REPORT FOR THE HEARING
in Joined Cases E-11/19 and E-12/19

REQUESTS to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Liechtenstein Board of Appeal for Administrative Matters (*Beschwerdekommission für Verwaltungsangelegenheiten*), in cases pending before it between

Adpublisher AG

and

J

and

Adpublisher AG

and

K

concerning the interpretation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

I Introduction

1. By a letter of 18 December 2019, registered at the Court as Case E-11/19 on 23 December 2019, the Liechtenstein Board of Appeal for Administrative Matters (*Beschwerdekommission für Verwaltungsangelegenheiten*) ("the Board of Appeal") made a request for an advisory opinion in a case pending before it between *Adpublisher AG* and

J. By a separate letter of 18 December 2019, registered at the Court as Case E-12/19 on 23 December 2019, the Board of Appeal made a request for an advisory opinion in a case pending before it between *Adpublisher AG* and *K*.

2. The questions referred by the Board of Appeal arise in the context of appeals against decisions of the Data Protection Authority for the Principality of Liechtenstein ("the Data Protection Authority"), which have been brought before the Board of Appeal by the applicant, Adpublisher AG ("Adpublisher"), a public limited company registered under the laws of Liechtenstein.

3. The cases before the Board of Appeal concern the interpretation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

II Legal background

EEA law

4. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ("the Regulation") (OJ 2016 L 119, p. 1) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 154/2018 of 6 July 2018 (OJ 2018 L 183, p. 23), and is referred to at point 5e of Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement. Constitutional requirements were indicated by Liechtenstein and the decision entered into force on 20 July 2018.

5. Recital 2 of the Regulation reads as follows:

> *The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Regulation is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons.*

6. Recital 122 of the Regulation reads as follows:

Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation. This should cover in particular the processing in the context of the activities of an establishment of the controller or processor on the territory of its own Member State, the processing of personal data carried out by public authorities or private bodies acting in the public interest, processing affecting data subjects on its territory or processing carried out by a controller or processor not established in the Union when targeting data subjects residing on its territory. This should include handling complaints lodged by a data subject, conducting investigations on the application of this Regulation and promoting public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data.

7. Recital 123 of the Regulation reads as follows:

The supervisory authorities should monitor the application of the provisions pursuant to this Regulation and contribute to its consistent application throughout the Union, in order to protect natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the internal market. For that purpose, the supervisory authorities should cooperate with each other and with the Commission, without the need for any agreement between Member States on the provision of mutual assistance or on such cooperation.

8. Recital 125 of the Regulation reads as follows:

The lead authority should be competent to adopt binding decisions regarding measures applying the powers conferred on it in accordance with this Regulation. In its capacity as lead authority, the supervisory authority should closely involve and coordinate the supervisory authorities concerned in the decision-making process. Where the decision is to reject the complaint by the data subject in whole or in part, that decision should be adopted by the supervisory authority with which the complaint has been lodged.

9. Recital 141 of the Regulation reads as follows:

Every data subject should have the right to lodge a complaint with a single supervisory authority, in particular in the Member State of his or her habitual residence, and the right to an effective judicial remedy in accordance with Article 47 of the Charter if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation

following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can also be completed electronically, without excluding other means of communication.

10. Recital 143 of the Regulation reads, in extract, as follows:

Any natural or legal person has the right to bring an action for annulment of decisions of the Board before the Court of Justice under the conditions provided for in Article 263 TFEU. As addressees of such decisions, the supervisory authorities concerned which wish to challenge them have to bring action within two months of being notified of them, in accordance with Article 263 TFEU. Where decisions of the Board are of direct and individual concern to a controller, processor or complainant, the latter may bring an action for annulment against those decisions within two months of their publication on the website of the Board, in accordance with Article 263 TFEU. Without prejudice to this right under Article 263 TFEU, each natural or legal person should have an effective judicial remedy before the competent national court against a decision of a supervisory authority which produces legal effects concerning that person. Such a decision concerns in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints. However, the right to an effective judicial remedy does not encompass measures taken by supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and should be conducted in accordance with that Member State's procedural law. Those courts should exercise full jurisdiction, which should include jurisdiction to examine all questions of fact and law relevant to the dispute before them.

…

11. Recital 144 of the Regulation reads as follows:

Where a court seized of proceedings against a decision by a supervisory authority has reason to believe that proceedings concerning the same processing, such as the same subject matter as regards processing by the same controller or processor, or the same cause of action, are brought before a competent court in another Member State, it should contact that court in order to confirm the existence of such

related proceedings. If related proceedings are pending before a court in another Member State, any court other than the court first seized may stay its proceedings or may, on request of one of the parties, decline jurisdiction in favour of the court first seized if that court has jurisdiction over the proceedings in question and its law permits the consolidation of such related proceedings. Proceedings are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

12. Article 4 of the Regulation, headed "Definitions", reads, in extract, as follows:

...

(7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

...

13. Article 55 of the Regulation, headed "Competence", reads, in extract, as follows:

1. Each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State.

...

14. Article 56 of the Regulation, headed "Competence of the lead supervisory authority", reads, in extract, as follows:

1. Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60.

...

15. Article 57 of the Regulation, headed "Tasks", reads, in extract, as follows:

1. Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

(a) monitor and enforce the application of this Regulation;

…

(f) handle complaints lodged by a data subject, or by a body, organisation or association in accordance with Article 80, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;

…

(h) conduct investigations on the application of this Regulation, including on the basis of information received from another supervisory authority or other public authority;

…

3. The performance of the tasks of each supervisory authority shall be free of charge for the data subject and, where applicable, for the data protection officer.

4. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

16. Article 58 of the Regulation, headed "Powers", reads, in extract, as follows:

1. Each supervisory authority shall have all of the following investigative powers:

(a) to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks;

…

(d) to notify the controller or the processor of an alleged infringement of this Regulation;

(e) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;

(f) to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance with Union or Member State procedural law.

2. Each supervisory authority shall have all of the following corrective powers:

(a) to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;

(b) to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;

(c) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;

(d) to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;

(e) to order the controller to communicate a personal data breach to the data subject;

(f) to impose a temporary or definitive limitation including a ban on processing;

(g) to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19;

…

(i) to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;

…

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.

5. Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation.

6. Each Member State may provide by law that its supervisory authority shall have additional powers to those referred to in paragraphs 1, 2 and 3. The exercise of those powers shall not impair the effective operation of Chapter VII.

17. Article 77 of the Regulation, headed "Right to lodge a complaint with a supervisory authority", reads as follows:

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.

