ARTICLE 29 DATA PROTECTION WORKING PARTY

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WP 179 update

Update of Opinion 8/2010 on applicable law in light of the CJEU judgement in Google Spain

Adopted on 16 December 2015

Update of Opinion on applicable law[1] in light of the CJEU judgement in *Google Spain*[2]

1. Introduction and main issues discussed in this guidance document

In its judgement in *Google Spain* the Court of Justice of the European Union ('**CJEU**') found that the processing of personal data in question by the search engine operated by Google Inc., a US-based controller, was *'inextricably linked to'*, and therefore was carried out *'in the context of the activities'* of Google's establishment in Spain, considering that the advertising and commercial activities of the Spanish subsidiary constituted the *'means of rendering the search engine economically profitable'*. On these grounds, the CJEU concluded that Spanish law applied to the processing in question.

The implications of the judgement are broader than merely determining applicable law in relation to the operation of the Google search engine in Spain.

- The judgement confirms the broad territorial reach of Article 4(1)(a) of Directive 95/46/EC ('**Directive**')[3]: it applies EU law to data processing conducted by a foreign controller established outside the EU, which has a 'relevant' establishment in the EU triggering the application of EU data protection law. How far this broad territorial reach applies, however, raises many questions.

- In addition, questions also arise as to how to interpret the judgement in cases where the issue is not whether EU law or a foreign law applies, but whether the law of one EU Member State or the law of another Member State applies. The Directive provides that *'where 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 obligations laid down by the national law applicable'* (Art. 4(1)(a), second sentence). The question here therefore is whether, and to what extent, companies having a designated 'EU headquarters' (acting as a 'controller'), need only to comply with one national law within the EU or also with the laws of other EU Member States in which they may also have a 'relevant' establishment.

- Further, it is to be noted that even though the CJEU did not discuss in its judgement whether using a national domain name and/or using robots to collect information from European websites would trigger EU law on the basis of a *'use of equipment'* test under Article 4(1)(c), the judgement does not by any means exclude the possibility of activities of controllers having no establishment of any sort within the EU being subject to EU data protection requirements. Indeed, Article 4 of the Directive makes it clear that this can be the case.

The WP29 Opinion 8/2010 and, in particular, some of its examples (i.e. examples 5 and 11) should now be read in the light of the *Google Spain* judgement and of this new guidance document. In this guidance document the WP29 explores the first two of these

[1] A29 WP Opinion 8/2010 on applicable law (WP179).

[2] CJEU judgement of 13 May 2014 in case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González ('Google Spain')*. In this guidance document we will also briefly discuss some elements of the CJEU judgement of 1 October 2015 in Case C-230/14, *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság ('Weltimmo')*.

[3] This has subsequently also been confirmed by the CJEU in the *Weltimmo* case, see paras 25 and 27.

questions, which are both linked to the way the CJEU interpreted the 'establishment' test in Article 4(1)(a) of the Directive.

2. Implications of the CJEU judgement with regard to *'context of the activities of an establishment'*

The first question answered by the CJEU in *Google Spain* concerned the 'establishment' test under Art. 4(1)(a) of the Directive, which says that the Directive will apply where processing is carried out *'in the context of the activities of an establishment'* of the controller on the territory of a Member State.

First, it must be recalled that, in line with recital 19 of the Directive and the guidance already provided in WP29 Opinion 8/2010, and as confirmed by the recent *Weltimmo* judgement, the notion of establishment has to be interpreted broadly. In para 41 of that judgement the CJEU emphasised that if the controller exercises *'a real and effective activity - even a minimal one'* - through *'stable arrangements'* in the territory of a Member State, it will be considered to have an establishment in that Member State.[4]

In the case of *Google Spain*, Google's search engine is provided by Google Inc., a US-based company, but Google does have an office in Spain, Google Spain SL, which promotes and sells online advertising space. The question to consider, therefore, was whether the personal data processed by the Google search index is processed *'in the context of the activities of an establishment'* in a Member State because of the activities of Google Spain SL.

