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ESSENTIAL

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D5.6 - Fellows' Handbook for Introduction to Technology Law

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1. Introduction

1.1. Aim of the Handbook

The aim of this handbook is to provide an easy introduction to Technology Law primarily to the ESRs with a limited legal background. The aim is to assist the ESSENTIAL Early Stage Researchers and other students in the field of security science to have access to some of the basic texts in technology law. The Handbook consists of reading lists and texts that can help in the understanding of Technology Law.

1.2. Target Audience

The main target group of this Handbook are the ESSENTIAL Early Stage Researchers, but also any other students from the field of Security Science with a limited legal background.

1.3. Additional note

Part of this handbook is used in the Course Introduction to Technology Law offered by the University of Groningen.

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2. Technology Law

Technology law has developed in response to rapid technological and social change from a patchwork of applications of ordinary rules, as for example: of contract, criminal, and commercial law, to cyberspace and the digitisation and virtualisation of everyday activities.

This handbook is designed to introduce the students to the key legal principles and implications deriving from the development of technology and the influence that this has in different fields of law. It begins by introducing students to key debates in Technology law and internet governance. Once students are equipped with this knowledge, they will consider how the law has responded to the challenges of Technology and the extent to which legal issues have shaped the development of information society policy. This will be done through a detailed examination of topics such as, freedom of speech, computer misuse and hacking, the protection of intellectual property, e-commerce and privacy and data protection.

The focus will be initially on European law, although the global nature of Technology Law means that the comparative aspects will be introduced in places, and readings will include materials drawn from, amongst others, the US system.

We hope that this helps students to understand:

- The relationship between technology and law;
- The foundations of Technology law and how it has developed;
- Different aspects of law and how law relates to the modern online environment, including governance, digital content and intellectual property, criminal activities, e-commerce as well as fundamental rights.

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3. An Introduction to Technology Law

Key readings:

A.D. Murray: Information Technology Law: Law and Society 3rd ed (Oxford: OUP, 2016) in particular pp. 1-17, 26-57

L. Lessig: Code and Other Laws of Cyberspace ver.2.0 (New York: Basic Books,2006).

Important texts:

3.1. Communication on the Open Internet and Net Neutrality in Europe

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - The open internet and net neutrality in Europe

1. Introduction

When concluding the 2009 EU telecoms reform package, the European Commission set out in a declaration[1] its commitment to "preserving the open and neutral character of the internet, taking full account of the will of the co-legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities". According to this declaration, in addition to monitoring implementation of the relevant provisions relating to net freedoms, the Commission would "monitor the impact of market and technological developments on net freedoms reporting to the European Parliament and the Council before the end of 2010 on whether additional guidance is required". This Communication hereby seeks to fulfil this commitment, which was recalled in the Digital Agenda for Europe Communication[2], setting out what the Commission has learned as a result of its consultation and fact-finding processes and drawing the appropriate conclusions.

Process

In order to provide an evidence base for its Communication, the Commission launched a public consultation on "The open internet and net neutrality in Europe", conducted between 30 June and 30 September 2010. The consultation attracted over 300 responses from a wide range of stakeholders,

[1] OJ L 337, 18 December 2009.
[2] COM(2010)245

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including network operators, internet content providers, Member States, consumer and civil society organisations as well as a number of individuals. The full list of respondents together with the non-confidential responses was published on the Commission's dedicated website,[3] accompanied by a report providing a concise, non-exhaustive overview. In addition, the Commission and the Parliament organised a joint summit on 11 November 2010[4], which gave a wide range of stakeholders the opportunity to present and discuss their views on net neutrality in an open and public forum.

2. The net neutrality debate

Evolution of the internet

The internet has assumed the dimensions of a global phenomenon at an exceptional pace. In 15 years, the internet connectivity market has grown from almost zero to a multi-billion euro business. The blossoming of the internet has facilitated cross-border trade through e-commerce, helping to further develop the internal market and contributing to the erosion of barriers between Member States. The internet is at the core of the global economy. It has been responsible for an unprecedented level of innovation.

The internet owes much of its success to the fact that it is open and easily accessible, provided that the user has an internet connection. In order to provide content or services, save for some basic technical requirements, an individual or a company does not currently face high entry costs or other barriers that are characteristic of many other entrenched network industries. Indeed it is the absence of these barriers that has enabled many of the applications that are now household names to take off.

At its inception, access to the internet was achieved through dial-up on the telephone, but with the proliferation of attractive applications – made accessible through ever-increasing speeds of broadband connections – the internet has become much more than a mere telephone line. It is the "network of networks" that has transformed the way we communicate and do business, the way we work, opening up great opportunities in education, culture, communication, social interaction, as well as enabling advancements in science and technology and more broadly encouraging freedom of expression and media plurality.

Billions of Euros have been invested in upgrading the infrastructure to provide better services to consumers at lower prices. This, in combination with the EU model of pro-competitive wholesale access regulation and the application of EU competition rules, has spurred downstream competition, giving rise to a competitive offering of broadband access packages which, combined with an enticing array of content and services, has driven consumer demand. More investment will be required to keep up with the explosion of data traffic. According to some traffic projections, traffic is set to

[3] http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm
[4] http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm

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increase by 35% year on year for fixed networks and by 107% year on year for mobile. The internet has become a very precious good in today's society. Its full potential remains untapped.

Parameters of the net neutrality debate

Although there is no set definition of 'net neutrality', **Article 8 (§4) (g) of the Framework Directive[5] requires national regulatory authorities to promote the interests of the citizens of the European Union by promoting the ability of end-users to access and distribute information or run applications and services** of their choice**.** This is naturally subject to applicable law and thus without prejudice to EU or national measures taken to counter illegal activities, notably the fight against crime.

The essence of net neutrality and the issues underpinning the debate concern first and foremost how best to preserve the openness of this platform and to ensure that it can continue to provide high-quality services to all and to allow innovation to flourish, while contributing to enjoyment of and respect for fundamental rights, such as freedom of expression and freedom to conduct business.

Much of the net neutrality debate centers around traffic management and what constitutes reasonable traffic management. It is widely accepted that network operators need to adopt some traffic management practices to ensure an efficient use of their networks and that certain IP services, such as for instance real-time IPTV and video conferencing, may require special traffic management to ensure a predefined high quality of service. However, the fact that some operators, for reasons unrelated to traffic management, may block or degrade legal services (in particular Voice over IP services) which compete with their own services can be considered to run against the open character of the Internet. Transparency is also an essential part of the net neutrality debate. Obtaining adequate information on possible limitations or traffic management enables consumers to make informed choices. These issues of traffic management, blocking and degradation, quality of service and transparency need to be addressed.

3. Net neutrality provisions of the EU regulatory framework

The principles of competition

The EU regulatory framework aims at promoting effective competition, which is considered the best way to deliver high-quality goods and services at affordable prices to consumers. For competition to work, consumers must be able to choose between a variety of competing offerings on the basis of clear and meaningful information. Consumers must also be effectively able to switch to a new provider where a better quality of service and/or a lower price is offered, or where they are not satisfied with the service they are receiving, e.g. where their current provider imposes restrictions on

[5] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 (Framework Directive)

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particular services or applications. In a competitive environment this acts as a stimulus to operators to adapt their pricing and abstain from restrictions on applications that prove popular with users, as is the case with voice over IP (VoIP) services.

The significance of the types of problems arising in the net-neutrality debate is therefore correlated to the degree of competition existing in the market.

In Europe, the regulatory framework has facilitated competition by requiring network operators with significant market power to provide wholesale access and by allocating spectrum in a pro-competitive manner. Wholesale access to mobile networks has been [largely?] deregulated on the basis of evidence that such access is offered on commercial terms to mobile virtual network operators, who add to the range of offerings at retail level. Enforced in parallel to the ex ante regulatory framework, competition law has contributed to efficient market entry by tackling abuses of dominant position by regulated operators. As a result, retail pricing of fixed and wireless internet access is not regulated in the EU and consumers benefit from a variety of services at different price points adapted to their needs (e.g. in terms of volume, bandwidth).

At the same time, the adequacy of the competitive environment as a guarantor of the openness of the internet can be affected by the possible existence of market failures, of oligopolistic practices, of bottlenecks to the provision of high quality services to consumers and of information asymmetry.

The amended Telecommunications framework

The amended telecoms framework adopted in 2009 favours the preservation of the open and neutral character of the internet. Under the revised rules, national telecoms regulatory authorities are required to promote 'the ability of end users to access and distribute information or run applications and services of their choice' (Article 8(4)(g) of the Framework Directive).

This is supported by new transparency requirements vis-à-vis consumers (Article 21 of the Universal Service Directive). More specifically, when subscribing to a service and in case of any changes thereafter, consumers will be informed about:

- conditions limiting access to and/or use of services and applications, in conformity with Union law; and
- procedures put in place by the provider in order to measure and shape traffic so as to avoid filling or overfilling a network link, and how these may impact on service quality.

These transparency requirements are necessary to inform consumers of the service quality they can

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expect.

As regards switching, consumers will be able to **switch operators** and keep their numbers within one working day. Moreover, operators must offer users the possibility to subscribe to a contract with a maximum duration of 12 months. The new rules also make sure that conditions and procedures for contract termination do not act as a disincentive against changing service provider (Article 30(6) of the Universal Service Directive).

In addition, national regulators – after consulting the Commission - have the power to intervene by setting minimum quality of service requirements for network transmission services (Article 22(3) of the Universal Service Directive) and so guarantee a robust level of quality of service.

All these provisions, contained in the revised EU regulatory framework, will have to be transposed by the Member States by 25 May 2011.

Moreover. EU law[6] offers protection to individuals regarding the processing of personal data, including when decisions significantly affecting individuals are taken on the basis of automated processing of their personal data. Any activity related to blocking or management of traffic on such a basis will therefore have to comply with the data protection requirements.

Finally, Member States must comply with the Charter of Fundamental Rights of the EU when implementing EU law and this also applies to the implementation of the revised telecommunications framework, which could affect the exercise of a number of such rights.

4. Findings to date

Blocking

Blocking or throttling of lawful traffic was one of the main issues raised during the public consultation and net neutrality summit. Blocking can take the form of either making it difficult to access or outright restricting certain services or websites on the internet. A classic example of this would be mobile internet operators, blocking voice over internet protocol (VoIP). Throttling, which is a technique employed to manage traffic and minimize congestion, may be used to degrade (e.g. slow down) certain type of traffic and so affect the quality of content, such as video streaming provided to consumers by a competitor.

At European level, the Body of European Regulators for Electronic Communications (BEREC) conducted a survey among its members in early 2010 to assess the state of play in the different

[6] For example, the Data Protection Directive (95/46/EC) and the e-Privacy Directive (2002/58/EC)

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Member States. In addition, at national level, prior to the launch of the Commission's public consultation, both ARCEP[7] and OFCOM[8] , respectively the French and United Kingdom national regulatory authorities, launched their own consultations.

In its response to the public consultation, BEREC noted that there have been instances of unequal treatment of data by certain operators. Indeed, BEREC reported some concerns voiced by both users and content providers:

- Limits on the speed ('throttling') of peer-to-peer (P2P) file-sharing or video streaming by certain providers in France, Greece, Hungary, Lithuania, Poland and the United Kingdom;
- Blocking or charging extra for the provision of voice over internet protocol (VoIP) services in mobile networks by certain mobile operators in Austria, Germany, Italy, the Netherlands, Portugal and Romania.

BEREC however, did not distinguish the instances of outright blocking from those where operators are offering the service but requiring additional payments, and did not indicate the economic significance of these payments. These are essential issues which need to be clarified further. It will therefore be important to get a clear view of the situation across the EU in a more exhaustive fact-finding exercise. Consumer and civil society organisations also referred to a number of alleged instances of blocking or throttling. BEREC findings show that many of these issues were solved voluntarily, often through intervention by the NRA or pressure created by adverse media coverage.

Concerns were raised that blocking, though currently limited mainly to VoIP, could be extended in the future to other services, such as television broadcasting via the internet. Other potential issues highlighted by respondents to the consultation include the risk that charging structures would favour big players who may afford to pay for prioritisation while new entrants would be constrained to the slow lane and hence limiting the incentives for innovation. Reference has also been made to the risk that, if different operators block or degrade different services, consumers could have difficulty in accessing the services of their choice through a single internet subscription.

The Commission does not have evidence to conclude that these concerns are justified at this stage but this should be borne in mind in a more exhaustive fact-finding exercise.

Traffic management

[7] http://stakeholders.ofcom.org.uk/consultations/net-neutrality/?showResponses=true
[8] http://www.arcep.fr/uploads/tx_gspublication/net-neutralite-orientations-sept2010-eng.pdf

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The growing demands placed on broadband networks as well as different services and applications which require continuous data exchange mean that traffic management is required to ensure that the end user's experience is not disrupted by network congestion.

There are different types of traffic management techniques:

- Packet **differentiation** allows different classes of traffic to be treated differently, for example for services which require real-time communication such as live streaming of audio or video events and VoIP. This differentiation guarantees a certain minimum quality of service to end-users.
- IP **routing** allows ISPs to route packets via different communication paths to avoid congestion or provide better services. For example, an Internet Service Provider may route packets towards a server that contains a copy of the requested information which is located either in its network or somewhere close.
- **Filtering** allows an Internet Service Provider to distinguish between "safe" and "harmful" traffic and block the latter before it reaches its intended destination.

A consumer's experience is not affected if an email reaches him a few seconds after it has been sent, whereas a similar delay to a voice communication would cause it to be significantly degraded, if not rendered entirely useless.

Much of the net neutrality debate centers around traffic management and what constitutes reasonable traffic management. Traffic management is considered necessary to ensure the smooth flow of traffic, particularly at times when networks become congested.

Several respondents to the public consultation agreed that traffic management was not new in the field of electronic communications. For example operators prioritised voice traffic, particularly in the case of mobile. Properly used, some respondents argue that such traffic management techniques should enhance consumer experience.Even those respondents in the public consultation that alluded to blocking of peer-to-peer or VoIP services argued that traffic management was a necessary and essential part of the operation of an efficient internet. They agreed that its use for the purposes of addressing congestion and security issues was entirely legitimate and not contrary to the principles of net neutrality.

A number of respondents raised concerns about potential abuse of traffic management, for example, for the purposes of granting preferential treatment to one service over another, a practice that they would not consider justifiable if the services were similar in nature.

There was broad consensus that operators and ISPs should be allowed to determine their own business models and commercial arrangements, subject to all applicable laws. Some respondents called on National Regulatory Authorities and operators to work together to

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ensure that transparency to consumers as regards traffic management practices was meaningful and effective.

Several respondents considered that traffic management should apply to both fixed and mobile networks, in line with the principle of technology neutrality that underlies the electronic communications framework in the EU.

The Commission, together with BEREC, will continue monitoring this issue to allow for reasonable and transparent traffic management, which will support the objectives of the EU Telecommunication framework.

Consumers and quality of service

Transparency is a key part of the net neutrality debate. Obtaining adequate information on possible limitations or traffic management enables consumers to make informed choices.

According to BEREC, the majority of NRAs received complaints from consumers concerning the **discrepancy between advertised and actual delivery speeds** for an internet connection. There was consensus that transparency on the quality of the service is essential. Given the complexity and technical nature of the multiplicity of internet offerings from the consumer perspective, according to many respondents, a balance needs to be struck between simplicity and the provision of meaningful and appropriately detailed information.

Some stakeholders pointed to the fact that safeguards for preserving the open and neutral character of the internet are already provided for in the regulatory framework and that NRAs should avail themselves of the provisions under Article 22(3) of the Universal Service Directive and set appropriate minimum quality of service requirements, where they are made aware of degradation of service, hindering or slowing down of traffic over networks.

In the course of the summit of November 2010, Members of the European Parliament urged more work to be done on quality of service indicators and would look to BEREC for the best way to proceed.

The international context

A number of issues – such as whether internet providers can prioritise one kind of content over another, whether mobile and fixed networks should be subject to different rules – have generated much discussion and no little controversy in a number of countries outside the EU.

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In the **United States**, the Federal Communications Commission (FCC) has regularly declared its commitment to preserving the openness of the internet. To this end, the FCC adopted in 2005 four key principles allowing internet consumers to use the content, applications, services and devices of their choice, and promoting competition among network, service and content providers. These ideas correspond largely to the 'open internet' principle enshrined in the revised EU telecoms framework.

In December 2010, the FCC issued an order which introduced new rules on transparency as well as clarification as to the types of blocking permitted for fixed and mobile broadband. In principle, fixed broadband providers may not block lawful content, services, non-harmful devices and applications, including those competing with their own voice or video telephony services. The approach to mobile broadband is incremental, at this time providers are only specifically prevented from blocking lawful websites and VoIP or video-telephony applications that compete with their own voice or video telephony services.

Other countries have adopted non-binding guidelines on net neutrality. In **Norway**, the Norwegian Post and Telecommunications Authority (NPT), in collaboration with a range of stakeholders, adopted a voluntary agreement in February 2009 entitling users to an internet connection (i) with a predefined capacity and quality; (ii) that enables them to use the content, services and applications of their choice; and (iii) that is free of discrimination with regard to type of application, service or content.

Meanwhile in **Canada**, the Canada Radio-television and Telecommunications Commission (CRTC) issued in October 2009 a new framework on net neutrality that subjects internet providers to increased transparency requirements and allows them to employ traffic-management techniques only as a last resort.

Chile appears to be the first country to address directly the principle of net neutrality in its legislation. In August 2010, its parliament adopted a new law on net neutrality, which essentially restricts the rights of internet providers to manage content, while increasing protection for content providers and internet users.

The Commission is following these international developments closely and will continue to take them into account in its own thinking on possible approaches to net neutrality.

5. Conclusion

The importance of maintaining the open internet, underlined in the Commission Declaration, received large endorsement in the public consultation and joint Commission-Parliament summit. The Commission remains committed to this objective, and to ensuring that the maintenance of a robust best-efforts internet to which everyone has access.

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The Commission is of the opinion that the rules on transparency, switching and quality of service that form part of the revised EU electronic communications framework should contribute to producing competitive outcomes.

Given that Member States are still transposing the revised EU electronic communications framework into national law, it is important to allow sufficient time for these provisions to be implemented and to see how they will operate in practice.

Moreover, as stated above the data obtained from the public consultation was incomplete or imprecise in many aspects that are essential to understand the current state of play in the European Union. For this reason, the Commission, with BEREC, is currently looking into a number of issues that surfaced in the course of the consultation process, in particular, barriers to switching (for example, after how long, on average, a customer is permitted to break a post-paid contract, and what if any are the penalties), practices of blocking, throttling and commercial practices with equivalent effect, transparency and quality of service as well as the competition issues relating to net neutrality (e.g. discriminatory practices by a dominant player).

In this regard, the Commission reserves its right to assess under Articles 101 and 102 of the TFEU any behaviour related to traffic management that may restrict or distort competition.

The way forward

The Commission will publish, by the end of the year, the evidence that will come to light from BEREC's investigations, including any instance of blocking or throttling certain types of traffic.

On the basis of the evidence and the implementation of the telecom framework provisions, the Commission will decide, as a matter of priority, on the issue of **additional guidance** on net neutrality.

If significant and persistent problems are substantiated, and the system as a whole - comprising multiple operators - is not ensuring that consumers are easily able to access and distribute content, services and applications of their choice via a single internet subscription, the Commission will assess the need for **more stringent measures** to achieve competition and the choice consumers deserve. Transparency and ease of switching are key elements for consumers when choosing or changing internet service provider but they may not be adequate tools to deal with generalised restrictions of lawful services or applications.

Such additional measures may take the form of guidance or general legislative measures to enhance competition and consumer choice, such as by further facilitating consumer switching, or if this should

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prove to be insufficient, by for example imposing specific obligations regarding unjustified traffic differentiation on the internet applicable to all ISPs irrespective of market power. This could include the prohibition of the blocking of lawful services.

Net neutrality touches on a number of rights and principles enshrined in the EU Charter of Fundamental Rights, in particular the respect for private and family life, the protection of personal data and freedom of expression and information. For this reason, any legislative proposals in this area will be subject to an in-depth assessment of their impact on fundamental rights and of their compliance with the Charter of Fundamental Rights of the EU[9].

Any additional regulation should avoid deterring investment, or innovative business models, lead to a more efficient use of the networks and to creating new business opportunities at different levels of the internet value chain while preserving for consumers the advantages of a choice of internet access products tailored to their needs.

In parallel, the Commission will continue its dialogue with Member States and stakeholders to ensure the rapid development of broadband, which would reduce the pressure on data traffic.

[9] In line with the "Strategy for the effective implementation of the Charter of Fundamental Rights COM(2010)573 final of 19.10.2010

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3.2. Regulation 2015/2120 on Open Internet Access

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN

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4. Governance in the digital environment

Guided Reading:

Andrew Murray (2016) Information Technology law, pp. 61-109

Additional Reading:

4.1. Virtual goods – The Dutch example

RuneScape Theft – Dutch Supreme Court Decision

(The article below was borrowed from the webpage: http://www.virtualpolicy.net/runescape-theft-dutch-supreme-court-decision.html where you can find also a Google translation of the case. You can find the original Court decision in Dutch in the following link: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BQ9251&showbutton=true)

On the 31st of January 2012, the Supreme Court of the Netherlands found that items in the online game RuneScape had been stolen from a player. This is a ground-breaking case as it is the highest national court in the West to rule that taking virtual objects in this way is theft under national criminal law. This ruling may have broad implications for the online games industry.

The case dates back to 2007 when two youths used violence and threats of violence to forced another player to log into the game of RuneScape. After the victim logged in to the game one of the defendants transferred virtual items and virtual currency from the victims account to their own. The Supreme Court upheld the conviction for theft but reduced the number of hours of community service to be served (taking into account Juvenile detention served).

The appeal did not turn on the material facts, i.e. whether there were threats were made or items were transferred. Rather, the appeal centred on the question of whether what had occurred was 'theft' as defined by the law of the Netherlands.

Key Arguments

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The key arguments against the incident being defined as 'theft' considered by the court they were as follows:

Virtual items are not goods but an 'illusion' of goods made up of bits & bytes i.e. they are data

Virtual items are Information

The point of the game is to take objects from each other

The virtual items are and remain the property of the publisher of the game not the victim or the defendant - hence they could not have been stolen

The 'Illusion' argument

The court ruled that:

Virtual items have value in virtual of the effort and time invested in obtaining them

The value in Virtual items is recognised by those that play the game (including the defendents who went to the trouble to take them)

The Virtual items were under the exclusive control of the player – who was relieved of this control

The court made reference to cases of electricity theft which is a similar intangible good but certainly has properties of power and control, and consequently can be stolen.

The 'mere data' argument

The court agreed that virtual items are data, but crucially added that they are not just data. That is, the fact that virtual items have data like properties does not mean that they don't also have properties that make them capable of being stolen. In particular the court noted again that the virtual item had perceived value and were under the exclusive control of a player.

The 'I was playing a thief' argument

The defence argued that one of the points of the game of RuneScape is to take virtual items from other players. The court noted that this was true but the way that the property was taken was outside the 'context' of the game.

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The 'not your property' argument

The court agreed that under the RuneScape terms and conditions, the virtual items in the game are owned by the publisher of RuneScape who grant the players have a 'right to use'. However it concluded that the items in question were under the 'exclusive dominion' of the victim until they were removed from them, hence the position of RuneScape being owners of the items (from the perspective of intellectual property / contract law) is 'not relevant' in the context of the criminal case under consideration. Here the court made defence to money – which is the property of the sate but can still be stolen.

In coming to these conclusions the court noted that it is down to the discretion of the court to determine whether "due to the digitization of society, a virtual reality has been created, all aspects of which cannot be dismissed as mere illusion where the commission of criminal acts are not be possible".

Commentary: Significance

This case is significant because it changes the relationship between individuals and service providers in respect of digital objects. That is, RuneScape's contract clearly states that the players of the game do not own the game or any of the digital objects within it, whether they control them or not. This has long been a contentious matter as there is a large trade in the sale of objects between players for hard currency, so called Real Money Trading (RMT).

This ruling means that there is a degree of control that someone can have over an object which is sufficient for that object to be stolen. The question that has puzzled both the industry and academics for many years is: if a digital object is capable of being stolen, does this mean that other rights accrue to a player? For example, irrespective of what the contract says, can a player:

sell an object?

claim rights if an object is deleted or changed by company?

claim compensation if a game is closed?

For the moment, this matter is restricted both to The Netherlands and to the specific matter of theft. However in China and South Korea there have been similar types of cases which have made it to the courts, in these judges have displayed a general trend to grant more rights to players than are stated in their contract and to see digital objects as being akin to physical property in certain important

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respects. The fact that a case in the EU has got to such a senior court and has ruled along the same lines is likely to carry some weight with other cases that may occur in the West.

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4.2. Virtual goods – the Chinese example

Li Hongchen v. Beijing Arctic Ice Technology Development Co. Ltd.,

(The article below was borrowed from the webpage: http://www.virtualpolicy.net/arcticice.html where you can find also a Google translation of the case.)

This is generally is regarded as the first instance of 'virtual theft' being recognised by a court. The case concerns virtual items taken from a player's account through some form of account hacking. The case was brought by the victim of the theft against the game company (rather than the other player) as the company refused to re-instate the virtual items.

