Decision of the European Data Protection Supervisor on five complaints submitted by several complainants against the Single Resolution Board, cases [redacted]

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU, and Regulation (EU) 2018/1725[1],

Has issued the following decision:

PART I
Proceedings

The EDPS received five complaints on 19, 26 and 28 October, and 5 December 2019 under Article 63(1) of Regulation (EU) 2018/1725 (the Regulation) against the Single Resolution Board (SRB) with the same allegations.

On 12 December 2019, the EDPS requested written comments from the controller on the complainants' allegations.

The SRB provided written comments to the EDPS on 17 January 2020.

The complainants were asked to comment on the controller's reply and provided the EDPS with that information on 6 and 18 February 2020 respectively.

In order to clarify certain aspects, the EDPS asked the Data Protection Officer (DPO) of the SRB to provide additional information about the data processing of the complainants by the SRB.

The DPO of the SRB provided those clarifications on 16 March 2020.

PART II
The facts

On 6 June 2017, the European Central Bank (ECB) decided that Banco Popular Español, S.A. (Banco Popular) was 'failing or likely to fail' and notified the SRB accordingly. The SRB and the Spanish National Resolution Authority (FROB) decided that the sale of the bank was in the public interest to protect all depositors of Banco Popular and ensure financial stability. The resolution scheme entered into force on the same day, following the endorsement by the European Commission.

On 7 June 2017, the SRB transferred all shares of Banco Popular to Banco Santander S.A (Banco Santander). Banco Popular continued to operate under normal business conditions as a solvent and liquid member of the Santander Group with immediate effect.

[1] OJ L 295, 21.11.2018.

On 18 March 2020, the SRB decided that no compensation was due to shareholders and creditors affected by the resolution of Banco Popular. It concluded that they would not have been better off under normal insolvency proceedings. The decision was based on the post-resolution valuation by an independent valuer (Deloitte), as well as on the analysis of comments received in the context of the 'right to be heard' process of Banco Popular's shareholders and creditors.

During the 'right to be heard' process, shareholders and creditors of Banco Popular were asked to first identify themselves (phase I), and then to comment on the bank's resolution (phase II). SRB could match the replies given by the data subjects in the two phases through an identifier given by the SRB via a link to the shareholders and creditors.

1. Allegations of the complainants

The complainants are shareholders and creditors of Banco Popular affected by the SRB resolution decision, who participated in the SRB 'right to be heard' process. The complainants allege that the SRB has transferred their personal data to two private companies (Deloitte and Banco Santander) without informing them. The complainants state that they became aware of that data transfer through a report written by the European Ombudsman, in the context of its investigation.

The complainants add that the data protection notice regarding the SRB's 'right to be heard' process did not mention any of the above private entities as recipients of their personal data and that the transfer of their personal data is unlawful. Some of the complainants allege that the transfer of their personal data exposes their legal strategy to the counterparts in their judicial claim[2]. Some of the complainants claim that they have an on-going dispute with Banco Santander and that they would have not provided certain information to the SRB had they known that the SRB would transfer it to Banco Santander and Deloitte.

2. Comments of the data controller

The SRB stated that it '... was required by Regulation (EU) No 806/2014 on the Single Resolution Mechanism to conduct a right to be heard procedure in the context of a bank resolution case and a related valuation, the so-called Valuation 3, of the concerned bank (...) phase I was dedicated to identify eligible participants and their legal representatives where applicable. The collection of personal data by the SRB from the participants was strictly limited to phase I of the procedure.

Any personal data as collected in phase I of the right to be heard process have been treated in accordance with the privacy statement. The potential recipients of such data were listed in the privacy statement and I [the Chair of SRB] confirm that personal data was not circulated beyond these recipients.

[2] Quoting one of the complainants: '*La forma de proceder en este caso de cara al derecho de audiencia teniendo en cuenta las demandas al organismo en los tribunales puede ser una treta para preparar sus defensas lo cual iría en contra del propio derecho de audiencia que supone un derecho de los afectados (...)*'. Our translation: 'The procedure in this case for the right to be heard taking into account the appeals to the organisation in the courts may be a trick to prepare their defences, which would go against the very right to be heard that implies a right of the persons concerned (...)'.

In the scope of phase II, eligible participants or their legal representatives had the opportunity to provide comments on the valuation of the bank and to respond to a set of related questions in an anonymous manner.

Eligible participants or their legal representatives were not requested to provide any personal data in the meaning of Art. 3 (1) of Regulation (EU) 2018/1725 in phase II.

In this sense, the views and comments expressed in this second phase are not considered 'personal data' in the sense of Article 3(1) of Regulation (EU) 2018/1725 and do not fall under the application of the privacy statement.

Furthermore (...), please note that the SRB has put in place all the necessary safeguards to collect and treat those views and comments separately from phase I, i.e. processing them on a completely anonymous basis.'

The DPO of the SRB added that '[f]ollowing thorough, careful and extensive internal review at the level of the SRB - restricted to a limited number of staff and under strict confidentiality - any relevant comment relating to the report by the independent valuer was forwarded to the latter, requesting to obtain its views on those comments and how they could affect the conclusions of its report. This communication of comments was made solely on the basis of the second phase, excluding the possibility for Deloitte to access any data submitted in the first phase. Furthermore, it was ensured that any review by the SRB of comments collected in the second phase was made on a completely anonymised basis by separating phase one and two data for reviewers.'

