



EUROPEAN DATA PROTECTION SUPERVISOR

Overview of Recent Case Law

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EDPS meeting with DPOs
28 April 2016

Case law for discussion

Disclosure of personal data on EP's website, Consent

- Case T-343/13, CN (supported by EDPS) v European Parliament, 3 December 2015

Interceptions of communications interfering with Article 8 ECHR

- C-419/14, WebMindLicenses Kft. v. Nemzeti Adó-és Vámhivatal Kiemelt Adó-és Vám Foigazgatóság, 17 December 2015
- Case n°47143/06, Roman Zakharov v. Russia, 4 December 2015

PNR Canada

- Pleading notes of the EDPS - Hearing of 5 April 2016

CN v. European Parliament

Case T-343/13, 3 December 2015

- The applicant - a former official of the Council - submitted a petition to the Parliament containing data about his health condition and the psychiatric diagnosis of his son.
- The applicant requested the deletion of his data after publication of the petition, including the health data, on the Parliament's website and invoked a violation of Article 8 of ECHR.
- The Parliament agreed to remove the data but upheld that the processing was lawful:
 - Legal obligation to publish the data (general rule of transparency)
 - The applicant had given his consent
 - The sensitive data had manifestly been made public by the data subject

CN v. European Parliament

Case T-343/13, 3 December 2015

EDPS intervention

- 1) The publication of the health related data, is **not imposed on the EP by a legal obligation** - Article 5(b) not applicable;
- 2) The EP has **not gathered a valid explicit consent** from the applicant and his son (as a third party) for the publication on the internet of the sensitive data at stake – requirements of Articles 5(d) and 10.2(a) not met;
- 3) The health related data of the petitioner and his son have **not been made manifestly public by them** – Article 10.2(d) not applicable;
- 4) The publication of the health related data was **neither necessary nor proportional for the purpose of the processing activity** – violation of Article 4.1(c).

The processing of the health data relating to the applicant is unlawful.

CN v. European Parliament

Case T-343/13, 3 December 2015

Findings of the Tribunal

- The applicant expressed a **free, specific and informed indication of his will** with regard to the publication of his data – could have asked for anonymous or confidential treatment when filling out the petition form.
- **Lawful processing**, in accordance with Article 10.2(a).
- The applicant's consent cannot cover the health data of his son, but in **absence of proof of legal custody** the applicant cannot claim violation of his son's rights as a third party data subject.
- **Right to request deletion?** Only if processing is unlawful, not the case here.
- **Right to object?** Not when data subject has given his unambiguous consent.
- When a data subject **consents to disclosure**, there is **no intrusion of privacy** and **no infringement of Article 8 ECHR**.

WebMindLicenses Kft. v. Nemzeti Adó-és Vámhivatal

Kiemelt Adó-és Vám Foigazgatóság

Case C-419/14, 17 December 2015

- Following a tax inspection, the Hungarian tax authorities ordered the Hungarian company WML to pay VAT, a fine and penalties for late payment with regard to an alleged fake economic transaction with a Portuguese company.
- WML brought an action against the tax authorities for using evidence obtained without WML's knowledge by means of intercepting telecommunications and seizing emails in the course of a parallel criminal procedure.
- **Preliminary ruling:** Whether tax authorities may gather such evidence and use it as the basis for an administrative decision. What limits does the Charter place on the institutional and procedural autonomy of Member States.

WebMindLicenses Kft. v. Nemzeti Adó-és Vámhivatal

Kiemelt Adó-és Vám Foigazgatóság

Case C-419/14, 17 December 2015

Findings of the Court

- National rules of evidence should be used to assess whether an action constitutes an abusive practice. Those rules cannot, however, undermine **the effectiveness of EU law.**
- **Fundamental rights** are applicable in all situations governed by EU law.
- EU law does not preclude use of such evidence, provided that **rights guaranteed by EU law, especially the Charter, are observed.**
- Any limitation on rights and freedoms recognised by the Charter must be **provided for by law and respect their essence.**
- **Proportionality:** Measures adopted by Member States must be **necessary** to meet the objective of **general interest**

WebMindLicenses Kft. v. Nemzeti Adó-és Vámhivatal

Kiemelt Adó-és Vám Foigazgatóság

Case C-419/14, 17 December 2015

Findings of the Court

- In the **absence of prior judicial authorisation**, seizure can be compatible with Article 7 only if domestic legislation and practice afford **adequate and effective safeguards** against abuse and arbitrariness. Counterbalanced by **judicial review** (legality and necessity).
- **Right to protection of personal data**: no need to assess if the gathering and use of that evidence by the tax authorities interfered with Article 8, since WML is **not a natural person**.
- **Right to respect for private and family life**: the use of such evidence constitutes a limitation on the exercise of the rights of Article 7.
 1. **Means of investigation should be lawful and necessary**
 - 2₈ **Use of evidence should be lawful and necessary**

Roman Zakharov v. Russia

Case n°47143/06, 4 December 2015

- Mr Z, a publisher and a chairman of an NGO campaigning for media freedom and journalists' rights, alleged that the system of secret interception of mobile telephone communications in Russia violated his **right to respect for his private life and correspondence (Article 8 ECHR)** and that he had **no effective remedy (Article 13)** in that respect.
- Russian courts rejected RZ's claims: he had failed to prove that his telephone conversations had been intercepted. The installation of the equipment enabling interception did not as such infringe the privacy of his communications.