The CJEU held that the Directive applies to processing by Google to provide search results in Spain, despite the fact that Google Inc. is based in California, and that it is Google Inc., rather than Google Spain, that provides search services in Spain. The Court rejected Google's argument that it was not conducting its search activities in Spain and that Google Spain SL was merely a commercial representative for its advertising activities. The Court recalled that Article 4(1)(a) does not necessarily require the processing of personal data in question to be carried out 'by' the relevant establishment itself, rather that it is sufficient if the processing is carried out '*in the context of the activities'* of the establishment[5].

The CJEU reasoned that the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are *'inextricably linked'* to the processing carried out by Google Inc.'s search engine, arguing that the activities of Google Spain SL are the means of rendering the search engine economically profitable.[6] It is sufficient that Google Spain SL carries out advertising activities, these being linked to the business model of Google (selling advertising relevant to the results provided by the search engine). In other words, without the advertising activities, which are facilitated by Google Spain SL, and similar Google subsidiaries across the globe, it would not be economically feasible for Google to offer its search engine services. The search engine

[4] See in particular para 29 of the *Weltimmo* judgement, which emphasizes a flexible definition of the concept of 'establishment' and clarifies that *'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*.'

[5] See *Google Spain* para 52, as also confirmed by para 35 in *Weltimmo*.

[6] See para 56 of the judgement.

activities carried out by Google cannot be separated from the generation of advertising revenue.[7]

The Court thus concluded 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'*[8].

The CJEU also explained that in light of the objectives of the Directive, the rules on its scope *'cannot be interpreted restrictively'*, and that the Directive had '*a particularly broad territorial scope'*. The Court in particular argued that '*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*'[9].

Finally, it is important to highlight that the final ruling of the Court[10] not only emphasises the fact that '*the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertisement space offered by that engine'* but also that this branch or subsidiary '*orientates its activity towards the inhabitants of that Member State'*. In Google's case this means presenting Spain-orientated advertising alongside the search results.

3. Determining the 'inextricable link' between activities of an establishment in the EU and data processing by a non-EU controller

The judgement *in Google Spain* confirms that the activities of a local establishment and the data processing activities may be inextricably linked, and thereby may trigger the applicability of EU law, even if that establishment is not actually taking any role in the data processing itself. Following the Opinion of its Advocate General[11], the CJEU decided that the sales generated by Google's local establishment in Spain were *'inextricably linked to'* the profit generated through the data processing activities - irrespective of where these actually took place - and that this *'inextricable'* link was sufficient to trigger the applicability of Spanish law.

The key point is that even if the local establishment is not involved in any direct way in the processing of data - as was the case here - the activities of that local subsidiary may still bring the data processing within the scope of EU data protection law, as long as there is an *'inextricable link*' between the activities of the local establishment and the data processing.

The CJEU's judgement suggests that revenue-raising in the EU by a local establishment, to the extent that such activities can be *'inextricably linked*' to the processing of personal

[7] As an additional argument, the CJEU also referred to the fact that the adverts and the search results are displayed on the same page, as further evidence of their inter-dependency.
[8] See para 57 of the judgement.
[9] See paras 53, 54 and 58 of the judgement.
[10] See para 60 as well as point 2 of the final holding.
[11] Opinion of Advocate General Jaaskinen delivered on 25 June 2013 in Case C-131/12. Available at; http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN. See in particular, para 64.

data taking place outside the EU, is sufficient for the Directive to apply to such processing by the non-EU controller.[12]

The CJEU ruling was specifically concerned with the question of ad-serving by search engines, and with the extent to which a local advertising subsidiary may be considered as a 'relevant' establishment to trigger applicability of EU law. However, companies have many ways to organise themselves and different business models exist. Each scenario must be assessed on its own merits, taking into account the specific facts of the case. It would be a mistake to read the CJEU ruling too broadly, and conclude that any and all establishments with the remotest links to the data processing activities will trigger application of EU law.[13] It would be equally wrong to read the judgement too restrictively, and merely to apply it to the specific business model of search engine operators.