The SRB alleges that 'the views and comments expressed in the second phase are not considered «personal data» in the sense of Article 3(1) of Regulation (EU) 2018/1725 and do not fall under the application of the privacy statement. Indeed, these views and comments relate to the preliminary decision of the SRB and the underlying Valuation 3 report and as such do not relate to the specific situation of any particular affected shareholder or creditor.'

PART III
Legal analysis

1. Admissibility of the complaint

The complainants have the right to lodge a complaint with the EDPS if they consider that the processing of personal data relating to them infringes the Regulation, according to Article 63(1) of the Regulation. The complaints are therefore admissible.

The EDPS will only address the data protection issues, i.e. whether i) the processing operations involve personal data, and ii) whether Deloitte is a recipient and data subjects should have been informed via the data protection notice (Article15(1)(d) of the Regulation).

The possible data transfer between Banco Popular and Banco Santander falls outside the field of competence of the EDPS since our remit is limited to the data processing operations carried out by European Union institutions and bodies.[3]

[3] Article 52 (3) of the Regulation: The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal

The SRB consultation of Banco Santander also falls outside the EDPS' competence and will not be analysed in the present decision.

2. Assessment of the processing operations involved in the SRB right to be heard process

The SRB processed personal data through the collection of information submitted by the data subjects affected by the resolution of Banco Popular, or by their legal representatives, for the purpose of participating in the right to be heard process.

To the EDPS understanding, the two-phase approach of the right to be heard process adopted by the SRB was intended to pre-select the eligible participants to express their views about the Banco Popular resolution and related valuation and to ensure that the answers could be separated from the identification of the participants. During the second phase, only verified affected shareholders and creditors could express in writing their views and reasoning on the SRB's preliminary decision that compensation would not need to be granted.

2.1 Personal data collected

According to the definition in Article 3(1) of the Regulation, personal data means any information relating to an identified or identifiable natural person. The same Article defines an identifiable person as one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person.

The personal data collected in **phase I** were:
- **for the affected persons**: first and last name, date of birth, address, email address. In addition, a copy of the passport, national identity card or driving licence, as a proof of identity, and a proof of ownership of a Banco Popular instrument affected by the resolution scheme, were requested;

-**for the representatives**: first and last name, private or professional address and relationship with the affected person.

The data protection notice indicated the above categories of personal data that were collected as well as the purpose of the processing in question, namely : ' identify and verify that persons that wish to exercise the right to be heard are directly affected parties (...) and are, as a consequence, entitled to a right to be heard'.

The data collected in **phase II** referred to the views and comments written by the eligible participants of phase I. The SRB sent a hyperlink to those participants who could reply to five questions through an online-form. At that stage, the participants presented their arguments and legal considerations about Banco Popular's resolution and valuation procedures.

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data by a Union institution or body, and for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data.

The data collected in phase I were not visible in phase II, but the SRB could relate the answers between the two phases. In other words, SRB could link to each data subject their answers given in phases I and II, through an identifier attributed by the first to the latter as mentioned above in the facts.

The Court of Justice of the European Union (CJEU) has ruled several times on the definition of personal data, stating that the answers in a test[4], as well as IP addresses are personal data[5] . Both court cases are particularly important in the analysis of the facts at hand.

In the Nowak case, the CJEU stated that '[t]he use of the expression 'any information' in the definition of the concept of 'personal data' (...) reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it 'relates' to the data subject'.

In the light of this judgment, the data subjects' replies in phase II of the right to be heard process must be considered personal data. Their personal opinions on the resolution and valuation of Banco Popular show their logic and reasoning, even if the replies do not specifically mention their name or refer to the exact amount lost.

The identifier attributed by the SRB to the data subjects, which enabled to link the information provided in phases I and II, is also considered to be personal data.

2.2 Data transfer from the SRB to Deloitte

The SRB sent the replies in phase II to Deloitte for their independent assessment. The replies were not aggregated. The SRB simply transferred to Deloitte the participants' replies, in total or partially, in the same form as the participants had submitted them using the SRB online form, after checking that such answers did not include the names or contact details of the data subjects. However, as stated in section 2.1 above, these replies contained personal data of the participants in the right to be heard process (their views and opinions). By providing their reasoning and opinions, the complainants were providing their personal data. This data could be used to re-identify them by combining that information with other personal data. For example, if the complainants bring actions in court and use the exact same allegations and opinions they used in the replies sent in phase II of the 'right to be heard' process SRB, Deloitte could re-identify their answers in that phase (even without direct access to the complainants' answers in phase I).

As stated by the CJEU in paragraph 43 of the Breyer case, '... for information to be treated as 'personal data' (...) it is not required that all the information enabling the identification of the data subject must be in the hands of one person'.

Therefore, even if Deloitte did not know the names of the participants in the right to be heard process, it processed personal data when analysing the replies in phase II.

[4] CJEU Case C-434/16 (Peter Nowak v Data Protection Commissioner) - Judgment of the Court (Second Chamber) of 20 December 2017.
[5] CJEU Case C-582/14 (Patrick Breyer v Bundesrepublik Deutschland) - Judgment of the Court (Second Chamber) of 19 October 2016.

