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Vienna, 08 August 2024

Decision of the Administrative Court: FR 6034-24

Complainant: [redacted]

Represented under Article 80(1) GDPR by: *noyb* - European Centre for Digital Rights
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Counterpart: **The Data Protection Authority**
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The case: Appeal against the decision of the Administrative Court

APPEAL

1. REPRESENTATION

1. *noyb* - European Center for Digital Rights is a non-profit organisation promoting the rights and freedoms of data subjects with its headquarters at Goldschlagstraße 172/4/2, 1140 Vienna, Austria, registration number ZVR: 1354838270 (hereafter: *"noyb")* (**Annex 1**).

2. *noyb* represents the complainant under Article 80(1) GDPR (**Annex 2**).

2. MOTION

2.1. Summary of the complainant's position

3. The decision of the Administrative Court authorises IMY to close investigations of complaints before it is clear whether or not a breach has occurred. In IMY's own words: "*IMY has not [...] made any assessment [...] whether the processing complies with the provisions of the GDPR*"[1]. According to the case law, and forthcoming case law, of the European Court of Justice,[2] an investigation of complaints needs to be conducted with due diligence. This means that DPAs are only mandated to decide **how** to conduct a complaint investigation, but they are not mandated to decide **whether** to conduct an investigation.[3] The precedence also states that the role of the national court is to fully scrutinise and assess the correctness of the supervisory authority's actions in the light of the GDPR. [4]

4. If an investigation of a complaint does not result in clarity as to whether or not there has been a breach of the rules, the investigation cannot be considered to have been carried out with due diligence. The Court of Appeal's judgement should therefore be that the investigation is not adequate.

2.2. Authorisation to proceed to trial

5. The appellant requests the Court of Appeal to admit the case for trail.

2.3. Motion on the substance

6. The appellant requests the Administrative Court of Appeal to alter the Administrative Court's judgement and to refer the case back to the Authority for Privacy Protection (IMY).

[1] See attached Information letter from IMY (Annex 3)

[2] See C-26/22 and C64/22 -(SCHUFA) paragraph 68 and cf. the Advocate General's reasoning in C-768/21 paragraph 32 to 42 in particular

[3] The exception to this is if the circumstances of the offence have already been established, in which case an investigation is not necessary, see paragraph 24.

[4] See GDPR Article 78 and the SCHUFA judgement

3. BACKGROUND AND FACTS

7. The decision under appeal relates to a decision[5] by IMY to close a complaint case after sending an information letter to the subject of the complaint.

8. The complainant contacted Region Uppsala after a personal data breach. He called the region's customer service for public transport because it was in public transport department that the personal data breach occurred.

9. The phone call with the customer service started with a robot voice informing the complainant that the call would be recorded for "quality and training purposes". As this purpose was perceived as weak and there was no possibility to request that the call not be recorded, the complainant asked the region for clarification regarding the purpose of recording calls.

10. The Region informed the complainant that the calls are recorded in order to deal with complaints from individuals. When the complainant objected to this on the grounds that he did not have a complaint and therefore did not need to be recorded, the Region instead referred to the fact that the recording of calls was necessary for providing regular train and bus services.

11. The complainant objected to this reasoning, arguing that there was no legal basis for recording conversations on the basis of the region's obligations to provide regular train and bus services. The complainant's objection was not adhered to.

12. The complainant then lodged a complaint with IMY to compel the region to cease the recording of calls, since they considered that there was no adequate legal basis under Article 6 of the GDPR to justify the recording of calls.

13. IMY closed the complaint after sending an information letter to the region.

14. In the information letter, IMY describes its actions in response to the complaint as follows: *"IMY has not taken a position on the content of the complaint. This means that IMY has not made any assessment of whether [Region Uppsala] is the controller of the personal data processing in question or whether the processing fulfils the provisions of the General Data Protection Regulation."*[6]

15. IMY concludes the information letter as follows: *"IMY will not take any action on the complaint other than to send this information letter to you and inform the complainant about it. Please note that this information is not a decision by IMY and that you do not need to provide IMY with any response or feedback."*[7]

16. According to IMY's own words, they did not investigate the complaint, but instead sent an information letter. In connection with sending the letter, they have also closed the case.

