Brief case-law companion for the GDPR professional

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Forward

This collection of quotes from relevant case-law has been compiled with the purpose of being useful to all those working with EU data protection law. The majority of the selected findings are part of a "Countdown to the GDPR" conducted by the curator on social media, one month before the Regulation became applicable, under #KnowYourCaseLaw. This exercise was prompted by a couple of reasons.

First, data protection in the EU is much older and wider than the General Data Protection Regulation (GDPR) and it has already invited the highest Courts in Europe to weigh in on the protection of this right. Knowing what those Courts have said is essential.

Data protection law in the EU is not only a matter of pure EU law, but also a matter of protecting human rights following the legal framework of the Council of Europe (starting with Article 8 of the European Convention on Human Rights – 'ECHR'). The interplay between these two legal regimes is very important, given the fact that the EU recognizes fundamental rights protected by the ECHR as general principles of EU law - see Article 6(3) TEU.

Finally, knowing relevant case-law makes the difference between a good privacy professional and a great one.

What to expect

This is not a comprehensive collection of case-law and it does not provide background for the cases it addresses. The Handbook of data protection law, edition 2018, is a great resource if this is what you are looking for.

This is a collection of specific findings of the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR) and one bonus finding of the German Constitutional Court. There are certainly other interesting findings that have not been included here (how about an "Encyclopedia of interesting findings" for the next project?). The ones that have been included provide insight into specific issues, such as the definition of personal data, what constitutes data related to health, what does freely consent mean or what type of interference with fundamental rights is profiling. Readers will even find a quote from a concurring opinion of an ECtHR judge that is prescient, to say the least.

Enjoy the read!

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Issue	Relevant paragraph	Reference
On the concept of personal data	"The use of the expression 'any information' in the definition of the concept of 'personal data' … reflects the aim of the EU legislature to **assign a wide scope** to that concept, which is **not restricted to information that is sensitive or private**, but potentially encompasses all kinds of information, **not only objective but also subjective**, in the form of **opinions and assessments**, provided that it 'relates' to the data subject" (para 34).	CJEU, C-434/16 *Nowak*, 2017

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On having no expectations of privacy using IT devices at work	"It is open to question whether – and if so, to what extent – the employer's restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, **an employer's instructions cannot reduce private social life in the workplace to zero**. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary" (para 80).	ECtHR, *Bărbulescu v. Romania*, 2017
On the intrusiveness of collecting metadata	"… data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services…" (para 26) "Those data, taken as a whole, may allow **very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained**, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, **the social relationships of those persons and the social environments** frequented by them" (para 27).	CJEU, Cases C-293/12 and C-594/12, *Digital Rights Ireland*, 2014

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On what constitutes an "establishment" for the territorial scope of the DP law:	"Both **the degree of stability of the arrangements** and **the effective exercise of activities** in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned. This is particularly true for undertakings offering services exclusively over the Internet" (*Weltimmo*, para 28). "**The presence of only one representative** can, in some circumstances, suffice to constitute a stable arrangement if that representative acts with a **sufficient degree of stability** through the presence of the necessary equipment for provision of the specific services concerned in the Member State in question". (*Weltimmo*, para 30). In order to attain that objective, it should be considered that the concept of 'establishment' … extends to **any real and effective activity — even a minimal one — exercised through stable arrangements** (*Weltimmo, para 31*).	CJEU, Case C-230/14 *Weltimmo*, 2015
	"[Directive 95/46] does not require the processing of personal data in question to be carried out **'by'** the establishment concerned itself, but only that it be carried out '**in the context of the activities'** of the establishment (*Google Spain*, para 52).	C-131/12, *Google Spain*, 2014
On data relating to a person's professional life	"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as	ECtHR, *Niemietz v Germany*, 1992

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	he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. **Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.** There appears, furthermore, to be **no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature** since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of **developing relationships with the outside world**. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time…" (para 29).	
On assessing necessity of a processing operation	"[national law] requires **disclosure of the names of the persons concerned, in relation to income above a certain level**, with respect not only to persons filling posts remunerated by salaries on a published scale, but to all persons remunerated by bodies subject to control	CJEU, Joined Cases C-465/00, C-138/01, C-139/01

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	by the Rechnungshof. Moreover, such information is not only communicated to the Rechnungshof and via the latter to the various parliamentary bodies, **but is also made widely available to the public** (para 87). It is for the national courts to ascertain whether such publicity is both **necessary and proportionate to the aim of keeping salaries within reasonable limits**, and in particular to examine **whether such an objective could not have been attained equally effectively by transmitting the information as to names to the monitoring bodies alone**. Similarly, the question arises whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which persons employed by the public bodies concerned have a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation (para 88).	*Österreichischer Rundfunk*, 2003
On establishing a detailed profile about an individual from sources that were not originally connected:	"It must be pointed out at the outset that… processing of personal data… carried out by the operator of a search engine is liable to **affect significantly the fundamental rights to privacy and to the protection of personal data** when the search by means of that engine is carried out on the basis of an **individual's name**, since that processing **enables any internet user to obtain through the list of results a structured overview of the**	CJEU, C-131/12, *Google Spain*, 2014