18. Article 78 of the Regulation, headed "Right to an effective judicial remedy against a supervisory authority", reads, in extract, as follows:

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.

3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.

...

National law

19. The Act of 4 October 2018 on Data Protection (*Datenschutzgesetz*, LR 235.1) ("the Data Protection Act") implements the Regulation in the Liechtenstein legal order.

20. Article 15 of the Data Protection Act, headed "Tasks", provides, in extract, as follows:

> *1) The Data Protection Authority has the following tasks in addition to those mentioned in Regulation (EU) 2016/679:*
>
> *a) monitor and enforce the application of this Act and other provisions on data protection, including the laws enacted to implement Directive (EU) 2016/680;*
>
> *...*
>
> *h) conduct investigations into the application of this Act and other provisions on data protection, including the laws enacted to implement Directive (EU) 2016/680, also on the basis of information from another supervisory authority or another authority;*
>
> *...*
>
> *5) The performance of the Data Protection Authority's tasks is free of charge for the data subject. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the Data Protection Authority may charge a reasonable fee based on the effort or refuse to act on the request. The Data Protection Authority bears the burden of demonstrating the manifestly unfounded or excessive character of the request. The government regulates the details of the fee by ordinance.*

21. Article 17 of the Data Protection Act, headed "Powers", provides, in extract, as follows:

> *1) The Data Protection Authority exercises, within the scope of Regulation (EU) 2016/679, the powers under Article 58 of Regulation (EU) 2016/679. If the Data Protection Authority concludes that there are infringements of the provisions on data protection or other deficiencies in the processing of personal data, it notifies this to the specific supervisory authority responsible and gives it, before exercising the powers in Article 58(2)(b) to (g), (i) and (j) of Regulation (EU) 2016/679 against the controller, the opportunity to comment within a reasonable period. The granting of an opportunity to comment may be dispensed with if an immediate decision appears necessary due to imminent danger or in the public interest or if it is contrary to an overriding public interest. The opinion shall include a brief description of the measures taken on the basis of the information from the Data Protection Authority.*
>
> *...*

22. Article 20 of the Data Protection Act, headed "Legal remedies", provides as follows:

> *1) Appeals against decisions and orders of the Data Protection Authority may be lodged with the Board of Appeal for Administrative Matters within four weeks of service.*
>
> *2) Appeals against decisions and orders of the Board of Appeal for Administrative Matters may be lodged with the Administrative Court within four weeks of service; the Data Protection Authority also has this right.*
>
> *3) The Data Protection Authority may not deprive decisions and orders against a public body of suspensive effect.*

23. Article 31 of the General Administrative Procedures Act ("the Administrative Procedures Act") (*Landesverwaltungspflegegesetz*, LR 172.020) provides, in extract, as follows:

> *1) A person who approaches the administrative authority (official) with the request that it undertake or refrain from a sovereign administrative act in the legal interest of the applicant (interested party), or who as a possible subject of a public obligation or a public right is subjected to a procedure intended to determine the obliged or entitled person, or finally to whom the authority directs an order or decision as a result of a procedure is to be considered a party (intervening party, party involved, interested party, opposing party). In the case of doubt, the status as a party (beneficiary, interested party, etc.) is to be determined with due regard to the subject matter and on the basis of the applicable laws.*
>
> …

24. Article 35 of the Administrative Procedures Act, headed "Principles for the obligation to pay costs", provides as follows:

> *1) In a procedure that may only be initiated at the request of a party, such as granting a permit, initiating expropriation, concession, etc., all costs and fees of the procedure, as well as those of the other parties, shall be paid by the party initiating the procedure.*
>
> *2) If a procedure is initiated by the authority ex officio, due to an unlawful situation, the costs caused by the procedure shall be borne by the party who is responsible for the unlawful situation through his own unlawful acts; if fault is not present or it is impossible to identify the person responsible, the costs shall be borne by the owner.*
>
> *3) In all cases, however, each party shall bear the costs which have been caused by their wilful requests, their wilful objections to requests by the other party or other*

acts aimed at delaying the procedure, or by such requests that are capable of forming the basis for an independent procedure that may only be initiated at the request of a party.

4) If a procedure aims at a decision on a claim to financial benefits, which is requested by one party against another party, the issue of the costs shall be decided according to the relevant provisions of the Code of Civil Procedure regarding the costs of litigation.

25. Article 82(1) of the Administrative Procedures Act provides, in extract, as follows:

1) The written copy of the decision must contain:

(a) the title: decision;

(b) the names of the members of the government and of the official who carried out the investigation and, if the hearing was conducted on different administrative days and by different officials, the names of the same, specifying the hearings they chaired;

the designation of the parties to the procedure by first and last name, employment and place of residence, as well as the designation of the legal representatives of the parties present at the hearing, their representatives, and technical or other advocates;

as well as any representatives of authorities or advisory experts or specialists;

…

III Facts and procedure

Background

26. According to the request for an advisory opinion in Case E-11/19, the Board of Appeal has under review a challenge by the applicant in the present case, Adpublisher, ("the Applicant"), to a decision by the Data Protection Authority, in response to a complaint brought by the data subject J for alleged infringement of Articles 5, 6 and 15 of the Regulation. Data subject J remains anonymous in the proceedings.

27. In Case E-12/19, the Board of Appeal has under review a challenge by the Applicant to a decision by the Data Protection Authority, in response to a complaint brought by the data subject K for alleged infringement of Article 15 of the Regulation. Data subject K also remains anonymous in the proceedings.

28. In both cases, the original complaints were brought to the Commissioner for Data Protection for Lower Saxony (*Landesbeauftragter für den Datenschutz Niedersachsen*), on 16 September 2018 and 18 November 2018, respectively. Both complaints questioned the sourcing and subsequent processing of personal data by the Applicant as a data controller pursuant to Article 4(7) of the Regulation, in the context of online marketing.

29. The Applicant is a public limited company under Liechtenstein law, with a registered office in Liechtenstein. Given the cross-border character of the complaints, pursuant to Article 56 of the Regulation, the Data Protection Authority was competent to deal with the cases as the lead supervisory authority.

30. The Data Protection Authority upheld J's complaint concerning the infringement of Articles 5 and 6 of the Regulation. Further, of its own motion, the Data Protection Authority determined that there had been an infringement of Articles 7, 15 and 32 of the Regulation. In addition, the Data Protection Authority upheld K's complaint in part and determined that there had been an infringement of Article 15 of the Regulation.