[5] IMY-2024-1183, 2024-03-19 (Annex 3)

[6] See attached Information letter from IMY (Annex 3)

[7] See attached Information letter from IMY (Annex 3)

17. As a party, the complainant has a statutory[8] and in Swedish case law[9] right of appeal against the supervisory authority's decision not to investigate complaints. The complainant has exercised this right.

18. In its ruling, the Administrative Court stated that IMY's discretion to handle complaints means that they are mandated to close complaint cases, where doubts about compliance with the GDPR have been raised, with information letters.[10]

19. The complainant considers that IMY has an obligation to investigate complaints concerning regulatory breaches. At least to the extent that the supervisory authority can determine whether or not a breach has occurred.

20. It is therefore the appellant's view that the decision of the Administrative Court is not in accordance with the law.

4. THE GROUNDS

4.1. The grounds

21. The legal questions relevant to this case are: (1) what is IMY's obligation to investigate complaints and (2) under what conditions can IMY close cases with information letters?

4.1.1. Investigation of complaints

22. IMY, as a supervisory authority under the GDPR, is responsible for investigating complaints from individuals under Article 57(1)(f) of the GDPR. This responsibility has been recognised in the case law of the CJEU, case C-311/18 (Schrems II) and in joined cases C-26/22 and C-64/22 (SCHUFA), as imposing an obligation on the "*supervisory authority [to] investigate with due diligence any such complaint*" made under Article 77(1) of the Regulation.[11]

23. The judgement of particular interest in the present case is SCHUFA, which is based on the reasoning of the CJEU in Schrems II. That case concerned, inter alia, a question of interpretation regarding the jurisdiction of a court to review a decision of a supervisory authority. The Court held that Article 78(1) of the GDPR is to be interpreted as meaning that "*a decision taken by a supervisory authority on a complaint is subject to full judicial review*".[12]

24. The Advocate General in C-768/21[13] has in his opinion developed the reasoning on the obligation of supervisory authorities to investigate complaints and their obligation to take decisions on corrective measures in the following way:

[8] GDPR Article 78 in the light of Recital 143 of the GDPR and the EU Charter 47

[9] HFD cases 6193-22 and 3691-22

[10] See Administrative Court judgement page 8

[11] See paragraph 56 of the SCHUFA

[12] See 1) of the Court's judgement in SCHUFA

[13] The case concerns the tasks of the Supervisory Authority under Article 58(2) and is due for decision in the near future.

"38. [...] The CJEU followed the interpretation I advocated in my Opinion in the SCHUFA cases, according to which, the complaints procedure [...] is designed as a mechanism capable of effectively protecting the rights and interests of data subjects."

40. When the supervisory authority, when examining a complaint, recognises that a personal data breach has occurred, the question arises as to how it should proceed. [Such a finding imposes an obligation on the supervisory authority to act in accordance with the principle of legality. In general terms, it is a question of determining the most appropriate corrective measure or measures to remedy the infringement. I consider this to be a reasonable interpretation, as Article 57(1)(a) of the GDPR requires the authority to "monitor the application of the Regulation" and "ensure compliance with it". It would be inconsistent with this mandate if the supervisory authority had the possibility to simply disregard the established infringement.

41. Moreover, the investigative powers of the supervisory authority under Article 58(1) of the GDPR would be of little value if the supervisory authority had to limit itself to conducting an investigation despite a finding of a breach of the right to personal data. The implementation of EU law on the protection of personal data is an essential part of the concept of control in Article 16(2) TFEU and Article 8(3) of the Charter. In this context, it should not be forgotten that the supervisory authority also acts in the interest of the person or entity whose rights have been violated. In this regard, it should be noted that Articles 57(1)(f) and 77(2) of the GDPR provide for certain obligations in relation to the complainant, namely to inform 'the individual of the progress and outcome of the complaint'."

