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Data protection in EU law

A judicial dialogue between CJEU and domestic courts

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Outline



- ReJUS methodological and substantial premises
- The impact of CFR on DP law
 - Territorial application
 - Interplay between administrative and judicial enforcement
 - Effective, proportionate and dissuasive sanctions and remedies



ReJUS premises



- The traditional divide:
 - the EU deals with rights, whereas
 - enforcement of EU-based rights is mainly dealt with by the MS, both in the field of public and private enforcement.
- As a matter of principle, MSs enjoy procedural autonomy
- This may concern:
 - The choice between public and private enforcement mechanisms
 - the definition of rules affecting the enforcement procedures (administrative, judicial procedures)
 - the choice of remedies, their functioning, their effects
 - the recourse to alternative dispute resolution, their functioning and their relation with judicial and administrative enforcement.



Underlying questions



- How does the Charter impact on procedural autonomy? Powers and responsibility of national judges.
- The rise of administrative enforcement and its interaction with civil and criminal adjudication. Does art. 47 CFR influence the choice among enforcement mechanisms and/or their combination?
- Does art. 47 CFR broaden the judicial power to define remedies and sanctions? Does it contribute to
 - broaden/limit the scope of existing remedies and sanctions
 - create new remedies or sanctions
- Does art. 47 CFR have an impact on the allocation of such power between the judge and the parties?
- Does art 47 CFR modify procedural rules (eg, on allocation of the burden of proof) or rules on the competent jurisdiction and applicable law in cross-border situations?



Impact of the Charter on the territorial reach of DP



Impact of the Charter on the territorial reach of DP



Which is the law applicable to cross-border processing?

- jurisdiction of courts on litigation related to cross-border processing
- territorial reach of the powers of national supervisory authorities



Impact of the Charter on the territorial reach of DP



- QUESTION
- In the light of the principle of effectiveness, how should be defined the concept of processing of data “*carried out in the context of the activities of an establishment of the controller on the territory of*” a Member State, which constitute the relevant criteria for defining the territorial scope of the law of that Member State implementing Directive 95/46?



Impact of the Charter on the territorial reach of DP



- Article 4 Dir. 95/46 – National law applicable
- 1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:
 - (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; ...
 - (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
 - (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.



Impact of the Charter on the territorial reach of DP



- Cluster of cases
 - Google Spain ; Weltimmo; Amazon; Holstein Gmbh.
- A data subject, domiciled in one Member State, requests correction of/ protection against an alleged unlawful processing of its personal data from national authorities/courts, under the law of that Member State, and the data controller who is the main responsible for the processing of the data is established in a different MS.
 - However, this data controller's activity expands to the MS where the data subject is domiciled in diverse ways.



Impact of the Charter on the territorial reach of DP



- Preliminary references from national courts:
 - Should Article 4(1) of Directive 95/46 be interpreted as permitting, in circumstances such as those at issue in the main proceedings, the data protection authorities of a Member State to apply their national law on data protection with regard to a data controller whose main establishment is located in another Member State/ third country, given the links existing with the first Member State?



Impact of the Charter on the territorial reach of DP



- In **Google Spain**
- In order to achieve the the objective of ensuring an effective and complete protection the words “carried out in the context of the activities” of an establishment cannot be interpreted restrictively.
 - Not explicitly mentioning art 47 CFR but relying on the principle of effectiveness
- Consequently, the concept includes also processing that is “only” intended to promote and sell, in that MS, advertising space offered by the search engine which serves to make the service offered by that engine profitable.



Impact of the Charter on the territorial reach of DP



- In **Weltimmo**,
 - the concept of ‘establishment’ is interpreted as a flexible concept which departs from a formalistic approach whereby undertakings are established solely in the place where they are registered.
 - Accordingly, both the degree of stability of the arrangements and the effective exercise of activities in a MS must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned.
 - Given the objective pursued by that directive, consisting in ensuring effective and complete protection of the right to privacy and in avoiding any circumvention of national rules, the presence of only one representative can, in some circumstances, suffice to constitute a stable arrangement if that representative acts with a sufficient degree of stability through the presence of the necessary equipment for provision of the specific services concerned in the MS in question.
- (However) in **Amazon**
 - the Court specifies that, even if under its previous case-law the concept of ‘activities carried out in the context of an establishment’ extends to any real and effective activity, even a minimal one, exercised through stable arrangements, such an establishment cannot exist in a MS merely because the undertaking’s website is accessible there.