While the details of the case are slightly complex, the final judgment (over turning an appeal) found that the game publisher has a duty of care to its players, and specially that in this case its security systems were insufficient to ensure that virtual items could not be transferred out of players account through hacking and that this act constitutes theft.

Li Hongchen claimed that when he logged into his account "President" on 17 February 2003 he found that all the contents, including such things as: '2 poisons', 1 God of War' had been sent to account SHUILIU0011. He asked for the details of the account but Arctic Ice refused to provide these as it would breach the personal privacy of the other player, they also stated that the action had nothing to do with them as the security of the account is the player's responsibility. It seems like some of the items in question were generated through game play and some through 'pet cards' individual payment for a given item.

When the matter eventually went to court Arctic Ice made a number of general and very specific claims:

the security of a player account is their responsibility (as defined in the ToS), hence any thefts form the account are the player's responsibility;

players are obliged to maintain standards of security and loss due to failure to meet this contractual obligation is their liability;

operator obligations under Consumer protection law should be limited;

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virtual items are a ‘pile of data’ and do not constitute a ‘thing’ under Chinese Civil Law;

there are three possibilities for why the items where no in the account: (1) stolen, (2) hacked at a network level, or (3) given away – and that the player could not prove that it was (1); and

the account in question was not the players as it did not have the player’s name associated with it.

Li Hongchen made a number of counter claims:

the account was his, and though he had used pseudonyms, the phone number on the account was his. Moreover he evidenced things such as game CD ROM, game cards and a whiteness; and

while the ToS were agreed to when he initially registered for the game, the ToS were no displayed during the account re-charge process

The court found for Li Hongchen in respect of the return of the virtual items and costs, including the travel costs of his witness. Li Hongchen’s claim of compensation for ‘mental damages’ was not held.

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5. Cyber-speech and social networking

Guided reading:

Andrew Murray (2016) Information Technology law, pp. 110-172

Additional Reading:

5.1. ECHR decision in Jersid v Denmark

JERSILD v DENMARK

Application no. 15890/89

European Court of Human Rights

Strasbourg, 23 September 1994

[…]

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Jens Olaf Jersild, a Danish national, is a journalist and lives in Copenhagen. He was at the time of the events giving rise to the present case, and still is, employed by Danmarks Radio (Danish Broadcasting Corporation, which broadcasts not only radio but also television programmes), assigned to its Sunday News Magazine (Søndagsavisen). The latter is known as a serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia, immigration and refugees.

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A. The Greenjackets item

10. On 31 May 1985 the newspaper Information published an article describing the racist attitudes of members of a group of young people, calling themselves "the Greenjackets" ("grønjakkerne"), at Østerbro in Copenhagen. In the light of this article, the editors of the Sunday News Magazine decided to produce a documentary on the Greenjackets. Subsequently the applicant contacted representatives of the group, inviting three of them together with Mr Per Axholt, a social worker employed at the local youth centre, to take part in a television interview. During the interview, which was conducted by the applicant, the three Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. It lasted between five and six hours, of which between two and two and a half hours were video-recorded. Danmarks Radio paid the interviewees fees in accordance with its usual practice.

11. The applicant subsequently edited and cut the film of the interview down to a few minutes. On 21 July 1985 this was broadcast by Danmarks Radio as a part of the Sunday News Magazine. The programme consisted of a variety of items, for instance on the martial law in South Africa, on the debate on profit-sharing in Denmark and on the late German writer Heinrich Böll. The transcript of the Greenjackets item reads as follows [(I): TV presenter; (A): the applicant; (G): one or other of the Greenjackets]:

(I) "In recent years, a great deal has been said about racism in Denmark. The papers are currently publishing stories about distrust and resentment directed against minorities. Who are the people who hate the minorities? Where do they come from? What is their mentality like? Mr Jens Olaf Jersild has visited a group of extremist youths at Østerbro in Copenhagen.

(A) The flag on the wall is the flag of the Southern States from the American Civil War, but today it is also the symbol of racism, the symbol of the American movement, the Ku Klux Klan, and it shows what Lille Steen, Henrik and Nisse are.

Are you a racist?

(G) Yes, that's what I regard myself as. It's good being a racist. We believe Denmark is for the Danes.

(A) Henrik, Lille Steen and all the others are members of a group of young people who live in Studsgårdsgade, called STUDSEN, in Østerbro in Copenhagen. It is public housing, a lot of the inhabitants are unemployed and on social security; the crime rate is high. Some of the young people in this neighbourhood have already been involved in criminal activities and have already been convicted.

(G) It was an ordinary armed robbery at a petrol station.

(A) What did you do?

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(G) Nothing. I just ran into a petrol station with a ... gun and made them give me some money. Then I ran out again. That's all.

(A) What about you, what happened?

(G) I don't wish to discuss that further.

(A) But, was it violence?

(G) Yes.

(A) You have just come out of ... you have been arrested, what were you arrested for?

(G) Street violence.

(A) What happened?

(G) I had a little fight with the police together with some friends.

(A) Does that happen often?

(G) Yes, out here it does.

(A) All in all, there are 20-25 young people from STUDSEN in the same group.

They meet not far away from the public housing area near some old houses which are to be torn down. They meet here to reaffirm among other things their racism, their hatred of immigrants and their support for the Ku Klux Klan.

(G) The Ku Klux Klan, that's something that comes from the States in the old days during - you know - the civil war and things like that, because the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals, right, it's completely wrong, man, the things that happened. People should be allowed to keep slaves, I think so anyway.

(A) Because blacks are not human beings?

(G) No, you can also see that from their body structure, man, big flat noses, with cauliflower ears etc., man. Broad heads and very broad bodies, man, hairy, you are looking at a gorilla and compare it with an ape, man, then it is the same [behaviour], man, it's the same movements, long arms, man, long fingers etc., long feet.

(A) A lot of people are saying something different. There are a lot of people who say, but ...

(G) Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things.

(A) There are many blacks, for example in the USA, who have important jobs.

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(G) Of course, there is always someone who wants to show off, as if they are better than the white man, but in the long run, it's the white man who is better.

(A) What does Ku Klux Klan mean to you?

(G) It means a great deal, because I think what they do is right. A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.

(A) Henrik is 19 years old and on welfare. He lives in a rented room in Studsgårdsgade. Henrik is one of the strongest supporters of the Klan, and he hates the foreign workers, 'Perkere' [a very derogatory word in Danish for immigrant workers].

(G) They come up here, man, and sponge on our society. But we, we have enough problems in getting our social benefits, man, they just get it. Fuck, we can argue with those idiots up there at the social benefit office to get our money, man, they just get it, man, they are the first on the housing list, they get better flats than us, man, and some of our friends who have children, man, they are living in the worst slum, man, they can't even get a shower in their flat, man, then those 'Perkere'-families, man, go up there with seven kids, man, and they just get an expensive flat, right there and then. They get everything paid, and things like that, that can't be right, man, Denmark is for the Danes, right?

It is the fact that they are 'Perkere', that's what we don't like, right, and we don't like their mentality - I mean they can damn well, I mean ... what's it called ... I mean if they feel like speaking Russian in their homes, right, then it's okay, but what we don't like is when they walk around in those Zimbabwe-clothes and then speak this hula-hula language in the street, and if you ask them something or if you get into one of their taxis then they say: I don't know where it is, you give directions right.

(A) Is it not so that perhaps you are a bit envious that some of the 'Perkere' as you call them have their own shops, and cars, they can make ends ...

(G) It's drugs they are selling, man, half of the prison population in 'Vestre' are in there because of drugs, man, half of those in Vestre prison anyway, they are the people who are serving time for dealing drugs or something similar.

They are in there, all the 'Perkere', because of drugs, right. [That] must be enough, what's it called, there should not be drugs here in this country, but if it really has to be smuggled in, I think we should do it ourselves, I mean, I think it's unfair that those foreigners come up here to ... what's it called ... make Denmark more drug dependent and things like that.

We have painted their doors and hoped that they would get fed up with it, so that they would soon leave, and jumped on their cars and thrown paint in their faces when they were lying in bed sleeping.

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(A) What was it you did with that paint - why paint?

(G) Because it was white paint, I think that suited them well, that was the intended effect.

(A) You threw paint through the windows of an immigrant family?

(G) Yes.

(A) What happened?

(G) He just got it in his face, that's all. Well, I think he woke up, and then he came out and shouted something in his hula-hula language.

(A) Did he report it to the police?

(G) I don't know if he did, I mean, he won't get anywhere by doing that.

(A) Why not?

(G) I don't know, it's just kid's stuff, like other people throwing water in people's faces, he got paint in his. They can't make anything out of that.

(A) Per Axholt, known as 'Pax' [(P)], is employed in the youth centre in Studsgårdsgade. He has worked there for several years, but many give up a lot sooner because of the tough environment. Per Axholt feels that the reasons why the young people are persecuting the immigrants is that they are themselves powerless and disappointed.

What do you think they would say that they want, if you asked them?

(P) Just what you and I want. Some control over their lives, work which may be considered decent and which they like, a reasonable economic situation, a reasonably functioning family, a wife or a husband and some children, a reasonable middle-class life such as you and I have.

(A) They do many things which are sure to prevent them from getting it.

(P) That is correct.

(A) Why do you think they do this?

(P) Because they have nothing better to do. They have been told over a long period that the means by which to achieve success is money. They won't be able to get money legitimately, so often they try to obtain it through criminal activity. Sometimes they succeed, sometimes not, and that's why we see a lot of young people in that situation go to prison, because it doesn't work.

(A) How old were you when you started your criminal activities?

(G) I don't know, about 14 I guess.

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(A) What did you do?

(G) The first time, I can't remember, I don't know, burglary.

(A) Do you have what one might call a criminal career?

(G) I don't know if you can call it that.

(A) You committed your first crime when you were 14.

(G) Well, you can put it that way, I mean, if that is a criminal career. If you have been involved in crime since the age of 15 onwards, then I guess you can say I've had a criminal career.

(A) Will you tell me about some of the things you have done?

(G) No, not really. It's been the same over and over again. There has been pinching of videos, where the 'Perkere' have been our customers, so they have money. If people want to be out here and have a nice time and be racists and drink beer, and have fun, then it's quite obvious you don't want to sit in the slammer.

(A) But is the threat of imprisonment something that really deters people from doing something illegal?

(G) No, it's not prison, that doesn't frighten people.

(A) Is that why you hear stories about people from out here fighting with knives etc., night after night. Is the reason for this the fact that they are not afraid of the police getting hold of them?

(G) Yes, nothing really comes of it, I mean, there are no bad consequences, so probably that's why. For instance fights and stabbings and smashing up things ... If you really get into the joint it would be such a ridiculously small sentence, so it would be, I mean ... usually we are released the next day. Last time we caused some trouble over at the pub, they let us out the next morning. Nothing really comes of it. It doesn't discourage us, but there were five of us, who just came out and then we had a celebration for the last guy, who came out yesterday, they probably don't want to go in again for some time so they probably won't commit big crimes again.

(A) You would like to move back to Studsgårdsgade where you grew up, but we know for sure that it's an environment with a high crime rate. Would you like your child to grow up like you?

(G) No, and I don't think she will. Firstly, because she is a girl, statistics show that the risk is not that high, I mean they probably don't do it, but you don't have to be a criminal because you live in an environment with a high crime rate. I just wouldn't accept it, if she was mugging old women and stealing their handbags.

(A) What if she was among those beating up the immigrants etc. What then?

(G) That would be okay. I wouldn't have anything against that.

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(I) We will have to see if the mentality of this family changes in the next generation. Finally, we would like to say that groups of young people like this one in STUDSEN at Østerbro, have been formed elsewhere in Copenhagen."

B. Proceedings in the City Court of Copenhagen […]

C. Proceedings in the High Court of Eastern Denmark […]

D. Proceedings in the Supreme Court […]

II. RELEVANT DOMESTIC LAW […]

III. INSTRUMENTS OF THE UNITED NATIONS […]

PROCEEDINGS BEFORE THE COMMISSION […]

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT […]

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

25. The applicant maintained that his conviction and sentence for having aided and abetted the dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10 (art. 10) of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law

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and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. The Government contested this contention whereas the Commission upheld it.

27. It is common ground that the measures giving rise to the applicant's case constituted an interference with his right to freedom of expression.

It is moreover undisputed that this interference was "prescribed by law", the applicant's conviction being based on Articles 266 (b) and 23 (1) of the Penal Code. In this context, the Government pointed out that the former provision had been enacted in order to comply with the UN Convention. The Government's argument, as the Court understands it, is that, whilst Article 10 (art. 10) of the Convention is applicable, the Court, in applying paragraph 2 (art. 10-2), should consider that the relevant provisions of the Penal Code are to be interpreted and applied in an extensive manner, in accordance with the rationale of the UN Convention (see paragraph 21 above). In other words, Article 10 (art. 10) should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.

Finally it is uncontested that the interference pursued a legitimate aim, namely the "protection of the reputation or rights of others".

The only point in dispute is whether the measures were "necessary in a democratic society".

28. The applicant and the Commission were of the view that, notwithstanding Denmark's obligations as a Party to the UN Convention (see paragraph 21 above), a fair balance had to be struck between the "protection of the reputation or rights of others" and the applicant's right to impart information. According to the applicant, such a balance was envisaged in a clause contained in Article 4 of the UN Convention to the effect that "due regard" should be had to "the principles in the Universal Declaration of Human Rights and the rights ... in Article 5 of [the UN] Convention". The clause had been introduced at the drafting stage because of concern among a number of States that the requirement in Article 4 (a) that "[States Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred" was too sweeping and could give rise to difficulties with regard to other human rights, in particular the right to freedom of opinion and expression. In the applicant's further submission, this explained why the Committee of Ministers of the Council of Europe, when urging member States to ratify the UN Convention, had proposed that they add an interpretative statement to their instrument of ratification, which would, inter alia, stress that respect was also due for the rights laid down in the European Convention (Resolution (68) 30 adopted by the Ministers' Deputies on 31 October 1968).

The applicant and the Commission emphasised that, taken in the context of the broadcast as a whole, the offending remarks had the effect of ridiculing their authors rather than promoting their racist views. The overall impression of the programme was that it sought to draw public attention to a matter of great public concern, namely racism and xenophobia. The applicant had deliberately included the offensive statements in the programme, not with the intention of disseminating

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racist opinions, but in order to counter them through exposure. The applicant pointed out that he tried to show, analyse and explain to his viewers a new phenomenon in Denmark at the time, that of violent racism practised by inarticulate and socially disadvantaged youths. Joined by the Commission, he considered that the broadcast could not have had any significant detrimental effects on the "reputation or rights of others". The interests in protecting the latter were therefore outweighed by those of protecting the applicant's freedom of expression.

In addition the applicant alleged that had the 1991 Media Liability Act been in force at the relevant time he would not have faced prosecution since under the Act it is in principle only the author of a punishable statement who may be liable. This undermined the Government's argument that his conviction was required by the UN Convention and "necessary" within the meaning of Article 10 (art. 10).

29. The Government contended that the applicant had edited the Greenjackets item in a sensationalist rather than informative manner and that its news or information value was minimal. Television was a powerful medium and a majority of Danes normally viewed the news programme in which the item was broadcast. Yet the applicant, knowing that they would incur criminal liability, had encouraged the Greenjackets to make racist statements and had failed to counter these statements in the programme. It was too subtle to assume that viewers would not take the remarks at their face value. No weight could be attached to the fact that the programme had given rise to only a few complaints, since, due to lack of information and insufficient knowledge of the Danish language and even fear of reprisals by violent racists, victims of the insulting comments were likely to be dissuaded from complaining. The applicant had thus failed to fulfil the "duties and responsibilities" incumbent on him as a television journalist. The fine imposed upon him was at the lower end of the scale of sanctions applicable to Article 266 (b) offences and was therefore not likely to deter any journalist from contributing to public discussion on racism and xenophobia; it only had the effect of a public reminder that racist expressions are to be taken seriously and cannot be tolerated.

The Government moreover disputed that the matter would have been dealt with differently had the 1991 Media Liability Act been in force at the material time. The rule that only the author of a punishable statement may incur liability was subject to exceptions (see paragraph 20 above); how the applicant's case would have been considered under the 1991 Act was purely a matter of speculation.

The Government stressed that at all three levels the Danish courts, which were in principle better placed than the European Court to evaluate the effects of the programme, had carried out a careful balancing exercise of all the interests involved. The review effected by those courts had been similar to that carried out under Article 10 (art. 10); their decisions fell within the margin of appreciation to be left to the national authorities and corresponded to a pressing social need.

30. The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations. It may be true, as has been suggested by the applicant, that as a result of recent events the awareness of the dangers of racial discrimination is sharper today than it was a decade ago, at the material time. Nevertheless, the issue was already then of general importance, as is illustrated for instance

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by the fact that the UN Convention dates from 1965. Consequently, the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction, which - as the Government have stressed - was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was "necessary" within the meaning of Article 10 para. 2 (art. 10-2).

In the second place, Denmark's obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the "due regard" clause in Article 4 of the UN Convention, which is open to various constructions. The Court is however of the opinion that its interpretation of Article 10 (art. 10) of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention.

31. A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio (see paragraphs 9 to 11 above). In assessing whether his conviction and sentence were "necessary", the Court will therefore have regard to the principles established in its case-law relating to the role of the press (as summarised in for instance the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see Purcell and Others v. Ireland, Commission's admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262). The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 25, para. 57).

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The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued (see the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, for instance, the Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B, pp. 32-33, para. 29).

The Court's assessment will have regard to the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme. Bearing in mind the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices (see paragraph 21 above), an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.

32. The national courts laid considerable emphasis on the fact that the applicant had himself taken the initiative of preparing the Greenjackets feature and that he not only knew in advance that racist statements were likely to be made during the interview but also had encouraged such statements. He had edited the programme in such a way as to include the offensive assertions. Without his involvement, the remarks would not have been disseminated to a wide circle of people and would thus not have been punishable (see paragraphs 14 and 18 above).

The Court is satisfied that these were relevant reasons for the purposes of paragraph 2 of Article 10 (art. 10-2).

33. On the other hand, as to the contents of the Greenjackets item, it should be noted that the TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.

The Supreme Court held that the news or information value of the feature was not such as to justify the dissemination of the offensive remarks (see paragraph 18 above). However, in view of the principles stated in paragraph 31 above, the Court sees no cause to question the Sunday News Magazine staff members' own appreciation of the news or information value of the impugned item, which formed the basis for their decisions to produce and broadcast it.

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34. Furthermore, it must be borne in mind that the item was broadcast as part of a serious Danish news programme and was intended for a well-informed audience (see paragraph 9 above).

The Court is not convinced by the argument, also stressed by the national courts (see paragraphs 14 and 18 above), that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed. Both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of "a group of extremist youths" who supported the Ku Klux Klan and by referring to the criminal records of some of them. The applicant also rebutted some of the racist statements for instance by recalling that there were black people who had important jobs. It should finally not be forgotten that, taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets.

Admittedly, the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant.

35. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (see, for instance, the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.

There can be no doubt that the remarks in respect of which the Greenjackets were convicted (see paragraph 14 above) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (art. 10) (see, for instance, the Commission's admissibility decisions in Glimmerveen and Hagenbeek v. the Netherlands, applications nos. 8348/78 and 8406/78, DR 18, p. 187; and Künen v. Germany, application no. 12194/86, DR 56, p. 205). However, even having regard to the manner in which the applicant prepared the Greenjackets item (see paragraph 32 above), it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.

36. It is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist. Although he relied on this in the domestic proceedings, it does not appear from the reasoning in the relevant judgments that they took such a factor into account (see paragraphs 14, 17 and 18 above).

37. Having regard to the foregoing, the reasons adduced in support of the applicant's conviction and sentence were not sufficient to establish convincingly that the interference

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thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others". Accordingly the measures gave rise to a breach of Article 10 (art. 10) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50)

38. Mr Jersild sought just satisfaction under Article 50 (art. 50) of the Convention, according to which:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

39. The Government accepted parts of his claim. The Commission offered no comments.

A. Pecuniary damage

40. The applicant claimed 1,000 kroner in respect of the fine imposed upon him, to be reimbursed by him to Danmarks Radio which had provisionally paid the fine for him.

41. The Government did not object and the Court finds that the amount should be awarded.

B. Non-pecuniary damage

42. The applicant requested 20,000 kroner in compensation for non-pecuniary damage. He maintained that his professional reputation had been prejudiced and that he had felt distress as a result of his conviction.

43. The Court observes that the applicant still works with the Sunday News Magazine at Danmarks Radio and that his employer has supported him throughout the proceedings, inter alia by paying the fine (see paragraphs 9 and 40 above) and legal fees (see paragraph 44 below). It agrees with the Government that the finding of a violation of Article 10 (art. 10) constitutes in itself adequate just satisfaction in this respect.

C. Costs and expenses

44. The applicant claimed in respect of costs and expenses:

(a) 45,000 kroner for work done in the domestic proceedings by his lawyer, Mr J. Stockholm;

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(b) by way of legal fees incurred in the Strasbourg proceedings, 13,126.80 kroner for Mrs Johannessen, 6,900 pounds sterling for Mr Boyle and 50,000 kroner (exclusive 25% value-added tax) for Mr Trier;

(c) 20,169.20 kroner to cover costs of translation, interpretation and an expert opinion;

(d) 25,080 kroner, 965.40 pounds and 4,075 French francs in travel and subsistence expenses incurred in connection with the hearings before the Commission and Court, as well as miscellaneous expenses.

Parts of the above costs and expenses had been provisionally disbursed by Danmarks Radio.

45. The Government did not object to the above claims. The Court considers that the applicant is entitled to recover the sums in their entirety. They should be increased by any value-added taxes that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to seven that there has been a violation of Article 10 (art. 10) of the Convention;

2. Holds by seventeen votes to two that Denmark is to pay the applicant, within three months, 1,000 (one thousand) Danish kroner in compensation for pecuniary damage; and, for costs and expenses, the sums resulting from the calculations to be made in accordance with paragraph 45 of the judgment;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

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5.2. Directive on Privacy and Electronic Communications

Directive 2002/58/EC of the European Parliament and of the Council

of 12 July 2002

concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof, […]

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope and aim

1. This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2. The provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.

Article 2

Definitions

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Save as otherwise provided, the definitions in Directive 95/46/EC and in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)(8) shall apply.

The following definitions shall also apply:

(a) "user" means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;

(b) "traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

(c) "location data" means any data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

(d) "communication" means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

(e) "call" means a connection established by means of a publicly available telephone service allowing two-way communication in real time;

(f) "consent" by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC;

(g) "value added service" means any service which requires the processing of traffic data or location data other than traffic data beyond what is necessary for the transmission of a communication or the billing thereof;

(h) "electronic mail" means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

Article 3

Services concerned

1. This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community.

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2. Articles 8, 10 and 11 shall apply to subscriber lines connected to digital exchanges and, where technically possible and if it does not require a disproportionate economic effort, to subscriber lines connected to analogue exchanges.

3. Cases where it would be technically impossible or require a disproportionate economic effort to fulfil the requirements of Articles 8, 10 and 11 shall be notified to the Commission by the Member States.

Article 4

Security

1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the subscribers concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, of any possible remedies, including an indication of the likely costs involved.

Article 5

Confidentiality of the communications

1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

3. Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is

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provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.

Article 6

Traffic data

1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his/her consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

4. The service provider must inform the subscriber or user of the types of traffic data which are processed and of the duration of such processing for the purposes mentioned in paragraph 2 and, prior to obtaining consent, for the purposes mentioned in paragraph 3.

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.

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Article 7

Itemised billing

1. Subscribers shall have the right to receive non-itemised bills.

2. Member States shall apply national provisions in order to reconcile the rights of subscribers receiving itemised bills with the right to privacy of calling users and called subscribers, for example by ensuring that sufficient alternative privacy enhancing methods of communications or payments are available to such users and subscribers.

Article 8

Presentation and restriction of calling and connected line identification

1. Where presentation of calling line identification is offered, the service provider must offer the calling user the possibility, using a simple means and free of charge, of preventing the presentation of the calling line identification on a per-call basis. The calling subscriber must have this possibility on a per-line basis.

2. Where presentation of calling line identification is offered, the service provider must offer the called subscriber the possibility, using a simple means and free of charge for reasonable use of this function, of preventing the presentation of the calling line identification of incoming calls.

3. Where presentation of calling line identification is offered and where the calling line identification is presented prior to the call being established, the service provider must offer the called subscriber the possibility, using a simple means, of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling user or subscriber.

4. Where presentation of connected line identification is offered, the service provider must offer the called subscriber the possibility, using a simple means and free of charge, of preventing the presentation of the connected line identification to the calling user.

5. Paragraph 1 shall also apply with regard to calls to third countries originating in the Community. Paragraphs 2, 3 and 4 shall also apply to incoming calls originating in third countries.

6. Member States shall ensure that where presentation of calling and/or connected line identification is offered, the providers of publicly available electronic communications services inform the public thereof and of the possibilities set out in paragraphs 1, 2, 3 and 4.

Article 9

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Location data other than traffic data

1. Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. Users or subscribers shall be given the possibility to withdraw their consent for the processing of location data other than traffic data at any time.

2. Where consent of the users or subscribers has been obtained for the processing of location data other than traffic data, the user or subscriber must continue to have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication.