25. From the Advocate General's reasoning, it can be deduced that IMY's investigative power refers to an obligation to investigate complaints to identify whether or not there is a breach of the GDPR. And that an investigation is not required if the breach has already been established. The complainant therefore argues that IMY's obligation to investigate complaints from individuals should mean that IMY at least determines whether there are grounds for the complaint in or not. That is, IMY should at least take a position as to whether the complaint is justified or not, and take steps to remedy identified deficiencies if the complaint proves to be justified.

26. In the present case, IMY has explicitly stated in its information letter to Region Uppsala that it has not taken a position on the content of the complaint. That they have not made any judgement about who is the controller or whether the processing in question is lawful or not.[14]

27. IMY is thus clear that no investigation at all has been carried out. At least no investigation leading to a conclusion on the facts of the complaint.

28. The Administrative Court has ruled that IMY has the option not to investigate complaints and to close cases by sending information letters to the controller. However, the Administrative Court has not explained how IMY can send information letters to the controller if IMY does not know who the controller is.

29. The Administrative Court also notes that the scope for deciding not to investigate complaints is not *"completely unlimited"*, while the court in question is of the opinion that it was *"uncertain whether the region fulfilled its obligations under Article 6"* of the GDPR. The Court's conclusion that, in case of uncertainty about the lawfulness of a processing operation, it is appropriate to send information letters instead of investigating lawfulness is a conclusion that the

[14] See attached Information letter from IMY (Annex 3)

complainant does not understand. It should be precisely when the lawfulness of a processing operation is unclear that an investigation is required. Otherwise, it appears that IMY has an unlimited possibility not to investigate complaints, and by extension neglect its obligation to act as a supervisory authority under Article 8 of the EU Charter. If an investigation is not required in case of uncertainty, the Administrative Court of Appeal needs to clarify under what conditions an investigation of complaints is actually required and when in that case IMY needs to investigate complaints.

30. It should be recalled that, in accordance with EU law and Swedish case law[15] , the complainant has the right to an effective remedy against IMY's decision not to take action. This right is not upheld by the Administrative Court when it finds that it is within IMY's discretion to close cases without investigating any facts of a complaint. In particular, when the complainant has made it likely that there is an offence.

31. The Administrative Court has cited Schrems II and SCHUFA as the applicable judgements of the Court of Justice of the European Union as the basis for its assessment. The Court's reading of these judgements does not give a correct picture of what is stipulated regarding the authority's obligation to investigate. The Court confuses IMY's obligation to investigate complaints with its discretion to choose a remedy under Article 58(2) GDPR. See the following quotes paragraph 57, and 68-69 from SCHUFA, referred to by the Administrative Court:

> *"57. In order to deal with complaints received, Article 58(1) of the GDPR grants each supervisory authority significant investigative powers. Where, after completing its investigation, such an authority finds that the provisions of that regulation have been infringed, it is obliged to take appropriate measures to remedy the shortcoming found. Article 58(2) of that regulation sets out the various corrective measures that the supervisory authority may take in that context (see, to that effect, judgment of 16 July 2020, Facebook Ireland and Schrems, C-311/18, EU:C:2020:559, paragraph 111)*
>
> *68. However, it should be added that, although, as stated in paragraph 56 above, the supplementary authority is obliged to treat a complaint with all due diligence, it has, as regards the remedies listed in Article 58(2) of the GDPR, a discretion as to the choice of appropriate and necessary measures (see, to that effect, judgment of 16 July 2020, Facebook Ireland and Schrems, C-311/18, EU:C:2020:559, paragraph 112).*
>
> *69. Although, as stated in paragraph 52 above, the national court hearing an action under Article 78(1) of the GDPR must have full jurisdiction to examine all the facts and points of law relating to the dispute in question, ensuring effective judicial protection does not mean that it is authorised to substitute its own assessment for that of the authority in choosing the appropriate and necessary remedies, but rather that it is obliged to examine whether the supervisory authority has respected the limits of its discretion.*

32. Thus, according to the CJEU, IMY's discretion in dealing with complaints is limited to the corrective action that it may choose following an investigation resulting in a finding of deficiency. Provided that the choice of measure is appropriate and necessary to correct the identified deficiency. If no deficiency is found, the choice of corrective action of the deficiency cannot be actualised.