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	information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of **the interference with those rights of the data subject is heightened** on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (para 80)	
On the importance of allowing persons to control the use of their image	"In the context of the monitoring of the actions of an individual by the use of photographic equipment, the Court has found that private-life considerations may arise concerning the recording of the data and the systematic or permanent nature of the recording … . **A person's image constitutes one of the chief attributes of his or her personality, as it reveals unique characteristics and distinguishes him or her from his or her peers**. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image…" (para 56)	ECtHR, *Lopez Ribalda v Spain*, 2018
On the importance of	"the requirement to inform the data subjects about the processing of their personal data **is all the more important**	CJEU, Case C-201/14 *Smaranda Bara v. CNAS*, 2015

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providing notice right	**since it affects the exercise by the data subjects of their right of access to, and right to rectify**, the data being processed … and their right to object to the processing of those data" (para 33).	
On the fact that rights of the data subject override, as a rule, economic interests	"As the data subject may, in the light of his **fundamental rights under Articles 7 and 8 of the Charter**, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that **those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name**. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that **the interference with his fundamental rights is justified by the preponderant interest of the general public** in having, on account of inclusion in the list of results, access to the information in question" (para 97).	CJEU, Case C-131/12, *Google Spain*, 2014
On different retention periods: one for personal data, on for	"**Rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and**	CJEU, Case C-553/07 *Rijkeboer*, 2009.

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information about its recipients	**correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue**, unless it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the determinations necessary" (executive part).	
On consent not being the appropriate lawful ground where there is no choice	"First of all, concerning the condition requiring the consent of persons applying for passports before their fingerprints can be taken, it should be noted that, as a general rule, it is essential for citizens of the Union to own a passport in order, for example, to travel to non-member countries and that that document must contain fingerprints pursuant to Article 1(2) of Regulation No 2252/2004. Therefore, **citizens of the Union wishing to make such journeys are not free to object to the processing of their fingerprints**. In those circumstances, persons applying for passports cannot be deemed to have consented to that processing" (para 32).	CJEU, Case C-291/12 *Schwarz*, 2013
On what constitutes data related to health	"In the light of the purpose of the directive, the expression 'data concerning health' used in Article 8(1) thereof must be given **a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual** (para. 50)	CJEU, C-101/01 *Bodil Lingvist*, 2003

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	The answer to the fourth question must therefore be that reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46" (para 51)	
On the "mosaic" technique of profiling	"**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**. In order to answer the needs of planning and of social and tax policy, the State is obliged to amplify the scale of its interferences. In its administrative systems, the State is being led to proliferate and then to computerise its personal data-files. … The encoding of programmes and tapes, their decoding, and computer processing make it possible for interceptions to be multiplied a hundredfold and to be analysed in shorter and shorter time-spans, if need be by computer. **Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.**"	Concurring Opinion of Judge Pettiti in ECtHR, *Malone v. the UK*, 2 August 1985
On pseudonymizing personal data	For information to be treated as 'personal data', "**there is no requirement that all the information enabling the identification of the data subject must be in the hands of one person**" (*Breyer*, para 43; *Nowak*, para 31).	CJEU, C-582/14 *Breyer*, 2016;

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	"The fact that the additional data necessary to identify the user of a website are held not by the online media services provider, but by that user's internet service provider does not appear to be such as to exclude that dynamic IP addresses registered by the online media services provider constitute personal data within the meaning of Article 2(a) of Directive 95/46" (*Breyer*, para 44).	CJEU, C-434/16 *Nowak*, 2017
On the need for periodical revision of models used for profiling to avoid discrimination	"… in order to ensure that, in practice, **the pre-established models and criteria, the use that is made of them and the databases used are not discriminatory and are limited to that which is strictly necessary**, the reliability and topicality of those pre-established models and criteria and databases used should, taking account of statistical data and results of international research, be covered by the joint review of the implementation of the envisaged agreement (i.e. EU-Canada PNR Agreement)" (para 174).	CJEU, Opinion 1/15, *EU-Canada PNR*, 2017
On the essence of the right to respect for private life	"In particular, 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" (para 94).	CJEU, C-362/14, *Schrems*, 2015

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On the essential importance of the right to a judicial remedy for data protection	"…legislation not providing for **any possibility** for an individual **to pursue legal remedies** in order to **have access** to personal data relating to him, or to **obtain the rectification or erasure** of such data, **does not respect the essence of the fundamental right to effective judicial protection**, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law" (para 95).	CJEU, C-362/14, *Schrems*, 2015
On the effects of data collection on free speech	"Even if such legislation does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights …, **the retention of traffic and location data could nonetheless have an effect on the use of means of electronic communication and, consequently, on the exercise by the users thereof of their freedom of expression**, guaranteed in Article 11 of the Charter" (para 101).	CJEU, Case C-203/15 and C-698/15 *Tele2 Sverige*, 2016

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On the right to informational self-determination:	"[the personality right] includes **the authority of the individual to decide for himself, on the basis of the idea of self-determination, when and within what limits facts about his personal life shall be disclosed**. The individual's decisional authority needs special protection in view of the present and prospective conditions of automatic data processing" (German Constitutional Court, *BVerfGe 65,1*; 1983 – translation by Kommers)	German Constitutional Court, *BVerfGe 65,1*; 1983 – translation by Kommers

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