3. Processing of location data other than traffic data in accordance with paragraphs 1 and 2 must be restricted to persons acting under the authority of the provider of the public communications network or publicly available communications service or of the third party providing the value added service, and must be restricted to what is necessary for the purposes of providing the value added service.

Article 10

Exceptions

Member States shall ensure that there are transparent procedures governing the way in which a provider of a public communications network and/or a publicly available electronic communications service may override:

(a) the elimination of the presentation of calling line identification, on a temporary basis, upon application of a subscriber requesting the tracing of malicious or nuisance calls. In this case, in accordance with national law, the data containing the identification of the calling subscriber will be stored and be made available by the provider of a public communications network and/or publicly available electronic communications service;

(b) the elimination of the presentation of calling line identification and the temporary denial or absence of consent of a subscriber or user for the processing of location data, on a per-line basis for organisations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of responding to such calls.

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Article 11

Automatic call forwarding

Member States shall ensure that any subscriber has the possibility, using a simple means and free of charge, of stopping automatic call forwarding by a third party to the subscriber's terminal.

Article 12

Directories of subscribers

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.

3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.

4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

Article 13

Unsolicited communications

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use

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these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.

3. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.

4. In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited.

5. Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

Article 14

Technical features and standardisation

1. In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.

2. Where provisions of this Directive can be implemented only by requiring specific technical features in electronic communications networks, Member States shall inform the Commission in accordance with the procedure provided for by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(9).

3. Where required, measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use

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of their personal data, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and communications(10).

Article 15

Application of certain provisions of Directive 95/46/EC

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

2. The provisions of Chapter III on judicial remedies, liability and sanctions of Directive 95/46/EC shall apply with regard to national provisions adopted pursuant to this Directive and with regard to the individual rights derived from this Directive.

3. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.

Article 16

Transitional arrangements

1. Article 12 shall not apply to editions of directories already produced or placed on the market in printed or off-line electronic form before the national provisions adopted pursuant to this Directive enter into force.

2. Where the personal data of subscribers to fixed or mobile public voice telephony services have been included in a public subscriber directory in conformity with the provisions of Directive 95/46/EC and of Article 11 of Directive 97/66/EC before the national provisions adopted in pursuance of this Directive enter into force, the personal data of such subscribers may remain included in this public directory in its printed or electronic versions, including versions with reverse search functions, unless subscribers indicate otherwise, after having

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received complete information about purposes and options in accordance with Article 12 of this Directive.

Article 17

Transposition

1. Before 31 October 2003 Member States shall bring into force the provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

Article 18

Review

The Commission shall submit to the European Parliament and the Council, not later than three years after the date referred to in Article 17(1), a report on the application of this Directive and its impact on economic operators and consumers, in particular as regards the provisions on unsolicited communications, taking into account the international environment. For this purpose, the Commission may request information from the Member States, which shall be supplied without undue delay. Where appropriate, the Commission shall submit proposals to amend this Directive, taking account of the results of that report, any changes in the sector and any other proposal it may deem necessary in order to improve the effectiveness of this Directive.

Article 19

Repeal

Directive 97/66/EC is hereby repealed with effect from the date referred to in Article 17(1).

References made to the repealed Directive shall be construed as being made to this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

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Article 21

Addressees

This Directive is addressed to the Member States.

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5.3. ECHR decision in Von Hannover v Germany

Von Hannover v Germany

Application no. 59320/00

European Court of Human Rights
Strasbourg, 24 June 2004
[…]
THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, who is the eldest daughter of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time.

As a member of Prince Rainier's family, the applicant is the president of certain humanitarian or cultural foundations, such as the Princess Grace Foundation or the Prince Pierre of Monaco Foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or any of its institutions.

A. Background to the case

2. Since the early 1990s the applicant has been trying – often through the courts – in a number of European countries to prevent the publication of photos about her private life in the tabloid press.

3. The photos that were the subject of the proceedings described below were published by the Burda

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publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*.

1. The first series of photos

(a) The five photos of the applicant published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993)

4. These photos show her with the actor Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. The first page of the magazine refers to "The most tender photos of her romance with Vincent" ("*Die zärtlichsten Fotos Ihrer Romanze mit Vincent*") and the photos themselves bear the caption "These photos are evidence of the most tender romance of our time" ("*Diese Fotos sind der Beweis für die zärtlichste Romanze unserer Zeit*").

(b) The two photos of the applicant published in *Bunte* magazine (issue no. 32 of 5 August 1993)

5. The first photo shows her on horseback with the caption "Caroline and the blues. Her life is a novel with innumerable misfortunes, says the author Roig" ("*Caroline und die Melancholie. Ihr Leben ist ein Roman mit unzähligen Unglücken, sagt Autor Roig*").

The second photo shows her with her children Pierre and Andrea.

The photos are part of an article entitled "I don't think I could be a man's ideal wife" ("*Ich glaube nicht, dass ich die ideale Frau für einen Mann sein kann*").

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 34 of 19 August 1993)

6. The first photo shows her canoeing with her daughter Charlotte, the second shows her son Andrea with a bunch of flowers in his arms.

The third photo shows her doing her shopping with a bag slung over her shoulder, the fourth with Vincent Lindon in a restaurant and the fifth alone on a bicycle.

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The sixth photo shows her with Vincent Lindon and her son Pierre.

The seventh photo shows her doing her shopping at the market, accompanied by her bodyguard.

The article is entitled "Pure happiness" ("V*om einfachen Glück*").

2. The second series of photos

(a) The ten photos of the applicant published in *Bunte* magazine (issue no. 10 of 27 February 1997)

7. These photos show the applicant on a skiing holiday in Zürs/Arlberg. The accompanying article is entitled "Caroline... a woman returns to life" ("*Caroline... eine Frau kehrt ins Leben zurück*").

(b) The eleven photos of the applicant published in *Bunte* magazine (issue no. 12 of 13 March 1997)

8. Seven photos show her with Prince Ernst August von Hannover at a horse show in Saint-Rémy-de-Provence. The accompanying article is entitled "The kiss. Or: they are not hiding anymore" ("*Der Kuss. Oder: jetzt verstecken sie sich nicht mehr*").

Four other photos show her leaving her house in Paris with the caption "Out and about with Princess Caroline in Paris" ("*Mit Prinzessin Caroline unterwegs in Paris*").

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 16 of 10 April 1997)

9. These photos show the applicant on the front page with Prince Ernst August von Hannover and on the inside pages of the magazine playing tennis with him or both putting their bicycles down.

3. The third series of photos

10. The sequence of photos published in *Neue Post* magazine (issue no. 35/97) shows the applicant at the Monte Carlo Beach Club, dressed in a swimsuit and wrapped up in a bathing towel,

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tripping over an obstacle and falling down. The photos, which are quite blurred, are accompanied by an article entitled "Prince Ernst August played fisticuffs and Princess Caroline fell flat on her face" ("*Prinz Ernst August haute auf den Putz und Prinzessin Caroline fiel auf die Nase*").

B. The proceedings in the German courts […]

II. RELEVANT DOMESTIC AND EUROPEAN LAW […]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

11. The applicant submitted that the German court decisions had infringed her right to respect for her private and family life, guaranteed by Article 8 of the Convention, which is worded as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions of the parties and interveners

1. The applicant

12. The applicant stated that she had spent more than ten years in unsuccessful litigation in the German courts trying to establish her right to the protection of her private life. She alleged that as soon as she left her house she was constantly hounded by paparazzi who followed her every daily movement, be it crossing the road, fetching her children from school, doing her shopping, out

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walking, engaging in sport or going on holiday. In her submission, the protection afforded to the private life of a public figure like herself was minimal under German law because the concept of a "secluded place" as defined by the Federal Court of Justice and the Federal Constitutional Court was much too narrow in that respect. Furthermore, in order to benefit from that protection the onus was on her to establish every time that she had been in a secluded place. She was thus deprived of any privacy and could not move about freely without being a target for the paparazzi. She affirmed that in France her prior agreement was necessary for the publication of any photos not showing her at an official event. Such photos were regularly taken in France and then sold and published in Germany. The protection of private life from which she benefited in France was therefore systematically circumvented by virtue of the decisions of the German courts. On the subject of the freedom of the press, the applicant stated that she was aware of the essential role played by the press in a democratic society in terms of informing and forming public opinion, but in her case it was just the entertainment press seeking to satisfy its readers' voyeuristic tendencies and make huge profits from generally innocuous photos showing her going about her daily business. Lastly, the applicant stressed that it was materially impossible to establish in respect of every photo whether or not she had been in a secluded place. As the judicial proceedings were generally held several months after publication of the photos, she was obliged to keep a permanent record of her every movement in order to protect herself from paparazzi who might photograph her. With regard to many of the photos that were the subject of this application, it was impossible to determine the exact time and place at which they had been taken.

2. The Government

13. The Government submitted that German law, while taking account of the fundamental role of the freedom of the press in a democratic society, contained sufficient safeguards to prevent any abuse and ensure the effective protection of the private life of even public figures. In their submission, the German courts had in the instant case struck a fair balance between the applicant's rights to

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respect for her private life guaranteed by Article 8 and the freedom of the press guaranteed by Article 10, having regard to the margin of appreciation available to the State in this area. The courts had found in the first place that the photos had not been taken in a secluded place and had, subsequently, examined the limits on the protection of private life, particularly in the light of the freedom of the press and even where the publication of photos by the entertainment press was concerned. The protection of the private life of a figure of contemporary society "*par excellence*" did not require the publication of photos without his or her authorisation to be limited to showing the person in question engaged in their official duties. The public had a legitimate interest in knowing how the person behaved generally in public. The Government submitted that this definition of the freedom of the press by the Federal Constitutional Court was compatible with Article 10 and the European Court's relevant case-law. Furthermore, the concept of a secluded place was only one factor, albeit an important one, of which the domestic courts took account when balancing the protection of private life against the freedom of the press. Accordingly, while private life was less well protected where a public figure was photographed in a public place, other factors could also be taken into consideration, such as the nature of the photos, for example, which should not shock the public. Lastly, the Government observed that the decision of the Federal Court of Justice – which had held that the publication of photos of the applicant with the actor Vincent Lindon in a restaurant courtyard in Saint-Rémy-de-Provence were unlawful – showed that the applicant's private life was protected even outside her home.

3. The interveners

14. The Association of German Magazine Publishers submitted that German law, which was halfway between French law and United Kingdom law, struck a fair balance between the right to protection of private life and the freedom of the press. In its submission, it also complied with the principles set out in Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy and the European Court's case-law, which had always stressed the fundamental role of the press

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in a democratic society. The public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other reasons. The press's role of "watchdog" could not be narrowly interpreted here. In that connection, account should also be taken of the fact that the boundary between political commentary and entertainment was becoming increasingly blurred. Given that there was no uniform European standard concerning the protection of private life, the State had a wide margin of appreciation in this area.

15. Burda joined the observations of the Association of German Magazine Publishers and stated that German law required the courts to balance the competing interests of informing the public and protecting the right to control the use of one's image very strictly and on a case-by-case basis. Even figures of contemporary society "*par excellence*" enjoyed a not inconsiderable degree of protection, and recent case-law had even tended towards reinforcing that protection. Since the death of her mother in 1982, the applicant had officially been First Lady of the reigning family in Monaco and was as such an example for the public (*Vorbildfunktion*). Moreover, the Grimaldi family had always sought to attract media attention and was therefore itself responsible for the public interest in it. The applicant could not therefore, especially if account were taken of her official functions, be regarded as a victim of the press. The publication of the photos in question had not infringed her right to control the use of her image because they had been taken while she was in public and had not been damaging to her reputation.

B. The Court's assessment

1. As regards the subject of the application

16. The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003.

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The same applies to the photos published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence (see paragraph 11 above). In its judgment of 19 December 1995, the Federal Court of Justice prohibited any further publication of the photos on the ground that they infringed the applicant's right to respect for her private life (see paragraph 23 above).

17. Accordingly, the Court considers it important to specify that the present application concerns the following photos, which were published as part of a series of articles about the applicant:

(i) the photo published in *Bunte* magazine (issue no. 32 of 5 August 1993) showing the applicant on horseback (see paragraph 12 above)

(ii) the photos published in *Bunte* magazine (issue no. 34 of 19 August 1993) showing the applicant shopping on her own; with Mr Vincent Lindon in a restaurant; alone on a bicycle; and with her bodyguard at a market (see paragraph 13 above);

(iii) the photos published in *Bunte* magazine (issue no. 10 of 27 February 1997) showing the applicant on a skiing holiday in Austria (see paragraph 14 above);

(iv) the photos published in *Bunte* magazine (issue no. 12 of 13 March 1997) showing the applicant with Prince Ernst August von Hannover and alone leaving her Parisian residence (see paragraph 15 above);

(v) the photos published in *Bunte* magazine (issue no. 16 of 10 April 1997) showing the applicant playing tennis with Prince Ernst August von Hannover and both of them putting their bicycles down (see paragraph 16 above);

(vi) the photos published in *Neue Post* magazine (issue no. 35/97) showing the applicant tripping over an obstacle at the Monte Carlo Beach Club (see paragraph 17 above).

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2. Applicability of Article 8

18. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), or a person's picture (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, *mutatis mutandis*, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Botta v. Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 422, § 32). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see, *mutatis mutandis*, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I).

19. The Court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant "would have had a reasonable expectation of privacy for such calls" (see *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports* 1997-III, p. 1016, § 45).

20. As regards photos, with a view to defining the scope of the protection afforded by Article 8 against arbitrary interference by public authorities, the European Commission of Human Rights had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public (see, *mutatis mutandis*, *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B,

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opinion of the Commission, p. 21, §§ 49-52; *P.G. and J.H. v. the United Kingdom*, cited above, § 58; and *Peck*, cited above, § 61).

21. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.

3. Compliance with Article 8

(a) The domestic courts' position

22. The Court notes that, in its landmark judgment of 15 December 1999, the Federal Constitutional Court interpreted sections 22 and 23 of the Copyright (Arts Domain) Act (see paragraphs 40-41 above) by balancing the requirements of the freedom of the press against those of the protection of private life, that is, the public interest in being informed against the legitimate interests of the applicant. In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "*par excellence*", enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the public eye to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public". In the light of those criteria, the Federal Constitutional Court held that the Federal Court of Justice's judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions (see paragraph 25 above).

23. Referring to its landmark judgment, the Federal Constitutional Court did not entertain the

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applicant's appeals in the subsequent proceedings brought by her (see paragraphs 32 and 38 above).

(b) General principles governing the protection of private life and the freedom of expression

24. In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

25. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others (see *Schüssel*, cited above).

The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among many other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Botta*, cited above, p. 427, § 33).

26. That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

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In that context, the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

In that connection, the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Tammer v. Estonia*, no. 41205/98, §§ 59-63, ECHR 2001-I; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

27. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

28. In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, as a recent authority, *Tammer*, cited above, §§ 59 et seq.;

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News Verlags GmbH & Co. KG v. Austria, no. 31457/96, §§ 52 et seq., ECHR 2000-I; and *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, §§ 33 et seq., 26 February 2002). The Court thus found, in one case, that the use of certain terms in relation to an individual's private life was not "justified by considerations of public concern" and that those terms did not "[bear] on a matter of general importance" (see *Tammer*, cited above, § 68) and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of "major public concern" and that the published photographs "did not disclose any details of [the] private life" of the person in question (see *Krone Verlag GmbH & Co. KG*, cited above, § 37) and held that there had been a violation of Article 10. Similarly, in a recent case concerning the publication by President Mitterrand's former private doctor of a book containing revelations about the President's state of health, the Court held that "the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality" (see *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV) and held that there had been a breach of Article 10.

(c) Application of these general principles by the Court

29. The Court notes at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. The photos, in which the applicant appears sometimes alone and sometimes in company, illustrate a series of articles with such innocuous titles as "Pure happiness", "Caroline... a woman returning to life", "Out and about with Princess Caroline in Paris" and "The kiss. Or: they are not hiding anymore" (see paragraphs 11-17 above).

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30. The Court also notes that the applicant, as a member of the Prince of Monaco's family, represents the ruling family at certain cultural or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or any of its institutions (see paragraph 8 above).

31. The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest (see Observer *and* Guardian, loc. cit.), it does not do so in the latter case.

32. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Editions Plon*, loc. cit.), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.

33. As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public (see, *mutatis mutandis*, *Campmany y Diez de Revenga and Lopez Galiacho Perona v. Spain* (dec.), no. 54224/00, ECHR 2000-XII; *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003; and *Prisma Presse*, cited above).

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34. In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag GmbH & Co. KG*, cited above, § 37).

35. In that connection, the Court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the "one-sided interpretation of the right to freedom of expression" by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that "their readers are entitled to know everything about public figures" (see paragraph 42 above, and *Prisma Presse*, cited above).

36. The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant's knowledge or consent –and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see paragraph 59 above).

In the present case this point is illustrated in particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down (see paragraph 17 above). It appears that these photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists' and photographers' access to the club was strictly regulated (see paragraph 33 above).

37. The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life (see paragraph 51 above and, *mutatis mutandis*, *Halford*, cited above, p. 1016, § 45).

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38. Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data (see point 5 of the Parliamentary Assembly's resolution on the right to privacy, paragraph 42 above, and, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II; *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 57-60; and *Peck*, cited above, §§ 59-63 and 78). This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public.

39. Lastly, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33).

40. The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society "*par excellence*". Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.

In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.

41. Lastly, the distinction drawn between figures of contemporary society "*par excellence*" and "relatively" public figures has to be clear and obvious so that, in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need

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to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

42. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society "*par excellence*" she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

43. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.

(d) Conclusion

44. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

45. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places

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that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

46. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

47. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

48. There has therefore been a breach of Article 8 of the Convention.

49. Having regard to that finding, the Court does not consider it necessary to rule on the applicant's complaint relating to her right to respect for her family life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

51. The applicant claimed 50,000 euros (EUR) for non-pecuniary damage on the ground that the German courts' decisions prevented her from leading a normal life with her children without

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being hounded by the media. She also claimed EUR 142,851.31 in reimbursement of her costs and expenses for the many sets of proceedings she had had to bring in the German courts.

52. The Government contested the amounts claimed. As regards non-pecuniary damage, they reiterated that, under German law, the applicant enjoyed protection of her private life even outside her home, particularly where her children were concerned. With regard to costs and expenses, they submitted that not all the proceedings could be taken into account, that the value of parts of the subject matter was less than the amount stated, and that the legal fees being claimed, in view of the amount concerned, could not be reimbursed.

53. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that the question of the application of Article 41 is not ready for decision; and accordingly,

(a) *reserves* the said question in whole;

(b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

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5.4. ECHR decision in Von Hannover v Germany (No. 2)

Applications nos. 40660/08 and 60641/08

European Court of Human Rights

Strasbourg, 7 February 2012

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

54. The applicants, who are the elder daughter of the late Prince Rainier III of Monaco and her husband, were born in 1957 and 1954 respectively and live in Monaco.

A. Background to the cases

55. Since the early 1990s the first applicant has been trying – often through the courts – to prevent the publication of photos about her private life in the press.

56. Two series of photos, published in 1993 and 1997 respectively in three German magazines and showing the first applicant with the actor Vincent Lindon or her husband, had been the subject of three sets of proceedings in the German courts and, in particular, leading judgments of the Federal Court of Justice of 19 December 1995 and of the Federal Constitutional Court of 15 December 1999 dismissing the first applicant's claims.

57. Those proceedings were the subject of the *Von Hannover v. Germany* judgment of 24 June 2004 (no. 59320/00, ECHR 2004-VI) in which the Court held that the court decisions had infringed the first

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applicant's right to respect for her private life, a right guaranteed by Article 8 of the Convention.

58. Regarding the reasoning of the domestic courts, the Court made the following findings in particular:

"72. The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society '*par excellence*'. Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a 'private' individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.

In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.

73. Lastly, the distinction drawn between figures of contemporary society '*par excellence*' and 'relatively' public figures has to be clear and obvious so that, in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

74. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society '*par excellence*' she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are

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then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society '*par excellence*' does not suffice to justify such an intrusion into her private life."

B. The photos in issue

59. Relying on the Court's judgment in the first applicant's case, the applicants subsequently brought several sets of proceedings in the civil courts seeking an injunction against any further publication of photos that had appeared in German magazines.

1. The photos published in the magazine *Frau im Spiegel*

60. The first three photos were published by the publishing company Ehrlich & Sohn GmbH & Co. KG in the magazine *Frau im Spiegel*.

(a) The first photo

61. The first photo, which appeared in issue no. 9/02 of 20 February 2002, shows the applicants out for a walk during their skiing holiday in St Moritz. It is accompanied by an article with the heading: "Prince Rainier – not home alone" ("*Fürst Rainier – Nicht allein zu Haus*"). The article reads as follows.

"The first magnolia buds are flowering in the grounds of Monaco Palace – but Prince Rainier (78) appears to have no interest in the burgeoning spring. He goes for a walk outside with his daughter Stéphanie (37). She supports him as he walks along slowly. He is cold despite the sunshine. The old gentleman is weary. The Monegasques saw their prince for the last time three weeks ago at a circus festival. He had appeared bright and cheerful, walking along beside his daughter who was

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laughing. But since then he has not left the palace. Not even for the St Devota celebration held in honour of the national Patron Saint. The Principality is worried, as are Prince Rainier's children. Prince Albert (who is currently taking part in the Olympic Games in Salt Lake City), Princess Caroline (on holiday in St Moritz with Prince Ernst August von Hannover) and Princess Stéphanie take it in turns to look after their father. He must not be left home alone when he is not well. Not without his children's love."

A photo of Prince Rainier with his daughter Princess Stéphanie and a photo of Prince Albert of Monaco taken during the Olympic Games in Salt Lake City appeared on the same page.

(b) The second photo

62. The second photo, which appeared in issue no. 9/03 of 20 February 2003, shows the applicants out for a walk in St Moritz. The caption says: "Ernst August von Hannover and his wife, Princess Caroline of Monaco, enjoy the sun and snow in St Moritz." A small photo of Prince Albert and two photos of members of a European royal family appeared on the same page. The article accompanying the photos, bearing the heading "Royal fun in the snow", is about how happy the persons photographed are to meet up in St Moritz.

(c) The third photo

63. The third photo, which appeared in issue no. 12/04 of 11 March 2004, shows the applicants in a chair lift in Zürs am Arlberg during their skiing holiday. On the same page there is a small photo of Prince Rainier, the first applicant and Prince Albert, taken during the national holiday on 19 November and bearing the heading "The princess's last appearance". Another photo, taking up half the page, shows the first applicant at the Rose Ball.

The three photos illustrate an article bearing the heading "Princess Caroline. The whole of Monaco awaits her", of which the passages relevant to the present case read as follows.

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"Tickets for the Rose Ball, which will be held on 20 March in Monaco, have been selling for weeks. And the guests will be coming only for her: Princess Caroline von Hannover (47). She has not attended any official engagements since the national holiday ... She was not at the circus festival or the St Devota celebration held in honour of the patron saint of Monaco. By tradition, the eldest daughter of Prince Rainier (80) opens the annual ball. She has inherited this role from her mother, who died in an accident, and this ball is Caroline's favourite ... The prince, who is seriously ill, has just come out of hospital after a heart operation and is still too weak to attend the ball. The welcome speech which he will be making in honour of the guests will be retransmitted via television cameras and projected onto a big screen. Princess Caroline and her husband [Prince] Ernst August von Hannover will open the Rose Ball with a waltz.

They celebrated their fifth wedding anniversary together in January. And there was more cause for celebration in the von Hannover household: the prince turned 50 on 26 February. He celebrated his birthday with Caroline and some friends at the fashionable resort of St Moritz, glistening white in the snow. The couple were actually spending their holiday in Zürs am Arlberg, but for the birthday party they went down to the Palace Hotel in St Moritz for a few days."

2. The photo published in the magazine *Frau Aktuell*

64. The publishing company WZV Westdeutsche Zeitschriftenverlag GmbH & Co. KG published in issue no. 9/02 of 20 February 2002 of the magazine *Frau Aktuell* the same photo (or a virtually identical one) as the one that had appeared the same day in the magazine *Frau im Spiegel* no. 9/02 (see paragraph 17 above). The article accompanying the photo in *Frau Aktuell* bears the heading: "That is genuine love. Princess Stéphanie. She is the only one looking after the sick prince." The relevant passages of the article are worded as follows.

"Her love life may appear unbridled. One thing is certain, though: as far as her father is concerned, Princess Stéphanie knows where her heart lies. While the rest of the family are travelling

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around the world, she has run to be at the side of Prince Rainier (78), who appears to be seriously ailing. She is the only one who takes care of the sick monarch. Stéphanie's sister, Caroline (45), has taken a few days' holiday with her husband Ernst August (48) and their daughter Alexandra (2) at the fashionable St Moritz ski resort in Switzerland. Prince Albert, for his part, has been at the Olympic Games in Salt Lake City taking part in the four-man bobsleigh race. 'For the fifth and last time,' he said. From time to time he would disappear for a number of days. It is said that the prince has seen his heart-throb, Alicia Warlick (24), an American pole vaulter who is rumoured to become his future wife. [Prince Rainier], who hates being alone now, was very glad to see his younger daughter. Stéphanie has devoted a lot of time to him. She has been out on long walks with him and they have greatly confided in each other. 'Rainier has relished the company of his younger daughter. When she is at his side he truly flourishes. During those moments he forgets that he is old and sick,' say the Monegasques. 'Stéphanie should come much more often.'"