Impact of the Charter on the territorial reach of DP



- GDPR application should solve the issue of the territorial scope of MS' laws: the same EU rules will apply everywhere on the EU territory.
 - However, the implementation of the Regulation may vary from one MS to another, notably given the principle of procedural autonomy of Member States.
 - Thus, CFR could be a decisive tool in order to reach better harmonisation and effectiveness of the rights enshrined in the GDPR.



Impact of the Charter on the territorial reach of DP



- Article 3 GDPR
- “1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
- 2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to :
 - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
 - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
- 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”



Effective Data protection between administrative and judicial enforcement



Effective Data protection between administrative and judicial enforcement



- What is the impact of art 47 CFR on the coordination between CJEU, national courts and national authorities in case of violation of DP law?
- What is the role of the right to effective judicial remedy (Article 47 CFREU), in defining the relationship between administrative and judicial enforcement?
- Which are the powers of courts in their judicial reviews of administrative decisions?



Effective DP between administrative/judicial enforcement



- QUESTION N. 1
- Is the supervisory authority of a Member State able to examine the claim of a person regarding the processing of personal data relating to him, implying the transfer of personal data from a Member State to a third country, where the Commission previously found that this third country ensures an adequate level of protection?
- Is the supervisory authority of a Member State able to examine the claim of a person regarding the validity of a EU act?



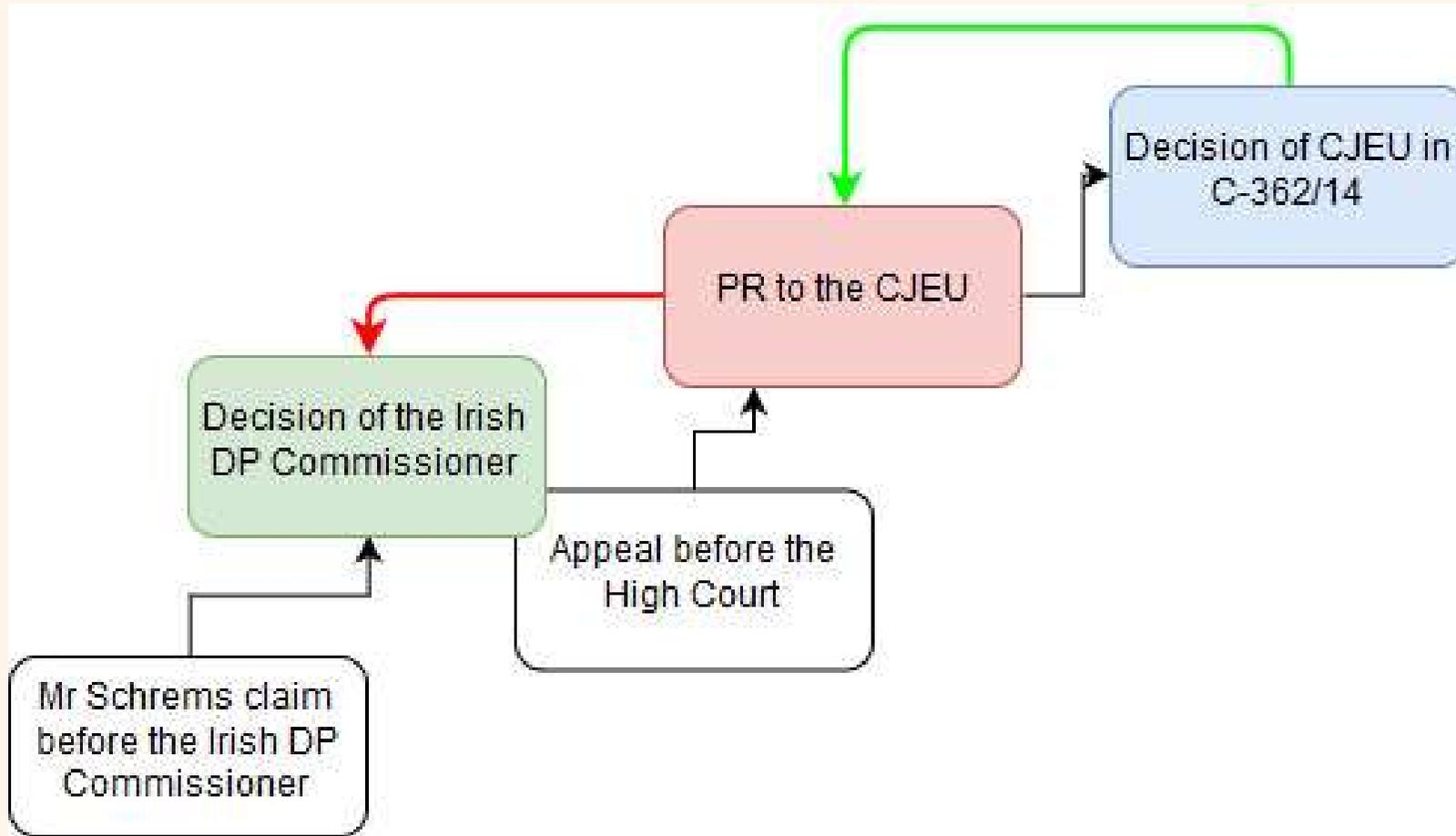
Effective DP between administrative/judicial enforcement



