



Overview of recent case law

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EDPS meeting with DPOs
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The EDPS Strategy

2015-2019

Leading by example



Case Law for discussion

Personal Data and Purpose Limitation

- Case C-582/14, Breyer, CJEU 19 October 2016

Right to be forgotten II

- Case C-398/15, Manni, AG Bot 8 September 2016

Jurisdiction

- C-191/15, VKI v Amazon, CJEU 28 July 2016

Essential role of DPO

- T-483/13, Oikonomopoulos, GC 20 July 2016

Requirements and Derogations

- Tele2 and Watson, C-203/15 and C-698/15, AG 19 July 2016
- A₂-1/15, Canada-EU PNR Agreement, AG Mengozzi 8 Sep '16
- Baka v Hungary ECtHR 23 June 2016



Breyer v DE, Case C-582/14

CJEU 19 October 2016

- P challenges registration and storage by federal bodies of dynamic IP addresses allocated to him when accessing their websites
- federal bodies keep logfiles in order to prevent attacks and make it possible to prosecute ‘pirates’
- question whether controllers could store data after consultation of website (or after end of need for billing purposes)

See forthcoming EDPS Web Services Guidelines



Breyer v DE, Case C-582/14

CJEU 19 October 2016

Personal data

- dynamic IP addresses are personal data, when operator has legal means to identify with info from ISP
- see recital 26 of Dir 95/46 and WP29 opinions 5063/00 WP37 and 4/2007 WP136 (example 15)

Purpose Limitation

- may use legitimate interest, even though public bodies, because acting as individuals
- may have legitimate interest in ensuring continued functioning of those websites



Case C-398/15, Manni

AG Bot 8 September 2016

- Right to be forgotten II, after C-131/12, Google Spain
- Chamber of Commerce of Lecce refused to delete P's name from the Commercial Register
- AG balanced two Directives - Directive 68/151 and Directive 95/46 – in favour of protection of all persons seeking info about a company in the Register
- Dismissed COM limitation to 3rd parties that “show a legitimate interest”
- Reference to GDPR art 17(3)(b) and (d) (right of⁵ erasure) rather than art 12(b) Dir 95/46 (101)



applicable law under 4(1)(a)

Case C-131/12, Google Spain v AEPD, 13 May 2014

- processing is carried out by Google Inc outside EU but *in the context of an establishment* in Spain

Case C-230/14, Weltimmo, 1 October 2015

- Weltimmo registered in Slovakia but ran website for Hungarians selling HU properties
- Had a bank account for recovering debts, a letter box and a formal representative in HU
- *establishment*: extends to any real and effective activity, even a minimal one, exercised through stable arrangements (see Dir 95/46 recital 19)



Case C-191/15, VKI v Amazon

CJEU 28 July 2016

- Amazon EU established in Luxembourg, uses .de website to sell to consumers in Austria, has no registered office or establishment in Austria
- VKI sued in Austrian courts for injunction to prohibit use of restrictive terms and conditions
- **Austrian Supreme Court** posed questions on private international law and consumer protection; re. data protection asked whether apply solely the DP rules of the MS of establishment or also apply the DP rules of MS to which its commercial activities are directed



Case C-191/15, VKI v Amazon

CJEU 28 July 2016

AG Saugmandsgaard Øe

- broad approach in Google intended to apply EU law
- need to identify establishment in the context of whose activities processing is most directly involved ;
- not enough : accessible website or after-sales service

CJEU

- aff'd Weltimmo: *degree of stability of arrangements and effective exercise of activities* in target MS
- *in the context of*, not *by*, the establishment
- ⁸establishment of .de website may be in Germany ...



Oikonomopoulos, T-483/13, General Court 20 July 2016

- OLAF investigation found P had engaged in unlawful conduct, funds paid to P's company to be reclaimed
- art 340 TFEU: damages if unlawful conduct + damage + causal link. P seeking €2m in damages
- unlawful conduct = sufficiently serious breach: no ground under Reg 45/2001, unlawful transfers, DPO not informed and hence EDPS not consulted for PC
- failure to notify the DPO under art 25(1) a sufficiently serious breach, because DPO *cannot effectively fulfil the essential task of supervision*
- no causal link between late notification and damage²⁸



Data Retention

Joined Cases C-293/12, ***Digital Rights Ireland*** and C-594/12, ***Seitlinger***, 8 April 2014

CJEU – Directive invalid *ab initio*, because:

- Particularly serious interference with fundamental rights under arts 7 and 8 Charter
- Exceeded the limits of proportionality
- Interference not limited to strictly necessary:
 - Covers all individuals, communications, traffic data
 - No objective criteria: serious crime, retention period
 - No safeguards of prior judicial or independent review
 - No safeguards against abuse, unlawful access