On the same page there is the photo of Princess Stéphanie with her father that had appeared the same day in the magazine *Frau im Spiegel* no. 9/02 (see paragraph 17 above), a headshot of her and two other photos, one of Prince Albert alone and the other of the prince with Alicia Warlick.

C. The proceedings in issue […]

II. RELEVANT DOMESTIC AND EUROPEAN LAW […]

THE LAW

I. DISJOINDER OF THE APPLICATIONS

65. The Court notes that before relinquishing jurisdiction in favour of the Grand Chamber the Chamber had joined the present applications to another application, *Axel Springer AG v. Germany* (no. 39954/08 – see paragraph 3 above). Having regard, however, to the nature of the facts and the

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substantive issues raised in these cases, the Grand Chamber considers it appropriate to disjoin application no. 39954/08 from the present applications.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicants complained of the refusal by the German courts to grant an injunction against any further publication of the photo that had appeared on 20 February 2002 in the magazines *Frau im Spiegel*, issue no. 9/02, and *Frau aktuell*, issue no. 9/02. They alleged that there had been a violation of their right to respect for their private life, as guaranteed by Article 8 of the Convention, the relevant parts of which read as follows:

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the protection of the rights and freedoms of others."

A. Admissibility

67. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

68. The Government pointed out at the outset that there was no conflict between the Federal Constitutional Court and the Court. They observed that in its judgment of 14 October 2004

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(*Görgülü* judgment – no. 2 BvR 1481/04, Reports of Judgments and Decisions of the Federal Constitutional Court no. 111, p. 307), the Federal Constitutional Court had stated that there were grounds for lodging a constitutional appeal before it where the domestic court had failed to take sufficient account of the Convention or of the Court's case-law. They pointed out that in the present cases the Federal Court of Justice and the Federal Constitutional Court had taken the Court's case-law into consideration, particularly the *Von Hannover* judgment. It could not therefore be alleged that there was an attitude of denial on the part of the German courts; on the contrary, they had granted far greater protection to personality rights than had been the case in the past.

69. The Government pointed out that the present applications related in essence to only one photo. In their submission, whilst it was true that the photos published on 20 February 2002, although not identical, were apparently part of the same series, the fact remained that from the point of view of an unbiased observer it was the same photographic representation of the applicants, albeit in a different size and format. The Government observed that in respect of the other photos examined in the judgment of the Federal Constitutional Court of 26 February 2008 either the Federal Court of Justice had upheld the injunction on their publication or they were the subject of a separate application before the Court. Other photos, mentioned by the applicants in their observations, could not be taken into consideration by the Court as the relevant domestic proceedings had not yet been concluded.

70. The Government submitted that up until the *Von Hannover* judgment the German courts had used the hard and fast concept of "figure of contemporary society *par excellence*", which attracted only limited protection under German law. Following the *Von Hannover* judgment, the Federal Court of Justice had abandoned that concept and developed a new concept of (graduated) protection according to which it was henceforth necessary to show in respect of every photo why there was an interest in publishing it. Furthermore, under the new approach adopted by the Federal Court of Justice the balancing of competing interests consisted in determining whether the publication contributed to a public debate. The information value of the publication was of particular

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importance in that respect. In sum, the new case-law of the Federal Court of Justice, endorsed by the Federal Constitutional Court, afforded greater weight to the protection of personality rights, as evidenced by the fact that an injunction was imposed on publication of two of the initial three photos. Besides that, the photo in question and the articles accompanying it could be clearly differentiated from the photos and their commentaries that had been the subject of the *Von Hannover* judgment.

71. The Government contested the applicants' allegation that, according to the clear findings of the Court, the first applicant was a private individual. The Court had in several judgments referred to her as a public figure in order to differentiate her from a private individual (see *Gurguenidze v. Georgia*, no. 71678/01, § 40, 17 October 2006; *Sciacca v. Italy*, no. 50774/99, § 27, ECHR 2005-I; and *Reklos and Davourlis v. Greece*, no. 1234/05, § 38, 15 January 2009). In categorising the applicants as public figures the German courts had merely followed the Court's case-law. As a member of a reigning dynasty, the first applicant appeared in public at official functions in the Principality. Moreover, she was the Chair of the Princess Grace Foundation, whose activities had been published by the Monegasque authorities in the official yearbook of the Principality.

72. The Government pointed out that the applicants had not complained before the national courts about the circumstances in which the photos had been taken, although those were factors which, as a general rule, the courts duly took into account. In their submission, whilst the photos in question had certainly been taken without the knowledge or consent of the relevant parties, this did not mean that they had been taken surreptitiously or in conditions unfavourable to the applicants.

73. The Government argued that the special nature of certain cases, such as the present ones, in which the domestic courts were required to balance the rights and interests of two or more private individuals lay in the fact that the proceedings before the Court were in fact a continuation of the original legal action, with each party to the domestic proceedings potentially able to apply to the Court. It was precisely for that reason that one result alone of the balancing exercise of the competing interests was insufficient, and that there should be a "corridor" of solutions within

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the confines of which the national courts should be allowed to give decisions in conformity with the Convention. Failing that, the Court would have to take the decision on every case itself, which could hardly be its role. Consequently, it should limit the scope of its scrutiny and intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate (see, for example, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 111-20, ECHR 2004-XI). The Government argued that where the relationship between State and citizen was concerned, a gain of freedom for the individual concerned involved only a loss of competence for the State, whereas in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 of the Convention. The scope of the Court's scrutiny was accordingly reduced in such cases.

74. The Government highlighted the margin of appreciation enjoyed by the State in the present case. That margin depended on the nature of the activities in question and the aim pursued by the restrictions. In its recent case-law, the Court had moreover left the State a broad margin of appreciation in cases concerning Article 8 of the Convention (see *A. v. Norway*, no. 28070/06, § 66, 9 April 2009, and *Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008). Generally speaking, the margin enjoyed by the States was broader where there was no European consensus. In the Government's submission, whilst there was admittedly a trend towards harmonisation of the legal systems in Europe, differences nevertheless remained, as evidenced by the failure of the negotiations for the adoption of a regulation of the European Union on conflict-of-law rules regarding non-contractual obligations (Regulation EC No. 864/2007 of 11 July 2007 – Rome II Regulation). The margin of appreciation was also broad where the national authorities had to strike a balance between competing private and public interests or Convention rights (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V, and *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR

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2007-I). Moreover, the case-law of the Court of Justice of the European Union apparently took the same approach (cases of *Schmidberger* of 12 June 2003, C-112/00, and *Omega* of 14 October 2004, C-36/02).

(b) The applicants

75. The applicants wished to stress the context of the present applications. Since the first applicant had lost her first husband in a tragic accident in 1985, the media had realised that the story of the widow and her three young children would sell well and provided a lucrative market. Although it was illegal under the French Civil Code to take or publish such photos in France, the applicants had nonetheless been pursued by paparazzi who could sell the photos in other markets, particularly in Germany. Whereas the public had never heard of the second applicant before, he had also been pursued by paparazzi since his marriage to the first applicant and the birth of their child. In accordance with decisions of the German civil courts, upheld by the Federal Constitutional Court in 1999, the applicants had been able to oppose publication of such photos only where they were in a secluded location, out of public view. The applicants had constantly been aware of being observed, pursued and hounded and had therefore had high hopes after the adoption of the *Von Hannover* judgment, in which the Court had called into question the case-law of the domestic courts. They had accordingly brought six test cases regarding photos comparable to those that had been the subject of the *Von Hannover* judgment. It would appear that the German authorities had not been ready to follow that judgment, however. This was evidenced both by the statements of the Federal Minister of Justice and the German Chancellor at the time, according to which the Court's judgment was not binding on the German courts because the case-law of the Federal Constitutional Court was of higher ranking than the Convention, and by the opinions expressed by the respective reporting judges in the *Caroline von Hannover* cases before the Federal Constitutional Court in an interview and in a legal article published in 2004 and 2009 respectively.

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76. Germany had categorically refused until now to execute the *Von Hannover* judgment, in breach of Article 46 of the Convention. Accordingly, in its *Görgülü* judgment the Federal Constitutional Court had observed that a blanket execution of the Court's judgments should be avoided. The Court of Appeal had clearly stated in the present case that the judgment of the Federal Constitutional Court of 1999 took precedence. The Federal Court of Justice and the Federal Constitutional Court, for their part, had circumvented the *Von Hannover* judgment and continued to rely on the concept of figure of contemporary society (*par excellence*) that had been called into question by the Court, by using the terms "prominent persons" or "high-profile persons", and referring – *de facto* – to the spatial-isolation factor by using the expression "moment of relaxation or letting go, freed from the constraints of professional or everyday life". The applicants continued to be the subject of press articles on their daily and private life and to be hounded by paparazzi, with the German courts doing nothing to put a stop to this. As it was impossible for them to know whether they were protected from harassment by paparazzi, they complained of an intolerable situation of legal insecurity and a considerable risk of litigation and costs resulting from that.

77. The applicants argued that none of the photos, whether considered alone or in the context of the written article, contributed to a debate of public interest in a democratic society. They served purely to satisfy the curiosity of a particular readership. How and where the applicants spent their holidays clearly did not concern any matter that materially affected the public. A walk by the applicants during their holiday was not an event of contemporary society, especially as it was not undertaken in the exercise of any official function.

78. The reference to Prince Rainier's long-term illness in the article accompanying the photos in question could not alter that finding. The article was not about whether the prince's illness prevented him from carrying out his sovereign tasks. There were only a few sentences informing the reader about his illness; the article was mainly about the private life of the applicants and other members of the prince's family. The prince's illness had been merely a pretext for extensive coverage of

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the applicants' private life. It was already doubtful whether publication of the photo of Prince Rainier with his daughter Stéphanie could be justified, so publication of the photo complained of in this case was clearly unjustified. Even if there was information value in the prince's illness, there was no genuine link between the applicants' skiing holiday and that illness. A simple article would, moreover, have sufficed to satisfy the public's interest.

79. The applicants submitted that there had been nothing unusual or reprehensible in their spending a few days on a skiing holiday with their daughter during the prince's illness, just like other families. That information was totally irrelevant to how the Principality of Monaco was governed. It was precisely when a family member was suffering from a long-term illness that the relatives needed special protection during the few days that they could relax. If a relative's poor health were sufficient grounds upon which to publish photos, the Article 8 guarantees would be undermined and the press could permanently report on the applicants' private life. Where the photos showed the applicants visiting the prince, the event of contemporary society would be the visit, and where they were elsewhere the event would be their absence. The German media had fully grasped this: they could enrich their articles with a few sentences to artificially generate information value.

80. The applicants complained of the absence of two important factors in the balancing exercise undertaken by the German courts. They argued that the courts had failed to have regard to the fact that they had never sought to publicise details of their private life in the media, but had always defended themselves against any illegal publication. They thus had a legitimate expectation that their private life would be protected. Moreover, unlike the Court, the German courts had not taken account of the fact that the applicants were being permanently observed and hounded by paparazzi and that the photos had been taken without their knowledge or consent. Furthermore, the first applicant had not at any time been called to the throne of the Principality of Monaco: her father had still been alive when the photos were taken. On the latter's death, it was her brother Albert who had succeeded him to the throne.

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81. The applicants submitted that since the *Von Hannover* judgment, in which the Court had clearly established the criteria that had to be met in cases of illegal publication of photos, the German authorities could no longer rely on a margin of appreciation. In their submission, a European consensus had emerged following the influence of that judgment as illustrated by the adoption of a Resolution by the Parliamentary Assembly in 1998. The differences that remained were merely in the nuances. The *Von Hannover* judgment was part of a line of established case-law and had subsequently been confirmed many times. The applicants expressed surprise, moreover, that the Court, as a supreme European court, should have less extensive powers of scrutiny than those exercised by the Federal Constitutional Court, which, in the proceedings in respect of the photo published in the magazine *7 Tage* (paragraph 40 above), had overridden the opinion of the eleven professional judges who had examined the case and substituted its own opinion down to the last detail.

2. Third parties' observations

(a) Association of German magazine editors

82. The third-party association observed that the *Von Hannover* judgment delivered by the Court had had considerable effects on the freedom of the press in Germany. Following that judgment, the German courts had attached much less weight to the freedom of the press than before. Their decisions had now fallen into line with the Court's case-law, to which they often referred moreover. The association submitted that the press, in its role of "public watchdog", had the task not only of watching over parliaments, governance and other political events, but also of observing public life in general whether in politics, the economy, the arts, the social sphere, sport or any other domain. Like members of other royal families, the first applicant had a function as a role model and was unquestionably a public figure. The third-party association pointed out that, since 2003, the first applicant had been a UNESCO Goodwill Ambassador, a title bestowed on famous persons such as Nelson Mandela, Claudia Cardinale or Pierre Cardin. The Court had, moreover, described the first applicant as a public figure in judgments delivered after the *Von Hannover* judgment. In

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the association's view, the protection of privacy had already been quite extensive before the *Von Hannover* judgment and that protection had subsequently been further extended. The German courts had not therefore exceeded their margin of appreciation. The standard as it existed in France could not constitute a model for Europe.

(b) Ehrlich & Sohn GmbH & Co KG publishing company

83. The third-party publishing company reiterated the importance of the freedom of the press in Germany, particularly having regard to the country's former National Socialist era. It observed that, in accordance with the settled case-law of the Federal Constitutional Court, the entertainment press also enjoyed the protection of press freedom. Moreover, as the daughter of the late sovereign prince of a European country, sister of the current sovereign prince and wife of the Head of a former German noble dynasty, the first applicant was undeniably a public figure who attracted attention, at least in Europe. The publishing company submitted, lastly, that following the *Von Hannover* judgment delivered by the Court in 2004, the German courts had departed from precedent by restricting the possibility of publishing photographs of persons taken outside official events and without the consent of the interested parties and had thus severely curtailed the freedom of information and of the press.

(c) Media Lawyers Association

84. The third-party association argued that Article 8 of the Convention did not create an image right or, moreover, a right to reputation. Publication of a person's photo did not, of itself, necessarily constitute an interference with the rights guaranteed under that provision. In determining whether there had been an interference, regard had to be had to all the circumstances and a certain level of seriousness was required. It was vital that media reporting upon all matters of public interest was strongly protected. In the Association's submission, whilst the Court had rightly held, in its *Von Hannover* judgment, that regard had to be had to the context in which a photo had been taken, it had gone too far in asserting – in error – that publication of any photo fell within the scope of

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Article 8. The Court had unfortunately confirmed that position in subsequent judgments. The association maintained that the correct approach was first to examine whether the photo that had been published did or did not fall within the private sphere. In that context consideration had to be given to whether the person concerned, having regard to all the circumstances, had a legitimate expectation of privacy. If not, that was the end of the matter as Article 8 of the Convention did not apply. If yes, the domestic courts had to balance competing rights – of equal status – under Articles 8 and 10 of the Convention, whilst taking account of all the circumstances of the case. The balancing exercise and the outcome were matters that fell within the margin of appreciation of the States. The Court should intervene only where the national authorities had failed to undertake a balancing exercise or where their decisions were unreasonable. Lastly, the decision whether to include a photo in a written report fell within the editor's discretion and judges could not substitute their own opinion.

(d) Joint submissions by the Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers

85. The three third-party associations submitted that a broad trend could be observed across the Contracting States towards the assimilation by the national courts of the principles and standards articulated by the Court relating to the balancing of the rights under Article 8 against those under Article 10 of the Convention, even if the individual weight given to a particular factor might vary from one State to another. They invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of Article 53 of the Convention. They referred to the Court's judgment in *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III), submitting that the Court had indicated that it would allow the Contracting States a wide margin of appreciation in situations of competing interests. The Contracting States were likewise generally granted a wider margin in respect of positive obligations in relationships between private parties or other areas in which opinions within a democratic

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society might reasonably differ significantly (see *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). The Court had, moreover, already allowed the Contracting States a broad margin of appreciation in a case concerning a balancing exercise in respect of rights under Articles 8 and 10 of the Convention (see *A. v. Norway*, cited above, § 66). Its role was precisely to confirm that the Contracting States had put in place a mechanism for the determination of a fair balance and whether particular factors taken into account by the national courts in striking such a balance were consistent with the Convention and its case-law. It should only intervene where the domestic courts had considered irrelevant factors to be significant or where the conclusions reached by the domestic courts were clearly arbitrary or summarily dismissive of the privacy or reputational interests at stake. Otherwise, it ran the risk of becoming a court of appeal for such cases.

3. The Court's assessment

(a) Scope of the application

86. The Court observes at the outset that it is not its task in the present case to examine whether Germany has satisfied its obligations under Article 46 of the Convention regarding execution of the *Von Hannover* judgment it delivered in 2004, as that task is the responsibility of the Committee of Ministers (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 61, ECHR 2009, and *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010). The present applications concern only new proceedings instituted by the applicants following the *Von Hannover* judgment and relating to the publication of other photos of them (see paragraphs 15-20 above).

(b) General principles

(i) Concerning private life

87. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee

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afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002; *Von Hannover v. Germany*, no. 59320/00, §§ 50 and 53, ECHR 2004-VI; *Sciacca*, cited above, § 29; and *Petrina v. Romania*, no. 78060/01, § 27, 14 October 2008).

88. Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (see *Reklos and Davourlis v. Greece*, cited above, § 40).

89. The Court also reiterates that, in certain circumstances, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life (see *Von Hannover*, cited above, § 51; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 78, 9 November 2006; *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05, § 48, 4 June 2009; and *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, § 53, 23 July 2009).

90. In cases of the type being examined here, what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicants' private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between

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themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Armonienė*, cited above, § 36). That also applies to the protection of a person's picture against abuse by others (see *Schüssel*, cited above; *Von Hannover*, cited above, § 57; and *Reklos and Davourlis*, cited above, § 35).

91. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *White v. Sweden*, no. 42435/02, § 20, 19 September 2006, and *Gurguenidze*, cited above, § 38).

(ii) Concerning freedom of expression

92. The present applications require an examination of the fair balance that has to be struck between the applicants' right to respect for their private life and the right of the publishing company to freedom of expression guaranteed under Article 10 of the Convention. The Court therefore considers it useful to reiterate the general principles relating to the application of that provision as well.

93. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

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94. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI).

Furthermore, is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V).

95. The Court reiterates, lastly, that freedom of expression includes the publication of photos (see *Österreichischer Rundfunk v. Austria* (dec.), no. 57597/00, 25 May 2004, and *Verlagsgruppe News GmbH v. Austria (no. 2)*, no. 10520/02, §§ 29 and 40, 14 December 2006). This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family (see *Von Hannover*, cited above, § 59; *Hachette Filipacchi Associés v. France*, no. 71111/01, § 42, 14 June 2007; and *Eerikäinen and Others v. Finland*, no. 3514/02, § 70, 10 February 2009).

Moreover, photos appearing in the "sensationalist" press or in "romance" magazines, which generally aim to satisfy the public's curiosity regarding the details of a person's strictly private life (see *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003, and *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 40), are often taken in a climate of continual harassment which

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may induce in the person concerned a very strong sense of intrusion into their private life or even of persecution (see *Von Hannover*, cited above, § 59, and *Gurguenidze*, cited above, § 59).

(iii) Concerning the margin of appreciation

96. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *X and Y v. the Netherlands*, cited above, § 24, and *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III).

Likewise, under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard*, cited above, § 68).

97. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see, *mutatis mutandis*, *Peck v. the United Kingdom*, no. 44647/98, § 77, ECHR 2003-I, and *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 41, 21 September 2010; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

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98. In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 71 above). Accordingly, the margin of appreciation should in theory be the same in both cases.

99. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011).

(iv) The criteria relevant for the balancing exercise

100. Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

(α) Contribution to a debate of general interest

101. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; *Leempoel & S.A. ED. Ciné Revue*, cited above, § 68; and *Standard Verlags GmbH*, cited above, § 46). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an

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interest not only where the publication concerned political issues or crimes (see *White*, cited above, § 29; *Egeland and Hanseid v. Norway*, no. 34438/04, § 58, 16 April 2009; and *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. 11182/03 and 11319/03, § 28, 26 April 2007; and *Sapan v. Turkey*, no. 44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of the President of a country or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH*, cited above, § 52, and *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 43).

(β) How well known is the person concerned and what is the subject of the report?

102. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco*, cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47).

While in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the

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public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying public curiosity in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, cited above, § 53; see also point 8 of the Resolution of the Parliamentary Assembly – paragraph 71 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 40; and *MGN Limited*, cited above, § 143).

(γ) Prior conduct of the person concerned

103. The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, §§ 52-53, and *Sapan*, cited above, § 34). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the photo at issue (see *Egeland and Hanseid*, cited above, § 62).

(δ) Content, form and consequences of the publication

104. The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis*, cited above, § 42; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti*, cited above, § 47, and *Gurguenidze*, cited above, § 55).

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(ε) Circumstances in which the photos were taken

105. Lastly, the Court has already held that the context and circumstances in which the published photos were taken cannot be disregarded. In that connection regard must be had to whether the person photographed gave their consent to the taking of the photos and their publication (see *Gurguenidze*, cited above, § 56, and *Reklos and Davourlis*, cited above, § 41) or whether this was done without their knowledge or by subterfuge or other illicit means (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 47, and *Flinkkilä and Others v. Finland*, no. 25576/04, § 81, 6 April 2010). Regard must also be had to the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned (see *Egeland and Hanseid*, cited above, § 61, and *Timciuc*, cited above, § 150). For a private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article (see *Eerikäinen and Others*, cited above, § 70, and *A. v. Norway*, cited above, § 72).

(c) Application of the principles to the present case

106. The Court takes note of the changes made by the Federal Court of Justice to its earlier case-law following the *Von Hannover* judgment. That court stated, *inter alia*, that in future importance had to be attached to whether the report in question contributed to a factual debate and whether its contents went beyond a mere desire to satisfy public curiosity. It observed in that connection that the greater the information value for the public, the more the interest of a person in being protected against its publication had to yield, and vice versa. Whilst pointing out that the freedom of expression also included the entertainment press, it stated that the reader's interest in being entertained generally carried less weight than the interest in protecting the private sphere.

107. The Federal Constitutional Court confirmed that approach, stating that whilst it had not, in its judgment of 15 December 1999, called into question the former case-law of the Federal Court of Justice, that did not mean that another concept of protection – giving greater weight to

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balancing the conflicting interests at stake when examining the question whether a photo could be regarded as an aspect of contemporary society and could accordingly be published without the consent of the person concerned – could not be in conformity with the Basic Law.

108. In so far as the applicants alleged that the new approach of the Federal Court of Justice and the Federal Constitutional Court merely reproduced the reasoning of the former case-law using different terms, the Court reiterates that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to the applicants has infringed Article 8 of the Convention (see *Karhuvaara and Iltalehti*, cited above, § 49).

109. The Court observes that in applying its new approach the Federal Court of Justice found that as neither the part of the article accompanying the photos of the applicants' skiing holiday nor the photos themselves contained information related to an event of contemporary society, they did not contribute to a debate of general interest. The Federal Court of Justice found that the same could not be said, however, with regard to the information in the articles about the illness affecting Prince Rainier III, the reigning sovereign of the Principality of Monaco at the time, and the conduct of the members of his family during that illness. In the Federal Court of Justice's opinion, that subject qualified as an event of contemporary society on which the magazines were entitled to report, and which entitled them to include the photos in question in that report as these supported and illustrated the information being conveyed.

The Federal Constitutional Court, for its part, observed that the Federal Court of Justice had accepted that the reigning Prince of Monaco's illness could be regarded as a matter of general interest and that the press was therefore entitled to report on how the prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. It also confirmed that there was a sufficiently close link between the photo and the event described in the article.

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110. The Court observes that the fact that the Federal Court of Justice assessed the information value of the photo in question in the light of the accompanying article cannot be criticised under the Convention (see, *mutatis mutandis*, *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 87, 1 March 2007, and *Österreichischer Rundfunk v. Austria*, no. 35841/02, §§ 68-69, 7 December 2006). Regarding the characterisation of Prince Rainier's illness as an event of contemporary society, the Court is of the opinion that, having regard to the reasons advanced by the German courts, that interpretation cannot be considered unreasonable (see, *mutatis mutandis*, *Editions Plon*, cited above, §§ 46-57). It is worth mentioning in this connection that the Federal Court of Justice upheld the injunction forbidding publication of two other photos showing the applicants in similar circumstances, precisely on the grounds that they were being published for entertainment purposes alone (see paragraphs 36-37 above). The Court can therefore accept that the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest. It would reiterate, on this point, that not only does the press have the task of imparting information and ideas on all matters of public interest, the public also has a right to receive them (see paragraph 102 above).

111. In so far as the applicants complained of a risk that the media would circumvent the conditions laid down by the Federal Court of Justice by using any event of contemporary society as a pretext to justify the publication of photos of them, the Court notes that it is not its task, in the context of the present applications, to rule on the conformity with the Convention of any future publication of photos of the applicants. Should that happen, it will be open to them to bring proceedings in the appropriate national courts. The Court also observes that the Federal Constitutional Court stated in its judgment that where an article was merely a pretext for publishing a photo of a prominent person, no contribution was thereby made to the formation of public opinion and there were therefore no grounds for allowing the interest in publication to prevail over the protection of personality rights.

