

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | INTELLECTUAL PROPERTY, MEDIA AND IT

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INTELLECTUAL PROPERTY, MEDIA AND IT NEWSLETTER

I HIGHLIGHT

Safe Harbor Decision and personal data transfers to the US

In its press release of 29-10-2015, the European Parliament has held that, notwithstanding the recent developments, massive surveillance conducted in the United States makes the rights of European citizens whose data is transferred to this country to remain in danger.

The Parliament argued that, after the disclosures of massive and indiscriminate electronic surveillance in that country, little has been done to safeguard the fundamental rights of European citizens and reiterates that the European Commission has to ensure that all cross-border flows of EU data to the US ensure a level of protection appropriate to such data, which should also be safeguarded by the member states of the EU.

The concerns regarding this issue have intensified recently as a result of surveillance and similar disclosure which allegedly have been allowed by the laws approved in European countries, for example in France, the United Kingdom and the Netherlands.

When mentioning the recent developments, the Parliament was referring, of course, to the judgment of the Court of Justice of the EU (CJEU), dated of 06-10-2015 and published in the OJ C398/5 of 30-11-2015, delivered in the Case Maximilian Schrems Vs Ireland National Authority of Data Protection (case C-362/04), which considered invalid the decision of the European Commission 2000/520/EC (Safe Harbor Decision) of 26-07-2000 under which many European companies were sending personal data to the US, on grounds relating to subcontracting services for data communication to their parent companies, or others.

The Safe Harbor agreement, now considered invalid, stated that data transfers made to the US under it ensured an adequate level of protection of personal data, so that they could be validly made by the EU to the US, having been notified to (or authorized by) regulators.

The ruling by the ECJ ruled after a complaint by Maximilian Schrems, a citizen from Austria and user of Facebook, with the National Data Protection Authority (DPA) in Ireland, against the way the US treated the personal data without ensuring a sufficient level of protection thereof. The complaint of Maximilian Schrems was made after the disclosures made by Edward Snowden on NSA surveillance practices. Given the refusal of the Irish National Data Protection Authority to accept his complaint, the case was brought to the Irish courts, which put the ECJ several questions whose analysis led to the invalidation of the Safe Harbor Principles, among other extremely important considerations in this regard, namely that a Commission Decision on the adequate protection of personal data in a particular country, as is the case of Decision 2000/520 / EC, cannot prevent the regulatory authorities in each country to assess a complaint

presented by a data subject alleging that the legislation in a particular destination country of personal data does not ensure adequate protection for them.

But Parliament also refers to all the reactions that the said judgment did trigger in the various national regulators and also in the Data Protection Working Party of article 29.

In the case of CNPD, the Portuguese regulator, following the Judgment, issued a decision, on 23-10-2015, according to which, briefly, decided that:

Data flows to the US under the Safe Harbor Principles are prohibited, since the European Commission decision approving these principles is no longer considered a legitimate basis for performing data transfers to countries outside the EU whose legislation does not ensure an adequate level of protection of personal data.

Until the conclusion of the study that is being prepared by the Data Protection Working Party of article 29, of which CNPD is part itself, on the impact of the ECJ's Judgment, the CNPD will only issue provisional authorizations, even if they have as a basis or legitimacy condition alternative mechanisms to Safe Harbor (i.e., standard contractual clauses, intra-group agreements or other contracts).

The authorizations already issued will be reviewed also by CNPD and flows should be suspended by the controllers.

In the meantime, CNPD decided to consider as appropriate the multilateral agreements between the entities of the same group of companies when the controller in the notification of international transfers of personal data acknowledges to CNPD that the contract complies with the standard contractual clauses approved by the European Commission, according with the conditions set out in Resolution No. 1770/2015 of CNPD.

II LEGISLATION

Ordinance No. 322/2015. D.R. No 192/2015, Series I of 01-10-2015

Setting the third amendment to Ordinance No. 239/2012, of August 9, laying down additional rules on the designation, presentation and labeling of wine products.

Ordinance No. 323/2015. D.R. No 192/2015, Series I of 01-10-2015

The first amendment of Ordinance No. 199/2010, of April 14, laying down additional rules regarding the identification of the vintage year and or grape varieties on the labeling of wine products without designation of origin or geographical indication, produced from grapes harvested in continental Portugal territory.