Schrems v DPC Irl

Case C-362/14, 6 October 2015

- DPAs have a duty to examine a complaint (even where a binding EU decision); a decision under art 25(6) cannot restrict powers of DPAs under art 28
- Adequate level of protection = *essentially equivalent*
- The *Safe Harbor* decision is invalid *ab initio*
- “Essence” of fundamental right: *Legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.*
- DPAs must examine complaints with due diligence



Tele2 and Watson, ex-Davis

Joined Cases C-203/15 and C-698/15

Opinion AG Saugmandsgaard Øe, 19 July 2016

- Following *DR/I*, data retention left to national law under art 15(1) ePrivacy Directive. Tele2 decided to cease retaining data; UK adopted specific new Regs (DRIPA) which challenged by MPs
- Reference from Swedish and English CA
- Charter art 51 - applicable to national provisions implementing art 15 of ePrivacy Directive
- General retention of communications may be compatible with EU law subject to satisfying strict requirements required by ePrivacy and Charter



Tele2 and Watson, ex-Davis

Joined Cases C-203/15 C-698/15

Requirements to be compatible with arts 7, 8 and 52(1) Charter and Article 15(1) ePrivacy Directive:

- Legal basis– accessible, foreseeable, non-arbitrary
- Respects essence of rights in Charter arts 7 and 8
- Objective in general interest: serious crime only
- General obligation must be strictly necessary for fight against serious crime and respect conditions in DRI re. access to data, retention period and security
- General obligation must be proportionate to the objective of fight against serious crime
- Storage in the EU under control of DPAs (DRI 68)

Canada-EU PNR Agreement

Case A-1/15

- EU-Canada agreement on the transfer of Passenger Name Records (PNR) signed in June 2014, sets out legal framework for the transfer of PNR data by carriers to Canada to combat terrorist offences or serious transnational crime
- EP Resolution of 25/11/2014: following *DRI*, EP asked CJEU for Opinion on legal basis and compatibility of EU-Canada PNR treaty with Charter
- EDPS: wrong legal basis, no evidence to show necessity and proportionality, disproportionate in violation of arts 7, 8 and 52(1) of EU Charter – see EDPS Opinion of 30 September 2013



Canada-EU PNR Agreement

Case A-1/15

Opinion of AG Mengozzi of 8 September 2016

- Draft Agreement not ready to be ratified because incompatible with art 16 TFEU and arts 7 and 8 CFR
- Accepts possibility of PNR schemes if comply
- Art 16 TFEU is correct legal basis
- Not an Adequacy Decision, but has similar objective
- First ruling on compatibility of treaty with Charter
- Need for a fair balance between public security and privacy / data protection
- Two lists of compatibility and incompatibility:



Canada-EU PNR Agreement

Opinion of AG Mengozzi

List of requirements for compatibility (to do)

- Clear categories of PNR, no sensitive data
- Exhaustive list of offences
- Identification of authority responsible for PNR
- Limitation of targets to reasonable suspicion
- Limited and specified access rights
- Justification for 5 year retention period
- Prior review of transfers by independent Canadian authority
- ¹⁶ Monitoring by / access to an independent authority

Canada-EU PNR Agreement

Opinion of AG Mengozzi

List of incompatibilities with Charter (to strike out)

- PNR processing outside public security objective of fighting terrorism and serious transnational crime
- Processing of sensitive data
- Right to disclose information outside the objective
- Authorisation to retain PNR for 5 years outside the objective
- Transfers without prior assessment by competent Canadian authority that will be no further transfers



Independent Supervision

Case C-518/07, Commission v Germany

- DPAs must be free from any external influence, direct or indirect, from supervised bodies but also from government

Case C-614/10, Commission v Austria

- DPAs must remain above all suspicion of partiality, no pressure for prior compliance

Case C-288/12, Commission v Hungary

- A DPA cannot be replaced before end of mandate, even by legislation (Fundamental Law of 25.4.2011)

Case C-424/15, Garai CJEU19 October 2016

- independence of NRAs (AG Bot, para 42)

Independence of the judiciary

Baka v Hungary

ECtHR 23 June 2016

- Fundamental Law of 25 April 2011
- Dismissal of President of Supreme Court.
- Violation of Articles 6 § 1 (right of access to a court) and 10 (freedom of expression)
- Unanimous Chamber ruling of 27 May 2014 affirmed by Grand Chamber (15-2)
- Awarded € 70,000 damages and € 30,000 costs

Cases Pending

CJEU

- Model contractual clauses (IRL DPA)
- Privacy Shield ...

ECtHR

- Big Brother Watch et al v UK, no 58170/13
- Ten Human Rights Organisations et al v UK, no 24960/15
- Bureau of Investigative Journalism and Alice Ross v the UK, no. 62322/14



For more information

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