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FLASH NEWS

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PROTECTION OF PERSONAL DATA

2016 - 2018 OVERVIEW

SEARCH ENGINES

Spain – Supreme court

Search engine - Determination of the person responsible for processing

In the context of a case whose facts were similar to a case having led to the Google Spain and Google (C-131/12) ruling, the Supreme court confirmed that the operator of the search engine was responsible for the processing of the personal data of its users.

In this regard, after having found that Google Inc. operated the "Google Search" search engine, the Supreme court ruled that it was responsible for the said processing. In fact, Google Spain, its subsidiary, could not be considered to be responsible for such processing insofar as, in this instance, its activity is limited to the sales and promotion of advertising spaces for people living in Spain.

Tribunal Supremo, Sala de lo Contencioso, ruling of 13.06.2016, no. STS 2722/2016 ***(ES)***

France – Court of cassation

Search engine - De-listing of web links

The Court of cassation was referred an appeal concerning a request for de-listing filed by a private individual criticising Google Inc. for using his personal data without his consent.

It held that, based on the Google Spain and Google (C-131/12) ruling, the court of appeal was required to carry out the balancing of the interests involved in a meaningful way. Therefore, it could not order a general injunction making the removal of the links to web pages containing information related to a person, from the list of results displayed after a search performed using this person's name, automatic. Therefore, the ruling of the court of appeal has been annulled.

Court of cassation, ruling of 14.02.2017, no. 17-10.499 ***(FR)***
Published in Flash News "Decisions of interest for the Union" No. 1/2018.

Romania– Court of appeal of Bucharest

Search engine - De-listing of web links- Right to be forgotten

The court of appeal of Bucharest dismissed the appeal filed by Google Inc. against a decision of the National Authority for the Control of Personal Data Processing. This decision had required it to delist web links to personal data, accessible via its search engine. This data pertained to a person having held public office and who claimed that the publication of the said data had seriously damaged his image.

After having established the absence of the accurate and current nature of the data in question, the court of appeal emphasised that the interest of the person concerned to obtain the deletion of personal data should prevail over the economic interest of the operator of a search engine to publish them.

Curtea de Apel Bucuresti, judgment of 14.03.2017, no. 879 ***(RO)***

Press release (RO)

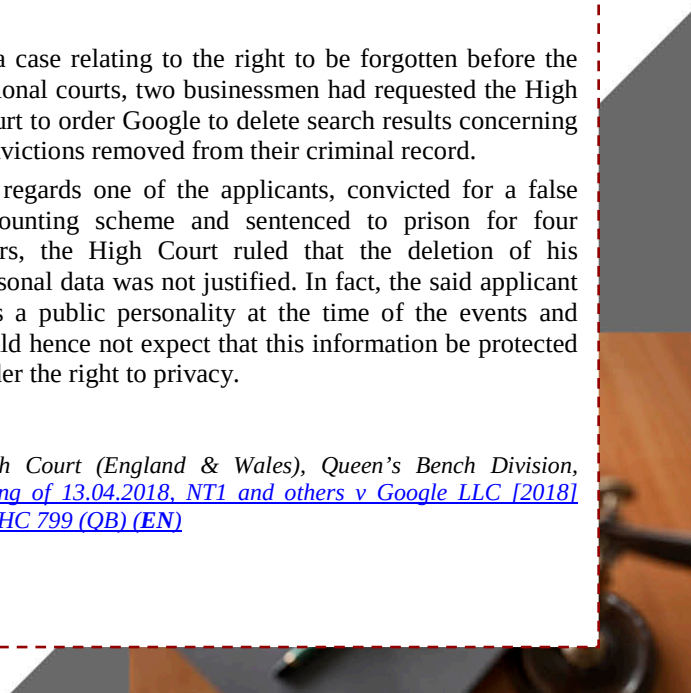
United Kingdom– High court of justice

Search engine - De-listing of web links- Right to be forgotten

In a case relating to the right to be forgotten before the national courts, two businessmen had requested the High Court to order Google to delete search results concerning convictions removed from their criminal record.

As regards one of the applicants, convicted for a false accounting scheme and sentenced to prison for four years, the High Court ruled that the deletion of his personal data was not justified. In fact, the said applicant was a public personality at the time of the events and could hence not expect that this information be protected under the right to privacy.