[15] See HFD 2023 ref. 54 I and II

33. No deficiency has been identified by IMY since no investigation has been carried out. Thus, it cannot be relevant to examine whether IMY took effective measures to remedy the deficiency. What the Administrative Court had to examine is thus whether IMY could have rejected the complaint without determining whether the complaint was justified or not. Not whether the measure of sending an information letter was a sufficient measure to remedy an alleged or established deficiency.

34. In its assessment, the Administrative Court referred to Swedish preparatory works. As is well known, the GDPR is an EU regulation and thus has direct effect; the interpretation of the regulation cannot be made teleologically with reference to Swedish preparatory works, as the regulation is not subject to Swedish legislative capacity.[16] This type of interpretation must instead be subject to the recitals to the GDPR. There it is stated, just as the Administrative Court found, that "*the investigation of a complaint should [...] take place to the extent appropriate in the individual* case". [17]

35. In light of Schrems II and SCHUFA, it is clear that an investigation must take place, and that which falls within the discretion of the authority is the depth of the investigation in question, and that the depth of the investigation is subject to judicial review in court. Swedish preparatory works as a source of legal interpretation of an EU regulation can at most be equated with doctrine, but as the government is not an authority on data protection, the doctrinal value of their statements is seemingly low.

36. As IMY has not taken a position on who is the controller or whether the processing is lawful, it can hardly be said that an investigation has been conducted at all. What's forthcoming from paragraphs 56[18] and 57[19] of the SCHUFA is that a supervisory authority needs to investigate cases at least in sufficient detail to be able to determine whether or not the provisions of the GDPR have been infringed.[20] It is the complainant's view that this is what the CJEU means by "due diligence" in relation to the obligation to investigate.

37. It should also be mentioned that complaints to the IMY is the only avenue, apart from court proceedings, that an individual has against a controller perceived to be in breach of the law. However, the court cannot be expected to have the same expertise as the supervisory authority. Taking cases to court thus places high demands on the individual's competence or resources to hire expertise, and limits the possibility of actual investigation of deficiencies as the court does not have the same investigative possibilities as IMY.

38. It follows that IMY must act as a guarantor of compliance with the GDPR, by actually investigating complaints, within the framework of its duty to monitor and enforce the application of the GDPR. As it seriously affects the individual's access to effective remedy if the

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[16] *"As the EU is an autonomous legal order, its legal rules and concepts must also be interpreted autonomously, in the context of EU law*" - Principles of Public Law, Reichel, p. 66.

[17] Administrative Court judgement page 4 with reference to Recital 141 of the GDPR

[18] *'In particular, Article 57(1)(f) of the GDPR requires each supervisory authority to examine, within its territory, complaints which any person has the right to lodge under Article 77(1) of that regulation where that person considers that the processing of personal data relating to him or her constitutes a breach of that regulation and, in so far as is necessary, to examine the purposes of that processing. The supervisory authority must investigate such a complaint with due diligence (judgment of 16 July 2020, Facebook Ireland and Schrems, -C311/18, EU:C:2020:559, paragraph 109)."*

[19] See paragraph 31

[20] See the Advocate General's Opinion in SCHUFA for further discussion, in particular points 39-41

circumstances of a reported breach of the GDPR does not need to be investigated sufficiently to at least identify whether a rule has been broken has occurred and who is responsible for breaking the rule.

39. In conclusion, in the present case, IMY has not fulfilled its obligation to investigate complaints with due diligence and, by this omission, it also fails to fulfil its role as the guardian of the regulatory framework it is supposed to supervise. The fact that the Swedish preparatory works foresaw a different obligation for the supervisory authority than what is apparent from the regulatory framework and the CJEU's interpretation of the regulatory framework does not change this obligation.