The proceedings before the Board of Appeal

31. The Applicant challenged both decisions before the Board of Appeal and requested that both decisions be set aside.

32. In its requests for advisory opinions, the Board of Appeal notes, first, that, pursuant to Article 31(1) of the Administrative Procedures Act, in the context of the cases before it, each data subject is regarded as a party to the respective appeal procedure. Pursuant to Article 82(1)(b) of the Administrative Procedures Act, the written version of decisions taken by the Board of Appeal must include the designation of the parties to the procedure stating, *inter alia*, their first and last names, profession and place of residence.

33. According to the Board of Appeal, the question, therefore, arises whether it results from the Regulation or another provision of EEA law, that an anonymisation of the complainant is permissible. Furthermore, the subsequent question arises as to whether particular reasons for the anonymisation must be *prima facie* established.

34. Second, the Board of Appeal notes in its requests that Article 57(3) of the Regulation provides that the performance of the tasks of each supervisory authority shall be free of charge for the data subject. Procedures before the Board of Appeal are governed by the Administrative Procedures Act. While Article 35 of the Administrative Procedures Act provides for different possibilities for the determination of costs, no express provision is made for a complaint procedure brought in accordance with Article 77 of the Regulation to be free of charge for the data subject. Hence, if a data subject brings a complaint to a data protection authority in accordance with Article 57(3) of the Regulation, should the data subject or the defendant in the complaint procedure bring an appeal against the

decision of the data protection authority, as a matter of Liechtenstein law, the data subject may come under an obligation to reimburse costs.

35. Lastly, the Board of Appeal notes that the question arises regarding how to proceed if an anonymised complaint procedure is permissible and an obligation to reimburse costs is not precluded.

36. On this basis, the Board of Appeal decided to stay both proceedings and make requests to the Court for advisory opinions pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The Board of Appeal has in both instances asked the following questions:

> ***1. Does it follow from Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) or from another provision of EEA law that an adversarial general procedure to hear a complaint may be carried out under the GDPR without disclosing the name and address of the complainant in the complaint procedure?***
>
> ***If the answer to the question is in the affirmative: Is it necessary in this case that a legitimate reason for the anonymisation is at least prima facie established or are no reasons required for the anonymisation?***
>
> ***2. Must a Member State ensure in its national procedural law that in a procedure to hear a complaint in accordance with Article 77 of the GDPR all further national appellate bodies are free of charge for the data subject and that the data subject may also not be ordered to reimburse the costs?***
>
> ***3. If Question 1 is answered in the affirmative and Question 2 is answered in the negative, in other words, an adversarial general procedure to hear a complaint may be carried out under the GDPR without identifying the name and address of the complainant in the complaint procedure and national procedural law is not required to ensure that in a procedure to hear a complaint in accordance with Article 77 of the GDPR all further national appellate bodies are free of charge for the data subject, the question arises how a decision resulting from a complaint procedure and ordering the data subject – who remains, however, anonymous – can be effected to reimburse the costs?***

37. Both requests for advisory opinions were registered at the Court on 23 December 2019. On 22 January 2020, the Court informed the parties that it was considering joining the two cases. No objections were raised to this course of action and, consequently, the Court decided, pursuant to Article 39 of the Rules of Procedure ("RoP"), to join Cases

E-11/19 and E-12/19 for the purpose of the procedure and the final judgment. The parties were informed of this decision on 5 February 2020.

38. By a letter dated 25 March 2020, the Court made a request for clarification to the Board of Appeal under Article 96(4) RoP concerning the facts set out in the orders for reference. The Board of Appeal replied to these questions by two letters dated 20 April and 4 May 2020.

IV Written observations

39. In accordance with Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Adpublisher, represented by Advokatur Ritter & Partner AG;

- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Romina Schobel, Legal Officer, EEA Coordination Unit, acting as Agents;

- The Government of Austria, represented by Dr Albert Posch, LL.M., and Dr Julia Schmoll, acting as Agents;

- Ireland, represented by Marie Browne, Chief State Solicitor, and Tony Joyce, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Ewa Gromnicka, Stewart Watson and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Friedrich Erlbacher and Herke Kranenborg, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

Adpublisher

40. In its submissions to the Court, Adpublisher observes in relation to the first question that no provision exists in Liechtenstein law for anonymous adversarial complaint proceedings.

41. However, should it be concluded that the Regulation or other provisions of EEA law make such anonymous proceedings possible, in any event, this would have to be based on particular justifiable reasons, relating to the factual circumstances of the case at hand, and would in any event necessitate a corresponding legal basis in national law. Adpublisher

submits that a blanket basis for anonymous proceedings may result in the risk of abusive behaviour. In any event, no justifiable basis may reasonably be argued to exist in the present case.

42. Regarding the second question, Adpublisher points out that Article 57(3) of the Regulation only provides for the tasks of supervisory authorities to be provided free of charge for the data subject, as is correspondingly reflected in Article 15(5) of the Data Protection Act. That applies, however, only to the relationship between the data subject and the relevant authority as a supervisory authority. Thus, data protection authorities may not charge the data subject fees.

43. Adpublisher contends, however, that costs that an opposing party incurs as a result of the data subject's actions in an adversarial procedure, must, be reimbursed where the data subject is the losing party. Adpublisher also notes in this regard that legal aid is provided by national law to those not in a position to finance a trial or administrative procedure, thus ensuring access to justice.

44. Adpublisher observes, in addition, that Article 57(4) of the Regulation allows supervisory authorities in cases of manifestly unfounded or excessive requests, in particular because of their repetitive character, to charge a reasonable administrative fee.

45. Adpublisher submits that the principle of equality of arms, reflected in Article 6(1) of the European Convention on Human Rights ("ECHR"), must be observed. A conclusion that a data subject is always exempt, even when an allegation is unfounded, would contravene this principle. Adpublisher refers, in this regard, to the judgment of the European Court of Human Rights in *Černius and Rinkevičius v. Lithuania*.[1] Further, Adpublisher maintains that it would be contrary to the principle of equal treatment if one party is exempt from the risk of costs while the other party is made to bear the full risk.

46. In any event, Adpublisher submits that a supervisory authority may always initiate an investigation procedure *ex officio* on the basis of a complaint. In such cases, the complainant will not be confronted with any costs.

47. As regards the third question, Adpublisher refers to its previous submissions and submits that neither national law nor EEA law provides for an anonymous adversarial complaint procedure, and emphasises that no *prima facie* reasons have been put forward that would justify or necessitate an anonymous complaint proceeding. Therefore, no evident enforcement problem for the obligation to reimburse costs is present in the case at hand.