High Court (England & Wales), Queen's Bench Division, ruling of 13.04.2018, NT1 and others v Google LLC [2018] EWHC 799 (QB) ***(EN)***



SOCIAL NETWORKS

Germany – Higher Regional Court of Berlin

Games on social networks - Transmission of data by the operator of the network - Concept of "consent" to processing of data

The higher regional court of Berlin was referred a case concerning the use, on a social networking platform, of an "App Center" allowing the users to play online games operated by third-parties.

It ruled that the operator of the said platform, Facebook in this case, was not entitled, by the simple fact of the consumer having clicked on the "Play game" button, to communicate to the game operator information from this platform and authorise it to publish the said information (status, photos, etc.) on behalf of the consumer. In fact, the court considered that the consumer was not sufficiently informed in this regard; the fact of having clicked on a button does not constitute valid consent for the purpose of such processing of data.

Kammergericht Berlin, ruling of 22.09.2017, 5 U 155/14 ***(DE)***

Ireland – High Court

Transfer of data to the Unites States - Facebook

Following the initial refusal of the data protection commissioner to investigate a complaint filed by Mr Schrems, which led to the Schrems (C-362/14) ruling, the said commissioner started an investigation relating to the transfer by Facebook Ireland of data of its users to the Unites States. For the purpose of his investigation, he filed this appeal by stating the necessity of a reference for a preliminary ruling concerning the validity of the 2001/497/EC, 2004/915/EC and 2010/87/EU decisions, relating to the contractual clauses for the transfer of personal data to third countries. The High Court formulated a series of preliminary questions in this regard (C-311/18). Nevertheless, it concluded that it was not required to check the adequacy of the data protection system in the Unites States but that it was competent for the questions relating to the potential violations of articles 47 and 57 of the Charter.

High Court, ruling of 03.10.2017, [2017] IEHC 545 ***(EN)***

Belgium – Dutch-speaking Court of first instance of Brussels

Information relating to data processing - Facebook

The Dutch-speaking court of first instance of Brussels was referred a case between the Belgian personal data protection authority and Facebook, concerning the collection by this operator of the information about the browsing behaviour of Facebook users as well as non-users, through cookies and software code elements mainly placed on third-party websites. It ruled that Facebook did not sufficiently inform the Belgian internet users about the fact that it collected information concerning them or how it was used. In addition, the consent given by the internet users to collect and process this information has been deemed invalid. Therefore, Facebook has been ordered to stop its practices and destroy all the illegally obtained personal data.

Nederlandstalige rechtbank van eerste aanleg Brussel, judgment of 16.02.2018, no. 2016/153/A ***(NL)*** ***(FR)***

Austria– Supreme court

[Schrems, C-498/16]

Jurisdiction in civil matters - Concept of "consumer" - Action against Facebook

Supporting the reasoning of the Court of Justice, the Supreme court ruled that Mr Schrems could initiate an independent action against Facebook Ireland in Austria, insofar as he could be considered as a "consumer" under regulation no. 44/2001. On the other hand, as assignee of the rights of other consumers, he could not avail of the consumer court for the purpose of a collective action. Therefore, the Supreme court confirmed the decision of the higher regional court of Vienna that had dismissed the appeal of Mr Schrems.

As regards the question of lis pendens in this case, the Supreme court stated that Mr Schrems's appeal could be filed in Vienna, given that the appeal filed in Ireland had neither the same subject, nor the same cause.

Oberster Gerichtshof, ruling of 28.02.2018 ***(DE)***

FREEDOM OF THE PRESS

France – Court of cassation

Freedom of the press - Archiving of articles on a website

The Court of cassation upheld the ruling of the court of appeal having dismissed the appeal seeking to order the deletion of the personal data of the applicants from the automated processing operations of the "LesEchos.fr" website, on the grounds that the use of their family name as keywords in the search engines of this site would immediately display the following title: "the Council of State has reduced the penalty of the X brothers... to an official reprimand".

The Court of cassation ruled that the fact of forcing a press organ, either to delete from the website dedicated to the archiving of its articles, which cannot be equivalent to the publishing of a data base of judicial decisions, the information itself contained in one of its articles, or restricting access by changing the usual referencing, exceeded the restrictions that can be put on the freedom of the press.