Depending on the facts of the case and the role which the local establishment plays, the judgement may apply to other non-EU companies whose business model relies on offering 'free services' within the EU, which are then financed by making use of the personal data collected from the users (such as for advertising purposes).

Further, and again, depending on the facts of each case, it cannot be ruled out that the activities of companies operating under other business models can also fall within the scope of EU law: the activities of foreign companies offering their services in the EU in exchange for membership fees or subscriptions, for example. This may even include organisations seeking donations - where this is done within the context of one or more establishments in the EU.

When reviewing the facts of the case, it may also be relevant that the proceeds from Spanish advertising generated by Google Spain SL are not necessarily used to fund www.google.es or any other European search service and, further, that the advertising contracts are generally entered into with the Google entity in Ireland[14]. This suggests that the necessary economic link between the activities of the local establishment and the data processing activities may not have to be particularly direct to meet the criteria.

To conclude, if a case by case analysis on the facts shows that there is an inextricable link between the activities of an EU establishment and the processing of data carried out by a non-EU controller, EU law will apply to that processing by the non-EU entity, whether or not the EU establishment plays a role in the processing of data. This confirms the Directive's broad territorial reach under Article 4(1).

This broad reach is expected to be further extended in the future by the rules set forth in the proposed General Data Protection Regulation[15] which more explicitly relies on the

[12] This may potentially be the case, for example, for any foreign operator with a sales office or some other presence in the EU, even if that office has no role in the actual data processing, in particular where the processing takes place in the context of the sales activity in the EU and the activities of the establishment are aimed at the inhabitants of the Member States in which the establishment is located.

[13] Some commercial activity, for example, may be so far removed from the processing of personal data that the existence of the commercial activity would not bring that data processing within the scope of EU law.

[14] Hannah Crowther: 'Remember to forget me: the recent ruling in Google v AEPD and Costeja', *Computer and Telecommunications Law Review*, 2014.

[15] COM/2012/011 final, Proposal for a Regulation 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).

'effects principle' to complement the *'territoriality principle'* when it comes to the activities of foreign data controllers in the EU.[16]

4. Determining applicable law for organizations with multiple EU establishments

The question arises which law applies where a company or group of companies operates throughout the EU and has sales offices or other establishments in several Member States, has designated a particular establishment in one EU Member State as its 'EU headquarters' and this establishment is the only one that carries out the functions of a controller in relation to the processing operations in question. Does this mean the controller needs to comply with the data protection law of only one Member State or will it also have to comply with some or all of the laws of the Member States where the company has establishments (which do not necessarily take any role in the processing operations themselves)? In other words, would the judgement lead to the application of several national data protection laws if the activities of several establishments of the same controller in the various Member States were *'inextricably linked'* to the data processing?

Whilst the CJEU did not address this issue directly, neither did it distinguish its ruling according to whether or not there is an EU establishment which acts as a controller or otherwise plays a role in the processing activities. Instead, the judgement added, with general applicability, a new interpretation of what *'in the context of the activities of an establishment'* means*:* the element of the *'inextricable link'* to the processing activities.

That said, the CJEU pointed out that one of the reasons for taking the approach it took was to prevent individuals from being deprived of the protection guaranteed by the Directive. This argument would not necessarily apply where a foreign company publicly identifies an EU-based entity as a controller, and which, also on the facts of the case, does indeed determine the purposes and means of the processing. In this case EU law would apply in any event. What would be at stake is not whether or not EU data protection law would apply at all. Instead, the question would be, which of the national EU data protection laws would apply. Would it be, for example, Irish law, Spanish law or both that would apply to the activities of a foreign company headquartered in Ireland but also established in Spain?

If the company were to be only subject to the data protection law of one Member State, and not also of another, the baselines provided by the Directive would still provide a relatively high level of protection for the individuals concerned. That said, and precisely because of the current lack of full harmonisation, it does matter which Member State's law applies. The Directive does not create a 'one-stop-shop' whereby it would only be the law of the Member State of the 'EU headquarters' that would apply to all processing of personal data throughout the EU.