Regulation No. 1872/2015. DR No. 198/2015, Series II of 09-10-2015

Suspends the validity of Regulation approving the rules of bingo game run base when

practiced at a distance, in a virtual environment, via any electronic, computer, telematics and interactive media or by any other means (online bingo).

Ordinance No. 356/20152 D.R. No 201/2015, Series I of 14-10-2015

Lays down the regulations necessary to share the net results of operations of social games assigned to the Presidency of the Council of Ministers for the year 2016.

Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25-11-2015. OJEU L310/1, of 26-11-2015

Laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

This Regulation establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights.

This Regulation also sets up a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges without distorting domestic and visited markets.

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16-12-2015

This Directive shall approximate the laws of the EU Member States relating to trade marks and emerges from the need to better achieve the aim to promote and create a functioning internal market in an harmonious way and to facilitate the acquisition and protection of brands in the Union.

In short, the amendments made to this Directive intend to ensure that registered trade marks receive the same protection under the legal systems of all Member States.

III CASE LAW

Judgment of the Court of Justice (Third Chamber) of 01-10-2015. OJEU C381/6, of 16-11-2015

Case C-230/14 (Protection of individuals with regard to the processing of personal data - Directive 95/46/EC - Articles 4(1) and 28(1), (3) and (6) - Controller who is formally established in a Member State - Impairment of the right to the protection of personal data concerning natural persons in another Member State - Determination of the applicable law and the competent supervisory authority - Exercise of the powers of the supervisory authority - Power to impose penalties)

Article 4(1)(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as permitting the application of the law on the protection of personal data of a Member State other than the Member State in which the controller with respect to the processing of those data is registered, in so far as that controller exercises, through stable arrangements in the territory of that Member State, a real and effective activity — even a minimal one — in the context of which that processing is carried out.

In order to ascertain, in circumstances such as those at issue in the main proceedings, whether that is the case, the referring court may, in particular, take account of the fact (i) that the activity of the controller in respect of that processing, in the context of which that processing takes place, consists of the running of property dealing websites concerning properties situated in the territory of that Member State and written in that Member State's language and that it is, as a consequence, mainly or entirely directed at that Member State, and (ii) that that controller has a representative in that Member State, who is responsible for recovering the debts resulting from that activity and for representing the controller in the administrative and judicial proceedings relating to the processing of the data concerned. By contrast, the issue of the nationality of the persons concerned by such data processing is irrelevant.

Where the supervisory authority of a Member State, to which complaints have been submitted in accordance with Article 28(4) of Directive 95/46, reaches the conclusion that the law applicable to the processing of the personal data concerned is not the law of that Member State, but the law of another Member State, Article 28(1), (3) and (6) of that directive must be interpreted as meaning that that supervisory authority will be able to exercise the effective powers of intervention conferred on it in accordance with Article 28(3) of that directive only within the territory of its own Member State. Accordingly, it cannot impose penalties on the basis of the law of that Member State on the controller with respect to the processing of those data who is not established in that territory, but should, in accordance with Article 28(6) of that directive, request the supervisory authority within the Member State whose law is applicable to act.

Judgment of the Court of Appeal of Porto, of 19-10-2015, available in www.dgsi.pt

Case 402 / 14.5TTVNG.P1 (Disciplinary proceedings - Image capture - invalidity of the proof - extrajudicial confession - coercion - burden of proof)

The images collected by authorized and properly publicized video surveillance system can be used by the employer as evidence in disciplinary proceedings, where acts committed by the employee constitute crimes against persons or property.

It does not make sense that a worker can be criminally punished for a crime committed in the workplace and during working time based on the use of video surveillance system images; but it can no longer be simultaneously used for the worker to be disciplinary

punished for the same offenses. This understanding can lead to absolutely unfair and unintended consequences.

Under Article 20, paragraph 1, of the Labor Code, the employer may not use distance means of surveillance in the workplace, through the use of technological equipment, in order to control the work performance of the worker.

However, it adds up to in paragraph 2 of the same article that the use of equipment referred to in the preceding paragraph is always lawful when the purpose is the protection and safety of persons and property, or when particular requirements inherent to the nature of the activity so require.