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[1] *Černius and Rinkevičius v. Lithuania* (CE:ECHR:2020:0218JUD007357917).

The Government of Liechtenstein

48. As regards the admissibility of the request for an advisory opinion, the Government of Liechtenstein submits that the Board of Appeal is a court or tribunal for the purposes of Article 34 SCA and that the request is therefore admissible. The Government of Liechtenstein argues that this conclusion is supported both by applicable law and by the interpretation given to the terms "court or tribunal" by the Court. In particular, the Government of Liechtenstein makes reference to the judgment in Case E-4/09 where the Court found that Appeals Commission of the Financial Market Authority, ("*Finanzmarktaufsicht*") qualified as a court of tribunal.[2] The Board of Appeal is similar to the Appeals Commission of the Financial Market Authority in that it is established by law, has a permanent character, and the provisions as regards its independence and *inter partes* procedure are comparable.

49. As a preliminary observation, the Liechtenstein Government submits that leading German-speaking academic writers derive from Article 77 in conjunction with Article 54(2) of the Regulation that the supervisory authority can investigate a complaint in accordance with the Regulation without disclosing the name of the complainant.[3] Articles 77 and 54(2) of the Regulation refer expressly and exclusively to proceedings before the supervisory authorities. This deduction must therefore be limited to these proceedings and cannot, according to the Liechtenstein Government, also apply to proceedings before appeal bodies and courts.

50. In relation to the first question, the Liechtenstein Government submits that the Regulation does not contain any provisions regarding the disclosure of the name and address of the complainant in an adversarial general procedure.

51. The Liechtenstein Government contends that, in the absence of specific procedural rules and having regard to the principle of procedural autonomy of the EEA States, national procedural rules apply to the disclosure of the name and address of a complainant in an adversarial appellate procedure.

52. Therefore, in response to the first question, the Liechtenstein Government takes the view that it is for the EEA States to determine in their respective procedural rules, whether, to what extent and under what conditions anonymised procedures are permissible, in line with the principles of equivalence and effectiveness.

53. In relation to the second question, the Government of Liechtenstein notes that the Regulation does not entail provisions regulating the scheme of legal costs for national

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[2] Reference is made to judgment in Case E-4/09 Inconsult Anstalt v Finanzmarktaufsicht [2009-2010] EFTA Ct. Rep. 86

[3] Reference is made to Kühling and Buchner (eds), *DS-GVO/BDSG, Datenschutzgrundverordnung - Bundesdatenschutzgesetz; Kommentar*; 2nd edition; paragraph 1070.

appellate bodies. Article 57(3) of the Regulation is confined to the performance of the tasks of each supervisory authority and does not include provisions as regards national appellate bodies. Having regard to the procedural autonomy of the EEA States and in line with recital 143 of the Regulation, the Government of Liechtenstein submits that the procedures under the Regulation must be conducted in accordance with national procedural law, while observing the principles of equivalence and effectiveness.

54. The Government of Liechtenstein emphasises that Article 80(1) of the Regulation permits a data subject, inter alia, to mandate not-for-profit bodies, organisations or associations to lodge complaints on their behalf. Additionally, the Regulation provides data protection authorities with *ex officio* competences to act on the basis of notifications and to initiate inspections and procedures according to Articles 57(1) and 58(2). In such cases, the person informing the supervisory authority will not be a complainant and therefore avoid any potential costs. Furthermore, to permit an exemption from costs only for data subjects would amount to unjustified and disproportionate discrimination, especially in light of the wide scope of the Regulation, *inter alia*, as regards the concept of controllers.

55. In the absence of provisions in the Regulation, the Government of Liechtenstein suggests that answer to the second question should be that it is for the EEA States to decide on how the costs of procedures are allocated.

56. In response to the third question asked, the Government of Liechtenstein submits that the answer should depend on the national procedural law at hand. It emphasises, however, that the competent supervisory authority must be in possession of information regarding the identity of a complainant in order to inform the complainant according to Article 57(1)(f) and Article 77 of the Regulation on the progress and the outcome of the complaint, but also because a complaint is based on the infringement of personal rights of a specific person. In order to deliver a summons to a hearing, the judgment or other documents, the same has to apply to the appellate body.

57. Furthermore, the Government of Liechtenstein emphasises that the objective of anonymisation is to protect the privacy of a complainant and therefore protect against discrimination or retaliation. In its view, neither national courts nor appellate bodies should be subject to this objective.

58. The Government of Liechtenstein proposes that the Court should answer the question referred as follows:

> *(1) Regulation (EU) 2016/679 neither obliges nor prohibits EEA States to allow adversarial general procedures without disclosing the name and address of the complainant.*

Procedures under the Regulation are therefore conducted in accordance with national procedural law. The respective national procedural law however has to comply with the principles of equivalence and effectiveness.

(2) Regulation (EU) 2016/679 neither obliges nor prohibits EEA States to keep all further national appellate bodies free of charge for the data subject. It is therefore for the EEA States to decide on how to regulate the costs of the data protection procedure.

It is also for the EEA States to decide on how to regulate the reimbursement of costs, as the Regulation does not entail any regulation in this regard.

When deciding, EEA States however have to take into account the principle of effectiveness and equivalence.

(3) It is for the EEA States to decide if the name of the complainant has to be disclosed and if the procedure is free of costs and no reimbursement of cost is to be ordered, as Regulation (EU) 2016/679 does not entail any provisions to this effect.

Even if the name and address of the complainant cannot be disclosed in the procedure, the data should be known to the national court respectively the national appellate body, as long as the complainant is party of the procedure.

The Government of Austria

59. As regards the first question, the Government of Austria notes that the Regulation does not explicitly state whether the name and address of the complainant (the data subject) must be disclosed to the respondent (the controller or processor), or at which stage of the proceedings. According to its submission, a complaint procedure under Article 77 of the Regulation can in most cases only be conducted by disclosing basic information about the parties, as concealing the identity of one party in adversarial proceedings not only raises issues with regard to the right to a fair trial, in particular the principle of equality of arms, but may also entail practical difficulties.

60. The Government of Austria thus emphasises, first, that not disclosing the basic data of one side of an adversarial procedure to the adversary may put the latter in a position in which they cannot fully make use of their rights of defence. Where complaints are lodged by a data subject it will in most cases be almost impossible for the controller or processor to establish the exact circumstances of the case and to produce adequate evidence to support their position if they do not know who lodged the complaint.

