Court of Justice of the European Union: Sergejs Buivids v. Datu valsts inspekcija

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On 14 February 2019, the Court of Justice of the European Union (CJEU) clarified the possibilities for the processing of personal data for journalistic purposes, as guaranteed under Article 9 of Directive 95/46 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. The CJEU was requested by the Latvian Supreme Court to deliver a preliminary ruling on the question of whether Mr Buivids, who had posted a video on the Internet showing public officials of the Latvian national police force without their consent, could rely on the exemption of Article 9 of Directive 95/46 (applicable at the time of the domestic proceedings against Mr Buivids), which allows the processing of personal data "solely for journalistic purposes". The question is of particular interest, as Mr Buivids is not a professional journalist, but simply a citizen-journalist. As Article 9 of the former Directive 95/46 is similar (but not identical) to Article 85 of the General Data Protection Regulation 2016/679 which has been in force since 25 May 2018 (GDPR), the interpretation by the CJEU of the journalistic exemption under the former Directive 95/46 is also of relevance for the application of the processing of personal data for journalistic purposes under the current GDPR. Article 85(1) GDPR requires the member states to reconcile by law the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

In its judgment, the CJEU first made clear that the recording of a video of police officers in a police station, and the publication of that video on a video website on which users can send, watch and share videos, was a matter which came within the scope of Directive 95/46. The CJEU reiterated that the image of a person recorded by a camera constituted "personal data" within the meaning of Article 2(a) of Directive 95/46 inasmuch as it made it possible to identify the person concerned. A video recording of persons which is stored on a continuous recording device, such as the memory of a camera, constituted a "processing of personal data by automatic means" within the meaning of Article 3(1) of Directive 95/46, while the operation of loading personal data onto an internet page must also be regarded as constituting the automatic processing of personal data. Hence, in principle, Mr Buivids had to respect the obligations and limitations enshrined in Directive 95/46 with regard to the processing of personal data when

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making the video in question showing police officers in the exercise of their duties and when publishing the recorded video on YouTube. As the action by Mr Buivids could not be regarded as the processing of personal data by a natural person in the course of a purely personal or household activity, and as Directive 95/46 contains no express exception which excludes the processing of the personal data of public officials from its scope, the CJEU next considered whether the recording and uploading of the video at issue could be justified under the journalism exception of Article 9 of Directive 95/46, as clarified by Recital 37 of Directive 95/46, which states that this article "seeks to reconcile two fundamental rights: the protection of privacy and freedom of expression".

The Court referred to its earlier findings in Satakunnan Markkinapörssi and Satamedia (CJEU 16 December 2008, C-73/07) that, in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly. This means that the exemptions and derogations provided for in Article 9 of Directive 95/46 apply not only to media undertakings but also to every person engaged in journalism. According to the CJEU, 'journalistic activities' are 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, while account must be taken of the evolution and proliferation of methods of communication and the dissemination of information. The medium which is used to transmit the processed data, whether it be classic in nature, such as paper or radio waves, or electronic, such as the Internet, is not determinative as to whether an activity is undertaken 'solely for journalistic purposes'. The CJEU also observed that the fact that Mr Buivids was not a professional journalist did not exclude the possibility that the recording of the video in question and its publication on the video website could come within the scope of Article 9 of Directive 95/46. However, the court also clarified that not all information published on the Internet involving personal data could come under the concept of 'journalistic activities'. The condition is that it must appear that "the sole purpose of the recording and publication of the video was the disclosure to the public of information, opinions or ideas".

According to the CJEU, it was of crucial importance that the exemptions or derogations in Article 9 of Directive 95/46 were only applied where they were necessary in order to reconcile the two fundamental rights concerned, namely the right to privacy and the right to freedom of expression. The CJEU referred to the case law of the European Court of Human Rights (ECtHR) on this matter, taking into account a number of relevant criteria, such as the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and the manner and circumstances in which the information was obtained, as well as its veracity (see also ECtHR (GC) 27 June 2017 Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, IRIS 2017-

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8:1/1). According to the CJEU, it could not be ruled out that the recording and publication of the video in question, which took place without the persons concerned being informed of the recording and its purposes, constituted an interference with the fundamental right to privacy of those persons, namely the police officers featured in the video. Therefore, it should transpire that the recording and publication of the video in question was solely to be regarded as a journalistic activity and whether the application of the exemptions or derogations provided for in Article 9 of Directive 95/46 were strictly necessary in order to reconcile the right to privacy with the rules governing freedom of expression. The CJEU concluded that the making and uploading of the video at issue on the Internet could constitute a processing of personal data solely for journalistic purposes within the meaning of Article 9 of Directive 95/46, insofar as it was apparent from that video that the sole object of that recording and the publication thereof was the disclosure of information, opinions or ideas to the public. It is, however, up to the referring Latvian court to determine whether this was the case with regard to Mr Buivids' video.

Judgment by the Court of Justice of the European Union, Second Chamber, case of Sergejs Buivids v. Datu valsts inspekcija, Case C-345/17, 14 February 2019

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