In addition, the complainants raise conflicts of interest regarding the intervention of Deloitte in Banco Popular's valuation procedure, and claim that they might bring court cases against Santander and Deloitte. Considering the above, their replies in phase II (which contain their opinions and legal reasoning) could be matched with their court proceedings, allowing the re-identification of the data subjects by Deloitte.

2.3 Alleged violation of Article 15 of the Regulation - right to information

The data protection notice was made available in English and Spanish immediately at the beginning of phase I of the right to be heard process in the registration webpage. This means that at the time of the registration, when data subjects were requested to submit personal information, they were given the data protection notice.

Regarding the terms of the processing operations, the data protection notice clearly stated that '[y]our personal data in the meaning of Regulation will not be subject to any publication. However, the personal views and comments you may provide during the hearing procedure might be subject to publication in an anonymised and as the case may be aggregated format. The latter will be subject to inclusion into the motivation of the final SRB decision to be taken after the hearing procedure.'

Therefore, the data subjects were informed of the possibility of their replies in phase II being made public in an anonymous way or in an aggregated form. The anonymisation mentioned in the SRB data protection notice, was not only based on the separation between the data collection in phase I and in phase II, but also on the individual assessment done by each of the SRB staff's answers. The purpose was to ensure that personal data, such as names and contact details, were not disclosed by the participants in their replies.

The SRB staff members thus double-checked the answers of the participants in the right to be heard process before sending them to Deloitte (the valuer), in order to ensure that their replies in the second stage did not include personal data that would directly identify them.

However, the scope of personal data - in line with Article 3(1) of the Regulation and the interpretation given by the CJEU - comprehends the views and comments of the data subjects. Their exact replies, even without the names and contact details collected in phase I of the right to be heard process, are to be considered personal data if they allow the re-identification of the data subjects. This makes the respondents identifiable, notwithstanding the SRB's efforts to avoid transferring personal data.

, the replies in phase II were not duly anonymised. Anonymisation means that there is no possibility of re-identifying the data subjects. As already seen, it is possible to re-identify the complainants via their non-aggregated replies in phase II in the right to be heard process, especially if there are court cases against Deloitte based on the same legal arguments. In this scenario, Deloitte would be able to compare the court allegations with the replies of the respondents in phase II.

Regardless of the fairness of disclosing potential legal strategies to Deloitte - which is outside the scope of the EDPS' competence and will therefore not be part of this analysis - the possibility that Deloitte may re-identify the data subjects cannot be excluded.

The SRB stated that not all the comments of the complainants were considered relevant and that only some were sent to Deloitte. However, the risk of re-identification still exists.

The right to information under Article 15(1)(d) of the Regulation stipulates that data subjects at the time of their data collection should be informed of certain aspects of the processing operation, including the recipients or categories of recipients of personal data, if any.

The SRB data protection notice related to the right to be heard processing operation does not list Deloitte as a recipient in the data protection notice, since in SRB's view, no personal data would be transferred to them. However, for the reasons explained above, the EDPS does not share this view and its narrow interpretation of personal data.

Consequently, Deloitte was a recipient of the data subjects' personal data and the SRB should therefore have mentioned Deloitte as a potential recipient in data protection notice. By providing this information, the SRB would have ensured a fair processing operation in accordance with Article 4(1)(a) and Article 15 of the Regulation, and the complainants could have made an informed decision as to which information they wanted to disclose to Deloitte.

PART IV
Conclusion

In light of the above, the EDPS concludes that there was a violation of Article 15 of the Regulation, since the SRB did not inform the complainants in the data protection notice about the possibility of their personal data being transferred to Deloitte.

The EDPS consequently reprimands the SRB for this violation under Article 58(2)(b) of the Regulation.

Done at Brussels,

Wojciech Rafal WIEWIÓROWSKI

Revised decision of the European Data Protection Supervisor following the Single Resolution Board's request for review of the EDPS decision of 24 June 2020, on five complaints submitted by several complainants (cases [redacted])

The EDPS,

Having regard to Article 8 of the Charter of Fundamental Rights of the EU, Article 16 TFEU, Regulation (EU) 2018/1725, and Article 18 of the EDPS Rules of Procedure,

Has issued the following revised decision:

PART I – Facts and proceedings

1. The five complaints

The European Data Protection Supervisor (the EDPS) received five complaints on 19, 26 and 28 October, and 5 December 2019 under Article 63(1) of Regulation (EU) 2018/1725 (the Regulation) against the Single Resolution Board (SRB).[1]

These complaints had been lodged in the context of the SRB's conduct of a right to be heard process in preparation for the decision whether to compensate affected shareholders and creditors pursuant to Article 76(1)(e) of Regulation (EU) No 806/20143 in the case of the resolution of Banco Popular Español ("Banco Popular").

On 6 June 2017, the European Central Bank decided that Banco Popular Español, S.A. was 'failing or likely to fail' and notified the SRB accordingly. The SRB and the Spanish National Resolution Authority decided that the sale of the bank was in the public interest to protect all depositors of Banco Popular and ensure financial stability. The resolution scheme entered into force on the same day, following the endorsement by the European Commission. On 7 June 2017, the SRB transferred all the shares of Banco Popular to Banco Santander S.A (Banco Santander). Banco Popular continued to operate under normal business conditions as a solvent and liquid member of the Santander Group with immediate effect.