61. In this regard, the Government of Austria notes the similarities of the procedures enshrined in Article 77 of the Regulation to court proceedings and recalls the established case law of the Court of Justice of the European Union ("ECJ") underlining the importance of the rights of the defence.[4]

62. In addition to the right to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"), reference is made to the legal safeguards, including an effective judicial remedy and due process, provided for in Article 58(4) of the Regulation. Thus, the Government of Austria assumes that the Regulation, in general, does not allow for anonymity of one side in an adversarial procedure under Article 77 of the Regulation, especially if the proceedings result in a decision binding on the respondent. The Government of Austria notes, however, that this may not be valid in all cases or from the very outset of proceedings and may vary across the Member States, depending on their national procedural rules and the circumstances of individual cases.

63. The Government of Austria contends that insofar as the Regulation does not contain specific provisions regulating the procedure before the supervisory authority, national rules of procedure apply in accordance with Article 6(1)(e), Article 6(2) and (3) and Article 58(4) of the Regulation. To the extent that the applicable national law provides for this, the Regulation allows, within the limits set out above, that the procedure under Article 77 of the Regulation may be conducted without disclosing the name and address of the complainant.

64. Second, the Government of Austria emphasises that the exercise of the supervisory authority's powers, as set out in Article 58 of the Regulation, will, in many cases, in order to be effective, require that the identity and contact data of the complainant are disclosed to the respondent. Reference is made to Article 58(2) of the Regulation in this respect.

65. The Government of Austria notes finally that, given the similarities of the procedure under Article 77 of the Regulation to court proceedings, it follows from Article 47 of the Charter that procedural principles should be assessed with this in mind.[5]

66. As regards the second question, the Government of Austria contrasts Article 57(3) of the Regulation with Article 78, noting that the latter contains no reference to proceedings being free of charge for the data subject, and contends further that Article 78 of the Regulation must be considered *lex specialis* as far as appeal procedures are concerned. However, the Government of Austria notes that the imposition of costs in appeal proceedings may have a *de facto* effect equivalent to charging fees for the performance of

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[4] Reference is made to the judgments in *RX-II*, C-197/09, EU:C:2009:804, paragraphs 39 to 41, and *Unitrading*, C-437/13, EU:C:2014:2318, paragraph 21, as well as the judgment of the European Court of Human Rights in *Beer v. Austria* (CE:ECHR:2001:0206JUD003042896), paragraph 17, as regards the principle of equality of arms in adversarial proceedings.

[5] Reference is made to the judgment in *Trade Agency Ltd*, C-619/10, EU:C:2012:531, paragraph 53.

the supervisory authority's tasks, for example, when the data subject who initially lodged a complaint is ordered to bear the costs of a subsequent appeal procedure, without being the party that sought the judicial remedy concerned.

67. For these reasons, the Government of Austria submits that the Regulation does not require Member States to ensure that all appeal proceedings following a procedure to hear a complaint in accordance with Article 77 of the Regulation are free of charge for the data subject. It has to be ensured, however, that fees and costs in appeal proceedings under Article 78 of the Regulation do not affect the provision of Article 57(3) of the Regulation and the performance of the supervisory authority's tasks.

68. The Government of Austria proposes that the Court should answer the questions referred as follows:

(1) In particular with a view to the right to a fair trial, which is a general principle of European Union law, an adversarial procedure to hear a complaint pursuant to Article 77 of the Regulation may in general not be carried out without disclosing information relating to the identity of the complainant. It is up to the national procedural law and the competent supervisory authority dealing with a case to assess the scale of information that is necessary to enable the adversary to effectively conduct its rights of defence.

(2) The GDPR does not require Member States to ensure that all appeal proceedings following a procedure to hear a complaint in accordance with Article 77 of the Regulation are free of charge for the data subject. It has to be provided however that fees and costs in appeal proceedings under Article 78 of the Regulation do not affect the provision Article 57(3) of the Regulation and the performance of the supervisory authority's tasks.

Ireland

69. At the outset, Ireland emphasises that, in the requests for an advisory opinion, the Board of Appeal has not identified any specific provision of the Regulation, or of EEA law more generally, which is said to provide a basis for the consideration by supervisory authorities of anonymous complaints. In Ireland's submission, no provision of the Regulation provides for the investigation of a complaint by a supervisory authority on an anonymous basis. What is, however, clear is that the exercise of a supervisory authority's extensive powers under Article 58 of the Regulation, including the investigation of complaints, must comply with due process, as guaranteed under Union and Member State law. While, subject to the provisions of the Regulation, the regulation of the procedures governing complaints is a matter for each Member State in accordance with the principle

of national procedural autonomy,[6] the real question is whether a supervisory authority could ever investigate a complaint on an anonymous basis while complying with the requirements of due process.

70. Ireland observes that complaints to national supervisory authorities concern the fundamental rights of data subjects as well as the exercise by such authorities of the very extensive powers under Article 58 of the Regulation against data controllers or data processors. In very many cases, in order to investigate a complaint effectively, it will be essential for the supervisory authority to disclose the identity of the complainant to the data controller or processor against which the complaint has been made. If a data controller or processor is not informed of the identity of the complainant, the data controller or processor may not be in a position to defend its position in circumstances where the decision of the supervisory authority may have significant financial, reputational and other consequences for it.

71. Ireland observes that in some cases, a complaint may be made to a supervisory authority which will not result in an adversarial process as between the data subject and the data controller or processor. For example, as a matter of Irish law, the Data Protection Commission may conduct inquiries of its own volition into suspected infringements of the Regulation under sections 110 and 111 of the Irish Data Protection Act 2018.[7] Such inquiries may arise from anonymous complaints or whistleblowing notifications. Similarly, under section 148(2) of the Irish Data Protection Act 2018, the Data Protection Commission may proceed to an investigation into the subject-matter of a complaint, notwithstanding the withdrawal of the complaint by the data subject, "*where it is satisfied that there is good and sufficient reason for so doing*". In such cases, however, the anonymous or former complainant would not be a party to any investigation which follows and, insofar as an adversarial process ensues, it is as between the Commission, on the one hand, and the data controller or processor, on the other hand. However, insofar as a complaint by a data subject results in an investigation which may affect the rights and obligations of the parties to that investigation, the requirements of due process apply.

72. For these reasons, as a matter of Irish law, the constitutional requirements of natural justice and fair procedures would preclude the investigation by the Data Protection Commission of anonymous complaints under the Regulation insofar as those complaints result in an adversarial process such as between the data subject and the data controller or processor.[8] In Ireland's submission, the requirements of due process and the rights of defence under Article 6(1) ECHR and Article 47 of the Charter would also preclude, save

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6 Reference is made to the judgment in *Impact*, C-268/06, EU:C:2008:223.