Roman Zakharov v. Russia

Case n°47143/06, 4 December 2015

Admissibility

- Mr Z was entitled to claim to be a victim of a violation of ECHR, even though he was unable to allege that he had been the subject of a concrete surveillance measure.
- Justified to examine the legislation *in abstracto*:
 - Secret nature
 - Broad scope
 - Lack of effective remedy
- The **very existence** of contested legislation **amounts to an interference** with Mr Z's right under Article 8.

Roman Zakharov v. Russia

Case n°47143/06, 4 December 2015

Substance

- Circumstances in which public authorities are empowered to resort to secret surveillance measures are **not defined with sufficient clarity**.
- Provisions on discontinuation of secret surveillance measures **do not provide sufficient guarantees against arbitrary interference**.
- **Procedures for destroying and storing** intercepted data are **not sufficiently clear**.
- **Authorisation procedures** are not capable of ensuring that secret surveillance measures are ordered only when “**necessary in a democratic society**”.

Roman Zakharov v. Russia

Case n°47143/06, 4 December 2015

Substance

- **Supervision of interceptions** does not comply with the requirements of independence, public scrutiny, and sufficient powers and competence.
- **Effectiveness of the remedies is undermined** by the fact that they are available only to persons able to submit proof of interception, and there is no notification unless criminal proceedings.

Conclusion

- Russian law did not meet the “**quality of law**” requirement and was incapable of keeping the interception of communications to what was “**necessary in a democratic society**.”
- **Violation of Article 8 ECHR.** No adequate and effective guarantees against arbitrariness and the risk of abuse.

PNR CANADA

Pleading notes of the EDPS – Hearing of 5 April 2016

Background

- The new EU-Canada agreement on the transfer of Passenger Name Records (PNR) was signed in June 2014.
- Legal framework for the transfer of PNR data by carriers operating passenger flights between the EU and Canada to the Canadian competent authority. Data may be used to prevent, detect, investigate and prosecute terrorist offences or serious transnational crime.
- Referred by the Parliament to the ECJ for an opinion on its compliance with the EU Treaties and Charter.

PNR CANADA

Pleading notes of the EDPS – Hearing of 5 April 2016

Points raised by EDPS at the hearing

- 1) The guarantees required under Article 8 of the Charter must be respected. An international agreement that governs **data transfers cannot lower the level of protection of that fundamental right.**
- 2) The processing of PNR data is **systematic and particularly intrusive in nature.** Review of the EU legislature's discretion must thus be **strict.**
- 3) The draft agreement **does not ensure a level of protection required under Article 8 of the Charter.**

PNR CANADA

Pleading notes of the EDPS – Hearing of 5 April 2016

- 1) **The draft agreement does not guarantee effective judicial remedy.**
 - In *Schrems*: the third country must give individuals the right to pursue effective legal remedies.
 - **Article 14(2) PNR** : some "other remedy" might be provided instead of judicial redress.
 - **Article 12 PNR** : the Canadian Privacy Act excludes individuals who are not Canadian citizens or permanent residents from the right of access to their personal data

PNR CANADA

Pleading notes of the EDPS – Hearing of 5 April 2016

2) PNR data processing for "predictive policing" purposes is systematic and particularly intrusive

- PNR can reveal one's travel habits, the relationship between people, the person or company that paid for the ticket, dietary information, etc.
- PNR data processing does not require a connection to a specific threat to public security.
- Enables “predictive policing“ based on abstract definitions of what a potential criminal or suspicious behaviour might look like.
- Unverified information neither complete, nor necessarily accurate, serves as basis for decisions with potentially very serious consequences for individuals.

PNR CANADA

Pleading notes of the EDPS – Hearing of 5 April 2016

3) Independent supervision required by Article 8(3) of the Charter is not guaranteed

- PNR does not guarantee supervision by an independent authority
- PNR would effectively deprive European supervisory authorities of the power to suspend or terminate a transfer of data to Canada, even in cases where basic requirements of data protection law are breached.
- PNR were correctly based on Article 16 of the Treaty, but legislation based on Article 16 must fully ensure independent control.

**Thank you for
your attention!**

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