- Article 25 - Principles
- 1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.
- 2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country. (...)
- 4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.



Effective DP between administrative/judicial enforcement





Effective DP between administrative/judicial enforcement



- In Schrems

- The CJEU affirms that in the implementation of a EU act, several actors may acknowledge the lack of compatibility of such act vis-à-vis the fundamental rights and freedoms, including national supervisory authorities and courts.
- However, neither the supervisory authorities nor the courts have the power to declare the invalidity of a EU act. The exclusive jurisdiction to declare the validity or invalidity of a EU act is allocated on the CJEU. This is based on legal certainty and uniform application of EU law.



Effective DP between administrative/judicial enforcement



- Additionally, given the specific features of the supervisory authorities, the latter do not fall into the definition of tribunals pursuant art. 267 TFUE, thus they may not have the possibility to present preliminary rulings to the CJEU. As a matter of fact, although the supervisory authorities provide for the first step in the evaluation of the validity of the EU acts, there must be a cooperation between the supervisory authorities and the national courts in relation to access the CJEU.
- Therefore, the different actors may play different roles in the following scenarios:
 - (1) an individual may present a claim before the national supervisory authority, claiming the incompatibility of a EU act with fundamental rights and freedoms. The national supervisory authority concludes that the claim is unfounded. Then, the claimant should have, pursuant article 28(3) of Directive 95/46 read in the light of Article 47 CFREU, access to judicial remedies enabling him to challenge such a decision before the national courts. In this case, if national courts do not share the evaluation of the supervisory authority and still have doubts regarding the compatibility of the EU act with fundamental right and freedoms, they must present a preliminary question to the CJEU.
 - (2) an individual may present a claim before the national supervisory authority, claiming the incompatibility of a EU act with fundamental rights and freedoms. The national supervisory authority concludes that the claim is founded. Then the supervisory authority must, pursuant Article 28(3) of Directive 95/46 read in the light in particular of Article 8(3) CFREU, be able to engage in legal proceedings. In this case, the supervisory authority may present its doubts regarding the validity of the EU act, and if the national courts share them they will present a preliminary reference for a preliminary ruling for the purpose of examination of the decision's validity.



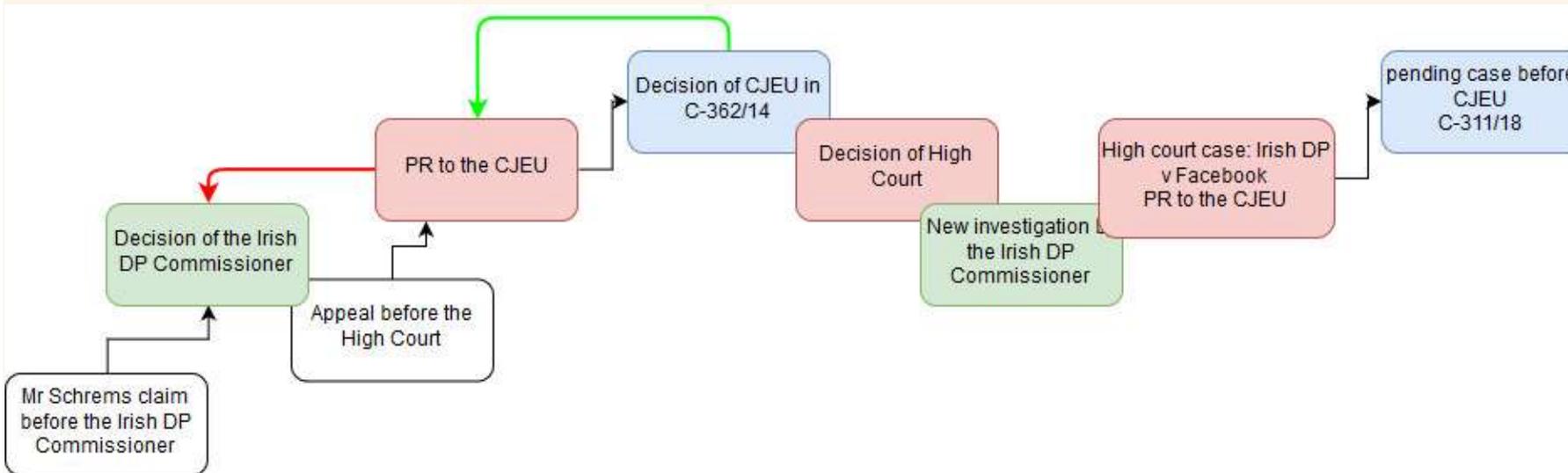
Effective DP between administrative/judicial enforcement



