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UNIFORM INTERPRETATION OF GENERAL DATA PROTECTION REGULATION CONCEPTS AS A NEW CHALLENGE FOR CJEU

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Abstract:

The aim of this paper is to provide the key elements of autonomous interpretation of the Court of Justice of the European Union in the field of data protection and to present selected autonomous concepts resulting from the case-law.

Keywords: data protection, personal data, uniform interpretation, autonomous concepts, case-law

Summary: 1. Introduction. – 2. The phenomenon of autonomous interpretation. – 3. GDPR and the methods of autonomous interpretation. – 4. Selected autonomous concepts in the field of data protection. – 5. Conclusion.

1. Introduction

This paper is based on the speech that took place at the University of Bergamo on October 3rd, 2019 during the international conference „Private Enforcement of General Data Protection Regulation. New Chances, New Challenges". Some thoughts presented at the said event are expressed in this paper. First, the phenomenon of autonomous interpretation will be presented. Then, the methods of autonomous interpretation will be discussed in the context of GDPR. Finally, selected autonomous concepts in the field of data protection will be provided. The paper is focused on EU perspective.

2. The phenomenon of autonomous interpretation

As a starting point, the very phenomenon of autonomous interpretation used

by the Court of Justice of the European Union in Luxembourg should be analysed. This particular method of interpretation serves to unify the understanding and application of EU law. For some legal scholars, as well as for practitioners, autonomous interpretation is perceived as the best (and even the only) tool to strengthen the European integration; for others, on the contrary, it does not constitute an effective measure.

The Court's autonomy should not be identified with a creation of new methods (directives) of interpretation. Autonomous interpretation is based on the classical methods known to international law and the laws of the Member States, such as: linguistic interpretation, systematic interpretation, teleological interpretation (purposeful arguments). The specificity of autonomous interpretation of the Court of Justice lies in reducing the importance of linguistic interpretation and attaching greater importance to systematic and teleological interpretation. Moreover, in the interpretation of EU law, comparative analysis and *travaux préparatoires* play an important role (it is particularly noticeable in the opinions of the Advocates General).

Autonomous interpretation is linked with autonomous concepts that should be perceived as "interpretative tools". The autonomous character of the term may be identified with the supranational meaning and with its independence from the interpretation used (accepted) in national legal orders [1]. In other words, the meaning assigned to a given concept in national legal order may be completely different from the uniform EU interpretation [2].

As it was expressed and then developed in the case-law of the Court of Justice:

'Terms used in Community law must be uniformly interpreted and implemented throughout the Community, except when an express or implied reference is made to national law' [3].

'[...] according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a pro-

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[1] See, e.g., G. BENACCHIO, *Diritto privato della Comunità Europea. Fonti, modelli, regole* (Milano 2008), 2nd ed., 49-51; J. ENGBERG, *Autonomous EU Concepts: Fact or Fiction?*, S. ŠARČEVIĆ (eds.), *Language and culture in EU law: Multidisciplinary Perspectives* (Farnham 2015), 170-171. The analysis of private law concepts in the context of EU primary law was conducted in: H.W. MICKLITZ-C. SIEBURGH (eds.), *Primary EU law and private law concepts* (Cambridge 2017).

[2] See A. GUZEWICZ, *Autonomous concepts of commercial law*, B. HEIDERHOFF-I. QUEIROLO (eds.), *European and international cross-border private and economic relationships and individual rights,* A. M. BENEDETTI - I. QUEIROLO (eds.), *Scritti di diritto privato europeo e internazionale* (Roma 2016) 8, 141-147.

[3] Case C-49/71, Hagen OGH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECJ, 1.2.1972, 6.

vision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union'[4].

It can therefore be stated that the uniform EU interpretation is restricted by a reference to national law. If EU provision does not refer to national law (what should be understood as an exception), the autonomous interpretation will apply (as a general rule). The interpretation of the Court of Justice is autonomous in nature, which means that the interpretation process cannot be neutral[5]. The Court of Justice applies the autonomous interpretation of EU provisions (in which case the uniform interpretation is concerned) or leaves the process of interpretation to the Member States (in this case a national interpretation is concerned).