Instead, whenever there is an establishment in any EU country, it has to be assessed in each case whether any particular processing activity is carried out in the context of the activities of that establishment. It is not at all uncommon that a company headquartered in one EU Member State and having operations in multiple EU Member States would

[16] See also para 56 of the Advocate General's Opinion, which explains that such an approach, attaching the territorial applicability of EU legislation to the targeted public, is consistent with the Court's case-law.

need to comply with the laws of each of these Member States (perhaps in respect of different parts of its processing operations)[17].

To illustrate, a bank headquartered in one Member State but offering retail banking services and operating a large number of branch offices throughout the EU must comply with each of these local laws. What applies in the off-line, bricks-and-mortar world, must also apply in the digital world. The contrary could risk encouraging all businesses that are sufficiently mobile, such as many engaged in doing business online, to engage in forum shopping. In turn, this could encourage a regulatory race to the bottom when it comes to data protection.[18]

4. Conclusion: the '*inextricable link*' test as a new element to the analysis of *'in the context of the activities'*

In conclusion, on the basis of the judgement in *Google Spain*, an additional element should be added to the criteria described in the WP29 Opinion on applicable law, which may trigger the applicability of EU/national law: the criteria of an *'inextricable'* (in this specific case economic) *'link'* between an activity and the data processing. In its judgement, the CJEU identified this *'inextricable link'* taking into consideration the advertisement-financed business model of free on-line services, which is currently the most common mode of operating businesses on the internet. In addition, the judgement suggests that other business models, and different forms of activity (including revenue-raising) in an EU Member State may also trigger the applicability of EU law, although the assessment must be made on a case by case basis.

Irrespective of where the data processing itself takes place, so long as a company has establishments in several EU Member States which promote and sell advertisement space, raise revenues or carry out other activities, and it can be established that these activities and the data processing are "*inextricably linked*", the national laws of each such establishments will apply.

The judgement provides useful clarification on two aspects: first, the judgement makes it clear that the scope of current EU law extends to processing carried out by non-EU entities with a 'relevant' establishment whose activities in the EU are *'inextricably linked'* to the processing of data, even where the applicability of EU law would not have been triggered based on more traditional criteria. Second, the judgement also confirms that - where there is an *'inextricable link'* - according to Article 4(1)(a) of Directive 95/46/EC, there may be several national laws applicable to the activities of a controller having multiple establishments in various Member States.

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[17] See also para 28 of the *Weltimmo* judgement.

[18] In this respect it is useful to refer also to Article 28(6) of the Directive, which provides that each supervisory authority is competent, whatever the national law applicable, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with Article 28(3) of that Directive. Article 28(6) of the Directive also provides that each authority may be requested to exercise its powers by an authority of another Member State and that the supervisory authorities are to cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information. With regard to penalties, the CJEU in its judgement in *Weltimmo, para 60,* concluded that a supervisory authority *'cannot impose penalties on the basis of the law of that Member State on the controller with respect to the processing of those data who is not established in that territory, but should, in accordance with Article 28(6) of that Directive, request the supervisory authority within the Member State whose law is applicable to act'.*

Annex 1: Amendments to 2010 Opinion

Page 16, Example No. 5: Internet service provider (modifications marked up on original example)

An internet service provider (the data controller) has its headquarters outside the EU,

e.g. in Japan. It has commercial offices in most Member States of the EU, and an office

in Ireland dealing with issues connected with the processing of personal data, including in particular IT support. The controller is developing a data centre in Hungary, with employees and servers devoted to the processing and storage of data relating to the users of its services. These establishments of the Japanese controller ~~in Japan also has other establishments~~ in the various Member States of the EU engage in ~~with~~ the following different activities:

-the data centre in Hungary is only involved in storage of data relating to the users of the ISP's services and technical maintenance;

-the commercial offices of the ISP engage in various sales, marketing and ~~organise general~~ advertising activities ~~campaigns;~~

~~-the office in Ireland is the only establishment within the EU, with activities in the context of which personal data are effectively being processed (notwithstanding the input from the Japanese headquarters).~~[19]

The 'establishment' test under Article 4(1)(a) of the Directive means that the Directive will apply where processing is carried out in the context of the activities of an establishment of the controller on the territory of a Member State. In light of the judgement of the CJEU in *Google Spain*[20] in order to see whether this test is met, it must be considered whether the activities of the local establishment are *'inextricably linked'* to the processing of personal data. This should be assessed case by case for each establishment.