- The Court underlines that EU legislation which interferes with the rights protected by Articles 7 and 8 CFREU must clearly delimit the scope and application of restrictive measures and impose minimum safeguards; that any derogations to the protection of personal data must be strictly necessary; and that legal remedies must be available, pursuant to Article 47 CFREU.
- According to the Court, “the Commission did not state, in Decision 2000/520, that the United States in fact ‘ensures’ an adequate level of protection by reason of its domestic law or its international commitments”. The decision is declared invalid.



Effective DP between administrative/judicial enforcement





Effective DP between administrative/judicial enforcement



- QUESTION N. 2
- In data protection cases what is the role of the right to effective judicial remedy (Article 47 CFREU), in defining the relationship between administrative and judicial enforcement?



Effective DP between administrative/judicial enforcement



- Article 22

- Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.



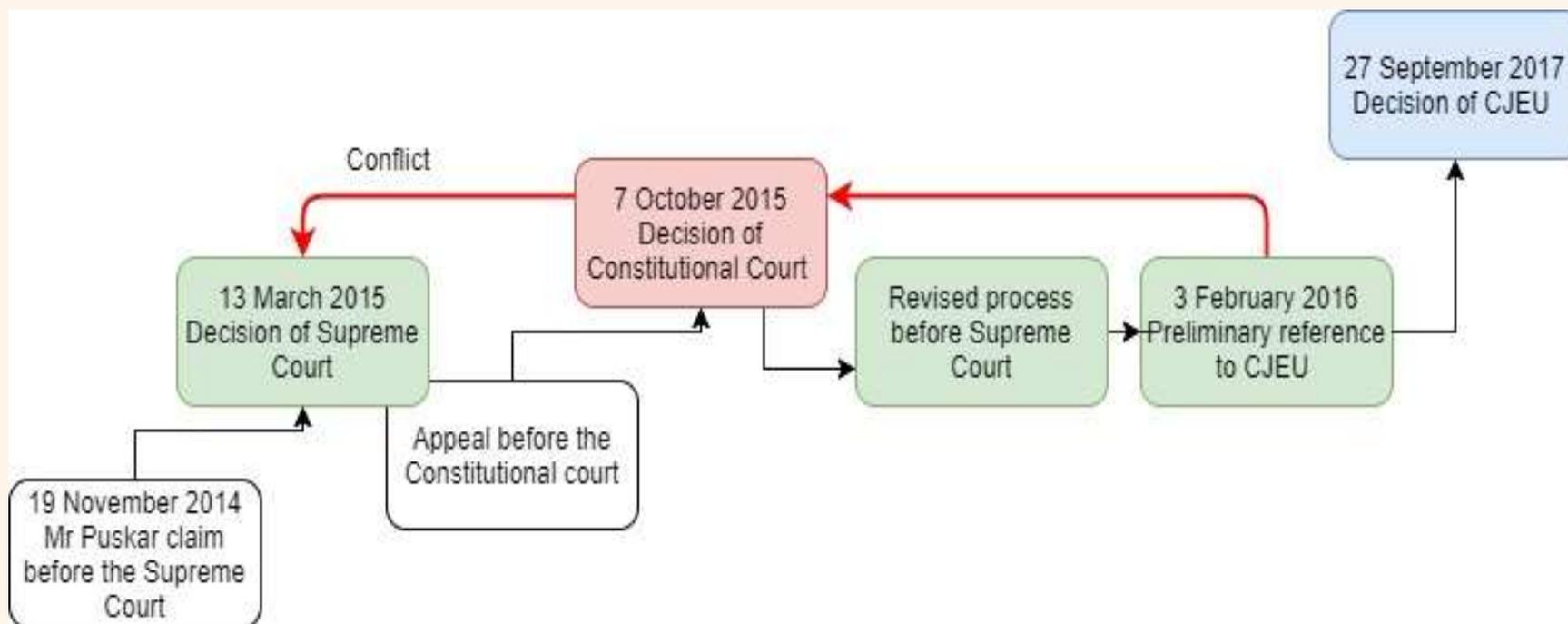
Effective DP between administrative/judicial enforcement



