Verein für Konsumenteninformation v. Amazon EU Sàrl

European Court of Justice, C-191/15, 28 July 2016

The ECJ ruled that the fact that the undertaking responsible for data processing does not have a branch or subsidiary in a Member State does not preclude it from having an 'establishment' there under Article 4 of the EU Data Protection Directive.

This case underlines the evolving interaction between data and consumer protection law. It involved the interpretation of Article 4 of the Data Protection Directive 95/46/EC ('Directive').

The case relates to the situation where an online trader sells to consumers in a different Member State ('MS') from the MS in which the trader is established. The ECJ was asked, amongst other questions, whether a term specifying that the data protection law of the MS of the trader (in this case Luxembourg) applies to the treatment of the consumers' data (in this case Austria) was an unfair term. The key question posed from a data protection perspective was whether Article 4(1)(a) of the Directive must be interpreted as meaning Amazon EU Sàrl ('Amazon EU'), established under Luxembourgish law, was the relevant establishment to trigger the applicability of Luxembourgish data protection law in relation to online sales to consumers based in Austria.

Facts of the case

Amazon EU enters into electronic sales contracts with consumers in countries across Europe, through different websites aimed at consumers in different MS. Regardless of the consumer's residency or the website used to make the purchase, the T&Cs applicable to all such transactions include a choice of law clause stating that Luxembourg law applies, and that data may be shared with other Amazon group companies. The situation was no different in Austria, where Amazon EU does not have a registered office or establishment. Also, Austria does not have its own individual Amazon website. Austrian consumers are directed to amazon.de. Verein für Konsumenteninformation ('VKI'), a consumer protection association, made a claim on behalf of Austrian consumers against Amazon EU, arguing that this approach contravened EU law.

Eventually, the case was appealed to the Austrian Supreme Court, which in turn referred various questions to the ECJ for a preliminary ruling, including whether Article 4(1)(a) of the Directive must be interpreted as meaning that the processing of personal data by an undertaking, engaged in e-commerce, which concludes contracts with consumers resident in other MS is governed by the law of the MS to which the undertaking directs its activities.

Clarifying the concept of 'establishment'

The relevant rule under Article 4 is in Article 4(1)(a), which states that 'Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where: (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable.'

'Establishment' is in itself an oblique concept and has been beset by a lack of clarity from the beginning. However, the ECJ in recent years on several occasions has been tasked with interpreting it, and has tended to interpret the concept broadly.

The seminal case of *Google Spain SL & Google Inc v. Agencia Española de Protección de Datos (AEPD) & Costeja González*, C-131/12 saw the first judicial consideration of Article 4(1)(a). In the case, Google argued that its operations fell outside the scope of the Directive. The rationale for its argument was that the operations of Google Spain, which were limited to selling advertising space, did not directly involve the processing of personal data. Instead, the operations of the search engine (and the use of personal data) were carried out by Google Inc., established in the US. The ECJ ruled that there was an 'inextricable link' between the two companies and held that Google's activities fell within the scope of the Directive.

In *Weltimmo s. r. o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság*, C-230/14, the ECJ once again considered the meaning of 'establishment' under the Directive. In this case it held that because Weltimmo had a representative in Hungary, a website in Hungarian aimed at Hungarian residents and a letter box and a bank account there, it pursued 'real and effective activity in Hungary,' and this was sufficient to qualify as an 'establishment'. The decision seemingly set the threshold even lower for determining whether a data controller is 'established' in a particular MS.

The ECJ's decision

The ECJ held that the fact that the undertaking responsible for the data processing does not have a branch or subsidiary in a MS does not preclude it from having an establishment there within the meaning of Article 4(1)(a). However, it also held that an establishment cannot exist simply due to the fact that an undertaking's website is accessible in a certain MS.

The ECJ referred to Article 4(1)(a) of the Directive, and stated that each MS should apply its transposing domestic provisions

where the data processing is carried out in the context of the activities of an establishment of the controller in the territory of that MS. It follows that the laws of the MS in which that establishment is situated govern the processing of data in the context of the activities of that establishment.

In conclusion, the ECJ held that it is for the national court to ascertain, taking account of all the relevant circumstances, whether Amazon EU carries out the data processing in question in the context of the activities of an establishment situated in a MS other than Luxembourg.

Consequences and comments

Regarding which MS' law applies to data processing, the ECJ's requirement for an establishment in the MS comes as no surprise and the question of applicable law in the context of Article 4(1)(a) of the Directive seems more settled. Although the decision reconfirms elements of the *Weltimmo* decision, the establishment test has been interpreted less broadly in the *Amazon* case, and the ECJ appears to have applied a higher threshold.

The decision will be welcomed by companies operating in the online space that have opted to appoint a single data controller for their EU activities for the sake of efficiency. The decision that an establishment cannot exist simply due to the fact that an undertaking's website is accessible in a certain MS, will provide comfort that they can cross EU borders without falling prey to the data protection laws of every jurisdiction in which websites are accessible.

Nevertheless, companies will need to continue to be cautious if they wish to avoid being deemed established in countries in which they wish to avoid establishment. It is still crucial that companies monitor their presence in all MS and even where they consider themselves to have a minimal presence. Even though accessibility of a company's website is now less of a concern, a company should still consider carefully where it locates staff and facilities, to avoid these factors leading them to be considered a relevant 'establishment,' triggering the application of local data protection law.

Obviously, it is not possible to consider implications for data protection law without bringing the General Data Protection Regulation (the 'Regulation') into focus. Since Article 3 of the forthcoming Regulation - which plays the role Article 4 does for the Directive - adopts largely the same focus on processing of personal data in the context of the activities of an establishment of a controller (or a processor) in the EU, this case along with the ECJ's decisions in *Weltimmo* and *Google Spain* determine not only the current law, but set precedents for future interpretation of the Regulation.

Nevertheless, although 'establishment' may appear a clearer concept now, as the Regulation itself will introduce new requirements such as its application to 'the activities of an establishment of a controller or processor,' and concepts such as the 'one-stop-shop' mechanism, it is likely that further clarification will be sought on it from the ECJ in the future.

The ECJ's decision in the *Weltimmo* case, exposing controllers to wider subjection, was difficult to reconcile with the 'one-stop-shop' concept which was contained in the (at the time draft) Regulation, which envisaged EU organisations having to deal with a single supervisory authority. Now that the Regulation has been formalised, and the 'one-stop-shop' concept is becoming a closer reality, the ECJ decision in the *Amazon* case looks to represent a shift in perspective towards this state of affairs.

As pointed out at the outset, the case is further evidence of the increasing interplay between consumer protection and data protection law, and this is a trend we can also expect to continue into the future. The principles enshrined in the applicable laws are closely aligned, with the requirements for accurate information and transparency, and the promotion and protection of consumers' or data subjects' welfare, paramount to both.

In the past, consumer protection law may have been viewed as more robust than data protection law, and regulators and individuals may have looked to rely on the former when looking for redress. However, with the advent of the Regulation, and the introduction of more severe sanctions, this imbalance will be reduced.

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