The SRB set up a 'right to be heard' process ("RTBH process"), in which shareholders and creditors of Banco Popular were asked to first identify themselves (phase I or registration phase), and then to comment on the bank's resolution answering a set of predefined questions (phase II or consultation phase). The registration phase took place between 6 August 2018 and 14 September 2018. The consultation phase took place between 6 and 26 November 2018.

An independent valuer, Deloitte, assisted the SRB in its decision-making process.

[1] Cases [redacted] submitted on 19, 26 and 28 October, and 5 December 2019, respectively.

The SRB could match the replies given by the complainants in the two phases through an identifier given by the SRB to each of the shareholders and creditors who participated in the RTBH process. As explained by the SRB '[i]n order to do so, the SRB sent out individual links to the e-mail addresses of the verified persons, by which they could access and submit their reply one time only.'[2]

The SRB informed the participants about the processing of personal data in the context of the RTBH process using a data protection notice, made available in both English and Spanish during the registration phase.[3] The forms used by the SRB to collect the participants' comments (annex 3 and 4 to the SRB's reply of 6 April 2020) did not, however, include any data protection information. The SRB also published information on the RTBH process on their website.[4] The webpage does not inform about the transmission of any data, personal or non-personal, to any third party. Regarding the review of the comments sent by the participants, the webpage explains[5] that the SRB will perform the review. [6]

Regarding the terms of the processing operations, the data protection notice of the registration phase stated that '[y]our personal data in the meaning of the Regulation will not be subject to any publication. However, the personal views and comments you may provide during the hearing procedure might be subject to publication in an anonymised and as the case may be aggregated format. The latter will be subject to inclusion into the motivation of the final SRB decision to be taken after the hearing procedure.' The complainants were thus informed of the possibility of their replies in phase II being made public in an anonymous way and possibly in an aggregated form.

The data protection notice did not refer to Deloitte or any other private company in the section on "recipients". The only recipient external to the SRB explicitly mentioned in the data protection notice was the EU Survey support staff.[7]

In their complaints to the EDPS, the complainants alleged a violation of the right to information, insofar as they were not informed by the SRB that their personal data, i.e. their comments on the bank's resolution, were going to be transmitted to Deloitte and Banco Santander.

On 12 December 2019, the EDPS requested written comments from the SRB on the complainants' allegations.

The SRB provided written comments to the EDPS on 17 January 2020. In its reply of 17 January 2020, the SRB considered that:

- 'The collection of personal data by the SRB from the participants was strictly limited to phase I of the procedure' and

[2] See the SRB's reply to the EDPS of 6 April 2020.
[3] The form included a reference to the data protection notice and indicated that it was available under 'Useful links'.
[4] https://srb.europa.eu/en/content/banco-popular-right-be-heard.
[5] 'Following the closure of the hearing phase on Monday 26 November 2018 at 12.00 CET, the SRB is carefully reviewing all comments received and will take them into account as appropriate in order to take its final decision on whether compensation is payable to affected Shareholders and Creditors.'
[6] https://srb.europa.eu/en/content/banco-popular-right-be-heard, last checked on 11 November 2020.
[7] "EU Survey" is the tool the SRB used to collect to the data in both phases of the RTBH process.

- '…the views and comments expressed in this second phase are not considered 'personal data' in the sense of Article 3(1) of Regulation (EU) 2018/1725 and do not fall under the application of the privacy statement.'
- '…the SRB has put in place all the necessary safeguards to collect and treat those views and comments separately from phase I, i.e. processing them on a completely anonymous basis.'

The complainants were asked to comment on the controller's reply and provided the EDPS with their comments on 6 and 18 February 2020.[8]

In order to clarify certain aspects, the EDPS asked the Data Protection Officer (DPO) of the SRB to provide additional information about the processing of the complainants' data by the SRB.

The DPO of the SRB provided those clarifications on 16 March 2020.

On 18 March 2020, the SRB decided that no compensation was due to shareholders and creditors affected by the resolution of Banco Popular. It concluded that they would not have been better off under normal insolvency proceedings. The decision was based on the post-resolution valuation by an independent valuer (Deloitte), as well as on the analysis of comments received in the context of the RTBH process of Banco Popular's shareholders and creditors.

At the EDPS' request, the SRB provided more details on the RTBH process and the processing of the data collected in phase II. In their letter of 6 April 2020, the SRB reiterated and further explained that:

- During phase II 'no personal information was requested, neither explicitly, nor implicitly.'
- 'Following thorough, careful and extensive internal review at the level of the SRB - restricted to a limited number of staff and under strict confidentiality - any relevant comment relating to the report by the independent valuer was forwarded to the latter, requesting to obtain its views on those comments and how they could affect the conclusions of its report'.
- The SRB had not sent any of the data collected during phase I to Deloitte. This separation was designed so that 'any review by SRB of comments collected in the second phase was made on a completely anonymised basis'.

2. The EDPS Decision of 24 June 2020

On 24 June 2020, the EDPS adopted his decision (the Decision) in the abovementioned complaint cases. In the Decision, the EDPS concluded that there had been a violation of Article 15 of the Regulation, since the SRB did not inform the complainants about the possibility of their personal data being transmitted to an external consultant, Deloitte.[9] The EDPS consequently reprimanded the SRB for this violation under Article 58(2)(b) of the Regulation.

