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COMMERCIAL LAW UPDATE DATA PROTECTION: SUPREME COURT JUDGMENT OF FEBRUARY 8, 2012

On February 8, 2012, Panel no. 6 of the Judicial Review Chamber of the Supreme Court handed down a judgment (Appeal no. 25/2008) (the “**Judgment**”) in relation to data protection that we believe is worth analyzing, albeit briefly, given the various different ways it is being interpreted.

1. ORIGIN OF THE CONTROVERSY

Article 7.f) 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 (“**Directive 95/46/EC**”) envisages the possibility of processing individuals’ data without their consent where such processing is “*necessary for the purposes of the legitimate interests*” of the controller or recipient of the data, except where such interests are overridden by the fundamental rights and freedoms of the data subject¹.

As opposed to other Member States, in Spain this exception to the need for the data subject’s consent to process his data was transposed by adding an additional requirement: that the data appear in publicly accessible sources – Articles 6.2² of Personal Data

¹ Article 7.f) of Directive 95/46/EC: “*Member States shall provide that personal data may be processed only if: [...] f) it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1)*”

² Article 6.2 of the LOPD: “*Consent shall not be necessary where the personal data are collected for the performance of the functions specific to public authorities within the scope of their powers; where they refer to the parties to a contract or preliminary contract for a business, labor or administrative relationship and are necessary for the maintenance or performance thereof; where the purpose of the processing of data is to protect a vital interest of the data subject in the terms of Article 7.6 of this Law, or where the data appear in publicly accessible sources and their processing is necessary for the purposes of the legitimate interest pursued by the data controller or by that of the third party to whom the data are disclosed, provided that the fundamental rights and freedoms of the data subject are not violated*”

Protection Organic Law 15/1999, of December 13, 1999 (the “**LOPD**”) and 10.2.b)³ of Royal Decree 1720/2007, of December 21, 2007 approving the implementing Regulations of the LOPD (“**RLOPD**”). Thus, Spanish legislation did not allow the exception to be applied to data that had not been obtained from publicly accessible sources⁴ (such as telephone directories or lists of professional associations).

As a result, the Electronic Commerce and Direct Marketing Federation (FECEMD) filed an appeal for judicial review at the Supreme Court, requesting the annulment of several articles of the RLOPD, and, in particular, Article 10.2.b), on the grounds that they breached several provisions of Directive 95/46/EC.

The Supreme Court admitted the appeal and simultaneously referred the following questions to the European Court of Justice (“**ECJ**”) for a preliminary ruling:

- (i) On the one hand, whether the requirement under Spanish legislation that the data appear in public sources in order to apply the legitimate interest exception, is, in addition to Article 7.f) of Directive 95/46/EC, in line with EU law.
- (ii) On the other, whether said article of Directive 95/46/EC meets the requirements of ECJ’s case law to have direct effect.

³ Article 10.2.b) of the RLOPD: “*However, personal data may be processed or disclosed without the data subject’s consent where:*

b) The processed or disclosed data appear in sources accessible to the public and the data controller or third party to which the data are disclosed have a legitimate interest in their processing or disclosure, provided that the fundamental rights and freedoms of the data subject are not infringed.

However, the public authorities may only disclose data collected from publicly accessible sources to controllers of privately-owned filing systems pursuant to this paragraph where they are authorized to do so by a statutory provision”.

⁴ The description of publicly accessible sources in data protection legislation is a closed list. Thus, article 3.j) of the LOPD considers sources accessible to the public to be: “*filing system that can be accessed by any person, without statutory limitations or requirements other than payment of consideration, where applicable. Publicly accessible sources are, solely, the promotional census, telephone directories on the terms envisaged in specific legislation in this regard and lists of members of professional associations solely containing the name, title, profession, activity, qualifications, address and indication of the group they belong to. Publicly accessible sources are also official journals and gazettes and the media.*”

The appeal by the FECEMD also intended to have point a) of Article 10.2. of the RLOPD⁵ annulled on the grounds that it breached legal and constitutional principles and entailed a restriction of freedom of movement in the EU.