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112. Admittedly, the Federal Court of Justice based its reasoning on the premise that the applicants were well-known public figures who particularly attracted public attention, without going into their reasons for reaching that conclusion. The Court considers, nonetheless, that irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the applicants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures (see *Gurguenidze*, cited above, § 40; *Sciacca*, cited above, § 27; *Reklos and Davourlis*, cited above, § 38; and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 123, 13 January 2009).

113. The Federal Court of Justice then examined the question whether the photos had been taken in circumstances unfavourable to the applicants. The Government submitted that the fact that the photos had been taken without the applicants' knowledge did not necessarily mean that they had been taken surreptitiously in conditions unfavourable to the applicants. The latter, for their part, alleged that the photos had been taken in a climate of general harassment with which they were constantly confronted.

114. The Court observes that the Federal Court of Justice concluded that the applicants had not adduced evidence of unfavourable circumstances in that connection and that there was nothing to indicate that the photos had been taken surreptitiously or by equivalent secret means such as to render their publication illegal. The Federal Constitutional Court, for its part, stated that the publishing company concerned had provided details of how the photo that had appeared in the *Frau im Spiegel* magazine had been taken, but that the first applicant had neither complained before the civil courts that those details were inadequate nor submitted that the photo in question had been taken in conditions that were unfavourable to her.

115. The Court observes that, according to the case-law of the German courts, the circumstances in which photos have been taken constitutes one of the factors that are normally examined when the competing interests are balanced against each other. In the present case it can be

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seen from the decisions of the national courts that this factor did not require a more thorough examination as the applicants did not put forward any relevant arguments and there were no particular circumstances justifying an injunction against publishing the photos. The Court notes, moreover, as pointed out by the Federal Court of Justice, that the photos of the applicants in the middle of a street in St Moritz in winter were not in themselves offensive to the point of justifying their prohibition.

(d) Conclusion

116. The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.

117. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.

118. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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1. *Disjoins* the application in the case of *Axel Springer AG v. Germany* (no. 39954/08) from the present applications;

2. *Declares* the present applications admissible;

3. *Holds* that there has been no violation of Article 8 of the Convention.

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5.5. CJEU decision in C-131/12 Google Spain and Google

JUDGMENT OF THE COURT (Grand Chamber)

13 May 2014

In Case C-131/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (Spain), made by decision of 27 February 2012, received at the Court on 9 March 2012, in the proceedings

Google Spain SL,

Google Inc.

v

Agencia Española de Protección de Datos (AEPD),

Mario Costeja González,

gives the following

Judgment

1This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council 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 (OJ 1995 L 281, p. 31) and of Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter').

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2The request has been made in proceedings between, on the one hand, Google Spain SL ('Google Spain') and Google Inc. and, on the other, the Agencia Española de Protección de Datos (Spanish Data Protection Agency; 'the AEPD') and Mr Costeja González concerning a decision by the AEPD upholding the complaint lodged by Mr Costeja González against those two companies and ordering Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.

Legal context […]

The dispute in the main proceedings and the questions referred for a preliminary ruling

14On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

15By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

16By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to La Vanguardia, taking the view that the publication by it of the information in question was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.

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17 On the other hand, the complaint was upheld in so far as it was directed against Google Spain and Google Inc. The AEPD considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.

18 Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions.

19 That court states in the order for reference that the actions raise the question of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users indefinitely. The answer to that question depends on the way in which Directive 95/46 must be interpreted in the context of these technologies, which appeared after the directive's publication.

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20In those circumstances, the Audiencia Nacional decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1.With regard to the territorial application of Directive [95/46] and, consequently, of the Spanish data protection legislation:

(a)must it be considered that an “establishment”, within the meaning of Article 4(1)(a) of Directive 95/46, exists when any one or more of the following circumstances arise:

—when the undertaking providing the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State,

Or

—when 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

—when the office 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 data protection, even where such collaboration is engaged in voluntarily?

(b)Must Article 4(1)(c) of Directive 95/46 be interpreted as meaning that there is “use of equipment … situated on the territory of the said Member State”:

—when a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State,

Or

—when it uses a domain name pertaining to a Member State and arranges for searches and the results thereof to be based on the language of that Member State?

(c)Is it possible to regard as a use of equipment, in the terms of Article 4(1)(c) of Directive 95/46, the temporary storage of the information indexed by internet search engines? If the answer to that question is affirmative, can it be considered that that connecting factor is present when the undertaking refuses to disclose the place where it stores those indexes, invoking reasons of competition?

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(d)Regardless of the answers to the foregoing questions and particularly in the event that the

Consideration of the questions referred

Question 2(a) and (b), concerning the material scope of Directive 95/46

21By Question 2(a) and (b), which it is appropriate to examine first, the referring court asks, in essence, whether Article 2(b) of Directive 95/46 is to be interpreted as meaning that the activity of a search engine as a provider of content which consists in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of that provision when that information contains personal data. If the answer is in the affirmative, the referring court seeks to ascertain furthermore whether Article 2(d) of Directive 95/46 is to be interpreted as meaning that the operator of a search engine must be regarded as the 'controller' in respect of that processing of the personal data, within the meaning of that provision.

22According to Google Spain and Google Inc., the activity of search engines cannot be regarded as processing of the data which appear on third parties' web pages displayed in the list of search results, given that search engines process all the information available on the internet without effecting a selection between personal data and other information. Furthermore, even if that activity must be classified as 'data processing', the operator of a search engine cannot be regarded as a 'controller' in respect of that processing since it has no knowledge of those data and does not exercise control over the data.

23On the other hand, Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the European Commission consider that that activity quite clearly involves 'data processing' within the meaning of Directive 95/46, which is distinct from the data processing by the publishers of websites and pursues different objectives from such processing. The operator of a search engine is the 'controller' in respect of the data processing carried out by it since it is the operator that determines the purposes and means of that processing.

24In the Greek Government's submission, the activity in question constitutes such 'processing', but inasmuch as search engines serve merely as intermediaries, the undertakings which operate them cannot be regarded as 'controllers', except where they store data in an 'intermediate memory' or 'cache memory' for a period which exceeds that which is technically necessary.

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25Article 2(b) of Directive 95/46 defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

26As regards in particular the internet, the Court has already had occasion to state that the operation of loading personal data on an internet page must be considered to be such 'processing' within the meaning of Article 2(b) of Directive 95/46 (see Case C-101/01 *Lindqvist*EU:C:2003:596, paragraph 25).

27So far as concerns the activity at issue in the main proceedings, it is not contested that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and thus 'personal data' within the meaning of Article 2(a) of that directive.

28Therefore, it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as 'processing' within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data.

29Nor is the foregoing finding affected by the fact that those data have already been published on the internet and are not altered by the search engine.

30The Court has already held that the operations referred to in Article 2(b) of Directive 95/46 must also be classified as such processing where they exclusively concern material that has already been published in unaltered form in the media. It has indeed observed in that regard that a general derogation from the application of Directive 95/46 in such a case would largely deprive the directive of its effect (see, to this effect, Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, paragraphs 48 and 49).

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31Furthermore, it follows from the definition contained in Article 2(b) of Directive 95/46 that, whilst the alteration of personal data indeed constitutes processing within the meaning of the directive, the other operations which are mentioned there do not, on the other hand, in any way require that the personal data be altered.

32As to the question whether the operator of a search engine must be regarded as the 'controller' in respect of the processing of personal data that is carried out by that engine in the context of an activity such as that at issue in the main proceedings, it should be recalled that Article 2(d) of Directive 95/46 defines 'controller' as 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.

33It 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).

34Furthermore, it would be contrary not only to the clear wording of that provision but also to its objective — which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.

35In this connection, it should be pointed out that the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page.

36Moreover, it is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published.

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37 Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject.

38 Inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.

39 Finally, the fact that publishers of websites have the option of indicating to operators of search engines, by means in particular of exclusion protocols such as 'robot.txt' or codes such as 'noindex' or 'noarchive', that they wish specific information published on their site to be wholly or partially excluded from the search engines' automatic indexes does not mean that, if publishers of websites do not so indicate, the operator of a search engine is released from its responsibility for the processing of personal data that it carries out in the context of the engine's activity.

40 That fact does not alter the position that the purposes and means of that processing are determined by the operator of the search engine. Furthermore, even if that option for publishers of websites were to mean that they determine the means of that processing jointly with that operator, this finding would not remove any of the latter's responsibility as Article 2(d) of Directive 95/46 expressly provides that that determination may be made 'alone or jointly with others'.

41 It follows from all the foregoing considerations that the answer to Question 2(a) and (b) is that Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).

Question 1(a) to (d), concerning the territorial scope of Directive 95/46

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42By Question 1(a) to (d), the referring court seeks to establish whether it is possible to apply the national legislation transposing Directive 95/46 in circumstances such as those at issue in the main proceedings.

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43In this respect, the referring court has established the following facts:

—Google Search is offered worldwide through the website ‘www.google.com’. In numerous States, a local version adapted to the national language exists. The version of Google Search in Spanish is offered through the website ‘www.google.es’, which has been registered since 16 September 2003. Google Search is one of the most used search engines in Spain.

—Google Search is operated by Google Inc., which is the parent company of the Google Group and has its seat in the United States.

—Google Search indexes websites throughout the world, including websites located in Spain. The information indexed by its ‘web crawlers’ or robots, that is to say, computer programmes used to locate and sweep up the content of web pages methodically and automatically, is stored temporarily on servers whose State of location is unknown, that being kept secret for reasons of competition.

—Google Search does not merely give access to content hosted on the indexed websites, but takes advantage of that activity and includes, in return for payment, advertising associated with the internet users’ search terms, for undertakings which wish to use that tool in order to offer their goods or services to the internet users.

—The Google group has recourse to its subsidiary Google Spain for promoting the sale of advertising space generated on the website ‘www.google.com’. Google Spain, which was established on 3 September 2003 and possesses separate legal personality, has its seat in Madrid (Spain). Its activities are targeted essentially at undertakings based in Spain, acting as a commercial agent for the Google group in that Member State. Its objects are to promote, facilitate and effect the sale of on-line advertising products and services to third parties and the marketing of that advertising.

—Google Inc. designated Google Spain as the controller, in Spain, in respect of two filing systems registered by Google Inc. with the AEPD; those filing systems were intended to contain the personal data of the customers who had concluded contracts for advertising services with Google Inc.

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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.

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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.

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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.

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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.

Question 1(b) to (d)

61 In view of the answer given to Question 1(a), there is no need to answer Question 1(b) to (d).

Question 2(c) and (d), concerning the extent of the responsibility of the operator of a search engine under Directive 95/46

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62By Question 2(c) and (d), the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions, the operator of a search engine is obliged 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 and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

63Google Spain and Google Inc. submit that, by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is he who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible. Furthermore, to require the operator of a search engine to withdraw information published on the internet from its indexes would take insufficient account of the fundamental rights of publishers of websites, of other internet users and of that operator itself.

64According to the Austrian Government, a national supervisory authority may order such an operator to erase information published by third parties from its filing systems only if the data in question have been found previously to be unlawful or incorrect or if the data subject has made a successful objection to the publisher of the website on which that information was published.

65Mr Costeja González, the Spanish, Italian and Polish Governments and the Commission submit that the national authority may directly order the operator of a search engine to withdraw from its indexes and intermediate memory information containing personal data that has been published by third parties, without having to approach beforehand or simultaneously the publisher of the web page on which that information appears. Furthermore, according to Mr Costeja González, the Spanish and Italian Governments and the Commission, the fact that the information has been published lawfully and that it still appears on the original web page has no effect on the obligations of that operator under Directive 95/46. On the other hand, according to the Polish Government that fact is such as to release the operator from its obligations.

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66First of all, it should be remembered that, as is apparent from Article 1 and recital 10 in the preamble, Directive 95/46 seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (see, to this effect, *IPI* EU:C:2013:715, paragraph 28).

67According to recital 25 in the preamble to Directive 95/46, the principles of protection laid down by the directive are reflected, on the one hand, in the obligations imposed on persons responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority and the circumstances under which processing can be carried out, and, on the other hand, in the rights conferred on individuals whose data are the subject of processing to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances.

68The Court has already held that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, in particular, Case C-274/99 P *Connolly* v *Commission* EU:C:2001:127, paragraph 37, and *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 68).

69Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. Those requirements are implemented inter alia by Articles 6, 7, 12, 14 and 28 of Directive 95/46.

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70 Article 12(b) of Directive 95/46 provides that Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data. As this final point relating to the case where certain requirements referred to in Article 6(1)(d) of Directive 95/46 are not observed is stated by way of example and is not exhaustive, it follows that non-compliant nature of the processing, which is capable of conferring upon the data subject the right guaranteed in Article 12(b) of the directive, may also arise from non-observance of the other conditions of lawfulness that are imposed by the directive upon the processing of personal data.

71 In this connection, it should be noted that, subject to the exceptions permitted under Article 13 of Directive 95/46, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 of the directive (see *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 65; Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD* EU:C:2011:777, paragraph 26; and Case C-342/12 *Worten* EU:C:2013:355, paragraph 33).

72 Under Article 6 of Directive 95/46 and without prejudice to specific provisions that the Member States may lay down in respect of processing for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data are processed 'fairly and lawfully', that they are 'collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes', that they are 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', that they are 'accurate and, where necessary, kept up to date' and, finally, that they are 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'. In this context, the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified.

73 As regards legitimation, under Article 7 of Directive 95/46, of processing such as that at issue in the main proceedings carried out by the operator of a search engine, that processing is capable of being covered by the ground in Article 7(f).

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74 This provision permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject — in particular his right to privacy with respect to the processing of personal data — which require protection under Article 1(1) of the directive. Application of Article 7(f) thus necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter (see *ASNEF and FECEMD*, EU:C:2011:777, paragraphs 38 and 40).

75 Whilst the question whether the processing complies with Articles 6 and 7(f) of Directive 95/46 may be determined in the context of a request as provided for in Article 12(b) of the directive, the data subject may, in addition, rely in certain conditions on the right to object laid down in subparagraph (a) of the first paragraph of Article 14 of the directive.

76 Under subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, Member States are to grant the data subject the right, at least in the cases referred to in Article 7(e) and (f) of the directive, to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. The balancing to be carried out under subparagraph (a) of the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.

77 Requests under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 may be addressed by the data subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly.

78 In this connection, it is to be noted that it is clear from Article 28(3) and (4) of Directive 95/46 that each supervisory authority is to hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data and that it has investigative powers and effective powers of intervention enabling it to order in particular the blocking, erasure or destruction of data or to impose a temporary or definitive ban on such processing.

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79 It is in the light of those considerations that it is necessary to interpret and apply the provisions of Directive 95/46 governing the data subject's rights when he lodges with the supervisory authority or judicial authority a request such as that at issue in the main proceedings.

80 It must be pointed out at the outset that, as has been found in paragraphs 36 to 38 of the present judgment, processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (see, to this effect, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* EU:C:2011:685, paragraph 45).

81 In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

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82 Following the appraisal of the conditions for the application of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 which is to be carried out when a request such as that at issue in the main proceedings is lodged with it, the supervisory authority or judicial authority 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 — of the publisher's own accord or following an order of one of those authorities — from the web page on which they were published.

83 As has been established in paragraphs 35 to 38 of the present judgment, inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject's fundamental rights additionally, the operator of the search engine as the controller in respect of that processing must ensure, within the framework of its responsibilities, powers and capabilities, that that processing meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect.

84 Given 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.

85 Furthermore, the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.

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86 Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.

87 Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page.

88 In the light of all the foregoing considerations, the answer to Question 2(c) and (d) is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged 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 and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

Question 3, concerning the scope of the data subject's rights guaranteed by Directive 95/46

89 By Question 3, the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.

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90 Google Spain, Google Inc., the Greek, Austrian and Polish Governments and the Commission consider that this question should be answered in the negative. Google Spain, Google Inc., the Polish Government and the Commission submit in this regard that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 confer rights upon data subjects only if the processing in question is incompatible with the directive or on compelling legitimate grounds relating to their particular situation, and not merely because they consider that that processing may be prejudicial to them or they wish that the data being processed sink into oblivion. The Greek and Austrian Governments submit that the data subject must approach the publisher of the website concerned.

91 According to Mr Costeja González and the Spanish and Italian Governments, the data subject may oppose the indexing by a search engine of personal data relating to him where their dissemination through the search engine is prejudicial to him and his fundamental rights to the protection of those data and to privacy — which encompass the 'right to be forgotten' — override the legitimate interests of the operator of the search engine and the general interest in freedom of information.

92 As regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that, as has been noted in paragraph 72 of the present judgment, such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes.

93 It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

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94 Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.

95 So far as concerns requests as provided for by Article 12(b) of Directive 95/46 founded on alleged non-compliance with the conditions laid down in Article 7(f) of the directive and requests under subparagraph (a) of the first paragraph of Article 14 of the directive, it must be pointed out that in each case the processing of personal data must be authorised under Article 7 for the entire period during which it is carried out.

96 In the light of the foregoing, when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97 As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.

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98As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject's name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject's name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results.

99It follows from the foregoing considerations that the answer to Question 3 is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

Costs

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100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 2(b) and (d) of Directive 95/46/EC of the European Parliament and of the Council 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 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).**

2. **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.**

3. **Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged 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 and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.**

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4. Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

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6. IP and the information society

Guided Reading:

Andrew Murray (2016) Information Technology law, pp. 221-273

Additional Reading:

6.1. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886

The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works, […]

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

Article 1
Establishment of a Union [2]

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

Article 2
Protected Works:
1. "Literary and artistic works"; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News

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(1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

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Article 2*bis*
Possible Limitation of Protection of Certain Works:
1. Certain speeches; 2. Certain uses of lectures and addresses; 3. Right to make collections of such works

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose.

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

Article 3
Criteria of Eligibility for Protection:
1. Nationality of author; place of publication of work; 2. Residence of author; 3: "Published" works; 4. "Simultaneously published" works

(1) The protection of this Convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;

(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.

(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic

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or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

Article 4
Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works

The protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union;

(b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union.

Article 5
Rights Guaranteed:
1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin"

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

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(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

Article 6
Possible Restriction of Protection in Respect of Certain Works of Nationals of Certain Countries Outside the Union:
1. In the country of the first publication and in other countries; 2. No retroactivity; 3. Notice

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as “the Director General”) by a written declaration specifying the countries in

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regard to which protection is restricted, and the restrictions to which rights of authors who are nationals of those countries are subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

Article 6*bis*
Moral Rights:
1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Article 7
Term of Protection:
1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works; 4. For photographic works and works of applied art; 5. Starting date of computation; 6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

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(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Article 7*bis*
Term of Protection for Works of Joint Authorship

The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.

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Article 8
Right of Translation

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

Article 9
Right of Reproduction:
1. Generally; 2. Possible exceptions; 3. Sound and visual recordings

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10
Certain Free Uses of Works:
1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

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Article 10*bis*
Further Possible Free Uses of Works:
1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Article 11
Certain Rights in Dramatic and Musical Works:
1. Right of public performance and of communication to the public of a performance;
2. In respect of translations

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

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Article 11*bis*
Broadcasting and Related Rights:
1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast,
public communication of broadcast by loudspeaker or analogous instruments;
2. Compulsory licenses; 3. Recording; ephemeral recordings

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

Article 11*ter*
Certain Rights in Literary Works:
1. Right of public recitation and of communication to the public of a recitation; 2. In respect of translations

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

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(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works.

(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 12
Right of Adaptation, Arrangement and Other Alteration

Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

Article 13
Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto:
1. Compulsory licenses; 2. Transitory measures;
3. Seizure on importation of copies made without the author's permission

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

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Article 14
Cinematographic and Related Rights:
1. Cinematographic adaptation and reproduction; distribution; public performance and public communication by wire of works thus adapted or reproduced; 2. Adaptation of cinematographic productions; 3. No compulsory licenses

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.

(3) The provisions of Article 13(1) shall not apply.

Article 14*bis*
Special Provisions Concerning Cinematographic Works:
1. Assimilation to "original" works; 2. Ownership; limitation of certain rights of certain contributors; 3. Certain other contributors

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)

(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance,

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communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

Article 14*ter*
"Droit de suite" in Works of Art and Manuscripts:
1. Right to an interest in resales; 2. Applicable law; 3. Procedure

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

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Article 15
Right to Enforce Protected Rights:
1. Where author's name is indicated or where pseudonym leaves no doubt as to author's identity; 2. In the case of cinematographic works; 3. In the case of anonymous and pseudonymous works; 4. In the case of certain unpublished works of unknown authorship

(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.

(2) The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

(3) In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

(4)

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Article 16
Infringing Copies:
1. Seizure; 2. Seizure on importation; 3. Applicable law

(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.

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(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

(3) The seizure shall take place in accordance with the legislation of each country.

Article 17
Possibility of Control of Circulation, Presentation and Exhibition of Works

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

Article 18
Works Existing on Convention's Entry Into Force:
1. Protectable where protection not yet expired in country of origin;
2. Non-protectable where protection already expired in country where it is claimed;
3. Application of these principles; 4. Special cases

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

Article 19
Protection Greater than Resulting from Convention

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The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

Article 20
Special Agreements Among Countries of the Union

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

Article 21
Special Provisions Regarding Developing Countries:
1. Reference to Appendix; 2. Appendix part of Act

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)(b), the Appendix forms an integral part of this Act.

Article 22
Assembly:
1. Constitution and composition; 2. Tasks;
3. Quorum, voting, observers; 4. Convocation; 5. Rules of procedure

(1)

(a) The Union shall have an Assembly consisting of those countries of the Union which are bound by Articles 22 to 26.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2)

(a) The Assembly shall:

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(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau") referred to in the Convention Establishing the World Intellectual Property Organization (hereinafter designated as "the Organization"), due account being taken of any comments made by those countries of the Union which are not bound by Articles 22 to 26;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the biennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii) establish such committees of experts and working groups as may be necessary for the work of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 22 to 26;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) exercise such other functions as are appropriate under this Convention;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3)

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(a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the following conditions are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 26(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(f) A delegate may represent, and vote in the name of, one country only.

(g) Countries of the Union not members of the Assembly shall be admitted to its meetings as observers.

(4)

(a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(5) The Assembly shall adopt its own rules of procedure.

Article 23
Executive Committee:
1. Constitution; 2. Composition; 3. Number of members; 4. Geographical distribution; special agreements;

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5. Term, limits of re-eligibility, rules of election; 6. Tasks; 7. Convocation; 8. Quorum, voting; 9. Observers; 10. Rules of procedure

(1) The Assembly shall have an Executive Committee.

(2)

(a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 25(7)(b), have an ex officio seat on the Committee.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements which might be established in relation with the Union to be among the countries constituting the Executive Committee.

(5)

(a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected, but not more than two-thirds of them.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(6)

(a) The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

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(ii) submit proposals to the Assembly respecting the draft program and biennial budget of the Union prepared by the Director General;

(iii) [*deleted*]

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly, take all necessary measures to ensure the execution of the program of the Union by the Director General;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(7)

(a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8)

(a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers.

(10) The Executive Committee shall adopt its own rules of procedure.

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Article 24
International Bureau:
1. Tasks in general, Director General; 2. General information; 3. Periodical; 4. Information to countries; 5. Studies and services; 6. Participation in meetings; 7. Conferences of revision; 8. Other tasks

(1)

(a) The administrative tasks with respect to the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Industrial Property.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union.

(2) The International Bureau shall assemble and publish information concerning the protection of copyright. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of copyright.

(3) The International Bureau shall publish a monthly periodical.

(4) The International Bureau shall, on request, furnish information to any country of the Union on matters concerning the protection of copyright.

(5) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of copyright.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7)

(a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee, make the preparations for the conferences of revision of the provisions of the Convention other than Articles 22 to 26.

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(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences.

(8) The International Bureau shall carry out any other tasks assigned to it.

Article 25
Finances:
1. Budget; 2. Coordination with other Unions; 3. Resources;
4. Contributions; possible extension of previous budget; 5. Fees and charges;
6. Working capital fund; 7. Advances by host Government; 8. Auditing of accounts

(1)

(a) The Union shall have a budget.

(b) The budget of the Union shall include the income and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Union shall be financed from the following sources:

(i) contributions of the countries of the Union;

(ii) fees and charges due for services performed by the International Bureau in relation to the Union;

(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union;

(iv) gifts, bequests, and subventions;

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(v) rents, interests, and other miscellaneous income.

(4)

(a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows [3]:

Class I 25

Class II 20

Class III 15

Class IV 10

Class V 5

Class VI 3

Class VII 1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce it to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the session.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the annual budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions shall have no vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

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(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, in accordance with the financial regulations.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General.

(6)

(a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, an increase shall be decided by the Assembly.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the increase decided.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7)

(a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

Article 26

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Amendments:
1. Provisions susceptible of amendment by the Assembly; proposals;
2. Adoption; 3. Entry into force

(1) Proposals for the amendment of Articles 22, 23, 24, 25, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment of Article 22, and of the present paragraph, shall require four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment.

