR, the EU legislature's decision to **leave to data subjects the option to exercise the remedies** provided for in Article 63(1) and Article 64(2) EUDPR, on the one hand, and Article 64(1) thereof, on the other, concurrently with and independently of each other, is consistent with that objective.

- Making several remedies available also strengthens the objective of guaranteeing for every data subject who considers that his or her rights under that regulation are infringed, the **right to an effective judicial remedy** in accordance with Article 47 of the Charter.

- It is **not excluded by the EUDPR** that the EDPS e.g. as a result of a complaint may come to a finding independently, which is contradicted by the CJEU seized directly, and based on the same facts.

However, as regards the **risk of contradictory decisions** by the administrative and judicial authorities concerned, the Advocate General emphasised that it is for each Member State to put in place the **procedural tools** that make it possible **to ensure, as much as possible, that contradictory decisions are not adopted in relation to the same processing of personal data**.[3] The CJEU concurred and concluded that it is for the Member States, in accordance with the principle of procedural autonomy, **to lay down detailed rules as regards the relationship between the different remedies** in order to ensure the effective protection of the rights guaranteed by that the GDPR and the consistent and homogeneous application of its provisions, as well as the right to an effective remedy before a court or tribunal as referred to in Article 47 of the Charter.

In this regard, the following applies as regards the remedial avenues available under the GDPR (the provisions concerned analysed in the judgment), and the EUDPR (which governs the EDPS), and the rules in the RoP:

- **The CJEU, as sole judicial body, has exclusive jurisdiction** under the EUDPR. There are no parallel judicial avenues such as in the Member States; a negative decision by the controller and a negative decision by the EDPS will both, if challenged by the data subject, ultimately be reviewed by the CJEU.

- Under the GDPR, it is for the Member States to choose which procedural remedies appear to them to be the most appropriate in order to determine the relationship between the remedies provided for in Articles 77 to 79 GDPR: The AG suggested that Member States might provide that data subjects were required to **exhaust all administrative remedies before bringing judicial proceedings** or that they provide that a court seized of an action against a controller or processor under Article 79(1) GDPR, when a complaint procedure under Article 77(1) GDPR or a legal action under Article 78(1) GDPR is pending, **may or must stay the proceedings** pending before it and not give judgment until a decision has been taken in one or other of those procedures.[4]

- The **EU legislators of the EUDPR did not determine the relationship between the remedies available** and did not provide that data subjects are required to exhaust all administrative remedies with the EDPS before bringing judicial proceedings before the Court. They also did not provide that once the Court was seized of an action against an EUI under Article 64(1), when a complaint procedure with the EDPS under Article 63(1) or a legal action under Article 64(2) against an EDPS decision is pending, may or must stay the proceedings pending before it and not give judgment until a decision has been taken in one or other of those procedures.

As a consequence of the above, there is a need to provide for clear rules to counter the risk of contradictory decisions between the EDPS and the Court.

Under Article 57(1)(e) EUDPR, the EDPS shall handle complaints lodged by a data subject, or a body, organisation, or association in accordance with Article 67, to **investigate to the**

[3] AG Opinion in Case C-132/21, para 58.
[4] AG Opinion in Case C-132/21, paras 68-69.

extent appropriate, the subject matter of the complaint.[5] The EDPS interprets the power to conduct investigations 'to the extent appropriate' to include the possibility to suspend investigations where appropriate and necessary, for instance where the matter is already being examined by the CJEU, which ultimately has jurisdiction to rule on any EDPS decision. This power is now laid down in more detail in Article 16(6) RoP.

The rationale behind Article 16(6) RoP is as follows:

- Firstly, for reasons of procedural economy: the EDPS will not investigate matters that are already under investigation by another administrative body, such as the appointing authority[6] or the Court, in order to avoid a duplication of efforts.

- Secondly, for reasons of legal certainty: suspension pending a ruling by the CJEU is necessary in order to avoid potential contradictions between the case law of the CJEU and findings by the EDPS. Article 16(6) RoP ensures such legal certainty and avoids the risk of contradictory decisions by the EDPS and the CJEU.

- However, the fact that the EDPS will suspend the investigation of a complaint if the same matter is pending before a court or another judicial or administrative body, does not affect the right to an effective judicial remedy or access to an impartial court, as the proceedings are suspended only in the situation when the matter is brought before the CJEU in parallel.

Therefore, in the absence of rules in the EUDPR, the EDPS, by adopting its RoP and in particular Article 16(6) therof, has put in place procedural tools and detailed rules, which avoid contradictory decisions in relation to the same processing of personal data whilst ensuring the right to an effective judicial remedy.

3.2. Must the judgment be interpreted as imposing an obligation on the EDPS to investigate a complaint concerning facts that are pending before the CJEU?

Under Article 57(1)(e) EUDPR, the EDPS is under an obligation to **handle complaints** lodged by a data subject, or a body, organisation, or association in accordance with Article 67, and **investigate to the extent appropriate**, the subject matter of the complaint.

It results from the case law that where a person lodges a claim with a supervisory authority concerning the protection of his rights and freedoms in regard to the processing of personal data, it is incumbent upon the EDPS as supervisory authority to examine the claim "**with all due diligence**".[7] With respect to the principle of diligence, the Court recalled in *Staelen* that, where an administration is called upon to conduct an inquiry, it is for that administration to conduct it with the greatest possible diligence in order to dispel the doubts which exist and to clarify the situation'.[8] As the European Ombudsman, the EDPS, in the performance of his duties, is merely under an obligation to use his best endeavours and

[5] Recital 79: The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case.
[6] For example, in the context of an appeal under Article 90(2) of the Staff Regulations, or an administrative inquiry, etc.
[7] CJEU, judgment of 6 October 2015, C-362/14, ECLI:EU:C:2015:650 – Schrems, para. 63.
[8] CJEU, judgment of 4 July 2017, Case C-337/15 P, ECLI:EU:C:2017:256 – Staelen, para. 114.

enjoys very wide discretion as regards (i) the merits of complaints and the way in which they are to be dealt with; (ii) the way in which open inquiries and investigations are to be conducted; and (iii) analysis of the information gathered and of the conclusions to be drawn from that analysis.[9]

In addition, it should be noted that the CJEU in Case C-132/21 concludes that the provisions of the GDPR examined in the case, **permit** the different remedies to be exercised concurrently with and independently of each other. The CJEU does not say that such remedies **must** be exercised concurrently with and independently of each other. The judgment can thus in no way be interpreted as imposing an obligation on the EDPS to investigate a complaint concerning facts that are pending before the CJEU.

It follows that Article 16(6) of the EDPS Rules of Procedure must be interpreted as being compliant with the jurisprudence derived from Case C-132/21.

3.3. Conclusions

Article 16(6) RoP is compatible with the findings in the judgment Case C-132/21. The judgment cannot be interpreted as imposing an obligation on the EDPS to investigate a complaint concerning facts that are pending before the CJEU.

The EDPS Legal Service Function was consulted, in accordance with the note on the organisation of the Legal Service function signed 13 April 2022.

4. Request to the Supervisor

It is requested that the Supervisor takes note of the above.

Thomas ZERDICK
Head of Unit "Supervision and Enforcement"

[9] In analogy to CJEU, judgment of 4 July 2017, Case C-337/15 P, ECLI:EU:C:2017:256 – Staelen, para. 38.