7 Ireland notes that similar provision is made in the field of law enforcement in Part 5 of the 2018 Act which transposes the Law Enforcement Directive: see sections 123 and 124 of the Data Protection Act 2018.

8 Reference is made to Article 34.1 of the Constitution of Ireland 1937 and the Irish Supreme Court decision in Melton Enterprises Limited v. Censorship of Publications Board [2003] 3 IR 623.

for compelling reasons of public interest provided for by law, the lodging of anonymous complaints and the bringing of legal proceedings on an anonymous basis. Case law of the ECJ underline the importance of upholding the rights of defence in administrative and judicial proceedings, even in circumstances where there are overriding considerations of public interest, including considerations of national and international security.[9]

73. Ireland notes that shortly after the coming into effect of the Regulation, the ECJ announced that requests for preliminary rulings involving natural persons would be anonymised, even where the parties will not be anonymized in the national proceedings.[10] Even where a party is entitled to anonymity on the national proceedings, a party to such proceedings would normally know the identity of the other party or parties.

74. As regards the first question, Ireland submits that the principles of due process and the rights of defence, as guaranteed under Member State, Union and EEA law, apply to the investigation of complaints by a data subject to a supervisory authority under the Regulation and to any judicial proceedings which may arise out of the investigation of such complaints. It follows from these principles that, if and insofar as there is a limitation on the rights of defence of the data controller or processor (for example, by reason of the anonymisation of the complainant before the supervisory authority and/or before the courts), such a limitation would have to be justified by compelling reasons of public interest (such as national security or confidentiality) provided for by law.

75. Ireland notes that, for its part, the Regulation does not make any provision for the lodging and investigation of anonymous complaints. Ireland submits that while the further regulation of the procedure governing complaints is a matter for each Member State in accordance with the principle of national procedural autonomy, the express guarantee of due process in Article 58(4) of the Regulation would preclude the investigation of anonymous complaints which result in an adversarial process as between the data subject and the data controller or processor in the absence of compelling reasons of public interest provided for by law.

76. As regards the second question, Ireland notes that the Board of Appeal has referred to Article 57(3) of the Regulation. In this regard Ireland emphasises that Article 57(3) of the Regulation is on its terms limited to the performance of the tasks of the supervisory authority. Nothing in the Regulation purports to extend this provision to the tasks of other bodies, including in particular the courts of Member States. Having regard to the potentially far-reaching implications which such a provision could have for Member States' systems for the administration of justice, with their widely varying rules governing the costs of

[9] Reference is made to judgments in *Salzgitter Mannesmann*, C-411/04, EU:C:2007:54, paragraph 43, *Kadi*, C-402/05 P, EU:C:2008:461, paragraph 348-349 and *ZZ*, C-300/11, EU:C:2013:363 and to Opinion of Advocate General Kokott in *Pupino*, C-105/03, EU:C:2004:712, paragraph 66

[10] Court of Justice of the European Union, Practice directions to parties concerning cases brought before the Court, 1 March 2020, paragraph 7.

court proceedings, and their public finances, any such provision would have had to be set out in the clearest and most express of terms in the Regulation. In light of the express provision made for the tasks of the supervisory authority to be free of charge and the silence in respect of proceedings before the court, Ireland submits that the basic principle of legislative interpretation – *expressio unius est exclusio alterius* – strongly suggests that the EU legislature did not intend that judicial proceedings concerning decisions of supervisory authorities must be provided free of charge.

77. Ireland contends that while a data subject has a choice of remedies available to him/her in the case of an infringement of the Regulation, one of the reasons why Article 57(3) of the Regulation requires that the performance of the tasks of the supervisory authority be free of charge is to encourage data subjects to address such matters, to the extent possible, through the mechanism of a complaint to the supervisory authority, rather than through the courts. If the Regulation were interpreted as requiring that proceedings by a data subject seeking a judicial remedy against a supervisory authority must be free of charge in all cases, this would have very significant financial and resource implications for Member States and their judicial systems.

78. It follows that, while the Regulation makes provision for the pursuit of judicial remedies by a data subject, it does not regulate the question of the costs of such judicial proceedings. As a result, it is for each Member State to regulate this matter in accordance with the principle of national procedural autonomy. Thus, while Article 47(3) of the Charter guarantees that legal aid shall be made available to "those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice", the judgment of the ECJ in *DEB* recognised that it was ultimately a matter for the national court to determine whether the provision of legal aid in a particular case was necessary to ensure access to justice.[11]

79. Thus, Ireland submits that the Regulation does not, either expressly or impliedly, require that the pursuit of a judicial remedy by a data subject against a supervisory authority under Article 77 of the Regulation must be free of charge or that such proceedings must not result in an order for costs against the data subject. Member States are accordingly not under any obligation to make provision to this effect in their national procedural law. Ireland makes reference to the Aarhus Convention. The Convention provides far-reaching protection for access to justice in environmental matters, but there is no requirement that court proceedings must be free of charge. Ireland finds it difficult to understand how an even more far-reaching obligation could be regarded as implicit under the Regulation.

80. In light of the proposed answer to the first and second questions, Ireland submits that the third question does not properly arise.

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[11] Reference is made to the judgment in *DEB*, C-279/09, EU:C:2010:811.

81. Ireland proposes that the Court should answer the questions referred as follows:

(1) In respect of Question 1, the Regulation does not make provision for the lodging and investigation of anonymous complaints. While the further regulation of the procedure governing complaints is a matter for each Member State in accordance with the principle of national procedural autonomy, the express guarantee of due process in Article 58(4) of the Regulation would preclude the investigation of anonymous complaints which result in an adversarial process as between the data subject and the data controller or processor in the absence of compelling reasons of public interest provided for by law.

(2) In respect of Question 2, Member States are not required to make provision in their national procedural law that the pursuit of a judicial remedy by a data subject against a supervisory authority under Article 77 of the Regulation must be free of charge or that such proceedings must not result in an order for costs against the data subject.

ESA

82. ESA submits that the protection of personal data is a fundamental right recognised in several international instruments, such as Article 8 ECHR and the Charter. The Court has on several occasions referred to fundamental rights and the essential role they play within the EEA legal framework.[12] Procedural guarantees and an unrestricted access to justice for individuals form a part of the core EEA principles and values, as stressed in the 8th recital to the EEA Agreement.[13] Rules on the protection of the processing of personal data of natural persons should respect their fundamental rights and freedoms, as stated recital 2 of the Regulation.