[8] The complainants in cases [redacted]

[9] As to the transmission of personal data from the SRB to Banco Santander, which was also part of the subject matter of the complaints, the EDPS found that it referred to the Valuation 3 report. That report is a public document that does not contain any personal data. Therefore, the EDPS considered that no such transmission of personal data took place.

3. The SRB's request for review

By letter dated 23 July 2020, the SRB requested a review of the Decision.

The SRB's request for review is based on the grounds that:

(i) 'the EDPS has failed and/or refused to have due regard to the safeguards introduced by the SRB in the design and operation of the RTBH Process by which the comments including those of the Complainants were anonymised and grouped'; and

(ii) 'the EDPS has erred in its interpretation of the jurisprudence of the Court of Justice in the cited case of *Novak* [sic] as regards the possibility of the Complainants being re-identified from the material transferred to Deloitte by reference to hypothetical litigation between the Complainants and Deloitte'[10].

In support of its request for review of the Decision, the SRB provided a very detailed description of the filtering and review of comments submitted in phase II of the RTBH process, and other relevant information that it had not provided to the EDPS before the latter issued his Decision.

The SRB claims that one of the aims of the division into two phases of the RTBH process was to limit the processing of personal data to the minimum so that personal data would only be processed during the registration phase (phase I) of the process.[11]

According to the SRB, at the end of phase I, there were 3.650 valid registered eligible parties of which only 2.856 sent replies during phase II. These replies accounted for 23.831 free text comments that were processed as follows:

1. Automated filtering of the submitted comments through two different algorithms in order to identify completely identical comments, firstly based on the nature of the characters used, and then removing the spacing between, before, and after them.
2. Filtering of similar, although not identical comments. Many claimants used the same internet sources for their comments. This step aimed at identifying equivalent comments.

   As a result of these two steps, the SRB found that 20.101 out of the 23.831 comments were identical or equivalent.
3. The non-duplicated comments were first classified according to the question to which they replied.
4. The SRB then developed a list of 15 themes and assigned one or more of them to each of the remaining comments. The theme would determine which comments would be analysed by the SRB and which would be analysed by Deloitte. Once classified, the SRB assessed the relevance (its estimated capacity to influence the SRB decision[12]) of each comment and assigned to each relevant comment a theme.
5. Finally, the SRB assessed the relevance of the classified comments.

[10] See para. 8 of the request for review.
[11] See para. 18 of the request for review.
[12] See para. 31 of the request for review

The outcome of this process were 3.370 comments. The SRB put forward that it was not aware that any of these comment included any personal data[13], and that it only shared 1.104 of them with Deloitte.

In the request for review, the SRB clarified that following the careful filtering of comments in the steps described, '... only a very small number of comments made by the identified complainants[14] were - partially - transferred on an individual basis to Deloitte at all. Those transferred parts were taken from publicly available sources[15] making it impossible to link this comment to an individual participant.'[16]

The SRB therefore held the view that the information on the complainants shared with Deloitte did not constitute personal data, since it cannot be considered as 'independent of the complainant[s]' concerned or as 'so unique that it could re-identify [them]'. As a consequence, the SRB would not have infringed Article 15(1)(d) of the Regulation.

On 24 July 2020, the complainants were asked to comment on the SRB's request for review of the Decision.

The complainants submitted their comments on 25 and 27 July 2020, as well as on 25, 27 and 28 August 2020.[17]

The complainants reiterated that their replies in phase II of the RTBH process constitute personal data. Furthermore, they believed that the SRB's allegations that it is not likely that Deloitte is able to re-identify them, lacked 'sufficient motivation'. The complainants challenged both the SRB's view that the comments they submitted are not theirs, and the argument that because the views expressed in their comments can be found on the internet, they cannot be used to re-identify them.

In addition, three of the complainants[18] alleged that the SRB did not provide sufficiently detailed information about the anonymisation process and techniques. Therefore, these complainants believe that the SRB did not comply with the data protection by design principle, and that the anonymisation process was not duly implemented. The complainants also considered that there was a reasonable likelihood of Deloitte re-identifying them by the information relating to phase II of the RTBH process that the SRB transmitted to Deloitte, contrary to the arguments brought forward by the SRB.[19]

The complainants[20] also reiterated that they were not informed about the transmission of their personal data to external companies and consequently were unable to provide their consent for the transmission of their personal data to Deloitte.

The EDPS requested additional information from the SRB on 18 September 2020. After having requested an extension of the deadline, the SRB replied to the EDPS on 2 October 2020.

Since the SRB's reply did not cover the whole the EDPS' request for information deemed necessary to finalise his revision, the EDPS sent an additional information request on 15

[13] See para. 29 of the request for review
[14] Four out of 28 comments in total.
[15] Mainly from www.rankia.com and the website of a Spanish law firm.
[16] See para. 37 of the request for review.
[17] The complainants in cases [redacted]
[18] The complainants in cases [redacted]
[19] The complainants in cases [redacted]
[20] The complainants in cases [redacted]

October 2020. The SRB replied to the EDPS additional request for information on 28 October 2020.

