Workshop 2. Data protection, incentives and dimensions of the copyright infrastructure, 7 December 2020

Jari Råman, Office of the Data Protection Ombudsman:
Impact of the application of the Data Protection Regulation
(Translation of the transcript into English)

> *"Indeed, it is one of our legal duties to encourage introducing these codes of conduct in different kinds of fields, which is, indeed, one way to standardise procedures within different fields and make it easier to follow the legislation within different fields… [and] they can be created and bring them to the monitoring authority for approval."*

I was asked to tell you briefly about what different options there are to get a statement from the Office of the Data Protection Ombudsman in case there's uncertainty as to how the act should be interpreted. I will not go into detail regarding the opening of artwork and author data, rather I will go over our tasks as to how one could get statements on the interpretation from the Office of the Data Protection Ombudsman and, possibly, European Data Protection Board. So I have worked as an assistant data protection ombudsman for one and a half years at the Office of the Data Protection Ombudsman, and throughout my stay here we have been going through a historical change: we're always on the verge of something new, and our most recent reform was that Reijo Aarnio who has been the head of our office for 23 years retired and that a new ombudsman started at the beginning of November, so the work has been extremely interesting and extremely challenging that often gives one the opportunity to skip from one subject matter to another, so my daily work, too, has practically more to do with security and administration of justice authorities, but one has to become something of a chameleon and skip smoothly from one area of expertise to another, because data protection has an impact on practically everything. Personal data is processed in all fields. There is no field that data protection would have no impact on. In a nutshell, the purpose of the Office of the Data Protection Ombudsman is to secure people's rights and liberties in processing of personal data, but of course, we also try to advance data protection on a broader level, for it's a success factor not only for private people – providing them with better personal data protection, and governing their own data – but also for companies, for it's a competitive advantage that also gives way to responsible operations, and opening data, of course, always advances competition. The organisation of the Office of the Data Protection Ombudsman has been reformed during the past year, and this year, there will be some small reforms. In practice, the way we have been organised is that we have three ombudsmen: data protection ombudsman Anu Talus, then I as one assistant data protection ombudsman, the third assistant data protection ombudsman position is currently unfilled, so I hope we get the third ombudsman early next year. We also have customer-service groups that are divided so that group number one, led by ombudsman Anu Talus, is mainly about issues related to the private sector, so the operations we're discussing now, and also border-crossing issues that have an impact outside of Finnish borders, within the EU. Then there's customer-service group number two, in which the position of ombudsman is currently unfilled, which is about public-sector issues, as well as national-level issues

that have to do with special national legislation. Then there's customer-service group number three, led by me, which includes criminal issues, authorities working under the Data Protection Act, so the field of administration of justice and security authorities. Indeed, in our organisation, we have the opportunity to deciding on administrative sanction fees, for which we have a sanction board, who have already made the first five solutions this year, deciding on administrative sanction fees. The sanction board consists of us ombudsmen, and now that we're one ombudsman short, we have a substitution arrangement.

In September this year, we founded a board of experts which we will discuss briefly later on, what it does and what opportunities one has to get statements through them. Here is a slide that's crammed with all the statutory tasks that we have. Of course, we do lots of other things as well, but here are the tasks that our office does according to the law. I'll point out only two things: we make statements on legislative and administrative reforms that are related to people's rights and liberties, the protection of liberties. And this is precisely about statement given to public administration, so different kinds of legislative drafting projects in particular ask us for statements in the drafting stage, and naturally, in the committee stage, there is a separate legislation to ask us for statements, but also on administrative reforms led by ministries in particular, we're a so-called internal consultant for the government when it comes to these matters, so it is one our duties to guide and support ministries if need be, also in administrative reforms. I guess this is the first path through which one could get initiate this thing at our office, in case it's a reform or project under the Ministry of Justice to advance these operations, so this could be one way to get a statement from our office.

