Recent CJEU case law on data and the media

Prof. Dr. Mark D. Cole
Director for Academic Affairs at the Institute of European Media Law (EMR) / Professor for Media and Telecommunication Law at the University of Luxembourg

ERA/EMR-Annual Media Law Conference, 6 June 2019, Brussels
Overview

I. Introduction

II. Data collection tools on Websites

III. Search engines and Delisting

IV. Data Journalism and other Publishers

V. Retention of Data Retention Cases

VI. And one final Name that should not be overlooked...
When fans start being a problem...

- **CJEU, C-210/16 ULD Schleswig-Holstein (DPA) ././ Wirtschaftsakademie Schleswig-Holstein (5.6.18)**

- **Background:** ‘web tracking’, which consists in the observation and analysis of user behaviour on the web.

- **The Wirtschaftsakademie provides services via a fan page hosted on the social network Facebook. Visiting that site resulted in cookies being placed. The DPA ordered the Academy – not Facebook – to deactivate the page because of lacking user information and consent.**

- **Wirtschaftsakademie sees sole responsibility with Facebook**

- **CJEU, based on old Directive 95/46/EC:**
  - Admin of a fan page is responsible (controller), jointly with FB → no “outsourcing of responsibility”
  - DPA is entitled to exercise its powers towards both controllers, even if FB only present with a subsidiary under jurisdiction
You like? Maybe not...

- **CJEU, Case C-40/17 Fashion ID**
  Protection of personal data of website users and liability of a website operator for an embedded Facebook plug-in
  Data transferred to FB even without clicking or having FB account
  The follow-up to Wirtschaftsakademie case, still under 95/46/EC

- **AG Opinion delivered on 19.12.2018**
  - Joint controllership means joint responsibility
    - AG urges for clarification of the concept and consequence of the notion of joint controller
    - Limit is to the operations which it co-decides about
  - Consent must be given to the operator of a website, not the third party tool provider, but: *before* operation begins, based on information
  - Also procedural element: standing for associations possible
I just cannot do other than...

...give you the joy of following AG Bobek’s metaphorical description of

(b) The bigger picture

89. A long time ago (the fans of a certain sci-fi franchise might wish to add: ‘in a galaxy far, far away’), it was cool to be on a social network. Then gradually, it started to be cool not to be on a social network. Nowadays, it appears to be a crime to be one (and for which novel forms of vicarious liability have to be put in place).
More Data Collection Tools

- **CJEU, Case C-673/17 Planet49 GmbH / Verbraucherzentrale Bundesverband e. V.**, Reference concerning the interpretation of Directive 2002/58/EC (consent to the setting of cookies → GDPR consent requirements!)
  E-Privacy Directive 2002/58/EC (& DPD & GDPR)

- **AG Opinion delivered on 21.03.2019**
  - Some clarifications on consent requirements regarding cookies and pre-ticked boxes
    - The active unticking of boxes or ‘bundling’ of consent does not satisfy the requirements
    - Information to be provided to users for consent to become valid
    - Quality of consent is the same under DPD and GDPR as well as for different types of data collection and use on websites
    - Clear and comprehensive information “includes the duration of the operation of the cookies and the question of whether third parties are given access to the cookies or not”.
Overview

I. Introduction

II. Data collection tools on Websites

III. Search engines and Delisting

IV. Data Journalism and other Publishers

V. Retention of Data Retention Cases

VI. And one final Name that should not be overlooked...
Google in the focus...

- **Remember: Google Spain 2014 – and now?**
  - CJEU, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, **C-131/12**
Google in the focus...

  About the existence and precise extent of the obligation to erase (diverse types of) data by search engine operators; 95/46/EC

- **AG Opinion delivered on 10.01.2019:**
  - operator of a search engine must, in principle grant any request for the de-referencing of sensitive data (ex post)
  - However: protection of the right of access to information and of the right of freedom of expression must be ensured → balancing of Art. 7, 8 with Art. 11 CFR which includes not only the information but also its availability in search engine
Google in the focus...

- **CJEU, C-507/17 Google ./. CNIL**
  Questioning the extent/territorial scope of the obligation to de-referencing referring to Google Spain decision (geo-blocking); 95/46/EC

- **AG Opinion delivered on 10.01.2019:**
  - Operator of a search engine is not required to dereference regardless of the place from which the search is carried out (non-global reach)
  - The operator is required to delete the links at issue from the results displayed located in the EU (“ensure effective and complete de-referencing”). Take all steps available: Geo-blocking
Overview

I. Introduction

II. Data collection tools on Websites

III. Search engines and Delisting

IV. Data Journalism and other Publishers

V. Retention of Data Retention Cases

VI. And one final Name that should not be overlooked...
The “private journalist”

- **Case C–345/17 Sergejs Buivids (14.02.2019)**

Mr Buivids made a **video recording** in a station of the Latvian national police in the context of administrative proceedings which had been brought against him.