In its reply of 28 October 2020, the SRB stated that 'Deloitte was not in a position to access any personal data submitted in the Registration Phase as they were only provided with **the unique alpha-numeric code and not with the underlying hard data linked to that code**. This code was developed for audit purposes so that the SRB could demonstrate to the EU Courts, if so required, how each comment was handled and assessed and thus taken into account for the purposes of adopting the Valuation 3 Decision. Hence, it was impossible for Deloitte to trace the identity of any party using this code by reference to the hard data provided by the eligible parties as part of the Registration phase (which was at all times retained by the SRB).' (*emphasis added*).[21]

PART II – Legal analysis

1. Admissibility of the request for review

The EDPS considers the SRB's request for review admissible.

In accordance with Article 18 of the EDPS Rules of Procedure[22], both the complainant and the institution concerned may request that the EDPS review its decision. Such a request shall be made within one month of the decision. The EDPS shall review its decision where the complainant or institution advances new factual evidence or legal arguments.

The SRB's request was submitted within the deadline of one month and is therefore admissible in this respect.

In addition, the SRB put forward additional substantial elements in the request for review of the Decision - such as the fact that the complainants' replies in the free text fields of the form in phase II were copied from public sources and were therefore not a product of their own reflection - that it had not provided to the EDPS before. The SRB also provided more details regarding the safeguards put in place to try to anonymise the comments submitted, i.e. to ensure that individuals from the registration phase would not be directly identifiable in the consultation phase.

The EDPS did not consider these elements in the Decision, since he had not been made aware of them. This information was relevant for the EDPS' assessment, but the SRB did not convey this information, although it had it in its possession at the time of the EDPS' requests for information.

Due to the substantial nature of these new elements, and their direct relevance for the accuracy and completeness of the EDPS' assessment, the EDPS decided that a revision of its Decision was necessary. The request for review is therefore admissible.

[21] See the SRB's request for review paragraph 23.
[22] The new EDPS Rules of Procedure entered into force on 26 June 2020. Considering that the SRB's request for review of the Decision was submitted after the entry into force of the new Rules of Procedure, the latter are applicable to the request for review, although the Decision was issued before that date. The Rules of Procedure are available at https://edps.europa.eu/sites/edp/files/publication/20-06-26_edps_rules_of_procedure_en.pdf.

2. Findings

In light of the new elements provided by the SRB in its request for review of the Decision and in its subsequent replies to EDPS' requests for information, as well as the comments submitted by the complainants, the EDPS has made the following findings:

2.1. The comments provided by the data subjects in the RTBH process phase II were personal data

As described in part I, section 1, the SRB did not consider that the comments collected from the participants in the RTBH process were personal data. It follows from the data protection notice provided in the course of the registration phase in August and September 2018 that the SRB did not consider the collection of comments in the consultation phase as a processing of personal data subject to the Regulation.

In the Decision - based on the information available at the time and in the light of the Nowak case and the Breyer case[23] -, the EDPS found that the complainants' replies in phase II of the RTBH process must be considered personal data, since their personal opinions on the resolution and valuation of Banco Popular showed their logic and reasoning.[24] That finding was based on the assumption that the comments were indeed an expression of a subjective opinion or view of the complainants. In the request for review, the SRB stated that the complainants merely copied information from publicly available sources into the free text fields in the phase II form. The SRB thus concluded that the complainants cannot be said to have expressed their unique and personal insights in those replies and that these can therefore not be considered their personal data.

According to the definition in Article 3(1) of the Regulation, personal data means any information relating to an identified or identifiable natural person. The same article defines an identifiable person as one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person.

According to recital 16 of the Regulation, '... to determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or another person, to identify the natural person directly or indirectly.'

The comments provided by the data subjects in the RTBH process phase II were personal data, since they are information relating to identified individuals.

First, the EDPS is of the opinion that the replies in the consultation phase constituted the complainants' personal data. The replies contained the complainants' personal views and were thus information relating to them, even if they relied on publicly available information to express their views. The fact that the complainants have expressed similar, though not identical,

[23] Case C-434/16 (Peter Nowak v Data Protection Commissioner) - Judgment of the Court (Second Chamber) of 20 December 2017, and Case C-582/14 (Patrick Breyer v Bundesrepublik Deutschland) - Judgment of the Court (Second Chamber) of 19 October 2016.
[24] See p. 5 of the Decision.

views to other participants does not mean that their replies did not reflect their own views. Consequently, the replies provided in the free text fields by the complainants and other participants must all be considered as 'personal data', whether these replies are the expression of an original and unique view or a view shared with others and/or inspired by or taken from publicly available information. This conclusion is not contradicted by the *Nowak* case law, where the CJEU does not make a distinction between responses entirely elaborated by the respondents and responses taken from other sources of knowledge. In fact, the *Nowak* case concerned an 'open book examination', which allowed the respondents to consult other sources of knowledge in order to formulate their own judgment and reasoning.

Second, as acknowledged by the SRB itself, the latter was always in a position to know the identity of the participants in phase II of the RTBH process, through the link (the alpha-numeric code) associated with the online form used in phase I.[25] As demonstrated in the request for review, the SRB has always been able to associate, through the unique alpha-numeric code, the comments to each participant.

These facts further demonstrate that, **contrary to the SRB's opinion, the complainants' comments were information relating to an identified individual and therefore qualified as personal data collected and processed by the SRB**.

