

ECJ Rules on Territorial Reach of EU Data Protection Law

Many readers will have heard of the landmark decision of the Court of Justice  of the European Union of May 13 in *Gonzales v. Google* (case C 131/12).

In 2010 Mario Costeja González, a Spanish national, lodged with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD) a complaint against La Vanguardia Ediciones SL (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) and against Google Spain and Google Inc. Mr Costeja González contended that, when an internet user entered his name in the search engine of the Google group ('Google Search'), the list of results would display links to two pages of La Vanguardia's newspaper, of January and March 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González.

Scholars are debating whether there is now a right to be forgotten. The case also has a choice of law dimension, as it accepts that the Data Protection Directive applies to Google.

The press release of the Court summarized the ruling on this point as follows.

As regards the directive's territorial scope, the Court observes that Google Spain is a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of the directive. The Court rejects the argument that the processing of personal data by Google Search is not carried out in the context of the activities of that establishment in Spain. The Court holds, in this regard, that where such data are processed for the purposes of a search engine operated by an undertaking which, although it has its seat in a non-member State, has an establishment in a Member State, the processing is carried out 'in the context of the activities' of that establishment, within the meaning of the directive, if the establishment is intended to promote and sell, in the Member State in question, advertising space offered by the search engine in order to make the service offered by the engine profitable.

Here are the reasons of the Court:

44 *Specifically, the main issues raised by the referring court concern the notion of ‘establishment’, within the meaning of Article 4(1)(a) of Directive 95/46, and of ‘use of equipment situated on the territory of the said Member State’, within the meaning of Article 4(1)(c).*

Question 1(a)

45 *By Question 1(a), the referring court asks, in essence, whether Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when one or more of the following three conditions are met:*

- the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State, or*
- the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or*
- the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily.*

46 *So far as concerns the first of those three conditions, the referring court states that Google Search is operated and managed by Google Inc. and that it has not been established that Google Spain carries out in Spain an activity directly linked to the indexing or storage of information or data contained on third parties’ websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group’s commercial activity*

and may be regarded as closely linked to Google Search.

47 *Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the Commission submit that, in the light of the inextricable link between the activity of the search engine operated by Google Inc. and the activity of Google Spain, the latter must be regarded as an establishment of the former and the processing of personal data is carried out in context of the activities of that establishment. On the other hand, according to Google Spain, Google Inc. and the Greek Government, Article 4(1)(a) of Directive 95/46 is not applicable in the case of the first of the three conditions listed by the referring court.*

48 *In this regard, it is to be noted first of all that recital 19 in the preamble to Directive 95/46 states that ‘establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements’ and that ‘the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor’.*

49 *It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an ‘establishment’ within the meaning of Article 4(1)(a) of Directive 95/46.*

50 *In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be ‘carried out in the context of the activities’ of an establishment of the controller on the territory of a Member State.*

51 *Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter’s activity is limited to providing support to the Google group’s advertising activity which is separate from its search engine service.*

52 *Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of 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.

53 *Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C-324/09 L’Oréal and Others EU:C:2011:474, paragraphs 62 and 63).*

54 *It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope.*

55 *In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out ‘in the context of the activities’ of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.*

56 *In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.*

57 *As has been stated in paragraphs 26 to 28 of the present judgment, the very display of personal data on a search results page constitutes processing of such data. Since that display of results is accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller’s establishment on the*

territory of a Member State, in this instance Spanish territory.

58 *That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, L'Oréal and Others EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others EU:C:2003:294, paragraph 70; Case C-553/07 Rijkeboer EU:C:2009:293, paragraph 47; and Case C-473/12 IPI EU:C:2013:715, paragraph 28 and the case-law cited).*

59 *Since the first of the three conditions listed by the referring court suffices by itself for it to be concluded that an establishment such as Google Spain satisfies the criterion laid down in Article 4(1)(a) of Directive 95/46, it is unnecessary to examine the other two conditions.*

60 *It follows from the foregoing that the answer to Question 1(a) is that Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.*