4.1.2. Choice of measure

40. The measure chosen by IMY in the present case is to send an information letter[21] to the party complained against. The information letter does not contain any request for information from the party in question, and thus cannot be seen as an investigative measure. Nor does it appear anywhere in the letter that IMY will follow up the case in any way. Rather, what is clear is that the letter in question has no legal effect.

41. From previous internal working documents[22] it appears that the use of information letters by IMY is based on the assumption of good faith and willingness to comply by the receiving party. However, compliance is not possible if no offence is identified. A comparison could be made with the police authority in the investigation of crime, a report where both the offence and the perpetrator are identified by the reporter is typically not responded to with an information letter to the perpetrator about the content of the criminal code.

42. Because what should be recalled is that breaches of the GDPR are criminal offences, and IMY's remedial powers are to some extent of a criminal law nature.[23]

43. The question is then whether information letters, which are not part of the catalogue of corrective powers, can be considered an effective way to induce controllers accused of breaches to actually change their behaviour.

44. As far as we know, there are no statistics on the frequency of changes after information letters. If information letters have a proven effect despite their apparent lack of actual injunctions or follow-up from IMY, it should be incumbent on IMY to show that the effect exists. This has not been demonstrated by IMY, and thus it must be concluded that the lack of actions or orders to change behaviour as a result of the information letter also leads to a lack of actions and lack of changed behaviour by the designated controller.

45. IMY and the Administrative Court consider that, if the information letter is not effective, the complainant is free to complain again. According to IMY's previous practice, such a situation would possibly put a controller in bad faith regarding their obligations under the regulatory framework. This creates a theoretical obligation for the authority to investigate repeated complaints about an infringement. Such a procedure puts the onus on the individual to

[21] See attached information letter from IMY (Annex 3)

[22] See CUP-II-Safeguards-for-handling-complaints-termination-and-termination-with-letter-page 5 (Annex 5)

[23] See the Advocate General's Opinion in Case C-768/21, paragraph 77.

monitor and enforce the application of the GDPR, which according to the legal text is the task of the IMY. It is unclear to the complainant where it is stated that this task can be delegated to the data subject.

46. IMY has referred to internal guidance from the European Data Protection Board (EDPB) to support the use of information letters. The members of the EDPB are the supervisory authorities of the Member States, and IMY is thus a co-author of the documents produced by the EDPB. The role of the EDPB is to work towards a uniform application of the GDPR. Guidelines on the application of Article 58(1) and (2) are one of the statutory means the EDPB has for this uniformity work.

47. It therefore appears somewhat mysterious that the Administrative Court unreservedly states that the guidelines are not binding in the application of the law by the authoring authority. This contrasts with the Administrative Court's statement in Case No 13539-23 that the guidance *"is not legally binding but can be used as an aid in the interpretation of the GDPR."*[24]

48. The guidelines in question state in line with the applicable law of the Court of Justice of the European Union that an investigation undertaken by the authority must act with due diligence and investigate all complaints. Therefore, as an interpretative aid of the GDPR, in the light of the applicable law, the guideline cannot lead to any other conclusion than that IMY needs to investigate complaints. The fact that the guideline is not binding does not change this fact, as it is also clear from the legal text and case law.[25]

49. The issue of choice of remedy following a complaint has been highlighted by the Advocate General in his Opinion in Case C-768/21 where he describes that the complaint mechanism is designed "*as a mechanism capable of effectively protecting the rights and* interests *of data subjects*"[26] and that "*it is clear that the complaint procedure would be of no use if the supervisory authority could remain passive in the face of a legal situation which is contrary to Union law*".[27]

50. It follows that it should also be obvious that the complaint procedure is of no use if the supervisory authority is able to remain passive in the face of a legal situation that is potentially contrary to Union law. If the choice of measure to close a case does not lead to the legal situation being corrected to be in compliance with the GDPR, because the legal situation was never even identified, the choice of measure cannot be considered sufficient.

51. The conclusion of this reasoning should be that an information letter of the kind sent by IMY in this case can never be a sufficient measure to close a case arising from a complaint. This does not exclude that information letters can be a tool in an investigation of complaints, under Article 58(1).