2.2. The data transmitted to Deloitte were pseudonymised data

According to the SRB, the division into two phases of the RTBH process aimed at limiting the processing of personal data to the minimum so that personal data would only be processed during the registration phase or phase I of the process. The SRB argued that the information transmitted to Deloitte was anonymised and did not contain any elements that could identify the complainants.[26]

The EDPS accepts that the SRB invested a considerable amount of time and effort in the design and implementation of the RTBH process. In the view of the EDPS, the SRB put in place measures to minimise the collection and internal processing of personal data while conducting a complex and technically challenging RTBH process. In this regard, the EDPS finds that the SRB was able to demonstrate compliance with the obligations of data protection by design and data protection by default, in accordance with Article 27 of the Regulation.

Nevertheless, the EDPS considers that the information transmitted to Deloitte was personal data and not anonymised data.

In this regard, it is important to distinguish between pseudonymous data, which are personal data subject to the scope of application of the Regulation, and anonymous data, which fall outside the scope of the Regulation.

On the one hand, Article 3(6) of the Regulation defines **pseudonymisation** as 'the processing of personal data in such a manner that the personal data can no longer be attributed to a specific

[25] See also EDPS-AEPD introduction to the hash function as a personal data pseudonymisation technique, October 2019 available at https://edps.europa.eu/sites/edp/files/publication/19-10-30_aepd-edps_paper_hash_final_en.pdf.

[26] One of complainants could not be identified by the SRB due to the limited personal information that he provided in the complaint to the EDPS.

data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'. This definition does not distinguish between those who keep the pseudonymous data and those who hold the additional data, which can be the same or different entities. While 'the application of pseudonymisation to personal data can reduce the risks to the data subjects concerned and help controllers and processors to meet their data protection obligations[27], the Regulation also provides that 'personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information, should be considered to be information on an identifiable natural person'.[28]

On the other hand, Recital 16 of the Regulation defines **anonymous** information as the one 'which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable.' The Regulation does not apply to anonymous information.

The difference between pseudonymous data and anonymous data is therefore that in the case of anonymous data, there is no 'additional information' that can be used to attribute the data to a specific data subject, while in the case of pseudonymous data there is such additional information. Therefore, in order to assess whether data are anonymous or pseudonymous, one needs to consider if there is any 'additional information' that can be used to attribute the data to specific data subjects.

The EDPS learned in the SRB's reply of 28 October 2020, that the SRB transmitted to Deloitte not only some of the participants' comments, but also 'the unique alpha-numeric code' associated to each participant.[29] This meant that Deloitte did not have access to the replies given in the registration phase of the RTBH process. Nonetheless, Deloitte was provided with the alpha-numeric code that constitutes the necessary 'additional information' to match the replies in both phases of the RTBH process.

As explained by the SRB, the identifier 'was developed for audit purposes so that the SRB could demonstrate to the EU Courts, if so required, how each comment was handled and assessed...' and that 'it was impossible for Deloitte to trace the identity of any party using this code by reference to the hard data provided by the eligible parties as part of the Registration phase (which was at all times retained by the SRB).'

However, the EDPS considers the registration phase data together with the unique identifier (alpha numeric code) attributed to each eligible participant as a perfect example of 'additional information' mentioned in Article 3(6) of the Regulation, because it can be used **by the SRB** to attribute the data to a specific data subject.

As explained above, the Regulation does not distinguish between those who keep the pseudonymous data and those who hold the additional information. The fact that they are different entities does not render pseudonymous data anonymous. Similarly, the fact that Deloitte was not in a position to attribute the comments singlehandedly to the registration phase data, does not alter the fact that the data it received were pseudonymised. Equally, it does not

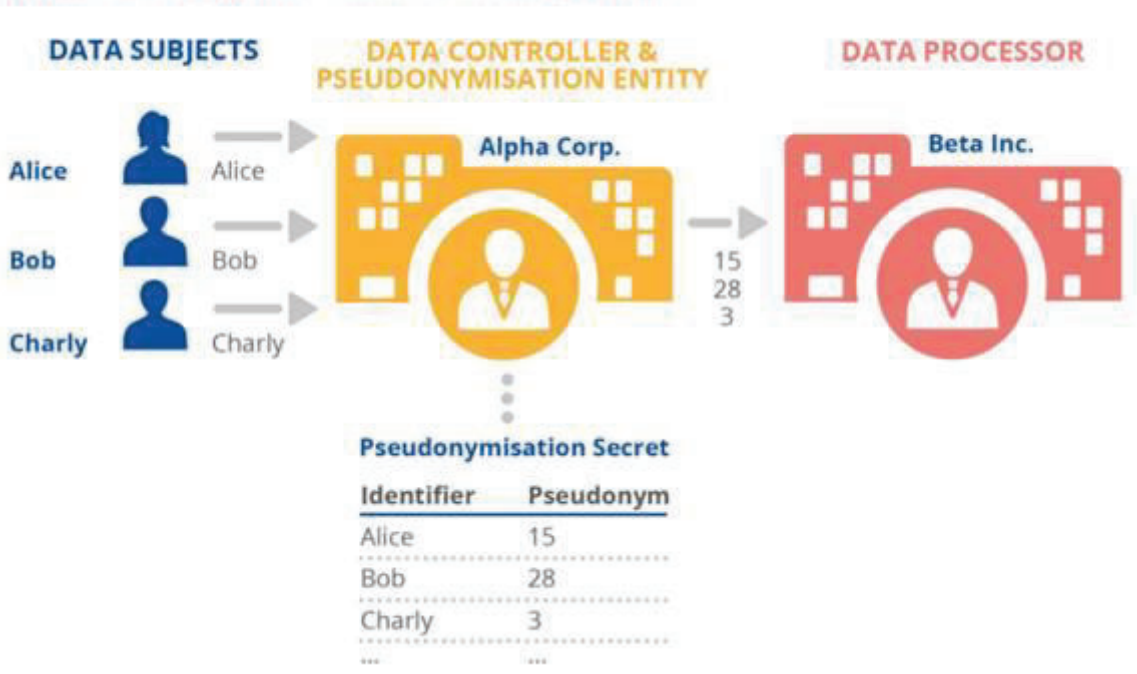
[27] Recital 17 of the Regulation.
[28] Recital 16 of the Regulation.
[29] See SRB's letter of 28 October 2020, p.4.