- The possible relationships between administrative and judicial enforcement on the basis of current legislations are the following:
 - a) Alternative (e.g. ITALY). National legislation indicates that national supervisory authority and courts are alternative means of enforcement for a violation of data protection legislation. The claimant can either bring the claim before an administrative authority or before a court.
 - b) Complementary (e.g. SLOVAKIA, IRELAND). National legislation indicates that national supervisory authority and courts are complementary for a violation of data protection legislation. It defines the relationship between the two bodies. The claimant can bring the same claim before the two, and the legislation can impose a sequence e.g, first administrative authority and then the court.
 - a. simultaneous
 - b. sequential
 - c) Independent (FRANCE). National legislation does not say anything about the relationship between national supervisory authority and courts.



Effective DP between administrative/judicial enforcement





Effective DP between administrative/judicial enforcement



- The Slovak Constitutional court focused mainly on the jurisprudence on art 6(1) ECHR in connection with art 46 Slovak Constitution.
- After having analysed and compared the national and ECtHR jurisprudence, the CC affirmed that the Supreme Court failed to take into account the factual and legal arguments of the case and, most importantly, to provide a decision regarding under which conditions the protection of personal data should have been met in the case of data processing by tax authorities.
- Thus, the decision of the Constitutional Court completely disregarded the sequence proposed by the Supreme Court ruling between the preliminary administrative proceedings and judicial ones, requiring the court to provide for a detailed analysis of the claim and a decision in terms of lawful processing of data by the tax authorities.
- The Constitutional court then affirmed that the Supreme Court had infringed the applicant's fundamental rights, namely the right to an effective remedy and a fair trial, the right to privacy and the right to protection of personal data. Thus, the Constitutional Court referred the case back to the Supreme Court.
- At this point, the Supreme court, believing that the Constitutional Court had not taken into account the case-law of the EU Court of Justice, decided to refer to such court for a preliminary ruling.



Effective DP between administrative/judicial enforcement



- The CJEU points out that the obligation to exhaust additional administrative remedies, whereas not excluded by Dir. 95/46, must be scrutinized in light of Article 47 CFR, Article 4 (3) of the TEU (principle of sincere cooperation) and Article 19 (1) of the TEU (effective judicial protection in the fields covered by EU law).
- Since such an obligation to exhaust additional administrative remedies constitutes a limitation of the right to an effective judicial remedy; therefore, it may be justified according to the criteria set in accordance to article 52 (1) CFREU, namely only when:
 - i) provided by law;
 - ii) respectful of the essence of the right;
 - iii) subject to the principle of proportionality;
 - iv) compliant with objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others.
- The Court focused in particular on the last two criteria.



Effective DP between administrative/judicial enforcement



- Existence of objectives of general interest: the Court acknowledged that the obligation to lodge an administrative complaint before bringing a legal action has two main positive effects: first, it may relieve the courts of disputes which can be decided in shorter time before the administrative authority concerned; and second, it may increase the efficiency of judicial proceedings as regards disputes in which a legal action is brought despite the fact that a complaint has already been lodged.



Effective DP between administrative/judicial enforcement



- As regards the test on proportionality, the Court relied on the AG opinion and on the decisions in *Alassini* and *Menini*. In particular, it did explicitly refer to the criteria identified in *Alassini* decision (par. 67) which should guide the proportionality test vis-à-vis the additional steps imposed in the national procedure, namely
 - 1. The procedures do not result in a decision which is binding on the parties,
 - 2. The procedures do not cause a substantial delay for the purposes of bringing legal proceedings,
 - 3. The procedures suspend the period for the time-barring of claims
 - 4. The procedures do not give rise to costs — or give rise to very low costs — for the parties
 - 5. The procedure may be access not exclusively by electronic means are not the only means by which the settlement procedure may be accessed and
 - 6. The procedures allow for interim measures in exceptional cases where the urgency of the situation so requires.
- On the basis of this criteria, the Court affirmed that the obligation to exhaust the available administrative remedies appears appropriate for achieving the aforementioned objectives of general interest, and no less onerous and efficient method is available and capable of realising those objectives.