Article 27
Revision:
1. Objective; 2. Conferences; 3. Adoption

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

(2) For this purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.

(3) Subject to the provisions of Article 26 which apply to the amendment of Articles 22 to 26, any revision of this Act, including the Appendix, shall require the unanimity of the votes cast.

Article 28
Acceptance and Entry Into Force of Act for Countries of the Union:
1. Ratification, accession; possibility of excluding certain provisions; withdrawal of

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exclusion;

2. Entry into force of Articles 1 to 21 and Appendix; 3. Entry into force of Articles 22 to 38

(1)

(a) Any country of the Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it. Instruments of ratification or accession shall be deposited with the Director General.

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply to Articles 1 to 21 and the Appendix, provided that, if such country has previously made a declaration under Article VI(1) of the Appendix, then it may declare in the said instrument only that its ratification or accession shall not apply to Articles 1 to 20.

(c) Any country of the Union which, in accordance with subparagraph (b), has excluded provisions therein referred to from the effects of its ratification or accession may at any later time declare that it extends the effects of its ratification or accession to those provisions. Such declaration shall be deposited with the Director General.

(2)

(a) Articles 1 to 21 and the Appendix shall enter into force three months after both of the following two conditions are fulfilled:

(i) at least five countries of the Union have ratified or acceded to this Act without making a declaration under paragraph (1)(b),

(ii) France, Spain, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, have become bound by the Universal Copyright Convention as revised at Paris on July 24, 1971.

(b) The entry into force referred to in subparagraph (a) shall apply to those countries of the Union which, at least three months before the said entry into force, have deposited instruments of ratification or accession not containing a declaration under paragraph (1)(b).

(c) With respect to any country of the Union not covered by subparagraph (b) and which ratifies or accedes to this Act without making a declaration under paragraph (1)(b), Articles 1 to 21 and the Appendix shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Articles 1 to 21 and the Appendix shall enter into force with respect to that country on the date thus indicated.

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(d) The provisions of subparagraphs (a) to (c) do not affect the application of Article VI of the Appendix.

(3) With respect to any country of the Union which ratifies or accedes to this Act with or without a declaration made under paragraph (1)(b), Articles 22 to 38 shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Articles 22 to 38 shall enter into force with respect to that country on the date thus indicated.

Article 29
Acceptance and Entry Into Force for Countries Outside the Union:
1. Accession; 2. Entry into force

(1) Any country outside the Union may accede to this Act and thereby become party to this Convention and a member of the Union. Instruments of accession shall be deposited with the Director General.

(2)

(a) Subject to subparagraph (b), this Convention shall enter into force with respect to any country outside the Union three months after the date on which the Director General has notified the deposit of its instrument of accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, this Convention shall enter into force with respect to that country on the date thus indicated.

(b) If the entry into force according to subparagraph (a) precedes the entry into force of Articles 1 to 21 and the Appendix according to Article 28(2)(a), the said country shall, in the meantime, be bound, instead of by Articles 1 to 21 and the Appendix, by Articles 1 to 20 of the Brussels Act of this Convention.

Article 29*bis*
Effect of Acceptance of Act for the Purposes of Article 14(2) of the WIPO Convention

Ratification of or accession to this Act by any country not bound by Articles 22 to of the Stockholm Act of this Convention shall, for the sole purposes of Article 14(2) of the Convention establishing the

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Organization, amount to ratification of or accession to the said Stockholm Act with the limitation set forth in Article 28(1)(b)(i) thereof.

Article 30
Reservations:
1. Limits of possibility of making reservations;
2. Earlier reservations; reservation as to the right of translation; withdrawal of reservation

(1) Subject to the exceptions permitted by paragraph (2) of this Article, by Article 28(1)(b), by Article 33(2), and by the Appendix, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of this Convention.

(2)

(a) Any country of the Union ratifying or acceding to this Act may, subject to Article V(2) of the Appendix, retain the benefit of the reservations it has previously formulated on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification or accession.

(b) Any country outside the Union may declare, in acceding to this Convention and subject to Article V(2) of the Appendix, that it intends to substitute, temporarily at least, for Article 8 of this Act concerning the right of translation, the provisions of Article 5 of the Union Convention of 1886 [4], as completed at Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. Subject to Article I(6)(b) of the Appendix, any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country.

(c) Any country may withdraw such reservations at any time by notification addressed to the Director General.

Article 31
Applicability to Certain Territories:
1. Declaration; 2. Withdrawal of declaration; 3. Effective date;
4. Acceptance of factual situations not implied

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification at any time thereafter, that this Convention shall be

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applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories.

(3)

(a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in which it was included, and any notification given under that paragraph shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

(4) This Article shall in no way be understood as implying the recognition or tacit acceptance by a country of the Union of the factual situation concerning a territory to which this Convention is made applicable by another country of the Union by virtue of a declaration under paragraph (1).

Article 32
Applicability of this Act and of Earlier Acts:
1. As between countries already members of the Union;
2. As between a country becoming a member of the Union and other countries members of the Union;
3. Applicability of the Appendix in Certain Relations

(1) This Act shall, as regards relations between the countries of the Union, and to the extent that it applies, replace the Berne Convention of September 9, 1886, and the subsequent Acts of revision. The Acts previously in force shall continue to be applicable, in their entirety or to the extent that this Act does not replace them by virtue of the preceding sentence, in relations with countries of the Union which do not ratify or accede to this Act.

(2) Countries outside the Union which become party to this Act shall, subject to paragraph (3), apply it with respect to any country of the Union not bound by this Act or which, although bound by this Act, has made a declaration pursuant to Article 28(1)(b). Such countries recognize that the said country of the Union, in its relations with them:

(i) may apply the provisions of the most recent Act by which it is bound, and

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(ii) subject to Article I(6) of the Appendix, has the right to adapt the protection to the level provided for by this Act.

(3) Any country which has availed itself of any of the faculties provided for in the Appendix may apply the provisions of the Appendix relating to the faculty or faculties of which it has availed itself in its relations with any other country of the Union which is not bound by this Act, provided that the latter country has accepted the application of the said provisions.

Article 33
Disputes:
1. Jurisdiction of the International Court of Justice;
2. Reservation as to such jurisdiction; 3. Withdrawal of reservation

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

Article 34
Closing of Certain Earlier Provisions:
1. Of earlier Acts; 2. Of the Protocol to the Stockholm Act

(1) Subject to Article 29*bis*, no country may ratify or accede to earlier Acts of this Convention once Articles 1 to 21 and the Appendix have entered into force.

(2) Once Articles 1 to 21 and the Appendix have entered into force, no country may make a

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declaration under Article 5 of the Protocol Regarding Developing Countries attached to the Stockholm Act.

Article 35
Duration of the Convention; Denunciation:
1. Unlimited duration; 2. Possibility of denunciation;
3. Effective date of denunciation; 4. Moratorium on denunciation

(1) This Convention shall remain in force without limitation as to time.

(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of all earlier Acts and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union.

Article 36
Application of the Convention:
1. Obligation to adopt the necessary measures; 2. Time from which obligation exists

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Article 37
Final Clauses:
1. Languages of the Act; 2. Signature;
3. Certified copies; 4. Registration; 5. Notifications

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(1)

(a) This Act shall be signed in a single copy in the French and English languages and, subject to paragraph (2), shall be deposited with the Director General.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the Arabic, German, Italian, Portuguese and Spanish languages, and such other languages as the Assembly may designate.

(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.

(2) This Act shall remain open for signature until January 31, 1972. Until that date, the copy referred to in paragraph (1)(a) shall be deposited with the Government of the French Republic.

(3) The Director General shall certify and transmit two copies of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country.

(4) The Director General shall register this Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Articles 28(1)(c), 30(2)(a) and (b), and 33(2), entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Articles 30(2)(c), 31(1) and (2), 33(3), and 38(1), as well as the Appendix.

Article 38
Transitory Provisions:
1. Exercise of the "five-year privilege";
2. Bureau of the Union, Director of the Bureau; 3. Succession of Bureau of the Union

(1) Countries of the Union which have not ratified or acceded to this Act and which are not bound by Articles 22 to 26 of the Stockholm Act of this Convention may, until April 26, 1975, exercise, if they so desire, the rights provided under the said Articles as if they were bound by them. Any country desiring to exercise such rights shall give written notification to this effect to the Director General; this notification shall be effective on the date of its receipt. Such countries shall be deemed to be members of the Assembly until the said date.

(2) As long as all the countries of the Union have not become Members of the Organization, the

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International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau.

(3) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization.

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6.2. Portability Regulation

REGULATION (EU) 2017/1128 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 14 June 2017

on cross-border portability of online content services in the internal market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof, […]

Article 1

Subject matter and scope

1. This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence.

2. This Regulation shall not apply to the field of taxation.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1)‘subscriber’ means any consumer who, on the basis of a contract for the provision of an online content service with a provider whether against payment of money or without such payment, is entitled to access and use such service in the Member State of residence;

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(2)‘consumer’ means any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside that person’s trade, business, craft or profession;

(3)‘Member State of residence’ means the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence;

(4)‘temporarily present in a Member State’ means being present in a Member State other than the Member State of residence for a limited period of time;

(5)‘online content service’ means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is:

(i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or

(ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;

(6)‘portable’ means a feature of an online content service whereby subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location.

Article 3

Obligation to enable cross-border portability of online content services

1. The provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities.

2. The provider shall not impose any additional charges on the subscriber for the access to and the use of the online content service pursuant to paragraph 1.

3. The obligation set out in paragraph 1 shall not extend to any quality requirements applicable to

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the delivery of an online content service that the provider is subject to when providing that service in the Member State of residence, unless otherwise expressly agreed between the provider and the subscriber.

The provider shall not take any action to reduce the quality of delivery of the online content service when providing the online content service in accordance with paragraph 1.

4. The provider shall, on the basis of the information in its possession, provide the subscriber with information concerning the quality of delivery of the online content service provided in accordance with paragraph 1. The information shall be provided to the subscriber prior to providing the online content service in accordance with paragraph 1 and by means which are adequate and proportionate.

Article 4

Localisation of the provision of, access to and use of online content services

The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.

Article 5

Verification of the Member State of residence

1. At the conclusion and upon the renewal of a contract for the provision of an online content service provided against payment of money, the provider shall verify the Member State of residence of the subscriber by using not more than two of the following means of verification and shall ensure that the means used are reasonable, proportionate and effective:

(a) an identity card, electronic means of identification, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council ([12]), or any other valid identity document confirming the subscriber's Member State of residence;

(b) payment details such as the bank account or credit or debit card number of the subscriber;

(c) the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscriber;

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(d) the payment by the subscriber of a licence fee for other services provided in the Member State, such as public service broadcasting;

(e) an internet or telephone service supply contract or any similar type of contract linking the subscriber to the Member State;

(f) registration on local electoral rolls, if the information concerned is publicly available;

(g) payment of local taxes, if the information concerned is publicly available;

(h) a utility bill of the subscriber linking the subscriber to the Member State;

(i) the billing address or the postal address of the subscriber;

(j) a declaration by the subscriber confirming the subscriber's address in the Member State;

(k) an internet protocol (IP) address check, to identify the Member State where the subscriber accesses the online content service.

The means of verification under points (i) to (k) shall only be used in combination with one of the means of verification under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register.

2. If the provider has reasonable doubts about the subscriber's Member State of residence in the course of the duration of the contract for the provision of an online content service, the provider may repeat the verification of the Member State of residence of the subscriber, in accordance with paragraph 1. In such a case, however, the means of verification under point (k) may be used as a sole means. Data resulting from the use of the means of verification under point (k) shall be collected in binary format only.

3. The provider shall be entitled to request the subscriber to provide the information necessary to determine the subscriber's Member State of residence in accordance with paragraphs 1 and 2. If the subscriber fails to provide that information, and as a result the provider is unable to verify the subscriber's Member State of residence, the provider shall not, on the basis of this Regulation, enable the subscriber to access or use the online content service when the subscriber is temporarily present in a Member State.

4. The holders of copyright or related rights or those holding any other rights in the content of an online content service may authorise the provision of, access to and use of their content

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under this Regulation without verification of the Member State of residence. In such cases, the contract between the provider and the subscriber for the provision of an online content service shall be sufficient to determine the subscriber's Member State of residence.

The holders of copyright or related rights or those holding any other rights in the content of an online content service shall be entitled to withdraw the authorisation given pursuant to the first subparagraph subject to giving reasonable notice to the provider.

5. The contract between the provider and the holders of copyright or related rights or those holding any other rights in the content of an online content service shall not restrict the possibility for such holders of rights to withdraw the authorisation referred to in paragraph 4.

Article 6

Cross-border portability of online content services provided without payment of money

1. The provider of an online content service provided without payment of money may decide to enable its subscribers who are temporarily present in a Member State to access and use the online content service on condition that the provider verifies the subscriber's Member State of residence in accordance with this Regulation.

2. The provider shall inform its subscribers, the relevant holders of copyright and related rights and the relevant holders of any other rights in the content of the online content service of its decision to provide the online content service in accordance with paragraph 1, prior to providing that service. The information shall be provided by means which are adequate and proportionate.

3. This Regulation shall apply to providers that provide an online content service in accordance with paragraph 1.

Article 7

Contractual provisions

1. Any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable.

2. This Regulation shall apply irrespective of the law applicable to contracts concluded between providers of online content services and holders of copyright or related rights or those holding any

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other rights in the content of online content services, or to contracts concluded between such providers and their subscribers.

Article 8

Protection of personal data

1. The processing of personal data carried out within the framework of this Regulation including, in particular, for the purposes of verification of the subscriber's Member State of residence under Article 5, shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC. In particular, the use of the means of verification in accordance with Article 5 and any processing of personal data under this Regulation, shall be limited to what is necessary and proportionate in order to achieve its purpose.

2. Data collected pursuant to Article 5 shall be used solely for the purpose of verifying the subscriber's Member State of residence. They shall not be communicated, transferred, shared, licensed or otherwise transmitted or disclosed to holders of copyright or related rights or to those holding any other rights in the content of online content services, or to any other third parties.

3. Data collected pursuant to Article 5 shall not be stored by the provider of an online content service longer than necessary to complete a verification of a subscriber's Member State of residence pursuant to Article 5(1) or (2). On completion of each verification, the data shall be immediately and irreversibly destroyed.

Article 9

Application to existing contracts and rights acquired

1. This Regulation shall apply also to contracts concluded and rights acquired before the date of its application if they are relevant for the provision of, access to and use of an online content service, in accordance with Articles 3 and 6, after that date.

2. By 21 May 2018, the provider of an online content service provided against payment of money shall verify, in accordance with this Regulation, the Member State of residence of those subscribers who concluded contracts for the provision of the online content service before that date.

Within two months of the date upon which the provider of an online content service provided without payment of money first provides the service in accordance with Article 6, the provider shall verify, in accordance with this Regulation, the Member State of residence of those subscribers who concluded contracts for the provision of the online content service before that date.

Article 10

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Review

By 21 March 2021, and as required thereafter, the Commission shall assess the application of this Regulation in the light of legal, technological and economic developments, and submit to the European Parliament and to the Council a report thereon.

The report referred to in the first paragraph shall include, inter alia, an assessment of the application of the verification means of the Member State of residence referred to in Article 5, taking into account newly developed technologies, industry standards and practices, and, if necessary, consider the need for a review. The report shall pay special attention to the impact of this Regulation on SMEs and the protection of personal data. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

Article 11

Final provisions

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 20 March 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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6.3. Summary of the Patent Cooperation Treaty

Summary of the Patent Cooperation Treaty (PCT) (1970) (This summary was borrowed from the WIPO webpage: https://www.wipo.int/treaties/en/registration/pct/summary_pct.html)

The Patent Cooperation Treaty (PCT) makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. Such an application may be filed by anyone who is a national or resident of a PCT Contracting State. It may generally be filed with the national patent office of the Contracting State of which the applicant is a national or resident or, at the applicant's option, with the International Bureau of WIPO in Geneva.

If the applicant is a national or resident of a Contracting State party to the European Patent Convention, the Harare Protocol on Patents and Industrial Designs (Harare Protocol), the Bangui Agreement, or the Eurasian Patent Convention, the international application may also be filed with the European Patent Office (EPO), the African Regional Intellectual Property Organization (ARIPO), the African Intellectual Property Organization (OAPI) or the Eurasian Patent Office (EAPO), respectively.

The Treaty regulates in detail the formal requirements with which international applications must comply.

Filing a PCT application has the effect of automatically designating all Contracting States bound by the PCT on the international filing date. The effect of the international application is the same in each

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designated State as if a national patent application had been filed with the national patent office of that State.

The international application is subjected to an international search. That search is carried out by one of the competent International Searching Authorities (ISA) under the PCT [1] and results in an international search report, that is, a listing of the citations of published documents that might affect the patentability of the invention claimed in the international application. In addition, a preliminary and non-binding written opinion on whether the invention appears to meet patentability criteria in light of the search report results is also issued.

The international search report and written opinion are communicated to the applicant who, after evaluating their content, may decide to withdraw the application, in particular where the content of the report and opinion suggests that the granting of patents is unlikely, or the applicant may decide to amend the claims in the application.

If the international application is not withdrawn, it is published by the International Bureau, together with the international search report. At the same time, the written opinion is made available on PATENTSCOPE.

Before the expiration of 22 months from the priority date, the applicant has the option to request a Supplementary International Searching Authority (SISA) (an ISA willing to offer this service) to carry out an additional search of relevant documentation, specifically focusing on documents in the particular language in which that authority specializes. The goal of this additional search is to reduce the likelihood of further documents coming to light in the national phase that would make granting the patent unlikely.

An applicant that decides to continue with the international application with a view to seeking national (or regional) patents can, in relation to most Contracting States, wait until the end of the thirtieth month from the priority date to commence the national procedure before each

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designated office by furnishing a translation (where necessary) of the application into the official language of that office, paying to it the necessary fees and acquiring the services of local patent agents.

If the applicant wishes to make amendments to the application – for example, in order to address documents identified in the search report and conclusions made in the written opinion – and to have the potential patentability of the "as-amended" application reviewed – an optional international preliminary examination may be requested. The result of the preliminary examination is an international preliminary report on patentability (IPRP Chapter II) which is prepared by one of the competent International Preliminary Examining Authorities (IPEA) under the PCT [2] and which contains a preliminary and non-binding opinion on the patentability of the claimed invention. It provides the applicant with an even stronger basis on which to evaluate the chances of obtaining a patent and, if the report is favorable, a stronger basis on which to continue with the application before national and regional patent offices. If no international preliminary examination has been requested, the International Bureau establishes an international preliminary report on patentability (IPRP Chapter I) on the basis of the written opinion of the ISA and communicates this report to the designated offices.

The procedure under the PCT has numerous advantages for applicants, patent offices and the general public:

(i) applicants have up to 18 months more than if they had not used the PCT to reflect on the desirability of seeking protection in foreign countries, appoint local patent agents in each foreign country, prepare the necessary translations and pay national fees;

(ii) applicants can rest assured that, if their international application is in the form prescribed by the PCT, it cannot be rejected on formal grounds by any designated office during the national phase;

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(iii) on the basis of the international search report and the written opinion, applicants can evaluate with reasonable probability the chances of their invention being patented;

(iv) applicants have the possibility, during the optional international preliminary examination, to amend the international application and thus put it in order before processing by the various patent offices;

(v) the search and examination work of patent offices can be considerably reduced or eliminated thanks to the international search report, the written opinion and, where applicable, the international preliminary report on patentability which are communicated to designated offices together with the international application;

(vi) applicants are able to access fast-track examination procedures in the national phase in Contracting States that have PCT-Patent Prosecution Highway (PCT-PPH) agreements or similar arrangements;

(vii) since each international application is published with an international search report, third parties are in a better position to formulate a well-founded opinion about the potential patentability of the claimed invention; and

(viii) for applicants, international publication on PATENTSCOPE puts the world on notice of their applications, which can be an effective means of advertising and looking for potential licensees.

Ultimately, the PCT:

brings the world within reach;

streamlines the process of fulfilling diverse formality requirements;

postpones the major costs associated with international patent protection;

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provides a strong basis for patenting decisions; and

is used by the world's major corporations, research institutions and universities in seeking international patent protection.

The PCT created a Union which has an Assembly. Every State party to the PCT is a member of the Assembly. Among the most important tasks of the Assembly are the amendment of the Regulations issued under the Treaty, the adoption of the biennial program and budget of the Union and the fixing of certain fees connected with the use of the PCT system.

The Assembly of the PCT Union has established a special measure to benefit (1) an applicant who is a natural person and who is a national of and resides in a State that is listed as being a State whose per capita gross domestic product is below US$ 25,000 (according to the most recent 10-year average per capita gross domestic product figures at constant 2005 US$ values published by the United Nations), and whose nationals and residents who are natural persons have filed less than 10 international applications per year (per million population) or less than 50 international applications per year (in absolute numbers) according to the most recent five-year average yearly filing figures published by the International Bureau, and (2) applicants, whether natural persons or not, who are nationals of and reside in a State that is listed as being classified by the United Nations as a LDC. That benefit consists of a reduction of 90 per cent of certain fees under the Treaty.

Details concerning the PCT can be obtained by consulting the PCT website, the *PCT Applicant's Guide*, published by WIPO in English and French and the PCT Newsletter, published by WIPO in English.

The PCT was concluded in 1970, amended in 1979 and modified in 1984 and in 2001.

It is open to States party to the Paris Convention for the Protection of Industrial Property (1883). Instruments of ratification or accession must be deposited with the Director General of WIPO.

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6.4. Summary of the Madrid Agreement Concerning the International Registration of Marks (1891)

Summary of the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989) (This summary was borrowed from the WIPO webpage: https://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html)

Introduction

The Madrid System for the International Registration of Marks is governed by two treaties:

the Madrid Agreement, concluded in 1891 and revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and amended in 1979, and

the Protocol relating to that Agreement, concluded in 1989, which aims to make the Madrid system more flexible and more compatible with the domestic legislation of certain countries or intergovernmental organizations that had not been able to accede to the Agreement.

States and organizations party to the Madrid system are collectively referred to as Contracting Parties.

The system makes it possible to protect a mark in a large number of countries by obtaining an international registration that has effect in each of the designated Contracting Parties.

Who May Use the System ?

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An application for international registration (international application) may be filed only by a natural person or legal entity having a connection – through establishment, domicile or nationality – with a Contracting Party to the Agreement or the Protocol.

A mark may be the subject of an international application only if it has already been registered with the trademark office of the Contracting Party with which the applicant has the necessary connections (referred to as the office of origin). However, where all the designations are effected under the Protocol (see below), the international application may be based simply on an application for registration filed with the office of origin. An international application must be presented to the International Bureau of WIPO through the intermediary of the office of origin.

The International Application

An application for international registration must designate one or more Contracting Parties in which protection is sought. Further designations can be effected subsequently. A Contracting Party may be designated only if it is party to the same treaty as the Contracting Party whose office is the office of origin. The latter cannot itself be designated in the international application.

The designation of a given Contracting Party is made either under the Agreement or the Protocol, depending on which treaty is common to the Contracting Parties concerned. If both Contracting Parties are party to the Agreement and the Protocol, the designation will be governed by the Protocol.

International applications can be filed in English, French or Spanish, irrespective of which treaty or treaties govern the application, unless the office of origin restricts that choice to one or two of these languages.

The filing of an international application is subject to the payment of a basic fee (which is reduced to 10 per cent of the prescribed amount for international applications filed by applicants whose

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country of origin is an LDC, in accordance with the list established by the United Nations), a supplementary fee for each class of goods and/or services beyond the first three classes, and a complementary fee for each Contracting Party designated. However, a Contracting Party to the Protocol may declare that, when it is designated under the Protocol, the complementary fee is replaced by an individual fee, whose amount is determined by the Contracting Party concerned but may not be higher than the amount that would be payable for the registration of a mark, at the national level, with its office.

International Registration

Once the International Bureau receives an international application, it carries out an examination for compliance with the requirements of the Agreement, the Protocol and their Common Regulations. This examination is restricted to formalities, including the classification and comprehensibility of the list of goods and/or services. If there are no irregularities in the application, the International Bureau records the mark in the International Register, publishes the international registration in the *WIPO Gazette of International Marks* (hereinafter referred to as "the Gazette"), and notifies it to each designated Contracting Party. Any matter of substance, such as whether the mark qualifies for protection or whether it is in conflict with a mark registered previously in a particular Contracting Party, is determined by that Contracting Party's trademark office under the applicable domestic legislation. The Gazette is available in electronic form (e-Gazette) on the Madrid system website.

Statement of Grant of Protection or Refusal of Protection

The office of each designated Contracting Party shall issue a statement of grant of protection under Rule 18*ter* of the Common Regulations.

However, when designated Contracting Parties examine the international registration for compliance with their domestic legislation, and if some substantive provisions are not complied with, they have the right to refuse protection in their territory. Any such refusal, including an indication

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of the grounds on which it is based, must be communicated to the International Bureau, normally within 12 months from the date of notification. However, a Contracting Party to the Protocol may declare that, when it is designated under the Protocol, this time limit is extended to 18 months. That Contracting Party may also declare that a refusal based on an opposition may be communicated to the International Bureau even after the 18-month time limit.