matter what the intentions were of the data controller or recipient: as long as the data are identifiable, data protection rules apply.[30]

The fact that pseudonymous data remain pseudonymous even when transmitted to a third party that does not have the 'additional information', is supported by guidelines on pseudonymisation published by other public authorities. The pseudonymisation guidelines published by the European Union Agency for Cybersecurity (ENISA)[31] or the Data Protection Focus Group at the German Government's Digital Summit[32] include examples of transmissions that can be applied to the transmission of data from the SRB to Deloitte.

Scenario 3.3 of the ENISA guidelines shows a data controller (Alpha Corp.) collecting data and performing the task of data pseudonymisation. Later, this data controller forwards the pseudonymised data to a subsequent data processor (Beta Inc.), e.g. for statistical analysis, or persistent data storage. The scenario considers the data pseudonymous, even if 'Beta Inc. does not learn the identifiers of the data subjects, thus is not directly able to re-identify the natural persons behind the data'.

Figure 3: Pseudonymisation example Scenario 3



This example can, in essence, be directly applied to the transmission by the SRB to Deloitte.

In the EDPS' view, the data the SRB shared with Deloitte were pseudonymous data, both because the comments in phase II were personal data (previous point), **and** because the SRB shared the alpha-numeric code that allows linking the replies given in phase I with the ones given in phase II of the RTBH process - notwithstanding the fact that the data provided by the participants to identify themselves in phase I were not disclosed to Deloitte.

[30] Article 29 Working Party, Opinion 05/2014 on Anonymisation Techniques, (WP216), p. 10.
[31] Pseudonymisation techniques and best practices, November 2019: https://www.enisa.europa.eu/publications/pseudonymisation-techniques-and-best-practices/at_download/fullReport.
[32] White paper on Pseudonymisation, 2017: https://www.gdd.de/downloads/white-paper-pseudonymization.

In light of the above, the EDPS' conclusion is therefore that the data transmitted to Deloitte were pseudonymous data, which qualify as personal data under the Regulation.

3. Infringement of Article 15

Article 15(1)(d) of the Regulation provides that, '[w]here **personal data relating to a data subject** are **collected from the data subject**, the **controller** shall, at the time when personal data are obtained, provide the data subject with all of the following **information**:
[...]
(d) the **recipients** or categories of recipients of the personal data, if any' (emphasis added).

In accordance with the above findings, the EDPS concludes that Deloitte was a recipient of the complainants' personal data under Article 3(13) of the Regulation. The fact that the company was not mentioned in the data protection notice as a potential recipient of the personal data collected and processed in the context of the RTBH process, constitutes an infringement to the right to information laid down in Article 15(1)(d) of the Regulation. Furthermore, there are no indications that the data subjects already had this information in accordance with Article 15(4) of the Regulation.

PART III – Conclusion

In view of the above, the EDPS decides to revise his Decision of 24 June 2020, as follows:

1. The EDPS finds that the data the SRB shared with Deloitte were pseudonymous data, both because the comments in phase II were personal data **and** because the SRB shared the alpha-numeric code that allows linking the replies given in phase I with the ones given in phase II of the RTBH process - notwithstanding the fact that the data provided by the participants to identify themselves in phase I were not disclosed to Deloitte.

2. The EDPS finds that Deloitte was a recipient of the complainant's personal data under Article 3(13) of the Regulation. The fact that Deloitte was not mentioned in SRB's data protection notice as a potential recipient of the personal data collected and processed by the SRB as the controller in the context of the RTBH process constitutes an infringement of the information obligations laid down in Article 15(1)(d).

3. In light of all the technical and organisational measures set up by the SRB to mitigate the risks for the individuals' right to data protection in the context of the RTBH process, the EDPS decides not to exercise any of his corrective powers laid down in Article 58(2) of the Regulation.

4. The EDPS nevertheless recommends the SRB to ensure that the data protection notice in future RTBH processes covers the processing of personal data in both the registration phase and the consultation phase, and includes all potential recipients of the information collected, in order to fully comply with the obligation to inform data subjects in accordance with Article 15.

The present revised decision repeals and replaces the Decision of 24 June 2020.

Done at Brussels, 24th November 2020

Wojciech Rafal WIEWIÓROWSKI