83. In relation to the first question, ESA contends that the question must be understood as asking whether the Regulation, in contrast to Liechtenstein administrative law, allows the data subject to remain anonymous when lodging a complaint before the supervisory authority and subsequently in any court proceedings against the decision taken by the supervisory authority.

[12] Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23, Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 63 and Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 238, paragraph 123.

[13] Reference is made to Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, para. 86, Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation*, [2003] EFTA Ct Rep 52, paragraphs 36 and 37 and Case E-3/11 *Sigmarsson*, [2011] EFTA Ct. Rep. 430, paragraph 29.

84. As a starting point, ESA observes that the Regulation does not contain any explicit provision on this matter.

85. ESA submits that it may be inferred from the complaint system set up by Articles 77 and 80, and the obligations of the supervisory authority set out in Article 57(1), that the Regulation allows for anonymity in the cases where, under Article 80 of the Regulation, a complaint is lodged on behalf of the complainant by a specialised organisation and in general investigations conducted by the supervisory authority under Article 57(1)h.

86. ESA notes that in cases of individual complaints lodged by a data subject relating to the infringement of their rights by a data controller, the identity of the data subject, in most cases, will be known to the latter. Indeed, the protection afforded by the Regulation is predicated on the fact that the processing of personal data, on the whole, is not anonymous.

87. ESA contends further that although permitting anonymity in such cases, particularly when the data subject has first approached the data controller directly to assert their rights, does not appear to serve any purpose, it is possible to conceive of situations in which there is a justifiable need to preserve anonymity, e.g. in cases of mistaken identity or where the data concerned only relate indirectly to the data subject's identity.

88. ESA submits that, as with the right to protection itself, the possibility of claiming anonymity should not be absolute[14] and should be based on a clear and demonstrable need to protect the identity of the data subject from any foreseeable incursion into their privacy. In considering whether to grant anonymity in conducting its investigation pursuant to a complaint lodged under Article 77 of the Regulation, the supervisory authority should take account not only of the legitimate interests of the data subject, but also guard against any possibility of abuse of rights on the part of the data subject.

89. Subject to these considerations, ESA concludes that the Regulation permits a data subject to claim anonymity for the purposes of lodging a complaint under Article 77 of the Regulation and for further steps of the investigation to be conducted by the supervisory authority, as well as the decision to be taken by the supervisory authority following that investigation.

90. As regards the situation in subsequent appellate procedures before the courts, ESA submits that the Regulation expresses the principle of procedural autonomy of the EEA States.[15]

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[14] Reference is made to recital 4 of the Regulation.

[15] Reference is made to the judgment in *J. van der Weerd and Others* (C-222/05), *H. de Rooy sr. and H. de Rooy jr.* (C-223/05), *Maatschap H. en J. van 't Oever and Others* (C-224/05) *and B. J. van Middendorp* (C-225/05), Joined Cases C-222/05 to C-225/05, EU:C:2007:318, paragraph 28.

91. ESA considers that as it is obvious that the administrative rules concerned affect actions based on EEA law and domestic law in a similar way, the question as to the possibility of anonymity in administrative procedures before the national courts should be considered from the perspective of the principle of effectiveness. More specifically, it is necessary to examine to what extent the impossibility of anonymity might impair the data subject's right to exercise his rights under the Regulation through administrative and judicial mechanisms.

92. In light of the above, ESA submits that the first question referred by the Board of Appeal in the two cases should be answered in such terms that in the context of complaint proceedings under Article 77 of the Regulation and subsequent appellate proceedings before the national courts, the data subject should be able to claim anonymity in case of a clear and demonstrable need to protect the identity of the data subject from any foreseeable incursion into their privacy.

93. As regards the second question, ESA submits that, as provided for in Article 77 of the Regulation, without prejudice to any other administrative or judicial remedy, every data subject shall have a right to lodge a complaint with a supervisory authority, in particular in the EEA State of his or her habitual residence, place of work or place of the alleged infringement if he or she considers that the processing of personal data relating to him or her infringes the Regulation.

94. ESA notes that Article 78 of the Regulation provides for every person to have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them, and a right for every data subject to have an effective judicial remedy where the competent supervisory authority does not handle the complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77 of the Regulation.

95. ESA further notes, as is highlighted by the referring court, that Article 57(3) of the Regulation provides that the performance of the tasks of each supervisory authority shall be free of charge for the data subject and, where applicable, for the data protection officer. This includes the complaint procedure provided for in Article 77 of the Regulation.

96. Although this is the basic rule, ESA contends that it is not absolute in that it does not apply in cases of manifestly unfounded or excessive or repetitive requests by a data subject. In such cases, the supervisory authority may, under Article 57(4) of the Regulation, charge a reasonable fee to cover administrative costs or even refuse to act on the request. In cases of refusal it is the supervisory authority that shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

97. ESA contends that, as such, the Regulation contains no provisions relating to proceedings before the national courts, but relies on national procedural law. The essence of the principle of procedural autonomy is the assumption that, in the absence of EEA rules

on the subject, EEA States enjoy the freedom to establish procedural rules in proceedings for claims under EEA law, subject to two main conditions, to be met cumulatively. First, in line with the principle of equivalence, national law governing redress based on EEA law cannot be less favourable than law governing redress based on national law. Secondly, in line with the principle of effectiveness, national law must not lead to the impediment or excessively difficult exercise of rights conferred by EEA law.[16]

98. However, in ESA's view, neither the freedom and independence of the supervisory authorities nor the particularities of procedural rules in different EEA States should hinder in practice the achievement of effectiveness of data protection as a fundamental right.

99. ESA contends that, as not only the data subject but also the defendant in the proceedings before the supervisory authority can lodge an appeal, a potential obligation to reimburse costs, also in a situation where the scope of the Data Protection Authority decision is wider than that of the scope of the complaint, constituting a wider execution of the Data Protection Authority's autonomous powers, would have a dissuasive effect on the data subject and thus fundamentally undermines the objective of a straightforward possibility to complain provided for in Article 77 of the Regulation.

100. To the extent that the combined applicability of these provisions could result in a data subject to refrain from asserting their rights, first, by lodging a complaint before a supervisory authority and, next, in possible proceedings before a national court, ESA contends that this would undermine the protection which the Regulation seeks to guarantee to data subjects.

101. Consequently, ESA, concludes that the answer to the second question must be that it follows from the objective and purpose of the Regulation that EEA States must ensure that, under their national procedural law, proceedings before their courts pursuant to a decision of the national supervisory authority such as in the pending cases are free of charge for the data subject.