52. Thus, what IMY is required to do is to first of all investigate the complaint in order to determine whether there is a breach of the GDPR, pursuant to Article 58(1) of the GDPR. If a breach of the GDPR is identified, it is incumbent on IMY to apply one or more corrective

[24] FR Case No 13539-23

[25] Internal EDPB Document 02/2021 on SAs duties in relation to alleged GDPR infringements, Annex 6, see paragraphs 38 and 64

[26] See the Advocate General's Opinion in Case C-768/21, paragraph 38.

[27] See the Advocate General's Opinion in Case C-768/21, paragraph 42.

measures pursuant to Article 58(2) of the GDPR, in order to bring personal data processing in line with the law. It is through these mechanisms that IMY can and shall ensure that complaints are an effective mechanism for individuals to have their rights to personal data guaranteed by the authority.

4.2. Precedential issues

53. The complainant perceives that the question of how EU law can be interpreted appears to be unclear to the Court. Therefore, the complainant requests guidance from the Administrative Court of Appeal regarding what weight can be given to Swedish preparatory works and supervisory tradition when interpreting EU regulations?

4.2.1. The importance of Swedish preparatory work and supervisory tradition

54. The Administrative Court has referred to Swedish preparatory works when interpreting the GDPR, which in turn refer to Swedish supervisory tradition for the interpretation of the regulation.[28] However, the GDPR is an EU regulation and thus did not arise from Swedish preparatory works or Swedish legal tradition.

55. It is clear from Schrems II and SCHUFA that the supervisory authority has an obligation to investigate complaints with due diligence. However, according to the Swedish preparatory work referred to by the Administrative Court, there is no such obligation. Thus, instead of interpreting the Swedish approach in the light of EU law, the Court seems to have interpreted EU law in the light of the Swedish approach.

56. In this context, the complainant again notes the following text from Reichel: *'As the EU is an autonomous legal order, its legal rules and concepts must also be interpreted autonomously, in the context of EU law*'.[29] The principle of autonomous interpretation of EU law has been established in the case law of the Court of Justice of the European Union in several judgements.[30] A consequence of this principle is that Swedish preparatory works and tradition should not be considered when interpreting EU law unless this is specifically provided for in EU law.

57. In the present case, the national provision is set out in Article 58(6) of the GDPR, which allows Member States to extend the powers of the supervisory authority by legislation. This has been done through Chapter 6 of the Data Protection Act.[31]

58. Since there seems to be uncertainty about the interpretation of EU law in relation to Swedish preparatory works and Swedish legal tradition, the complainant believes that it is important for future application of the law that the Court clarifies what importance should be given to government proposals and national supervisory tradition in the interpretation of EU law.

[28] See the Administrative Court's judgement on page 5 with reference to Bill 2017/18:105, pp. 164-165, where importance is attached to the Swedish supervisory tradition in the interpretation of the GDPR

[29] See Principles of Public Law, p. 66.

[30] See, inter alia, C-327/82 - Ekro, paragraphs 11 and 13 and C-53/81 - D.M. Levin, paragraph 11

[31] Act (2018:218) with supplementary provisions to the EU General Data Protection Regulation

4.3. Summary

59. IMY has an absolute obligation to investigate complaints due to the current case law of the European Court of Justice.

60. The investigation carried out needs to result in a conclusion by the authority as to whether or not the controller's behaviour actually constituted a infringement of the regulatory framework.

61. Following the detection of an infringement, the supervisory authority must take a corrective measure. The authority's discretion is limited to choosing which corrective measure to take, provided that the corrective measure leads to the correction of the infringement. It does not lay within the Authority's discretion not to take action.

62. An information letter of the kind sent by IMY to the region does not mean that IMY has identified whether a infringement has occurred or not, and an information letter is not a corrective measure.

63. Thus, IMY cannot be considered to have fulfilled its obligations to investigate complaints when it sends information letters according to the current practice of the Authority.

64. The Administrative Court's decision is therefore erroneous and the case must be referred back to the Authority for further processing.