Should it appear that the main processing operations of the ISP are not subject to local data protection law in the Member States, because there is no inextricable link between the data processing and the activities of the local establishments, this would be without prejudice ~~however~~ to the application of local, e.g. Hungarian law to a distinct processing ~~of personal data~~ activity carried out by the Hungarian data centre, in relation to its own activities – for instance processing of personal data concerning the employees of the data centre.

~~The activities of the Irish office may trigger the application of EU data protection law based on traditional criteria: personal data are processed in the context of the Irish office's activities, therefore such processing is subject to EU data protection legislation. The law applicable to processing carried out in the context of the Irish office's activities~~

[19] Note that each establishment may also process personal data in the context of its own activities, for example, each establishment also processes personal data of its own employees. These processing operations are distinct from the processing operations of the Japanese ISP, and for these, in any event, local law applies, as will be shown below.

[20] CJEU C-131/12 Google Spain v Agencia Española de Proteccion de Datos.

~~is Irish data protection legislation, regardless of whether the processing takes place in Portugal, Italy or any other Member State. This means that, in this hypothesis, the data centre in Hungary would have to comply with Irish data protection law with regard to the processing of the personal data of the users of the service provider.~~

For the commercial offices based in the various ~~other~~ Member States, a case-by-case assessment must be made: their activities may or may not be considered *'inextricably linked'* to the processing of personal data, therefore, their local laws may or may not apply to the processing operations of the Japanese ISP. ~~if their activity is limited to general non-user-targeted advertising campaigns which do not involve the processing of users' personal data, they are not subject to EU data protection laws. However,~~ For example, if the ISP (the controller) decides to conduct ~~a~~ processing activity directed at the inhabitants of the Member State where it has an establishment, that is carried out in the context of the activities of that local establishment ~~involving the personal data of individuals in the country where they are established~~ (such as sending targeted advertisements to users and possible future users for their own business purposes), they will have to comply with the local data protection legislation. The same applies for other situations provided that an inextricable link (which may also be purely economic such as in *Google Spain*) exists.

As to the activities of the Irish and the Hungarian establishments, when assessing whether Irish or Hungarian law applies to the processing of data by the Japanese controller, as in all other cases, it must be considered whether the activities of the Irish or Hungarian office are *'inextricably linked'* to the processing of personal data by the Japanese controller.

If no ~~connection~~ *'inextricable link'* can be established between the processing of data and the activities ~~any~~ of the ~~Irish~~ Japanese ISP's establishments in the EU (e.g. IT support is very limited and there is no involvement in the processing of personal data or other 'inextricable link', economic or otherwise), other provisions of the Directive could still trigger the application of data protection principles, for example if the controller uses equipment in the EU. This is considered in chapter III.3 below.

Page 27, Example No. 11: Social network having its headquarters in a third country and an

establishment in the EU (modifications marked up on original example)

A social network platform has its headquarters in a third country and a single establishment

in ~~a~~ one Member State only. It has no other establishments in any other Member State. The establishment defines and implements the policies relating to the processing of personal data of EU residents. The social network actively targets residents of all EU Member States, which constitute a significant portion of its customers and revenues. It also installs cookies on EU users' computers.