The refusal is communicated to the holder of the registration or the holder's representative before the International Bureau, recorded in the International Register and published in the Gazette. The procedure subsequent to a refusal (such as an appeal or a review) is carried out directly by the competent administration and/or court of the Contracting Party concerned and the holder, without the involvement of the International Bureau. The final decision concerning the refusal must, however, be communicated to the International Bureau, which records and publishes it.

Effects of an International Registration

The effects of an international registration in each designated Contracting Party are, from the date of the international registration, the same as if the mark had been deposited directly with the office of that Contracting Party. If no refusal is issued within the applicable time limit, or if a refusal originally notified by a Contracting Party is subsequently withdrawn, the protection of the mark is, from the date of the international registration, the same as if it had been registered by the office of that Contracting Party.

An international registration is effective for 10 years. It may be renewed for further periods of 10 years on payment of the prescribed fees.

Protection may be limited with regard to some or all of the goods or services or may be renounced with regard to some only of the designated Contracting Parties. An international registration may be

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transferred in relation to all or some of the designated Contracting Parties and all or some of the goods or services indicated.

Advantages of the Madrid System

The Madrid system offers several advantages for trademark owners. Instead of filing a separate national application in each country of interest, in several different languages, in accordance with different national or regional procedural rules and regulations and paying several different (and often higher) fees, an international registration may be obtained by simply filing one application with the International Bureau (through the office of the home country), in one language (English, French or Spanish) and paying one set of fees.

Similar advantages exist for maintaining and renewing a registration. Likewise, if the international registration is assigned to a third party, or is otherwise changed, such as a change in name and/or address, this may be recorded with effect for all designated Contracting Parties by means of a single procedural step.

To facilitate the work of the users of the Madrid system, the International Bureau publishes a *Guide to the International Registration of Marks under the Madrid Agreement and the Madrid Protocol*.

The Madrid Agreement and Protocol are open to any State party to the Paris Convention for the Protection of Industrial Property (1883). The two treaties are parallel and independent, and States may adhere to either or both of them. In addition, an intergovernmental organization that maintains its own office for the registration of marks may become party to the Protocol. Instruments of ratification or accession must be deposited with the Director General of WIPO.

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6.5. Directive on the legal protection of Databases

DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57 (2), 66 and 100a thereof,[…]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.

2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

3. Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

Article 2

Limitations on the scope

This Directive shall apply without prejudice to Community provisions relating to:

(a) the legal protection of computer programs;

(b)rental right, lending right and certain rights related to copyright in the field of intellectual property,

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(c) the term of protection of copyright and certain related rights.

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Article 4

Database authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.

2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.

3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 5

Restricted acts

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

(a) temporary or permanent reproduction by any means and in any form, in whole or in part;

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(b) translation, adaptation, arrangement and any other alteration;

(c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

(d) any communication, display or performance to the public;

(e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

(a) in the case of reproduction for private purposes of a non-electronic database;

(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) where there is use for the purposes of public security of for the purposes of an administrative or judicial procedure;

(d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which

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unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a)'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b)'re-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which

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unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

Article 8

Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

Article 9

Exceptions to the *sui generis* right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

(a) in the case of extraction for private purposes of the contents of a non-electronic database;

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Article 10

Term of protection

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1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

Article 11

Beneficiaries of protection under the *sui generis* right

1. The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.

2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

CHAPTER IV

COMMON PROVISIONS

Article 12

Remedies

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Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Article 13

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

Article 14

Application over time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.

2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.

3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.

4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.

5. In the case of a database the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date.

Article 15

Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

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Article 16

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

3. Not later than at the end of the third year after the date refered to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, *inter alia*, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

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6.6. CJEU decision in C-406/10 SAS Institute

JUDGMENT OF THE COURT

(Grand Chamber)

2 May 2012 (*)

In Case C-406/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Chancery Division (United Kingdom), made by decision of 2 August 2010, received at the Court on 11 August 2010, in the proceedings

SAS Institute Inc.

v

World Programming Ltd,

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(2) and 5(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), and of Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

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2 The reference has been made in proceedings between SAS Institute Inc. ('SAS Institute') and World Programming Ltd ('WPL') concerning an action for infringement brought by SAS Institute for infringement of copyright in computer programs and manuals relating to its computer database system.

Legal context […]

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 SAS Institute is a developer of analytical software. It has developed an integrated set of computer programs over a period of 35 years which enables users to carry out a wide range of data processing and analysis tasks, in particular, statistical analysis ('the SAS System'). The core component of the SAS System, called 'Base SAS', enables users to write and run their own application programs in order to adapt the SAS System to work with their data (Scripts). Such Scripts are written in a language which is peculiar to the SAS System ('the SAS Language').

24 WPL perceived that there was a market demand for alternative software capable of executing application programs written in the SAS Language. WPL therefore produced the 'World Programming System', designed to emulate the SAS components as closely as possible in that, with a few minor exceptions, it attempted to ensure that the same inputs would produce the same outputs. This would enable users of the SAS System to run the Scripts which they have developed for use with the SAS System on the 'World Programming System'.

25 The High Court of Justice of England and Wales, Chancery Division, points out that it is not established that, in order to do so, WPL had access to the source code of the SAS components, copied any of the text of that source code or copied any of the structural design of the source code.

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26 The High Court also points out that two previous courts have held, in the context of separate proceedings, that it is not an infringement of the copyright in the source code of a computer program for a competitor of the copyright owner to study how the program functions and then to write its own program to emulate that functionality.

27 SAS Institute, disputing that approach, has brought an action before the referring court. Its principal claims are that WPL:

– copied the manuals for the SAS System published by SAS Institute when creating the 'World Programming System', thereby infringing SAS Institute's copyright in those manuals;

– in so doing, indirectly copied the computer programs comprising the SAS components, thereby infringing its copyright in those components;

– used a version of the SAS system known as the 'Learning Edition', in breach of the terms of the licence relating to that version and of the commitments made under that licence, and in breach of SAS Institute's copyright in that version; and

– infringed the copyright in the manuals for the SAS System by creating its own manual.

28 In those circumstances, the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where a computer program ("the First Program") is protected by copyright as a literary work, is Article 1(2) [of Directive 91/250] to be interpreted as meaning that it is not an infringement of the copyright in the First Program for a competitor of the rightholder without access to the source code of the First Program, either directly or via a process such as decompilation of the object code, to create another program ("the Second Program") which replicates the functions of the First Program?

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(2) Is the answer to Question 1 affected by any of the following factors:

(a) the nature and/or extent of the functionality of the First Program;

(b) the nature and/or extent of the skill, judgment and labour which has been expended by the author of the First Program in devising the functionality of the First Program;

(c) the level of detail to which the functionality of the First Program has been reproduced in the Second Program;

(d) if the source code for the Second Program reproduces aspects of the source code of the First Program to an extent which goes beyond that which was strictly necessary in order to produce the same functionality as the First Program?

(3) Where the First Program interprets and executes application programs written by users of the First Program in a programming language devised by the author of the First Program which comprises keywords devised or selected by the author of the First Program and a syntax devised by the author of the First Program, is Article 1(2) [of Directive 91/250] to be interpreted as meaning that it is not an infringement of the copyright in the First Program for the Second Program to be written so as to interpret and execute such application programs using the same keywords and the same syntax?

(4) Where the First Program reads from and writes to data files in a particular format devised by the author of the First Program, is Article 1(2) [of Directive 91/250] to be interpreted as meaning that it is not an infringement of the copyright in the First Program for the Second Program to be written so as to read from and write to data files in the same format?

(5) Does it make any difference to the answer to Questions 1, 3 and 4 if the author of the Second Program created the Second Program by:

(a) observing, studying and testing the functioning of the First Program; or

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(b) reading a manual created and published by the author of the First Program which describes the functions of the First Program ("the Manual"); or

(c) both (a) and (b)?

(6) Where a person has the right to use a copy of the First Program under a licence, is Article 5(3) [of Directive 91/250] to be interpreted as meaning that the licensee is entitled, without the authorisation of the rightholder, to perform acts of loading, running and storing the program in order to observe, test or study the functioning of the First Program so as to determine the ideas and principles which underlie any element of the program, if the licence permits the licensee to perform acts of loading, running and storing the First Program when using it for the particular purpose permitted by the licence, but the acts done in order to observe, study or test the First Program extend outside the scope of the purpose permitted by the licence?

(7) Is Article 5(3) [of Directive 91/250] to be interpreted as meaning that acts of observing, testing or studying of the functioning of the First Program are to be regarded as being done in order to determine the ideas or principles which underlie any element of the First Program where they are done:

(a) to ascertain the way in which the First Program functions, in particular details which are not described in the Manual, for the purpose of writing the Second Program in the manner referred to in Question 1 above;

(b) to ascertain how the First Program interprets and executes statements written in the programming language which it interprets and executes (see Question 3 above);

(c) to ascertain the formats of data files which are written to or read by the First Program (see Question 4 above);

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(d) to compare the performance of the Second Program with the First Program for the purpose of investigating reasons why their performances differ and to improve the performance of the Second Program;

(e) to conduct parallel tests of the First Program and the Second Program in order to compare their outputs in the course of developing the Second Program, in particular by running the same test scripts through both the First Program and the Second Program;

(f) to ascertain the output of the log file generated by the First Program in order to produce a log file which is identical or similar in appearance;

(g) to cause the First Program to output data (in fact, data correlating zip codes to States of the [United States of America] for the purpose of ascertaining whether or not it corresponds with official databases of such data, and if it does not so correspond, to program the Second Program so that it will respond in the same way as the First Program to the same input data.

(8) Where the Manual is protected by copyright as a literary work, is Article 2(a) [of Directive 2001/29] to be interpreted as meaning that it is an infringement of the copyright in the Manual for the author of the Second Program to reproduce or substantially reproduce in the Second Program any of the following matters described in the Manual:

(a) the selection of statistical operations which have been implemented in the First Program;

(b) the mathematical formulae used in the Manual to describe those operations;

(c) the particular commands or combinations of commands by which those operations may be invoked;

(d) the options which the author of the First Program has provided in respect of various commands;

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(e) the keywords and syntax recognised by the First Program;

(f) the defaults which the author of the First Program has chosen to implement in the event that a particular command or option is not specified by the user;

(g) the number of iterations which the First Program will perform in certain circumstances?

(9) Is Article 2(a) [of Directive 2001/29] to be interpreted as meaning that it is an infringement of the copyright in the Manual for the author of the Second Program to reproduce or substantially reproduce in a manual describing the Second Program the keywords and syntax recognised by the First Program?'

Consideration of the questions referred

Questions 1 to 5

29 By these questions, the national court asks, in essence, whether Article 1(2) of Directive 91/250 must be interpreted as meaning that the functionality of a computer program and the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and may, as such, be protected by copyright in computer programs for the purposes of that directive.

30 In accordance with Article 1(1) of Directive 91/250, computer programs are protected by copyright as literary works within the meaning of the Berne Convention.

31 Article 1(2) of Directive 91/250 extends that protection to the expression in any form of a computer program. That provision states, however, that the ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under that directive.

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32 The 14th recital in the preamble to Directive 91/250 confirms, in this respect, that, in accordance with the principle that only the expression of a computer program is protected by copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under that directive. The 15th recital in the preamble to Directive 91/250 states that, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

33 With respect to international law, both Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPs Agreement provide that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

34 Article 10(1) of the TRIPs Agreement provides that computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention.

35 In a judgment delivered after the reference for a preliminary ruling had been lodged in the present case, the Court interpreted Article 1(2) of Directive 91/250 as meaning that the object of the protection conferred by that directive is the expression in any form of a computer program, such as the source code and the object code, which permits reproduction in different computer languages (judgment of 22 December 2010 in Case C-393/09 *Bezpečnostní softwarová asociace* [2010] ECR I-13971, paragraph 35).

36 In accordance with the second phrase of the seventh recital in the preamble to Directive 91/250, the term ‘computer program’ also includes preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

37 Thus, the object of protection under Directive 91/250 includes the forms of expression of a computer program and the preparatory design work capable of leading, respectively, to

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the reproduction or the subsequent creation of such a program (*Bezpečnostní softwarová asociace*, paragraph 37).

38 From this the Court concluded that the source code and the object code of a computer program are forms of expression thereof which, consequently, are entitled to be protected by copyright as computer programs, by virtue of Article 1(2) of Directive 91/250. On the other hand, as regards the graphic user interface, the Court held that such an interface does not enable the reproduction of the computer program, but merely constitutes one element of that program by means of which users make use of the features of that program (*Bezpečnostní softwarová asociace*, paragraphs 34 and 41).

39 On the basis of those considerations, it must be stated that, with regard to the elements of a computer program which are the subject of Questions 1 to 5, neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program for the purposes of Article 1(2) of Directive 91/250.

40 As the Advocate General states in point 57 of his Opinion, to accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development.

41 Moreover, point 3.7 of the explanatory memorandum to the Proposal for Directive 91/250 [COM(88) 816] states that the main advantage of protecting computer programs by copyright is that such protection covers only the individual expression of the work and thus leaves other authors the desired latitude to create similar or even identical programs provided that they refrain from copying.

42 With respect to the programming language and the format of data files used in a computer program to interpret and execute application programs written by users and to read and write data in

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a specific format of data files, these are elements of that program by means of which users exploit certain functions of that program.

43 In that context, it should be made clear that, if a third party were to procure the part of the source code or the object code relating to the programming language or to the format of data files used in a computer program, and if that party were to create, with the aid of that code, similar elements in its own computer program, that conduct would be liable to constitute partial reproduction within the meaning of Article 4(a) of Directive 91/250.

44 As is, however, apparent from the order for reference, WPL did not have access to the source code of SAS Institute's program and did not carry out any decompilation of the object code of that program. By means of observing, studying and testing the behaviour of SAS Institute's program, WPL reproduced the functionality of that program by using the same programming language and the same format of data files.

45 The Court also points out that the finding made in paragraph 39 of the present judgment cannot affect the possibility that the SAS language and the format of SAS Institute's data files might be protected, as works, by copyright under Directive 2001/29 if they are their author's own intellectual creation (see *Bezpečnostní softwarová asociace*, paragraphs 44 to 46).

46 Consequently, the answer to Questions 1 to 5 is that Article 1(2) of Directive 91/250 must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.

Questions 6 and 7

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47 By these questions, the national court asks, in essence, whether Article 5(3) of Directive 91/250 must be interpreted as meaning that a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright in that program, to observe, study or test the functioning of that program in order to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence with a purpose that goes beyond the framework established by the licence.

48 In the main proceedings, it is apparent from the order for reference that WPL lawfully purchased copies of the Learning Edition of SAS Institute's program, which were supplied under a 'click-through' licence which required the purchaser to accept the terms of the licence before being permitted to access the software. The terms of that licence restricted the licence to non-production purposes. According to the national court, WPL used the various copies of the Learning Edition of SAS Institute's program to perform acts which fall outside the scope of the licence in question.

49 Consequently, the national court raises the question as to whether the purpose of the study or observation of the functioning of a computer program has an effect on whether the person who has obtained the licence may invoke the exception set out in Article 5(3) of Directive 91/250.

50 The Court observes that, from the wording of that provision, it is clear, first, that a licensee is entitled to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program.

51 In this respect, Article 5(3) of Directive 91/250 seeks to ensure that the ideas and principles which underlie any element of a computer program are not protected by the owner of the copyright by means of a licensing agreement.

52 That provision is therefore consistent with the basic principle laid down in Article 1(2) of

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Directive 91/250, pursuant to which protection in accordance with that directive applies to the expression in any form of a computer program and ideas and principles which underlie any element of a computer program are not protected by copyright under that directive.

53 Article 9(1) of Directive 91/250 adds, moreover, that any contractual provisions contrary to the exceptions provided for in Article 5(2) and (3) of that directive are null and void.

54 Second, under Article 5(3) of Directive 91/250, a licensee is entitled to determine the ideas and principles which underlie any element of the computer program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing that program which he is entitled to do.

55 It follows that the determination of those ideas and principles may be carried out within the framework of the acts permitted by the licence.

56 In addition, the 18th recital in the preamble to Directive 91/250 states that a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in that program.

57 As the Advocate General states in point 95 of his Opinion, the acts in question are those referred to in Article 4(a) and (b) of Directive 91/250, which sets out the exclusive rights of the rightholder to do or to authorise, and those referred to in Article 5(1) thereof, relating to the acts necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

58 In that latter regard, the 17th recital in the preamble to Directive 91/250 states that the acts of loading and running necessary for that use may not be prohibited by contract.

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59 Consequently, the owner of the copyright in a computer program may not prevent, by relying on the licensing agreement, the person who has obtained that licence from determining the ideas and principles which underlie all the elements of that program in the case where that person carries out acts which that licence permits him to perform and the acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner in that program.

60 As regards that latter condition, Article 6(2)(c) of Directive 91/250 relating to decompilation states that decompilation does not permit the information obtained through its application to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

61 It must therefore be held that the copyright in a computer program cannot be infringed where, as in the present case, the lawful acquirer of the licence did not have access to the source code of the computer program to which that licence relates, but merely studied, observed and tested that program in order to reproduce its functionality in a second program.

62 In those circumstances, the answer to Questions 6 and 7 is that Article 5(3) of Directive 91/250 must be interpreted as meaning that a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program.

Questions 8 and 9

63 By these questions, the national court asks, in essence, whether Article 2(a) of Directive 2001/29 must be interpreted as meaning that the reproduction, in a computer program or a

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user manual for that program, of certain elements described in the user manual for another computer program protected by copyright constitutes an infringement of that right in the latter manual.

64 It is apparent from the order for reference that the user manual for SAS Institute's computer program is a protected literary work for the purposes of Directive 2001/29.

65 The Court has already held that the various parts of a work enjoy protection under Article 2(a) of Directive 2001/29, provided that they contain some of the elements which are the expression of the intellectual creation of the author of the work (Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 39).

66 In the present case, the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts which, considered in isolation, are not, as such, an intellectual creation of the author of the computer program.

67 It is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation (see, to that effect, *Infopaq International*, paragraph 45).

68 It is for the national court to ascertain whether the reproduction of those elements constitutes the reproduction of the expression of the intellectual creation of the author of the user manual for the computer program at issue in the main proceedings.

69 In this respect, the examination, in the light of Directive 2001/29, of the reproduction of those elements of the user manual for a computer program must be the same with respect to the creation of the user manual for a second program as it is with respect to the creation of that second program.

70 Consequently, in the light of the foregoing considerations, the answer to Questions 8 and 9 is that Article 2(a) of Directive 2001/29 must be interpreted as meaning that the reproduction,

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in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if — this being a matter for the national court to ascertain — that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.

2. Article 5(3) of Directive 91/250 must be interpreted as meaning that a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program.

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3. Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if — this being a matter for the national court to ascertain — that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright.

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7. Criminal activity in the digital society

Guided Reading:

See also Fellows' Handbook on Cybercrime

Andrew Murray (2016) Information Technology law, pp. 357-403, 424-446

Additional Reading:

7.1. Convention on Cybercrime

European Treaty Series - No. 185

Convention on Cybercrime

Budapest, 23.XI.2001

Preamble […]

Chapter I – Use of terms

Article 1 – Definitions

For the purposes of this Convention:

a"computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data;

b"computer data" means any representation of facts, information or concepts in a form suitable for

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processing in a computer system, including a program suitable to cause a computer system to perform a function;

c"service provider" means:

iany public or private entity that provides to users of its service the ability to communicate by means of a computer system, and

iiany other entity that processes or stores computer data on behalf of such communication service or users of such service.

d"traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

Chapter II – Measures to be taken at the national level

Section 1 – Substantive criminal law

Title 1 – Offences against the confidentiality, integrity and availability of computer data and systems

Article 2 – Illegal access

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right. A Party may require that the offence be committed by

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infringing security measures, with the intent of obtaining computer data or other dishonest intent, or in relation to a computer system that is connected to another computer system.

Article 3 – Illegal interception

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data. A Party may require that the offence be committed with dishonest intent, or in relation to a computer system that is connected to another computer system.

Article 4 – Data interference

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the damaging, deletion, deterioration, alteration or suppression of computer data without right.

A Party may reserve the right to require that the conduct described in paragraph 1 result in serious harm.

Article 5 – System interference

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data.

Article 6 – Misuse of devices

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Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right:

the production, sale, procurement for use, import, distribution or otherwise making available of:

a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5;

a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed,

with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5; and

the possession of an item referred to in paragraphs a.i or ii above, with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5. A Party may require by law that a number of such items be possessed before criminal liability attaches.

This article shall not be interpreted as imposing criminal liability where the production, sale, procurement for use, import, distribution or otherwise making available or possession referred to in paragraph 1 of this article is not for the purpose of committing an offence established in accordance with Articles 2 through 5 of this Convention, such as for the authorised testing or protection of a computer system.

Each Party may reserve the right not to apply paragraph 1 of this article, provided that the reservation does not concern the sale, distribution or otherwise making available of the items referred to in paragraph 1 a.ii of this article.

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Title 2 – Computer-related offences

Article 7 – Computer-related forgery

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible. A Party may require an intent to defraud, or similar dishonest intent, before criminal liability attaches.

Article 8 – Computer-related fraud

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the causing of a loss of property to another person by:

any input, alteration, deletion or suppression of computer data,

any interference with the functioning of a computer system,

with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person.

Title 3 – Content-related offences

Article 9 – Offences related to child pornography

Each Party shall adopt such legislative and other measures as may be necessary to establish as

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criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

producing child pornography for the purpose of its distribution through a computer system;

offering or making available child pornography through a computer system;

distributing or transmitting child pornography through a computer system;

procuring child pornography through a computer system for oneself or for another person;

possessing child pornography in a computer system or on a computer-data storage medium.

For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:

a minor engaged in sexually explicit conduct;

a person appearing to be a minor engaged in sexually explicit conduct;

realistic images representing a minor engaged in sexually explicit conduct.

For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d and e, and 2, sub-paragraphs b and c.

Title 4 – Offences related to infringements of copyright and related rights

Article 10 – Offences related to infringements of copyright and related rights

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Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

A Party may reserve the right not to impose criminal liability under paragraphs 1 and 2 of this article in limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party's international obligations set forth in the international instruments referred to in paragraphs 1 and 2 of this article.

Title 5 – Ancillary liability and sanctions

Article 11 – Attempt and aiding or abetting

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Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 2 through 10 of the present Convention with intent that such offence be committed.

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, an attempt to commit any of the offences established in accordance with Articles 3 through 5, 7, 8, and 9.1.a and c of this Convention.

Each Party may reserve the right not to apply, in whole or in part, paragraph 2 of this article.

Article 12 – Corporate liability

Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on:

a power of representation of the legal person;

an authority to take decisions on behalf of the legal person;

an authority to exercise control within the legal person.

In addition to the cases already provided for in paragraph 1 of this article, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

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Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 13 – Sanctions and measures

Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 2 through 11 are punishable by effective, proportionate and dissuasive sanctions, which include deprivation of liberty.

Each Party shall ensure that legal persons held liable in accordance with Article 12 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.

Section 2 – Procedural law

Title 1 – Common provisions

Article 14 – Scope of procedural provisions

Each Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this section for the purpose of specific criminal investigations or proceedings.

Except as specifically provided otherwise in Article 21, each Party shall apply the powers and procedures referred to in paragraph 1 of this article to:

the criminal offences established in accordance with Articles 2 through 11 of this Convention;

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other criminal offences committed by means of a computer system; and

the collection of evidence in electronic form of a criminal offence.

Each Party may reserve the right to apply the measures referred to in Article 20 only to offences or categories of offences specified in the reservation, provided that the range of such offences or categories of offences is not more restricted than the range of offences to which it applies the measures referred to in Article 21. Each Party shall consider restricting such a reservation to enable the broadest application of the measure referred to in Article 20.

Where a Party, due to limitations in its legislation in force at the time of the adoption of the present Convention, is not able to apply the measures referred to in Articles 20 and 21 to communications being transmitted within a computer system of a service provider, which system:

is being operated for the benefit of a closed group of users, and

does not employ public communications networks and is not connected with another computer system, whether public or private,

that Party may reserve the right not to apply these measures to such communications. Each Party shall consider restricting such a reservation to enable the broadest application of the measures referred to in Articles 20 and 21.

Article 15 – Conditions and safeguards

Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations

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International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, *inter alia*, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in this section upon the rights, responsibilities and legitimate interests of third parties.

Title 2 – Expedited preservation of stored computer data

Article 16 – Expedited preservation of stored computer data

Each Party shall adopt such legislative and other measures as may be necessary to enable its competent authorities to order or similarly obtain the expeditious preservation of specified computer data, including traffic data, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification.

Where a Party gives effect to paragraph 1 above by means of an order to a person to preserve specified stored computer data in the person's possession or control, the Party shall adopt such legislative and other measures as may be necessary to oblige that person to preserve and maintain the integrity of that computer data for a period of time as long as necessary, up to a maximum of ninety days, to enable the competent authorities to seek its disclosure. A Party may provide for such an order to be subsequently renewed.