*Court of cassation, ruling of 12.05.2016, no. 15-17.729 (**FR**)*

Estonia – Court of appeal of Tallinn

Freedom of the press - Media - Disclosure of the identity of a person without his consent

The court of appeal of Tallinn examined the case of a person having anonymously posted numerous extremely rude comments online about the mental health of another person. The identity of the anonymous author of the comments, mainly revealed by the IP addresses used to publish them, has been disclosed by the media. This person turned out to be a health professional.

The court of appeal ruled that there was an overriding public interest in the processing and disclosure of the data relating to the identity of the professional in question, taking into account the extremely offensive words that he used. Nevertheless, the said court stated that this case was exceptional in nature.

*Tallinna Ringkonnakohus, decision of 23.02.2017, 2-12-46283 (**ET**)*

PROFESSIONAL LIFE

Greece – Court of cassation

Viewing of professional messages and files by the employer - Former employees

According to the Court of cassation, the recovery of electronic messages and files of former employees of a company, which have been saved on hard disks belonging to the latter, is lawful in view of the necessity to ensure effective legal protection of the freedom to conduct business.

On the one hand, the Court of cassation held that the exchanged electronic messages do not come under the scope of secrecy of correspondence. On the other hand, it dismissed the arguments of the former employees drawn from the right to privacy and the unlawful nature of the treatment of their personal data, by considering that the exercise of these rights obstructed the evidence of their anticompetitive behaviour.

*Areios Pagos, ruling of 16.2.2017, 1/2017 **(EL)***

Lithuania – Supreme Administrative Court

Viewing of professional messages and files by the employer

The Administrative supreme court has been called upon to decide on the lawfulness of the viewing, by a private employer, of the files contained in professional computers as well as the electronic mail of his employees, with a view to establish whether their activities, while exercising their functions in the company concerned, harmed the interests of the latter.

The Administrative supreme court concluded that there was no violation of article 8 of the European Convention on Human Rights, directive 95/46, and the national regulations relating to data protection.

*Lietuvos vyriausiasis administracinis teismas, rulings of 20.04.2018, A-622-525/2018 (**LT**)*

Germany – Federal Court of Justice

Sending advertising e-mails to a professional address - Right to exercise an entrepreneurial activity - Concept of "consent" to data processing

The Federal Court of Justice ruled that advertising e-mails sent to a professional email address without the consent of the recipient constitutes an interference in the right of the latter to exercise his entrepreneurial activity, in this case incompatible with the regulations as regards unfair competition, as it results from directives 2002/58 and 95/46.

In fact, the use by the recipient of his email address to download software on a website cannot be considered as acceptance of the general conditions providing for the communication of his address to third-parties for advertising purposes. Therefore, it does not constitute a valid consent for the purpose of such treatment of the data of the user as the products and services offered by these third-parties are not clearly specified beforehand.

*Bundesgerichtshof, ruling of 14.03.2017, VI ZR 721/15 **(DE)***

COURT PROCEEDINGS

Belgium – Court of cassation

Data generated or processed by telecommunication services - Evidence obtained in an unlawful manner in the context of an investigation

The Court of cassation was called upon to decide on an appeal concerning the use of evidence based on telephone data collected from a telecommunications operator in the context of an investigation. It ruled that this data, obtained pursuant to a national provision providing for the conditions of storing such data similar to those fixed by directive 2006/24 (invalidated by the Court of Justice in its Digital Rights Ireland and Seitlinger and others, C-293/12 et C-594/12ruling), should not be discarded from the evidence. According to the Court of cassation, the fact that the evidence has been obtained in violation of the fundamental rights relating to privacy and protection of personal data does not necessarily imply a violation of the right to a fair hearing.

*Hof van Cassatie, ruling of 19.04.2016, no. P.15.1639.N **(NL)** **(FR)***

Germany – Federal Court of Justice

Admissibility of evidence in the context of civil liability proceedings - Video obtained using a DashCam

The Federal Court of Justice ruled that a video obtained using a DashCam, a small camera that is fixed on the dashboard of a vehicle can, as a rule, be used for evidence in the context of civil liability proceedings following a road accident.