Maybe it's a good idea to elaborate a bit on the background: in earlier times, the duty of the Office of the Data Protection Ombudsman was, in fact, only to give guidance and counselling – we had basically no authority for anything else; you could also bring matters for the old Data Protection Board to solve if need be, in order to make binding decisions, but other than that, mainly, the Office of the Data Protection Ombudsman only gave guidance and counselling. Now, in 2018 they began the application of Data Protection Act, so this changed in a radical way. So when we became a supervising authority who had strong authority to revise things, we no more had the same opportunity to give individual registrars guidance and counselling, in individual cases, but rather general raising of awareness, a sort of educational work in data protection. Therefore, our tasks also were changed in many respects in that we cannot make binding statements, barring certain definite cases, so our means of giving binding statements are very limited. One of these is, like I mentioned, supporting government, and another is advance audition of high-risk processing which is precisely a procedure imposed on registrars as to how one can get a binding statement from us when the processing likely causes (impact on) rights and liberties. And naturally, data protection ombudsmen also represent Finland in the European Data Protection Board which is a cooperation body of European supervising authorities where it is ensured that the act is applied in a uniform way

all across Europe, and that's largely where they make the instructions, recommendations, procedures for processing personal data, so the guidance given in Europe is mainly prepared by the European Data Protection Board and made in cooperation by the supervising authorities there. (So the Finnish data protection ombudsman, too), has much more limited chances to give even general guidance in individual cases, for it is mainly done in a uniform way so that all supervising authorities act in similar ways. The European Data Protection Board has made quite a lot of these instructions. So that's where one can get an extensive amount of instructions for different kinds of situations, but this is the radical difference from the earlier operational model in Finland, in which it was precisely the data protection ombudsman who made different kinds of instructions and guides, and now all this has been delegated to the European Data Protection Board. We have to work within the limits set by the European cooperation. Naturally, as is the case with authorities normally, we set goals for a couple of years' period, and out of our recent goals, I guess it is good to highlight the central one, so it is one of our 2021-2024 goals to make sure that data protection would be realised in administrative reform and digitalisation projects, and this is one of our main themes that we're trying to advance.

Not knowing the background and whether this is actually a project by the Ministry of Education and Culture or whether it's supposed to become such a project, whether that's the correct channel to bring this for the data protection ombudsman to process, so let's discuss briefly the other channel, which is a means for registrars to get a binding statement. The background is that registrars must – before they start processing personal data – always assess the risks related to the processing of personal data. Impact assessment is a mechanism in the Data Protection Act that seeks to help in following the demands of data protection legislation and documenting it. So one must identify what data one is processing, for what purposes, what risks it may have with regard to the rights and liberties, and seek to minimise the risks related to that. The assessment always has to be continuous, but in certain situations, act-following, a more rigid risk-assessment mechanism, so impact assessment has been made obligatory when it presents a high risk to people's rights and liberties, and there are some definite situations in which one has to do it, so when you're using new technology, processing data related to criminal sentences or special personal data groups, such as health data, political opinions, freedom of religion, sexual orientation, processing personal properties with the aid of automatic data processing, systematically, and with automatic decision-making or supervising (a general area) in a systematic and large-scale manner – in these cases particularly one must do impact assessment. Of course, there are some other field-specific situations, but I don't think they're relevant here.

Once finished with the impact assessment, which is kind of an obligatory preliminary stage before one can send us a prior consultation request, and once it has been assessed that it's not possible to minimise all the pertaining risks on your own, once can consult us in advance. Due to prior consultation, we give the registrar or the