When interpreting the EU provisions, the Court uses a new method called 'hybridization'. It involves the use of a broad spectrum of legal instruments, coming from both private and public law. The mix of substantive and procedural elements may also be noticed in the case-law. All these measures are aimed at supporting the functioning of the internal market.

The purpose of the uniform interpretation is to ensure the effectiveness of EU law. The interpretation adopted by the Court of Justice is consistent with the axiology of EU law or, in other words, the "spirit of the Treaty".

3. GDPR and the methods of autonomous interpretation

General Data Protection Regulation (hereinafter as: "GDPR"[6]) is the new EU legal act in the field of data protection. It repealed the Directive 95/46/EC[7]. The

[4] Case C-510/10, DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau, ECJ, 26.4.2012, 244, point 33; See also: Case C-327/82, Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees, ECJ, 18.1.1984, 11, point 11; Case C-287/98, Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster, ECJ, 19.9.2000, 468, point 43; Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, ECJ, 16.7.2009, 465, point 27; Case C-245/00, Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS), ECJ, 6.2.2003, 68, point 23; Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECJ, 7.12.2006, 764, point 31.

[5] See, M. AUDIT, *L'interprétation autonome du droit international privé communautaire* (2004) *Journal du Droit International*, 798; L. CHARBONNEAU, *Notions autonomes et intégration européenne* (2013) 1 *Cahiers de Droit Européen*, 53.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, 1-88.

[7] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on

uniform interpretation of GDPR provisions constitutes a new challenge for the Court of Justice. The arguments presented below are grounded on the analysis of the case-law of the Court of Justice based on the GDPR and the Directive 95/46/EC.

As it was highlighted above, the methods (directives) of autonomous interpretation are known to international law and the laws of the Member States but the hierarchy of importance is different.

When taking into consideration the general model, the Court of Justice begins the process of interpretation of EU provision with a linguistic interpretation, *id est* the analysis of the wording of the provision (so called literal meaning) [8]. It can be perceived in the judgments based on the Directive 95/46/EC that the Court of Justice examines whole sentences or single terms.

The specificity of EU autonomous legal order is that determining the wording of a provision, as a result of the application of the linguistic interpretation directives, usually does not end the interpretation process. The multilingual nature of EU law and the autonomy of its concepts are the reasons for the insufficiency of this interpretative directive.

After achieving the result of linguistic interpretation, the Court of Justice will turn to the systematic and teleological interpretation.

The basis for the existence of systematic interpretation rules is the assumption that the set of norms in a given legal system is coherent, ordered and has a specific hierarchy. Consequently, a legal provision cannot be analysed in isolation from the legal system in which it operates and, moreover, its place in a given legal act should not be seen as accidental.

The Court of Justice analyses provisions in the field of data protection in their context, taking into consideration their 'place' in the GDPR or Directive 95/46/EC.

Per exemplum, in the case C-345/17 (Buivids) [9] the Court of Justice, analysing the provisions of the Directive 95/46/EC, stated:

(...) according to settled case-law of the Court, the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system which it establishes [10].

Further arguments of this paper focus on the teleological approach, *id est* searching for the spirit of the provisions. The teleological interpretation pro-

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the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, 31–50 (hereinafter as: 'Directive 95/46/EC').

[8] See also, A. BREDIMAS, *Methods of Interpretation and Community Law (European Studies in Law)* (Amsterdam 1978), 35.

[9] Case C-345/17, Proceedings brought by Sergejs Buivids, ECJ, 14.2.2019, 122.