2. DECISION ON THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

In its decision of November 24, 2011 the ECJ (Third Chamber), held that:

- (i) Article 7.f) of Directive 95/46/EC precludes national rules from establishing new principles in relation to personal data processing or from imposing additional requirements that change the essential principles of this article of the directive. Thus national legislation in order to allow the processing of personal data as is necessary to pursue a legitimate interest of the data controller cannot require, in addition to respect for the fundamental rights and freedoms of the data subject that the data should appear in public sources, thereby excluding, in a categorical and generalized way, any processing of data not appearing in such sources. However, the ECJ held that national legislation does have the ability to balance the interests at stake, that is the legitimate interest of the party processing the data and the fundamental rights and freedoms of the data subject.
- (ii) Article 7.f) of the Directive has direct effect.

3. COURT JUDGMENT

Following the ECJ judgment, the Supreme Court annulled Article 10.2.b) of the RLOPD on the grounds that the requirement that the data appear in publicly accessible sources was an additional requirement and not a form of balancing the matter at hand in order to apply the legitimate interest exception.

As far as Article 10.2.a) of the RLOPD is concerned, the Supreme Court considered that it should not be annulled since it does not impose restrictions on Article 7 of Directive 95/46/EC and is an additional measure which allows the data controller to process data subjects' data without their consent where authorized by a statutory or EU law provision, when the correct conditions are met.

⁵ Article 10.2.a) of the RLOPD: "*However, the personal data may be processed or disclosed without the data subject's consent where:*

a) the processing is authorized by a statutory or EU law provision and in particular, in any of the following cases:

Where the purpose of the processing or disclosure is to satisfy a legitimate interest of the data controller or disclosee pursuant to such provision, unless such interest is overridden by the interest or fundamental rights and freedoms of the data subject, set out in article 1 of Organic Law 15/1999, of December 13, 1999.

The processing or disclosure of the data is necessary for the data controller to comply with an obligation imposed by any such provision".

4. DOUBTS AS TO CONTENT AND PROBLEMS ARISING FROM THE INTERPRETATION OF THE JUDGMENT

4.1 Has Article 6.2 of the LOPD also been annulled?

No, only Article 10.2.b) of RLOPD, since the Judicial Review Chamber of the Supreme Court does not have jurisdiction to annul primary legislation pursuant to Article 1.1 of Judicial Review Jurisdiction Law 29/1998, of July 13, 1998.

4.2 Can the direct effect of Article 7.f) of Directive 95/46/EC be invoked in Spain?

As the ECJ held in its judgment, Article 7.f) of the Directive has direct effect because it is “sufficiently precise to be relied on by an individual and applied by the national courts. Moreover, while that directive undoubtedly confers on the Member States a greater or lesser discretion in the implementation of some of its provisions, Article 7(f), for its part, states an unconditional obligation” (section 52 of the judgment).

Therefore, companies may process data without the data subject’s consent based on the legitimate interest exception, even though Article 6.2 of the LOPD has not been formally annulled.

4.3 Is the legitimate interest exception applicable without any additional requirements?

The application of the legitimate interest exception requires the existence of such interest and also that the data processing not infringe data subjects’ rights and freedoms. It must therefore be borne in mind that the application of the exception is subject to special control by the Spanish Data Protection Agency.

4.4 What is a legitimate interest?

Neither the EU nor Spanish legislators have expressed a view on to what is meant by the legitimate interest of the data controller to process data without the data subjects’ consent.

However, both the Article 29 Data Protection Working Party⁶, as well as the European data protection authorities give practical examples of cases in which a legitimate interest is deemed to exist, which can be used as reference to interpret this concept:

- The views held by the Information Commissioner’s Office (ICO)⁷, a UK data protection authority. It gives the example of a finance company which, unable to locate a customer who has stopped making payments, discloses the customer’s

⁶ The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 15 of Directive 2002/58/EC. It is composed of the data protection authorities of the various EU Member States.