processing party written instructions that you have to follow in order to lower the risk and to follow the Data Protection Act. You must follow the instructions before you start processing personal data. I must stress that this is the duty of the registrar, to identify who the registrar is, who has to do the impact assessment and get the prior consultation started. It is only the registrar who can approach us through this channel. What's more, I understand there has been discussion on our board of experts and whether it would be possible to get a statement from them, and I'll briefly describe their tasks. Like I said, in September, we set up a board of experts for the first time, and they give statements on significant issues pertaining to application of legislation regarding personal data processing – requested by the Data Protection Ombudsman. So it's precisely an organ of experts that relies on the activities of the Office of the Data Protection Ombudsman that only gives statements when requested by the ombudsman. The members and the chairperson have been chosen, and they meet up when invited by the chairperson, associate professor Riikka Koulu. Every member is an expert external to the Office of the Data Protection Ombudsman. The board has no formal decision-making power: it purely gives statements that support the activities of the Office of the Data Protection Ombudsman – on specific areas of expertise that have been requested. Like I already mentioned earlier, there is a significant difference between this one and the earlier Data Protection Board that was active from the end of the 1990s until 2018 and that was precisely the only organ making binding decisions when it came to processing of personal data. Those operations have, indeed, been discontinued, and there is no more a board in existence with such authority, for almost all their duties were delegated to the Office of the Data Protection Ombudsman. The board of experts' role now is only to bring in broader expertise from relevant fields, which enables having discussions with businesspeople, academics, and the third sector on issues that the Office of the Data Protection Ombudsman has to solve. I think that concludes my brief description of our duties through which one could get statements from us. Thank you, I am open to questions.

S: Thank you very much for the presentation, Jari Råman; I'm sure this helped us to understand a bit better what the Office of the Data Protection Ombudsman and their role currently is, for it has changed significantly from what it used to be, and on the other hand, what kinds of options there are to get an assessment of the impact of the data protection legislation on the opening of data. Currently, no clear decisions have been made as to how one should go about getting such a statement. But the starting point in the end is that the registrars, as well as the holders of the artwork and author data, and in most cases, collective management organisations, like any other companies, they manage personal data in accordance with the Data Protection Act in the best way possible, but the question is indeed how it is linked with the data infrastructure development once one starts sharing data more broadly or opening up interfaces, so to speak, for reuse of data, and this – in turn – is linked with the legislation: data infrastructures are developed in the EU, and one of the basic elements of the EU data economy is that data can be shared and that one can get benefits from it and make the EU grow with it. So in one sense, I guess there

are different kinds of open channels here currently. I'd like to provide our participants with an opportunity to ask Jari Råman questions pertaining to the subject. You can post them in the chat, or whoever has the courage to unmute their microphone and ask a question. At least it seems to me that… OK, Maria Rehbinder, go ahead.

S: Hey, Maria Rehbinder from Aalto University. Somehow I got the sense that a code of conduct created by, for example, European copyright operators would sound like a good idea, for the way I see it, this is not an issue that can be solved on a national level, rather there is a need for a pan-European code of conduct. Myself, I have been working on a research data code of conduct, and I know that creating a code of conduct is not exactly easy, but how would you comment on this? Could you tell me which codes of conduct have already been approved on the EU level?

S: Please go ahead, Jari, if you're able to answer these questions, thank you.

S: Yes, thank you for the question. Indeed, it is one of our legal duties to encourage introducing these codes of conduct in different kinds of fields, which is, indeed, one way to standardise procedures within different fields and make it easier to follow the legislation within different fields. Unfortunately, since no codes of conduct are created in my area of expertise, I don't know yet what kinds of codes of conduct have been created in general. In Finland, they're all still being prepared, so to speak, so there is no official code of conduct on that scale that would have been approved of. But indeed, they can be created and bring them to the monitoring authority for approval; when it comes to the code of conduct, they are also brought to the European Data Protection Board where it is reviewed in cooperation with our colleagues in other countries to decide whether it could be approved of; it is also possible to take these things forward nationally through uniform processing in the Data Protection Board. Of course, when it comes to operations like this, if it's possible to create a pan-European code of conduct and introduce it that way, it's always better so to speak.

S: Thank you very much for this. Myself I also noticed the code of conduct on the slide, so the possibilities of that… of course, when developing the copyright infrastructure, what's central is precisely that the fields together and also independently create these good practices regarding copyright data. And that's, in a way, why the process has begun, but as to how these will be taken forward, that is the most important question and challenge here: how should one package them in such a way that they would proceed? And like Maria mentioned, research data has a nature entirely of its own, precisely… in the research field, the bibliographic data is processed differently from, say, copyright data in copyright organisations. Is any of the copyright organisation representatives interested in asking questions or commenting at this point? Ok… thank you at this point, if there are no more comments or questions to Jari Råman. Thank you very much for the presentation.