Judgment of the Court of Justice (Forth Chamber) of 13-11-2015. *In InfoCuria Case C-572/13 (Intellectual property – Copyright and related rights – Directive 2001/29/EC – Exclusive reproduction right – Exceptions and limitations – Article 5(2)(a) and (b) – Reprography exception – Private copying exception – Requirement for consistent application of exceptions – Concept of ‘fair compensation’ – Recovery of remuneration as fair compensation for multifunction printers – Proportional remunerative payment – Lump-sum remunerative payment – Accumulation of lump-sum and proportional remunerative payments – Method of calculation – Recipients of fair compensation – Authors and publishers – Sheet music.)*

Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, with regard to the phrase ‘fair compensation’ contained in those provisions, it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.

Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.

Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music, and preclude such legislation which introduces an undifferentiated system for recovering fair compensation which also covers counterfeit reproductions made from unlawful sources.

Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which introduces a system that combines, in

order to finance the fair compensation payable to right holders, two forms of remuneration, namely, first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, and, second, proportional remuneration paid after that reproduction operation and determined solely by means of a unit price multiplied by the number of copies produced, which is payable by the natural or legal persons who make those copies, in so far as: (i) the lump-sum remuneration paid in advance is calculated solely by reference to the speed at which the device concerned is capable of producing copies; (ii) the proportional remuneration recovered after the fact varies according to whether or not the person liable for payment has cooperated in the recovery of that remuneration; (iii) the combined system, taken as a whole, does not include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users.

Judgment of the Court of Justice (Eighth Chamber) of 6-10-2015. OJEU C398/06, of 30-11-2015

Case C-471/14 (Intellectual and industrial property - Proprietary medicinal products - Regulation (EC) No 469/2009 - Article 13(1) - Supplementary protection certificate - Duration - Concept of the 'date of the first authorization to place the product on the market in the European Union' - Whether account is to be taken of the date of the decision granting authorization or the date on which notification was given of that decision.)

Article 13(1) of Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products must be interpreted as meaning that the 'date of the first authorisation to place the product on the market in the [European Union]' is determined by EU law.

Article 13(1) of Regulation No 469/2009 is to be interpreted as meaning that the 'date of the first authorisation to place the product on the market in the [European Union]' within the meaning of that provision is the date on which notification of the decision granting marketing authorisation was given to the addressee of the decision.

Judgment of the Court of Justice (Sixth Chamber) of 08-09-2015. OJEU C398/09, of 30-11-2015

Case C-13/15 (Directive 2005/29/EC - Consumer protection - Unfair commercial practices - Price reduction - Marking or display of reference price.)

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as precluding provisions of national law, such as those at issue in the main proceedings, which lay down a general prohibition of announcements of price reductions

which do not show the reference price when the price is marked or displayed, without providing for an assessment case by case allowing it to be determined whether the announcements are unfair, in so far as those provisions pursue objectives relating to consumer protection. It is for the referring court to determine whether that is so in the case in the main proceedings.

Judgment of the Court of Justice (Second Chamber) of 21-10-2015. OJEU C414/7, of 14-12-2015

Case C-347/14 (Directive 2010/13/EU - Concepts of 'programme' and 'audiovisual media service' - Determination of the principal purpose of an audiovisual media service - Comparability of the service to television broadcasting - Inclusion of short videos in a section of a newspaper's website available on the Internet.)

The concept of 'programme', within the meaning of Article 1(1)(b) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.

On a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form.

IV RESOLUTIONS, RECOMMENDATIONS, OPINIONS AND OTHER

Executive Summary of the second Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council. OJEU C 392/09 of 25-11-2015

Executive Summary of the second Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

European Parliament Resolution of 11-12-2012. OJEU C434/2 of 23-12-2015

About completing the Digital Single Market.

European Parliament Resolution of 11-12-2012. OJEU C434/4 of 23-12-2015

Regarding a Digital Freedom Strategy in EU Foreign Policy.

European Parliament Resolution of 11-12-2012. OJEU C434/5 of 23-12-2015

On jurisdictional system for patent disputes.

European Parliament Resolution of 11-12-2012. OJEU C434/27 of 23-12-2015

On the proposal for a regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection.

European Parliament Resolution of 11-12-2012. OJEU C434/28 of 23-12-2015

On the proposal for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

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