Although the permanent record with no specific reason is considered to be contrary to the regulations as regards the protection of personal data in the absence of consent of the persons concerned, the video can nevertheless be used as evidence as long as, after consideration of the interests involved, the interest of the production of the evidence prevails over the personal rights of the person concerned.

*Bundesgerichtshof, ruling of 15.05.2018, VI ZR 233/17 **(DE)***

Press release (DE)

Latvia – Constitutional Court

Criminal proceedings - Storage of DNA profiles - Unconstitutionality

The Constitutional Court declared a provision of the law on the creation and use of the DNA database incompatible with article 96 of the Constitution (respect for privacy) as regards persons suspected in the context of criminal proceedings. Pursuant to the said provision, the DNA profiles of the said persons can be stored for ten years, except in some specific cases authorising the person concerned to request for their removal.

Taking into account the sensitive nature of the DNA data, the Constitutional Court held that the law should ensure the removal of this data from storage when this person is no longer a suspect.

*Latvijas Republikas Satversmes tiesa, ruling of 12.05.2016, 2015-14-0103 **(LV)***

Press release (LV)

Unites States – Supreme court

Criminal offence - Cross-border access to user data - CLOUD Act

The Supreme court was referred a case concerning the refusal of Microsoft to disclose, to the American government, the contents of the email of one of its clients suspected in the context of a drug trafficking case, as well as any other relevant data, on the grounds that this information was stored outside the territory of the United States, i.e. in Ireland.

During the proceedings, the federal law clarifying the legal use of the data abroad (CLOUD Act) and allowing cross-border access to user data has been enacted, ordering Microsoft to send the disputed data to the American authorities. Noting the adoption of this new legal provision, the Supreme court held that the case had become inapplicable.

*US Supreme Court, ruling of 17.04.2018, United States v. Microsoft Corporation, No. 17-2 **(EN)***

HEALTH

Italy – Court of cassation

Health - Medical files - Anonymous birth - Right of the child to know his origins

The legislator having failed to draw the right conclusions from the ruling of the Constitutional Court no. 278/13 (see reflections no. 1/15), the Court of cassation ruled that the legal authority appealed to by a child, not recognised at the time of birth, can ask the biological mother not having consented to be named in the birth certificate, while guaranteeing her her confidentiality, if she wants to maintain her anonymity.

*Corte suprema di cassazione, ruling of 25.01.2017, no. 1946 (**IT**)*

Sweden – Administrative supreme court

Health - Medical files - Direct access of the persons authorised by patients

The Administrative supreme court gave a ruling on the question of knowing whether healthcare service providers, which process personal data relating to the patients, can give their authorised representatives a "direct access" to the data concerning them, under the same conditions as those applicable to the patients themselves. The said court responded in the negative stating that such an option does not come under the applicable law and that this assessment would not be affected by a possible consent of the patient in this regard.

*Högsta förvaltningsdomstolen, ruling of 04.12.2017, no. 3716-16 (**SE**)*

Netherlands – Supreme court

Health - Medical files - Electronic exchange system

According to the Supreme court, the processing, through an electronic exchange system, of personal data contained in the electronic health records of patients satisfies the conditions set out in article 6, paragraph 1, under c), of directive 95/46.

In fact, it ruled that this data was sufficient, relevant and not excessive in view of the purposes for which it was collected. It emphasised that the processing of this data was based on a valid consent of the parties concerned and thus respected the requirements drawn from the principle of proportionality. The said Court referred to regulation no. 2016/679, having led to the repealing of the Dutch law on the protection of personal data.

*Hoge Raad der Nederlanden, ruling of 01.12.2017 (**NL**)*

OTHER PROCESSING OPERATIONS OF PERSONAL DATA

Poland – Administrative supreme court

Parish registers - Absence of obligation of the priest to change the baptism certificate in case of apostasy

The administrative supreme court was referred an appeal in cassation filed against the judgment of an administrative court having annulled a decision of the national inspector of data protection, by which the latter had ordered a priest, following the request of a person, to complete the baptism certificate of this person by adding a special mention indicating that this person had undergone apostasy reflecting his renunciation of the Catholic religion.

Stating that the contested decision constituted an interference with the autonomy of the Catholic church, as the latter alone is competent to determine whether the person in question was a member of this church, the Administrative supreme court dismissed the appeal.