In this case, the applicable law will be, pursuant to Article 4(1)a, the data protection law of the Member State where the company is established within the EU.[21]

[21] In contrast, if the social network provider has more than one establishment in different Member States, e.g. sales and advertising offices, the social network service could fall under Art. 4 (1) (a) in each of those

The issue of whether the social network makes use of equipment located in other Member States' territory is irrelevant, since all processing takes place in the context of the activities of the single establishment and the Directive excludes the cumulative application of Articles 4(1)a and 4(1)c.

However, the supervisory authority of the Member State where the social network is established in the EU will - pursuant to Article 28(6) – have a duty to cooperate with other supervisory authorities, in order for example to deal with requests or complaints coming from residents of other EU countries.

- Page 12-

Deletion of the last paragraph on this page.

- Page 13 -

Deletion of the first paragraph on this page.

- Page 14-

Deletion of the following paragraph:

'Where the establishment processes personal data in the context of the activities of another establishment, the applicable law will be that of the Member State in which the other establishment is located.'

-Page 31-

Deletion of the entire Section '*IV.2. Improving current provisions*', considering that these forward-looking statements have since then been replaced by further guidance provided by the WP29 in the context of the data protection reform.

Member States provided that an *'inextricable link'* to the activities of the local establishments can be established.

Annex 2: Additional examples

The following examples are added to provide further clarification of the extent to which EU Member States' data protection laws apply to the processing of personal data by an international company - or group of companies. The examples aim to apply Article 4 of Directive 95/46/EC in light of the reasoning of the CJEU in *Google Spain*.

1. **A social networking service headquartered in Toronto**

- A company operating a global social networking service has its headquarters outside the EU, in Toronto and its site is increasingly used by individuals across the EU as well. The company is part of a group of companies, operating a variety of different businesses in different parts of the world, at the moment almost exclusively outside of Europe.

- The company has only one establishment in Europe, a wholly-owned subsidiary in France, engaged in the wholesale import and export of gourmet food and wine. The activities of the French subsidiary are in no way related to the activities of the social networking site. The French business does not process any personal data in connection with the social networking business – this all takes place in Toronto. Neither does the French business sell or market advertisement or subscriptions with regard to the social networking site.

- There is ultimately a financial connection between the service provider and the French establishment. They operate as part of the same corporate group and the activity of the French establishment ultimately and indirectly thus may also support and benefit the provision of the service based in Toronto.

- However, being part of the same corporate group in itself, without any further indicative factors, is not sufficient to establish that there is an 'inextricable link' between commercial activity taking place in the context of an EU establishment and the processing of personal data. Therefore, the processing of personal data in this case does not take place within the context of the company's establishment in France, and therefore Article 4.1(a) cannot be used to establish the applicability of French law.

2. **Online newspaper published in Washington DC**

- An online newspaper is based and published in Washington DC but is read by people across the world. The publishing company's headquarters are in the US. The online newspaper is a 'subscription only' service: it can only be accessed by subscribers.

- The company has offices in each EU Member State, and these each carry out the same role in terms of advertising and marketing the various 'local' editions of the paper, collecting personal data about subscribers, managing their subscriptions, sending them special offers for sponsored products, etc.

- In addition to this processing, the US online newspaper service itself also processes personal data about individuals in the EU in connection with the provision of the online newspaper (e.g. analysing the items in the paper most frequently read and commented on by the customers, the items liked and shared on the website, etc. for purposes of improving their service, as well as to better customise their service).

- Whether the processing of personal data by the US service provider in connection with the provision of the service can be said to take place in the context of the activities of its European establishments will depend on there being *an 'inextricable link'* between that processing and the activities of the European establishments.

- If the US online newspaper provides a 'subscription only' service to individuals in Europe, individuals may only access the service by subscribing and providing their personal data to the service's EU establishments. It is therefore the case that the processing of personal data by the US newspaper to provide the online service in Europe is carried out in the context of the activities of the EU establishments, because that processing is inextricably linked to the subscription management activities of the EU establishments – the US online newspaper cannot be accessed in Europe except through the activities of the EU establishments. The processing by the US service provider will therefore fall within the scope of Directive 95/46/EC, or more precisely under the national laws of the Member states where the offices are established.