EDPS

EUROPEAN DATA PROTECTION SUPERVISOR

Overview of recent case law

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EDPS meeting with DPOs

27 October 2016

Case Law for discussion

Legitimate interest

- Case C-13/16, Rigas, CJEU 4 May 2017

Right to be forgotten II

- Case C-398/15, Manni, CJEU 9 March 2017

Right to a judicial remedy

- C-73/16 Puskar, AG Kokott 30 March 2017

Requirements and Derogations

- Cases C-203/15 & C-698/15, Tele2 and Watson, CJEU 21 Dec 2016

Inspections and inquiries: due diligence

- Case C-337/15 P, EO v Staelen, CJEU 4 April 2017

Case C-13/16, Rigas

The facts

- X opened taxi door in Riga,scraped side of tram. Tram company could only seek compensation from X, asked police for his identity.
- Police fined X, but by law could only disclose X's name, not identity card number or address. Company sued police, argued bound by art 7(f) to disclose his personal data

Art 7(f) : processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Case C-13/16, Rigas

CJEU 4 May 2017

- Legitimate interest is a possibility, not an obligation, to disclose personal data to a third party
- Disclosure subject to three conditions in Article 7(f):
  - Pursuit of legitimate interest (=damages)
  - Necessity for that interest (needs extra identifying data)
  - Balance of opposing rights and interests (publically available data, data subject a minor)
- But national law must lay down the obligation
- cf art 6 GDPR: legitimate interest unavailable to public authorities, and processing on basis of legal obligation or public duty must be on basis of a law

Case C-73/16, Puskar
AG Kokott, 30 March 2017

The facts P learned from a leak that his name and ID number were on a secret Finance Ministry anti-fraud blacklist of "fronts" directors of companies

- P claimed an infringement of his dignity and reputation
- Slovakian Supreme Court rejected his claims
- Overruled by Constitutional Court, found a violation of privacy and data protection, and referred four questions to CJEU

AG Kokott

Exhaustive analysis of questions:

Case C-73/16, Puskar

Right to effective judicial review per art 47(1) CFEU

- arts 28(4) and 22 DPD; art 79 GDPR
- obligation to exhaust administrative procedures before going to court ok so long as *proportionate* and does not render judicial remedy *ineffective*, e.g. by causing unreasonable delay or excessive costs overall

Use of leaked blacklist as evidence ok

- Blacklist obtained without consent of authority
- Check whether a right of access to the document
- Arts 8(2) CFEU &12 DPD: right of access to personal data
- Art 13 DPD: restriction only if provided for by law

Case C-73/16, Puškár

Legitimate grounds for processing of blacklist

Ok under art 7(e) of DPD, task in public interest, so long as:

- Task legally assigned to tax authorities
- Use of list appropriate and necessary for the purpose
- Sufficient grounds to suspect persons on the list

Cf Shimovolos v Russia, ECtHR 21 June 2011

Conflicting case law of CJEU and ECtHR

- Art 52(3) CFEU: Charter rights correspond to ECHR rights, but EU law can provide higher level of protection
- Apply EU law when difference gives higher protection
- Refer case to CJEU when EU law offers less protection

The right to be forgotten

Case C-131/12, Google Spain v AEPD

- complaint against continued publication of 1998 newspaper auction notice for unpaid debts
- requested erasure by Google Spain, Google Inc and by newspaper
- AEPD made order against Google only, Google challenge in Audiencia Nacional referred to CJEU

CJEU, 13 May 2014

- Material scope: a search engine determines the purposes and means of processing, a controller, additional activity
- Responsibility: search engines must remove links to web pages displayed after search on person's name

Case C-398/15, Manni

Two questions after Google Spain:

- Should the right to object apply to the original publishers, including newspapers, as well as to the search engine?
- What are the public interest criteria that override the right to object?

The facts

- P, a real estate developer, could not sell properties.
- Background checks for buyers found his name in Public Register of Companies as administrator of company bankrupt in 1992 and wound up in 2005
- Chamber of Commerce of Lecce refused to delete P's name from the Commercial Register

Case C-398/15, Manni

AG Bot 8 September 2016

- Balanced Directives 68/151 and 95/46 – in favour of protection of all persons seeking info about a company in the Register
- Dismissed suggested COM limitation to 3rd parties that "show a legitimate interest"
- Referred to GDPR art 17(3)(b) and (d) (right of erasure) rather than art 12(b) Dir 95/46 (101)

CJEU, 9 March 2017

- Company Registers' public nature requires legal certainty and protection of interests of 3rd parties
- Requires availability of limited personal data for many years after company ceases to exist
- A proportionate interference with arts 7 and 8

EO v Staelen

Case C-337/15 P, CJEU 4 April 2017

- P one of 21 laureates of EP concours. After 2 years she was the only one left on the list, suspected EP of discrimination
- P complained to EO in 2006. EO opened 2 successive inquiries (2d own initiative), found no maladministration
- P sued EO in damages

GC

- EO had distorted content of EP document, failed to check whether P's name had been circulated, failed to respond in reasonable time
- These all a lack of due diligence constituted *per se* a "sufficiently serious breach" of right to duty of care to P

EO v Staelen

Case C-337/15 P, CJEU 4 April 2017

AG

- EO does not have own higher standard of diligence
- No obligation to second-guess credible responses

CJEU

- Only a manifest and grave disregard of discretion can give rise to liability in damages
- EO liable in damages because had distorted document, based on inference rather than information, and had failed to check precisely when P's details had been circulated
- Belated responses do not constitute serious breach
- Confirmed GC damages of €7000

Data Retention Trilogy

[1] 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

[2] 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

[3] Tele2 and Watson, ex-Davis

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

- Following *DRI*, data retention left to national law under art 15(1) ePrivacy Directive. In SV Tele2 decided to cease retaining data; in UK, govt adopted specific new Regs (DRIPA 2014) which challenged by MPs.
- References from Swedish and English CAs

Opinion AG Saugmandsgaard Øe, 19 July 2016

- 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)

Tele2 and Watson 21/12/16

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

CJEU: ePrivacy Directive must be read in light of Charter:

- national measures fall within scope of Directive art 15(1)
- derogations only insofar as strictly necessary

a) Retention of Data

- Metadata as revealing as content.
- Makes profiling possible
- Data liable to allow very precise conclusions to be drawn on the private lives, give feeling that under constant surveillance, effect use of communications and right to **freedom of expression**

Malone v UK,
ECtHR 2 August 1984

Judge Pettiti, concurring

- The danger threatening democratic societies in the years 1980-1990 stems from the temptation facing public authorities to "see into" the life of the citizen
- public decided authorities seek, for the purposes of their statistics and decision-making processes, to build up a "profile" of each citizen
- Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.

Tele2 and Watson

In consequence:

- only serious crime can justify interference
- precludes national legislation which provides for general and indiscriminate retention of data

Access: national legislation precluded where:

- Objective not limited to fighting serious crime
- Access not subject to prior review by court or independent administrative authority
- No requirement that data concerned should be retained in the EU (DRI 68: under control of DPAs) and destroyed at end of retention period

Thank you for your attention!

For more information

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