*Naczelny Sąd Administracyjny, judgment of 09.02.2016, I OSK 1466/15 **(PL)***

Sweden – Supreme Administrative Court

Video recording of the registration of vehicles - Right to privacy

The Supreme Administrative Court declared a system operated by a private company, recording the registration numbers of vehicles of the persons not paying for their refuelling, illegal.

In fact, pursuant to the general rule of the law on data protection, only the public authorities can process the personal data relating to criminal offences. Now, neither directive 95/46, nor the Swedish law provide any indications as regards the cases in which the exemptions from this general rule could be accepted. Therefore, the court ruled that, insofar as these exceptions are strictly interpreted, this case cannot come under such exceptions, on the grounds that the purpose of the processing of data could not be considered as justifying the violations of privacy resulting from the said processing.

*Högsta förvaltningsdomstolen, ruling of 16.02.2016, no. 4970-14 **(SE)***

United Kingdom– Supreme court

Supervision of minors - Appointment of a reference person - Exchange of information about minors - Right to privacy

The Supreme court ruled that a regulation providing for the compulsory appointment, for each child and young person (minor) in Scotland, of a person in charge of ensuring their well-being and involved, in this regard, in certain functions, including the possibility of sharing information concerning the health or sexual life of the minor with schools and health services without informing the person concerned or his parents and without obtaining their consent to be contrary to article 8 of the European Convention on Human Rights.

In fact, according to the Supreme court, in the absence of the possibility to challenge the sharing of information, the established system was not provided for by the law under said article 8.

*Supreme Court, ruling of 28.07.2016, The Christian Institute v The Lord Advocate [2016] UKSC 51 **(EN)***

Press release (EN)

France – Court of cassation

IT - Concept of "personal data" - IP addresses

The Court of cassation ruled that the IP addresses, which allow indirectly identifying an individual, are personal data, under law no. 78-17, relating to information technology, files and liberties. Therefore, their collection constitutes processing of personal data and must be declared beforehand to the French Data Protection Authority.

Thus, the Court of cassation has reversed and annulled the ruling of the court of appeal under appeal, which had ruled that the IP address, comprising a series of numbers, is related to a computer and not the user and that the fact of storing, in the form of files, the IP addresses of the computers having been used to login, without authorisation, to the computer network of a company did not constitute a processing of personal data.

*Court of cassation, ruling of 03.11.2016, no. 15-22595 **(FR)***

Czech Republic– Constitutional Court

Electronic register of the turnovers of traders - Personal identification number of the trader on the receipts

The Constitutional Court has partially annulled the law concerning the electronic register of the turnovers of traders, seeking to enable better traceability of direct payments.

It has mainly considered that certain provisions of this law violated the right to the protection of personal data of traders. More specifically-speaking, it ruled, taking into account the protection offered by regulation no. 2016/679, that the obligation for an individual trader to indicate his personal identification number on receipts was disproportionate in nature.

Ústavní soud, ruling of 12.12.2017, Pl. ÚS 26/16 (CS)

Press release (CS)

Portugal – Supreme Administrative Court

Public function - Personal data of the candidates of a competition

Hearing an appeal, the Supreme Administrative Court gave a ruling on the interpretation of the national provision having transposed article 7, under f), of directive 95/46.

It ruled that the legitimate interest of a civil services examination candidate, to obtain access to all the non-anonymised information about the other candidates, for the purpose of being able to decide whether he should contest his grading at the end of the recruitment procedure, took precedence over, pursuant to the principle of proportionality, the interest of the other candidates to not disclose this data.

Austria– Supreme court

Incomplete anonymisation of a decision of a supreme court - Absence of responsibility of the State

The applicant had filed an action for damages against the Republic of Austria, on the grounds that an order issued by the Administrative court, containing his family name in full, had been included in a database accessible to the public.

The Supreme court ruled that it is incumbent upon the relevant chamber of a supreme court to decide whether and in which measure a decision, meant to be published, should be anonymised. It stated that the anonymisation cannot be separated from the substantive decision. Thus, in this instance, the said court concluded that the national law, excluding the responsibility of the State for the decisions of the supreme courts, was applicable.

Oberster Gerichtshof, ruling of 21 March 2018 1 Ob 22/18v (DE)

Press release (DE)