102. In view of the answers it proposes to the first and second questions, to the effect that the anonymity of the data subject can in principle be assured and that all procedures following from the data subject's original complaint should be free of charge, ESA submits that the third question has become devoid of purpose.

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[16] Reference is made to the judgment in *Rewe-Zentralfinanz*, 33/76, EU:C:1976:188, and more recently to the judgment in *Duarte Hueros*, C-32/12, EU:C:2013:637; and to Case E-5/10 *Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 52. Reference is also made to C.N. Kakouris, "Do the Member States possess judicial procedural autonomy", Common Market Law Review, 1997, No 6, 1389; M. Bobek, "Why There is No Principle of 'Procedural Autonomy' of the Member States", in B. de Witte and H. Micklitz (eds), *The European Court of Justice and Autonomy of the Member States*, Cambridge, 2011, 305; and K. Kowalik-Bańczyk, "Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings", Yearbook of Antitrust and Regulatory Studies, 2012, 5(6), 218.

103. Nevertheless, for the sake of completeness ESA observes that it remains for the national court to determine how national law is to guarantee the rights granted under the Regulation. However, in order to help the national court to ensure rights granted by the Regulation to the data subjects, ESA submits that where any costs are a result of a successful challenge to the decision of the supervisory authority, it would seem more appropriate that that authority bear the costs. Any other conclusion would be contrary to the objective of the Regulation and would render the protection of the rights under the Regulation ineffective.

104. ESA proposes that the Court should answer the questions in the following manner:

(1) It follows from the objective and purpose of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC that in the context of complaint proceedings under Article 77 of the Regulation and subsequent appellate proceedings before the national courts, the data subject should be able to claim anonymity in case of a clear and demonstrable need to protect the identity of the data subject from any foreseeable incursion into their privacy.

(2) It follows from the objective and purpose of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC that EEA States must ensure that under their national procedural law proceedings before their courts pursuant to a decision of the national supervisory authority such as in the pending cases are free of charge for the data subject.

The Commission

105. As regards the first question, the Commission submits that the Regulation establishes in Article 77 the right of data subjects to lodge a complaint with a supervisory authority but does not contain rules obliging or allowing the supervisory authority to withhold the identity of the data subject in the course of the complaint procedure before it. It is therefore for the national legislature to establish the rules governing these procedural matters, which, however, must be construed in a way that they do not jeopardise the rights and obligations in the Regulation.

106. The Commission agrees that to not disclose to the data controller the identity of a data subject lodging a complaint could put the data controller in a position in which it cannot establish the exact circumstances of the case and defend itself against the allegations made in the complaint.

107. However, this does not exclude the possibility that procedures are put in place allowing the data subject's identity to be withheld for the purposes of the investigation and the decision of the supervisory authority where it remains possible for the data controller to defend itself without knowing the identity of the complainant. Reference is made to Article 57(1)(h) of the Regulation, which ensures that supervisory authorities can conduct investigations on their own motions, including on the basis of information received in a complaint.

108. In the Commission's view, withholding the identity of the complainant would also be in line with the principle of data minimisation laid down in Article 5 of the Regulation, which also applies to the procedure before the supervisory authority.

109. According to the Commission, whether or not it is possible to conduct the investigation in an anonymous manner depends on the specific circumstances of the case. For example, when exercising its corrective power to order the controller to comply with the data subject's requests to exercise his or her rights pursuant to the Regulation (Article 58(2)(c)), the supervisory authority may under certain circumstances have to reveal personal data of the complainant to the controller so that the latter can comply with the order.

110. In the present case, the Commission understands that, based on identical or similar facts, an important number of data subjects, including the anonymous data subjects J and K, have launched identical or similar complaints before the Data Protection Authority. In these circumstances, the Commission considers it not to seem necessary for the data controller's right of defence to disclose the identity of the data subject to the controller, since the approach of the controller in collecting the personal data at issue is assessed in general.

111. In view of the above, the Commission submits that the first question should be answered in such a way that the provisions of the Regulation do not exclude national procedural rules to the effect that the investigative procedure before a supervisory authority may be carried out without disclosing the identity of the complainant to the data controller where revealing the identity of the complainant to the data controller is not necessary to allow the latter to defend itself.

112. As regards the second question, the Commission contends that national procedural rules must be construed in a way that they do not jeopardise the rights and obligations in the Regulation. Also, as stated in recital 141 of the Regulation, the right to an effective judicial remedy under Article 78(1) of the Regulation must be construed in light of Article 47 of the Charter. Such remedies are to be conducted in accordance with the national procedural law. Article 78(1) of the Regulation does not state that judicial procedures shall be free of charge for the data subjects or other parties to the procedure.

113. In that regard, the Commission understands that where the data controller appeals before the Board of Appeal against a decision of the supervisory authority exercising powers provided for in Article 58 of the Regulation, as has happened in the main proceedings, it is the data subject who acts as defendant, while the supervisory authority acts as the relevant authority.

114. The Commission contends that this construction under Liechtenstein law seemingly leads to the result that the data subject has to defend a decision of the supervisory authority, including on matters raised by the supervisory authority that the data subject never brought forward. Consequently, due to this specificity of Liechtenstein law, when submitting a complaint to the supervisory authority, the data subject automatically runs the risk of entering into a procedure which will no longer be free of charge for him as the decision to appeal against a decision of the supervisory authority is not necessarily his.

115. The Commission contends that a legal construction leading to such results is incompatible with the right to lodge a complaint with a supervisory authority free of charge for the data subject, as laid down in Articles 77(1) and 57(3) of the Regulation.

116. Therefore, the Commission takes the view that the second question should be answered in such a way that Articles 57(3) and 77 of the Regulation are to be interpreted as precluding national rules establishing an appeal procedure against decisions of the supervisory authority in which the data subject becomes the defendant of the decision of the supervisory authority and thereby carries the risk of bearing the costs if the appeal body does not uphold the decision of the supervisory authority.

117. In the Commission's opinion, there is no need to reply to the third question.

118. The Commission proposes that the Court should answer the questions as follows:

(1) The provisions of the Regulation do not exclude national procedural rules to the effect that the investigative procedure before a supervisory authority may be carried out without disclosing the identity of the complainant to the data controller where revealing the identity of the complainant to the data controller is not necessary to allow for the latter to defend itself.

(2) Articles 57(3) and 77 of the Regulation are to be interpreted as standing in the way of national rules establishing an appeal procedure against decisions of the supervisory authority in which the data subject becomes the defendant of the decision of the supervisory authority and thereby carries the risk of bearing the costs in case the appeal body decides against the decision of the supervisory authority.

Páll Hreinsson
Judge-Rapporteur