[10] *Ibidem* point 49; See also: Case C-73/07, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, ECJ, 16.12.2008, 727, point 51; Case C-265/07, Caffaro Srl v Azienda Unità Sanitaria Locale RM/C, ECJ, 11.09.2008, 496, point 14.

vides such an interpretation of a legal provision that guarantees its effectiveness (*effet utile*) [11]. Finding the sense (purpose) of EU provision is an inspiration and a main task of the Court of Justice in the interpretation of EU law. The spirit of the Treaty permeates the case-law and should be combined with the axiological foundations of EU law.

Considering the purpose of EU legal acts and the teleological interpretation of the Court of Justice, the crucial role of the preambles should be underlined.

According to the first recital in the preamble to GDPR "the protection of natural persons in relation to the processing of personal data is a fundamental right". Therefore the first recital refers to the Charter of Fundamental Rights of the European Union [12] and to the Treaty on the Functioning of the European Union [13]. The protection of personal data constitutes a fundamental right, however it is not an absolute right.

The second recital of GDPR concerns the processing of personal data, which should be carried out respecting fundamental rights and freedoms [14]. As it was expressed in the fourth recital "the processing of personal data should be designed to serve mankind". The limits, such as the principle of proportionality and the respect for other fundamental rights, should be underlined. Among the fundamental rights, it is worth emphasizing here the respect for private and family life.

New developments (especially technological) and the phenomenon of globalisation require more coherent EU framework for data protection. The increase in cross-border flows of personal data has brought new challenges. These factors are related to the proper functioning of the internal market.

It should also be mentioned that the comparative analysis and legislative history are not forgotten in the process of interpretation of data protection provisions [15].

In the context outlined above, the role of the Court of Justice in interpreting uniformly GDPR concepts cannot be underestimated.

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[11] See, G. ITZCOVICH, *The Interpretation of Community Law by the European Court of Justice* (2009) 10 (5) *German Law Journal*, 555.

[12] See Article 8 (1) of the Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2017 (hereinafter as: 'the EU Charter').

[13] See Article 16 (1) of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012 (hereinafter as: 'TFEU').

[14] The purpose of the Directive 95/46/EC was to harmonise the provisions (rules) concerning the protection of personal data and to ensure the free flow between Member States.

[15] In regard to the Court's reference to legislative history of the Directive 95/46/EC, see Case C-345/17 (fn 9) point 52.

4. Selected autonomous concepts in the field of data protection

It will be outlined in this part of the paper how the Court of Justice interprets some basic concepts in the field of data protection, such as 'personal data', 'processing of personal data', 'controller' and 'journalistic purposes' ('journalistic activites'). The aim of this section is to present certain formulas from the case-law of the Court of Justice confirming the autonomous nature of these concepts (not their analysis).

It must be born in mind that in each case the Court of Justice takes a decision in the specific factual circumstances, especially in the preliminary ruling procedure. In this context, some limitations to the interpretation may be involved.

The concepts of 'personal data' and 'processing of personal data' ('processing') will be analysed together. Their definitions are contained, respectively, in the Article 2 of the Directive 95/46/EC and in the Article 4 of the GDPR. The Court of Justice developed these concepts in the case-law. Their interpretation, so far, is based mainly on the provisions of the Directive 95/46/EC.

Per exemplum, in its judgments the Court of Justice argued that an image of a person recorded by a camera '*inasmuch as it makes it possible to identify the person concerned*' [16] or a tax data [17] constitute 'personal data'. The linguistic and purposeful arguments were used.

Referring to the professional activity, the Court stated that '*the fact that information is provided as part of a professional activity does not mean that it cannot be characterised as 'personal data*' [18]'.

For the 'processing of personal data', it is apparent from the Court's case-law that:

'a video recording of persons which is stored on a continuous recording device – the hard disk drive of that system – constitutes (...) the automatic processing of personal data' [19].

'the operation of loading personal data onto an internet page must be regarded as constituting such processing' [20].

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[16] Case C-345/17 (fn 9) point 31.