⁷ http://www.ico.gov.uk/for_organisations/data_protection/the_guide/conditions_for_processing.aspx.

personal data to a debt collection agency, without the customer's consent, in order to find the customer and seek repayment of the debt. The ICO considers that the disclosure is made for the purposes of the finance company's legitimate interests – i.e. to recover the debt and that it has no prejudicial effect on the customer provided that the processed data is accurate and up to date and only such data as is necessary for the task in hand is disclosed.

- The Commission Nationale de l'Informatique et des Libertés (CNIL), the French authority on data protection has analyzed cases in which the data controller processes the data under the legitimate interest exception: Thus, for example, in the context of whistleblowing schemes in companies, a legitimate interest is held to exist where the processing aims at complying the requirements of foreign legislation⁸ (i.e. compliance by French companies established in the United States with the obligations of the Sarbanes-Oxley Law).
- The Article 29 Working Party in turn gives the example of legitimate interest to process personal data when buying a car, with a view to servicing the vehicle in the different affiliate companies in the EU⁹.

Finally, it should be borne in mind that the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), of January 25, 2012, does not contain a definition of legitimate interest either but requires the controller to explicitly inform the data subject on the legitimate interests pursued and on the right to object, and to document these legitimate interests (Recital 38).

4.5 If a company has a legitimate interest to process the data subjects' data, must it observe additional obligations set out in data protection legislation?

The application of the legitimate interest exception, through the direct effect of Article 7.f) of Directive 95/46/EC, does not rule out the need to observe data protection and information society services and e-commerce legislation, as occurs, inter alia, with:

- (i) Compliance with the duty of information in cases where the data have not been collected directly from the data subject (Article 5.4 of the LOPD)¹⁰.

⁸ Guideline document adopted by the "Commission nationale de l'informatique et des libertés" (CNIL) on 10 November 2005 for the implementation of whistleblowing systems in compliance with the French Data Protection Act of 6 January 1978, as amended in August 2004, relating to information technology, data filing systems and liberties.

⁹ Opinion 15/2011 on the definition of consent adopted on July 13.

¹⁰ Article 5.4 of the LOPD: "Where the personal data have not been collected from the data subject, the data controller or its representative shall expressly, precisely and unequivocally inform the data subject, within three months from registering the data, unless he has already been informed beforehand, of the content of the processing, the origin of the data and of the provisions of letters a), d) and e) of point 1 of this article."

- (ii) The need to obtain the data subject's consent to send commercial communications by e-mail (Article 21.1 of Information Society Services and E-Commerce Law 34/2002, of July 11, 2002)¹¹.
- (iii) Compliance with the principle of quality established in Article 4 of the LOPD, that is, processing may only be made of data that are “*adequate, relevant and not excessive in relation to the scope and specific, express and lawful purposes for which they have been obtained*”.
- (iv) Observing data subjects' rights of access, rectification, cancellation and objection.

4.6 Is an amendment of the LOPD envisaged in the short term, or an interpretation of the judgment by the Spanish Data Protection Agency?

It is likely that, as on previous occasions, the Spanish Data Protection Agency will publish a note or legal report giving its formal opinion on interpreting the possible application of the legitimate interest exception.

As to a potential amendment of the LOPD, although nothing has been mentioned for the time being, it would be advisable for the legislator to introduce the necessary changes to data protection legislation as soon as possible in order to clarify the interpretation of the legitimate interest concept and specifically determine the cases in which said concept can be applied in order to facilitate the free movement of data among companies in the European Union.

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¹¹ Article 21.1 of Information Society Services and E-Commerce Law 34/2002, of July 11, 2002: “*1. Sending advertising or promotional communications by e-mail or any other similar means of electronic communication that have not been requested or expressly authorized by the recipients is prohibited.*”