Effective DP between administrative/judicial enforcement



- Article 58 (5) GDPR
 - “5. Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation.”
- Article 79 (1) of the GDPR deals with the right to an effective judicial remedy, and the parallelism between judicial and administrative enforcement:
 - “1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation”.
- This provision imposes on Member States an obligation to propose a judicial channel for data subjects whose rights have been violated.
- Article 81 (3) lays down that :
 - “3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof”.
- This provision questions the relations between parallel proceedings in one Member State.



Effective DP between administrative/judicial enforcement



- QUESTION n. 3
- Which are the powers of courts in their judicial reviews of administrative decisions?
- When the national systems envisage two alternative procedures, respectively decided by national supervisory authorities as regards the violation of data protection law, and decided by courts with regard to the determination of damages, are the courts bound by the administrative decisions in terms of
 - existence of the violation;
 - use and acquisition of (new) proofs;
 - type and content of the penalty? If they are not bound, what legal effect do administrative decisions have over judicial remedies?



Impact of the Charter on the territorial reach of DP



- According to Article 24 of Directive 95/46, Member States are compelled to “lay down the sanctions to be imposed in case of infringement” of the data protection legislation.
- According to art. 28(3) of Directive 95/46, then, decisions by the supervisory authority which give rise to complaints may be appealed against through the courts. This applies to the data subject as well as to controllers, having been a party to proceedings before a supervisory authority.



Impact of the Charter on the territorial reach of DP



- No decision of the CJEU addressed this issue in the DP area, although in other areas the effectiveness of judicial review has been addressed by the CJEU. For instance, in East Sussex Council case (C-71/14) the CJEU affirmed that where the European legislation do not detail the extent of judicial review, it is for the legal systems of the MS to determine that extent, subject to the principles of equivalence and effectiveness.



Impact of the Charter on the territorial reach of DP



- In the Italian system, the authority responsible for overseeing Italian data protection law is the Italian Data Protection Authority.
- According to art. 145 Data protection code (implementing Directive 95/46) in case of violation of the data protection legislation two alternative enforcement systems are available:
 - one before the supervisory authority, having the latter the power to adopt injunctive measures and to issue fines for breaches;
 - and one before civil courts, where damages may be also awarded to the victim of an infringement.
- In case of enforcement before the supervisory authority, data subjects and data processor may oppose to the decision and initiate a proceeding before a civil court which will provide for judicial review.



Impact of the Charter on the territorial reach of DP



- In case judicial review:
 - DP authority's decisions are not binding for the first instance court neither in terms of the existence of the violation, nor on the use and acquisition of (new) proofs, nor on the type and content of the penalty.
- Tribunal of Milan, n. 10374/2016
 - the court quashed the decision affirming that the balancing exercise between the public interest in the news (re-)published by an online blog, and the right to personal identity (enshrining the right to oblivion) was not correctly assessed by the national supervisory authority.
 - In this case, then, the tribunal addressed in detail the proofs (i.e. the pieces of news published online) in order provide its own evaluation on whether the personal data of the claimant could be qualified as pertinent, complete and updated.



Effective, proportionate and dissuasive sanctions and remedies



Effective, proportionate and dissuasive sanctions and remedies



- In order to ensure an effective remedy to data subjects, should EU law be interpreted as implicitly including a right to be de-listed?



Effective, proportionate and dissuasive sanctions and remedies



- In **Google Spain**
- The Court recalls that data subjects have the right to obtain from the controller the rectification, erasure or blocking of data processing which does not comply with EU legislation, “in particular” because they are incomplete or inaccurate.
 - Notably, this should be the case where the processing of data is inadequate, irrelevant or excessive in relation to the purposes for which they are collected and/or processed, and when the balance of interests is weighted in favor of the data subjects’ right to privacy and protection of data



Effective, proportionate and dissuasive sanctions and remedies



- Thus, supervisory or judicial authorities may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information from the web page on which they were published.
- The right to be delisted is driven by the principle of effectiveness, since
 - “the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites”



Effective, proportionate and dissuasive sanctions and remedies



- Which remedy to adopt in case of online news archives?
 - District Court of Amsterdam (11 March 2015) upholding the request of an individual who demanded that two articles deemed to be no more relevant to be untraceable for search engines. The court ordered to the media company to request Google not to list the articles in its search results.
 - Belgian, Court of Cassation (29 April 2016) granted the request of an individual to anonymise an article from an online archive on the basis of the right to be forgotten.



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Thanks for your attention
Questions?

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