[17] Case C-496/17, Deutsche Post AG v Hauptzollamt Köln, ECJ, 16.1.2019, 26; point 55; Case C-73/16, Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy, ECJ, 27.9.2017, 725, point 41; Case C-201/14, Smaranda Bara and Others v Casa Naţională de Asigurări de Sănătate and Others, ECJ, 1.10.2015, 638, point 29.

[18] Case C-345/17 (fn 9) point 46.

[19] Case C-345/17 (fn 9) point 37.

[20] *Ibidem*; Case C-101/01, Criminal proceedings against Bodil Lindqvist, ECJ, 6.11.2003, 596, point 25.

The decisions are taken in individual situations, but the Court's statements can be repeated in subsequent judgments.

With regard to the case C-345/17 (Buivids), the Court of Justice also interpreted the notion of 'journalistic purposes' ('journalistic activities') provided for in the Article 9 of the Directive 95/46/EC. Referring to its previous judgment, the Court held that the concepts related to freedom of expression must be interpreted broadly [21]. Afterwards, following the previous case-law, the Court recalled the autonomous definition of the 'journalistic activities', that is to say: '*those which have as their purpose the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them'* [22]. Finally, the concept 'solely for journalistic purposes' was analysed. The Court's considerations are based on the provisions of the EU Charter which is particularly important. The Court faced a dilemma on how to reconcile two fundamental rights, *id est* the right to privacy and the right to freedom of expression. It stated that the exemptions and derogations provided for in the Article 9 of the Directive 95/46/EC must be applied „*only where they are necessary*" [23]. The significance of the jurisprudence of the European Court of Human Rights was also highlighted.

In the case C-40/17 (Fashion ID) the concept of 'controller' was interpreted [24]. In the process of interpretation the Court reminded the definition contained in the Article 2 (d) of the Directive 95/46/EC (literal meaning). Then the Court focused on the objective of that provision which manifests in '*effective and complete protection of data subjects*' [25]. Furthermore it emphasized the broad definition of the concept of „controller" as it was interpreted in its previ-

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[21] Case C-345/17 (fn 9) point 51.

[22] Case C-345/17 (fn 9) point 53; Case C-73/07 (fn 10) point 61. In the legal doctrine, see: K. WOLLTER, *Data Protection and "journalistic activities" – ECJ rules on exceptions to the Data Protection Directive* (2009) 2 *Bulletin of international legal developments*, 13-15; W. HINS, *Case C-73/07, Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy, Judgment of the Court of Justice (Grand Chamber) of 16 December 2008* (2010) 47 (1) *Common Market Law Review*, 215-233.

[23] Case C-345/17 (fn 9) point 63; Case C-73/07 (fn 10) point 55.

[24] Case C-40/17, Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV, ECJ, 29.7.2019, 629. In the legal doctrine see: F. MATTATIA, *Données personnelles: la reponsabilité d'un utilisateur des services proposés par Facebook* (2019) 40 *La Semaine Juridique – édition generale*, 1730-1735.

[25] Case C-40/17 (fn 24) point 66; Case C-210/16, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH, ECJ, 5.6.2018, 388, point 28; Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECJ, 13.5.2014, 317, point 34.

ous case-law [26]. Purposeful arguments were particularly important in the final Court's interpretation.

5. Conclusion

It can be concluded that the process of GDPR interpretation, which is in the initial stage at this point, will certainly evolve. The interpretative guidelines for the Court of Justice may be provided from its previous judgments based on the Directive 95/46/EC. The following years will show to what extent the Court of Justice will refer to the interpretation of the concepts contained in the Directive 95/46/EC. The perspective of „new" or rather „old-new" concepts in the area of data protection remains an open question.

In instances, where the ensuring of a high level of protection of the fundamental rights and freedoms of individuals is at stake, it seems that the CJEU will adopt a broad interpretation of the concepts.

Undoubtedly, all the factors mentioned in this paper can affect the application of law in national legal orders. The influence of the uniform interpretation on the application of national law requires further in-depth research.

[26] In the case C-131/12 (fn 25) it can be found the statement: '*It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d)*'.