- Published the recorded video on **www.youtube.com**
- Latvia National Data Protection Agency: Infringement of Personal Data Protection Law because the police officers was not informed about the recording
- Mr Buivids: Right to freedom of expression
- Directive 95/46/EC as basis for balancing
Case C–345/17 Sergejs Buivids

- CJEU bases decision on Directive 95/46/EC → implications under the GDPR
- Tensions between data protection and freedom of expression → processing in this case not a purely household activity ≠ case of Lindqvist
- Journalistic derogation („media privilege“) not limited to institutions or profession
- Notions relating to the freedom of expression must be interpreted broadly → applicable to all persons engaged in journalism / publishing (in this case „sole object of that recording and publication thereof is the disclosure of information, opinions or ideas to the public“)
- → broad scope but functional condition
- → Role of courts and DPAs (strengthened under GDPR)
- → look out next for C-687/18 Associated Newspapers
For reasons of comparison: Standards of Art. 8 and ECtHR

- Multiple cases concerning “non-publishing” of personal information
- ‘Sedlmayr’ case: ML and WW v Germany (Appl. nos. 60798/10 and 65599/10)
  - In 1993 M.L. and W.W. were convicted of murdering a popular actor. They were released on probation in August 2007 and January 2008 respectively.
  - In 2007 the applicants brought proceedings against the radio station Deutschlandradio requesting anonymity
- ECtHR: Article 10 ECHR includes the protection of media archives and public access to these
  - in addition to the role of the press in disseminating information, an ancillary function is the maintenance of archives on published information and making these available to the public
- Differentiation between publishers and search engines
- Balancing of Article 8 and 10 rights by reference to the ‘Axel Springer criteria’
For reasons of comparison: Standards of Art 8 and ECtHR on non-publishing of personal information

- **Khadija Ismayilova v. Azerbaijan** (Applications nos. 65286/13 and 57270/14)
  - The case concerned the online dissemination of two intimate videos, receipt of a threatening letter, and disclosure of sensitive personal information in an investigation report, all allegedly part of an intimidation campaign against an investigative journalist.
  - Two violations of Article 8 (State’s positive obligation to protect the applicant’s private life / disclosure of sensitive information in the investigation status report)
  - Violation of Article 10 (Failure to protect the applicant’s right to freedom of expression)

→ State needs to create an environment that is beneficial for independent journalism
Overview

I. Introduction

II. Data collection tools on Websites

III. Search engines and Delisting

IV. Data Journalism and other Publishers

V. Retention of Data Retention Cases

VI. And one final Name that should not be overlooked...
From Digital Rights Ireland to Tele 2 and continued

- **CJEU, C-207/16, Ministerio Fiscal**
  - Reminder: in *Digital Rights Ireland* Data Retention Directive was struck down; in *Tele2* further clarification whether Member States can (still) foresee data retention obligations
  - Now comparable collection in investigation *Ministerio Fiscal*
  - e-Privacy Directive
Opening the door a bit further for data retention...

- CJEU, C-207/16, Ministerio Fiscal

- In an investigation concerning the robbery of a wallet and a mobile telephone, the Spanish Ministerio Fiscal raised questions about police/LE access to identification data of users of telephones.

- Under the e-Privacy Directive, access by public authorities to basic electronic communications metadata may be justified for the prevention, investigation, detection and prosecution of criminal offences that are not particularly serious, provided such disclosure does not seriously interfere with the right to privacy.
From Digital Rights Ireland to Tele 2 and continued

- **CJEU, Case C-623/17**  
  **Privacy International**  
  Two preliminary questions on whether the activities of **intelligence agencies** in relation to the acquisition and use of bulk personal datasets for the purposes of national security:
  
  - 1) Are subject to Union law and if so,
  - 2) whether the Tele2/Watson requirements apply in addition to those under the ECHR, taking into account the essential necessity of such bulk acquisition?
  - Can telecoms providers process personal data outside the scope of EU law when transferring such data to the intelligence agencies for retention?
  - And in Strasbourg: ECtHR, *Centrum för Rättvisa v Sweden* and *Big Brother Watch v UK*
Overview

I. Introduction

II. Data collection tools on Websites

III. Search engines and Delisting

IV. Data Journalism and other Publishers

V. Retention of Data Retention Cases

VI. And one final Name that should not be overlooked...
Schrems III: (still) upcoming

- In April 2018 the Irish High Court Commercial (Case 2016 No. 4809 P.) published its referral with the legal questions to be posed to CJEU concerning data transfer from EU to US.

- 11 questions asked but one is the most interesting: (No. 4) Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC Decision does this violate the rights of individuals under Articles 7 and/or 8 of the Charter?

- Case no. C-311/18
Franz-Mai-Straße 6
66121 Saarbrücken
Germany

Telefon +49/681/99275-11
Mail emr@emr-sb.de
Web europaeisches-medienrecht.de
emr-sb.de