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Each Party shall adopt such legislative and other measures as may be necessary to oblige the custodian or other person who is to preserve the computer data to keep confidential the undertaking of such procedures for the period of time provided for by its domestic law.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Article 17 – Expedited preservation and partial disclosure of traffic data

Each Party shall adopt, in respect of traffic data that is to be preserved under Article 16, such legislative and other measures as may be necessary to:

ensure that such expeditious preservation of traffic data is available regardless of whether one or more service providers were involved in the transmission of that communication; and

ensure the expeditious disclosure to the Party's competent authority, or a person designated by that authority, of a sufficient amount of traffic data to enable the Party to identify the service providers and the path through which the communication was transmitted.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Title 3 – Production order

Article 18 – Production order

Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:

a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and

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a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

For the purpose of this article, the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:

the type of communication service used, the technical provisions taken thereto and the period of service;

the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;

any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

Title 4 – Search and seizure of stored computer data

Article 19 – Search and seizure of stored computer data

Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to search or similarly access:

a computer system or part of it and computer data stored therein; and

a computer-data storage medium in which computer data may be stored

in its territory.

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Each Party shall adopt such legislative and other measures as may be necessary to ensure that where its authorities search or similarly access a specific computer system or part of it, pursuant to paragraph 1.a, and have grounds to believe that the data sought is stored in another computer system or part of it in its territory, and such data is lawfully accessible from or available to the initial system, the authorities shall be able to expeditiously extend the search or similar accessing to the other system.

Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to seize or similarly secure computer data accessed according to paragraphs 1 or 2. These measures shall include the power to:

seize or similarly secure a computer system or part of it or a computer-data storage medium;

make and retain a copy of those computer data;

maintain the integrity of the relevant stored computer data;

render inaccessible or remove those computer data in the accessed computer system.

Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order any person who has knowledge about the functioning of the computer system or measures applied to protect the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the measures referred to in paragraphs 1 and 2.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Title 5 – Real-time collection of computer data

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Article 20 – Real-time collection of traffic data

Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to:

collect or record through the application of technical means on the territory of that Party, and

compel a service provider, within its existing technical capability:

to collect or record through the application of technical means on the territory of that Party; or

to co-operate and assist the competent authorities in the collection or recording of,

traffic data, in real-time, associated with specified communications in its territory transmitted by means of a computer system.

Where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to in paragraph 1.a, it may instead adopt legislative and other measures as may be necessary to ensure the real-time collection or recording of traffic data associated with specified communications transmitted in its territory, through the application of technical means on that territory.

Each Party shall adopt such legislative and other measures as may be necessary to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Article 21 – Interception of content data

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Each Party shall adopt such legislative and other measures as may be necessary, in relation to a range of serious offences to be determined by domestic law, to empower its competent authorities to:

collect or record through the application of technical means on the territory of that Party, and

compel a service provider, within its existing technical capability:

to collect or record through the application of technical means on the territory of that Party, or

to co-operate and assist the competent authorities in the collection or recording of,

content data, in real-time, of specified communications in its territory transmitted by means of a computer system.

Where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to in paragraph 1.a, it may instead adopt legislative and other measures as may be necessary to ensure the real-time collection or recording of content data on specified communications in its territory through the application of technical means on that territory.

Each Party shall adopt such legislative and other measures as may be necessary to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it.

The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Section 3 – Jurisdiction

Article 22 – Jurisdiction

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Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed:

in its territory; or

on board a ship flying the flag of that Party; or

on board an aircraft registered under the laws of that Party; or

by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.

Each Party may reserve the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1.b through 1.d of this article or any part thereof.

Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in Article 24, paragraph 1, of this Convention, in cases where an alleged offender is present in its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality, after a request for extradition.

This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

Chapter III – International co-operation

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Section 1 – General principles

Title 1 – General principles relating to international co-operation

Article 23 – General principles relating to international co-operation

The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Title 2 – Principles relating to extradition

Article 24 – Extradition

This article applies to extradition between Parties for the criminal offences established in accordance with Articles 2 through 11 of this Convention, provided that they are punishable under the laws of both Parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.

Where a different minimum penalty is to be applied under an arrangement agreed on the basis of uniform or reciprocal legislation or an extradition treaty, including the European Convention on Extradition (ETS No. 24), applicable between two or more parties, the minimum penalty provided for under such arrangement or treaty shall apply.

The criminal offences described in paragraph 1 of this article shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The

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Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence referred to in paragraph 1 of this article.

Parties that do not make extradition conditional on the existence of a treaty shall recognise the criminal offences referred to in paragraph 1 of this article as extraditable offences between themselves.

Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition.

If extradition for a criminal offence referred to in paragraph 1 of this article is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case at the request of the requesting Party to its competent authorities for the purpose of prosecution and shall report the final outcome to the requesting Party in due course. Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.

Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of each authority responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty.

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The Secretary General of the Council of Europe shall set up and keep updated a register of authorities so designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.

Title 3 – General principles relating to mutual assistance

Article 25 – General principles relating to mutual assistance

The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Each Party shall also adopt such legislative and other measures as may be necessary to carry out the obligations set forth in Articles 27 through 35.

Each Party may, in urgent circumstances, make requests for mutual assistance or communications related thereto by expedited means of communication, including fax or e-mail, to the extent that such means provide appropriate levels of security and authentication (including the use of encryption, where necessary), with formal confirmation to follow, where required by the requested Party. The requested Party shall accept and respond to the request by any such expedited means of communication.

Except as otherwise specifically provided in articles in this chapter, mutual assistance shall be subject to the conditions provided for by the law of the requested Party or by applicable mutual assistance treaties, including the grounds on which the requested Party may refuse co-operation. The requested Party shall not exercise the right to refuse mutual assistance in relation to the offences referred to in Articles 2 through 11 solely on the ground that the request concerns an offence which it considers a

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fiscal offence.

Where, in accordance with the provisions of this chapter, the requested Party is permitted to make mutual assistance conditional upon the existence of dual criminality, that condition shall be deemed fulfilled, irrespective of whether its laws place the offence within the same category of offence or denominate the offence by the same terminology as the requesting Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under its laws.

Article 26 – Spontaneous information

A Party may, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

Prior to providing such information, the providing Party may request that it be kept confidential or only used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

Article 27 –Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

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Where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties, the provisions of paragraphs 2 through 9 of this article shall apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

Each Party shall designate a central authority or authorities responsible for sending and answering requests for mutual assistance, the execution of such requests or their transmission to the authorities competent for their execution.

The central authorities shall communicate directly with each other;

Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of this paragraph;

The Secretary General of the Council of Europe shall set up and keep updated a register of central authorities designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.

Mutual assistance requests under this article shall be executed in accordance with the procedures specified by the requesting Party, except where incompatible with the law of the requested Party.

The requested Party may, in addition to the grounds for refusal established in Article 25, paragraph 4, refuse assistance if:

the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or

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it considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

The requested Party may postpone action on a request if such action would prejudice criminal investigations or proceedings conducted by its authorities.

Before refusing or postponing assistance, the requested Party shall, where appropriate after having consulted with the requesting Party, consider whether the request may be granted partially or subject to such conditions as it deems necessary.

The requested Party shall promptly inform the requesting Party of the outcome of the execution of a request for assistance. Reasons shall be given for any refusal or postponement of the request. The requested Party shall also inform the requesting Party of any reasons that render impossible the execution of the request or are likely to delay it significantly.

The requesting Party may request that the requested Party keep confidential the fact of any request made under this chapter as well as its subject, except to the extent necessary for its execution. If the requested Party cannot comply with the request for confidentiality, it shall promptly inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

In the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by judicial authorities of the requesting Party to such authorities of the requested Party. In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

Any request or communication under this paragraph may be made through the International Criminal Police Organisation (Interpol).

Where a request is made pursuant to sub-paragraph a. of this article and the authority is not

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competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

Requests or communications made under this paragraph that do not involve coercive action may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this paragraph are to be addressed to its central authority.

Article 28 – Confidentiality and limitation on use

When there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and the requested Parties, the provisions of this article shall apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

The requested Party may make the supply of information or material in response to a request dependent on the condition that it is:

kept confidential where the request for mutual legal assistance could not be complied with in the absence of such condition, or

not used for investigations or proceedings other than those stated in the request.

If the requesting Party cannot comply with a condition referred to in paragraph 2, it shall promptly inform the other Party, which shall then determine whether the information should nevertheless be provided. When the requesting Party accepts the condition, it shall be bound by it.

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Any Party that supplies information or material subject to a condition referred to in paragraph 2 may require the other Party to explain, in relation to that condition, the use made of such information or material.

Section 2 – Specific provisions

Title 1 – Mutual assistance regarding provisional measures

Article 29 – Expedited preservation of stored computer data

A Party may request another Party to order or otherwise obtain the expeditious preservation of data stored by means of a computer system, located within the territory of that other Party and in respect of which the requesting Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the data.

A request for preservation made under paragraph 1 shall specify:

the authority seeking the preservation;

the offence that is the subject of a criminal investigation or proceedings and a brief summary of the related facts;

the stored computer data to be preserved and its relationship to the offence;

any available information identifying the custodian of the stored computer data or the location of the computer system;

the necessity of the preservation; and

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that the Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the stored computer data.

Upon receiving the request from another Party, the requested Party shall take all appropriate measures to preserve expeditiously the specified data in accordance with its domestic law. For the purposes of responding to a request, dual criminality shall not be required as a condition to providing such preservation.

A Party that requires dual criminality as a condition for responding to a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of stored data may, in respect of offences other than those established in accordance with Articles 2 through 11 of this Convention, reserve the right to refuse the request for preservation under this article in cases where it has reasons to believe that at the time of disclosure the condition of dual criminality cannot be fulfilled.

In addition, a request for preservation may only be refused if:

the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or

the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

Where the requested Party believes that preservation will not ensure the future availability of the data or will threaten the confidentiality of or otherwise prejudice the requesting Party's investigation, it shall promptly so inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

Any preservation effected in response to the request referred to in paragraph 1 shall be for a period not less than sixty days, in order to enable the requesting Party to submit a request for the

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search or similar access, seizure or similar securing, or disclosure of the data. Following the receipt of such a request, the data shall continue to be preserved pending a decision on that request.

Article 30 – Expedited disclosure of preserved traffic data

Where, in the course of the execution of a request made pursuant to Article 29 to preserve traffic data concerning a specific communication, the requested Party discovers that a service provider in another State was involved in the transmission of the communication, the requested Party shall expeditiously disclose to the requesting Party a sufficient amount of traffic data to identify that service provider and the path through which the communication was transmitted.

Disclosure of traffic data under paragraph 1 may only be withheld if:

the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence; or

the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

Title 2 – Mutual assistance regarding investigative powers

Article 31 – Mutual assistance regarding accessing of stored computer data

A Party may request another Party to search or similarly access, seize or similarly secure, and disclose data stored by means of a computer system located within the territory of the requested Party, including data that has been preserved pursuant to Article 29.

The requested Party shall respond to the request through the application of international

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instruments, arrangements and laws referred to in Article 23, and in accordance with other relevant provisions of this chapter.

The request shall be responded to on an expedited basis where:

there are grounds to believe that relevant data is particularly vulnerable to loss or modification; or

the instruments, arrangements and laws referred to in paragraph 2 otherwise provide for expedited co-operation.

Article 32 –Trans-border access to stored computer data with consent or where publicly available

A Party may, without the authorisation of another Party:

access publicly available (open source) stored computer data, regardless of where the data is located geographically; or

access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.

Article 33 – Mutual assistance regarding the real-time collection of traffic data

The Parties shall provide mutual assistance to each other in the real-time collection of traffic data associated with specified communications in their territory transmitted by means of a computer system. Subject to the provisions of paragraph 2, this assistance shall be governed by the conditions and procedures provided for under domestic law.

Each Party shall provide such assistance at least with respect to criminal offences for which real-time collection of traffic data would be available in a similar domestic case.

Article 34 – Mutual assistance regarding the interception of content data

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The Parties shall provide mutual assistance to each other in the real-time collection or recording of content data of specified communications transmitted by means of a computer system to the extent permitted under their applicable treaties and domestic laws.

Title 3 – 24/7 Network

Article 35 – 24/7 Network

Each Party shall designate a point of contact available on a twenty-four hour, seven-day-a-week basis, in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence. Such assistance shall include facilitating, or, if permitted by its domestic law and practice, directly carrying out the following measures:

the provision of technical advice;

the preservation of data pursuant to Articles 29 and 30;

the collection of evidence, the provision of legal information, and locating of suspects.

A Party's point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis.

If the point of contact designated by a Party is not part of that Party's authority or authorities responsible for international mutual assistance or extradition, the point of contact shall ensure that it is able to co-ordinate with such authority or authorities on an expedited basis.

Each Party shall ensure that trained and equipped personnel are available, in order to facilitate the operation of the network.

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Chapter IV – Final provisions

Article 36 – Signature and entry into force

This Convention shall be open for signature by the member States of the Council of Europe and by non-member States which have participated in its elaboration.

This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five States, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraphs 1 and 2.

In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Convention in accordance with the provisions of paragraphs 1 and 2.

Article 37 – Accession to the Convention

After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Contracting States to the Convention, may invite any State which is not a member of the Council and which has not participated in its elaboration to accede to this Convention. The decision shall be taken by the majority provided for in Article 20.d. of the Statute of the Council of Europe and by the unanimous

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vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

In respect of any State acceding to the Convention under paragraph 1 above, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 38 – Territorial application

Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the declaration by the Secretary General.

Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 39 – Effects of the Convention

The purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of:

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–the European Convention on Extradition, opened for signature in Paris, on 13 December 1957 (ETS No. 24);

–the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30);

–the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 17 March 1978 (ETS No. 99).

If two or more Parties have already concluded an agreement or treaty on the matters dealt with in this Convention or have otherwise established their relations on such matters, or should they in future do so, they shall also be entitled to apply that agreement or treaty or to regulate those relations accordingly. However, where Parties establish their relations in respect of the matters dealt with in the present Convention other than as regulated therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

Nothing in this Convention shall affect other rights, restrictions, obligations and responsibilities of a Party.

Article 40 – Declarations

By a written notification addressed to the Secretary General of the Council of Europe, any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the possibility of requiring additional elements as provided for under Articles 2, 3, 6 paragraph 1.b, 7, 9 paragraph 3, and 27, paragraph 9.e.

Article 41 – Federal clause

A federal State may reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central

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government and constituent States or other similar territorial entities provided that it is still able to co-operate under Chapter III.

When making a reservation under paragraph 1, a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures.

With regard to the provisions of this Convention, the application of which comes under the jurisdiction of constituent States or other similar territorial entities, that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

Article 42 – Reservations

By a written notification addressed to the Secretary General of the Council of Europe, any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the reservation(s) provided for in Article 4, paragraph 2, Article 6, paragraph 3, Article 9, paragraph 4, Article 10, paragraph 3, Article 11, paragraph 3, Article 14, paragraph 3, Article 22, paragraph 2, Article 29, paragraph 4, and Article 41, paragraph 1. No other reservation may be made.

Article 43 – Status and withdrawal of reservations

A Party that has made a reservation in accordance with Article 42 may wholly or partially withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect on the date of receipt of such notification by the Secretary General. If the notification states that the withdrawal of a reservation is to take effect on a date specified

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therein, and such date is later than the date on which the notification is received by the Secretary General, the withdrawal shall take effect on such a later date.

A Party that has made a reservation as referred to in Article 42 shall withdraw such reservation, in whole or in part, as soon as circumstances so permit.

The Secretary General of the Council of Europe may periodically enquire with Parties that have made one or more reservations as referred to in Article 42 as to the prospects for withdrawing such reservation(s).

Article 44 – Amendments

Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention as well as to any State which has acceded to, or has been invited to accede to, this Convention in accordance with the provisions of Article 37.

Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.

The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation with the non-member States Parties to this Convention, may adopt the amendment.

The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

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Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 45 – Settlement of disputes

The European Committee on Crime Problems (CDPC) shall be kept informed regarding the interpretation and application of this Convention.

In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the CDPC, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 46 – Consultations of the Parties

The Parties shall, as appropriate, consult periodically with a view to facilitating:

the effective use and implementation of this Convention, including the identification of any problems thereof, as well as the effects of any declaration or reservation made under this Convention;

the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form;

consideration of possible supplementation or amendment of the Convention.

The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the result of consultations referred to in paragraph 1.

The CDPC shall, as appropriate, facilitate the consultations referred to in paragraph 1 and take the measures necessary to assist the Parties in their efforts to supplement or amend the

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Convention. At the latest three years after the present Convention enters into force, the European Committee on Crime Problems (CDPC) shall, in co-operation with the Parties, conduct a review of all of the Convention's provisions and, if necessary, recommend any appropriate amendments.

Except where assumed by the Council of Europe, expenses incurred in carrying out the provisions of paragraph 1 shall be borne by the Parties in the manner to be determined by them.

The Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this article.

Article 47 – Denunciation

Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 48 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention as well as any State which has acceded to, or has been invited to accede to, this Convention of:

any signature;

the deposit of any instrument of ratification, acceptance, approval or accession;

any date of entry into force of this Convention in accordance with Articles 36 and 37;

any declaration made under Article 40 or reservation made in accordance with Article 42;

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any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Budapest, this 23rd day of November 2001, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

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8. E-Commerce

Guided Reading:

Andrew Murray (2016) Information Technology law, pp. 451-473, 480-538

Additional Reading:

8.1. Directive on Trade Marks

DIRECTIVE (EU) 2015/2436 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2015 to approximate the laws of the Member States relating to trade marks

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114(1) thereof, […]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

GENERAL PROVISIONS

Article 1

Scope

This Directive applies to every trade mark in respect of goods or services which is the subject of registration or of an application for registration in a Member State as an individual trade mark, a guarantee or certification mark or a collective mark, or which is the subject of a registration or an application for registration in the Benelux Office for Intellectual Property or of an international registration having effect in a Member State.

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Article 2

Definitions

For the purpose of this Directive, the following definitions apply:

(a) 'office' means the central industrial property office of the Member State or the Benelux Office for Intellectual Property, entrusted with the registration of trade marks;

(b) 'register' means the register of trade marks kept by an office.

CHAPTER 2
SUBSTANTIVE LAW ON TRADE MARKS

SECTION 1
Signs of which a trade mark may consist

Article 3

Signs of which a trade mark may consist

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

(a) distinguishing the goods or services of one undertaking from those of other undertakings; and

(b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

SECTION 2
Grounds for refusal or invalidity

Article 4

Absolute grounds for refusal or invalidity

1. The following shall not be registered or, if registered, shall be liable to be declared invalid:

(a) signs which cannot constitute a trade mark;

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(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

(e) signs which consist exclusively of:

(i) the shape, or another characteristic, which results from the nature of the goods themselves;

(ii) the shape, or another characteristic, of goods which is necessary to obtain a technical result;

(iii) the shape, or another characteristic, which gives substantial value to the goods;

(f) trade marks which are contrary to public policy or to accepted principles of morality;

(g) trade marks which are of such a nature as to deceive the public, for instance, as to the nature, quality or geographical origin of the goods or service;

(h) trade marks which have not been authorised by the competent authorities and are to be refused or invalidated pursuant to Article 6ter of the Paris Convention;

(i) trade marks which are excluded from registration pursuant to Union legislation or the national law of the Member State concerned, or to international agreements to which the Union or the Member State concerned is party, providing for protection of designations of origin and geographical indications;

(j) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional terms for wine;

(k) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional specialities guaranteed;

(l) trade marks which consist of, or reproduce in their essential elements, an earlier plant variety denomination registered in accordance with Union legislation or the national law of the Member State concerned, or international agreements to which the Union or the Member State concerned is party, providing protection for plant variety rights, and which are in respect of plant varieties of the same or closely related species.

2. A trade mark shall be liable to be declared invalid where the application for registration of the trade mark was made in bad faith by the applicant. Any Member State may also provide that such a trade mark is not to be registered.

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3. Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where and to the extent that:

(a) the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Union;

(b) the trade mark includes a sign of high symbolic value, in particular a religious symbol;

(c) the trade mark includes badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention and which are of public interest, unless the consent of the competent authority to their registration has been given in conformity with the law of the Member State.

4. A trade mark shall not be refused registration in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration, following the use which has been made of it, it has acquired a distinctive character. A trade mark shall not be declared invalid for the same reasons if, before the date of application for a declaration of invalidity, following the use which has been made of it, it has acquired a distinctive character.

5. Any Member State may provide that paragraph 4 is also to apply where the distinctive character was acquired after the date of application for registration but before the date of registration.

Article 5

Relative grounds for refusal or invalidity

1. A trade mark shall not be registered or, if registered, shall be liable to be declared invalid where:

(a) it is identical with an earlier trade mark, and the goods or services for which the trade mark is applied for or is registered are identical with the goods or services for which the earlier trade mark is protected;

(b) because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

2. 'Earlier trade marks' within the meaning of paragraph 1 means:

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(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

(i) EU trade marks;

(ii) trade marks registered in the Member State concerned or, in the case of Belgium, Luxembourg or the Netherlands, at the Benelux Office for Intellectual Property;

(iii) trade marks registered under international arrangements which have effect in the Member State concerned;

(b) EU trade marks which validly claim seniority, in accordance with Regulation (EC) No 207/2009, of a trade mark referred to in points (a)(ii) and (iii), even when the latter trade mark has been surrendered or allowed to lapse;

(c) applications for the trade marks referred to in points (a) and (b), subject to their registration;

(d) trade marks which, on the date of application for registration of the trade mark, or, where appropriate, of the priority claimed in respect of the application for registration of the trade mark, are well known in the Member State concerned, in the sense in which the words 'well-known' are used in Article 6bis of the Paris Convention.

3. Furthermore, a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where:

(a) it is identical with, or similar to, an earlier trade mark irrespective of whether the goods or services for which it is applied or registered are identical with, similar to or not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State in respect of which registration is applied for or in which the trade mark is registered or, in the case of an EU trade mark, has a reputation in the Union and the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark;

(b) an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name without the proprietor's authorisation, unless the agent or representative justifies his action;

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(c) and to the extent that, pursuant to Union legislation or the law of the Member State concerned providing for protection of designations of origin and geographical indications:

(i) an application for a designation of origin or a geographical indication had already been submitted in accordance with Union legislation or the law of the Member State concerned prior to the date of application for registration of the trade mark or the date of the priority claimed for the application, subject to its subsequent registration;

(ii) that designation of origin or geographical indication confers on the person authorised under the relevant law to exercise the rights arising therefrom the right to prohibit the use of a subsequent trade mark.

4. Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that:

(a) rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark, and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark;

(b) the use of the trade mark may be prohibited by virtue of an earlier right, other than the rights referred to in paragraph 2 and point (a) of this paragraph, and in particular:

(i) a right to a name;

(ii) a right of personal portrayal;

(iii) a copyright;

(iv) an industrial property right;

(c) the trade mark is liable to be confused with an earlier trade mark protected abroad, provided that, at the date of the application, the applicant was acting in bad faith.

5. The Member States shall ensure that in appropriate circumstances there is no obligation to refuse registration or to declare a trade mark invalid where the proprietor of the earlier trade mark or other earlier right consents to the registration of the later trade mark.

6. Any Member State may provide that, by way of derogation from paragraphs 1 to 5, the grounds for refusal of registration or invalidity in force in that Member State prior to the date of the entry into force of the provisions necessary to comply with Directive 89/104/EEC are to apply to trade marks for which an application has been made prior to that date.

Article 6

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Establishment *a posteriori* of invalidity or revocation of a trade mark

Where the seniority of a national trade mark or of a trade mark registered under international arrangements having effect in the Member State, which has been surrendered or allowed to lapse, is claimed for an EU trade mark, the invalidity or revocation of the trade mark providing the basis for the seniority claim may be established *a posteriori*, provided that the invalidity or revocation could have been declared at the time the mark was surrendered or allowed to lapse. In such a case, the seniority shall cease to produce its effects.

Article 7

Grounds for refusal or invalidity relating to only some of the goods or services

Where grounds for refusal of registration or for invalidity of a trade mark exist in respect of only some of the goods or services for which that trade mark has been applied or registered, refusal of registration or invalidity shall cover those goods or services only.

Article 8

Lack of distinctive character or of reputation of an earlier trade mark precluding a declaration of invalidity of a registered trade mark

An application for a declaration of invalidity on the basis of an earlier trade mark shall not succeed at the date of application for invalidation if it would not have been successful at the filing date or the priority date of the later trade mark for any of the following reasons:

(a) the earlier trade mark, liable to be declared invalid pursuant to Article 4(1)(b), (c) or (d), had not yet acquired a distinctive character as referred to in Article 4(4);

(b) the application for a declaration of invalidity is based on Article 5(1)(b) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of Article 5(1)(b);

(c) the application for a declaration of invalidity is based on Article 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of Article 5(3)(a).

Article 9

Preclusion of a declaration of invalidity due to acquiescence

1. Where, in a Member State, the proprietor of an earlier trade mark as referred to in Article 5(2) or Article 5(3)(a) has acquiesced, for a period of five successive years, in the use of a later trade mark registered in that Member State while being aware of such use, that proprietor shall no longer be entitled on the basis of the earlier trade mark to apply for a declaration that the later trade

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mark is invalid in respect of the goods or services for which the later trade mark has been used, unless registration of the later trade mark was applied for in bad faith.

2. Member States may provide that paragraph 1 of this Article is to apply to the proprietor of any other earlier right referred to in Article 5(4)(a) or (b).

3. In the cases referred to in paragraphs 1 and 2, the proprietor of a later registered trade mark shall not be entitled to oppose the use of the earlier right, even though that right may no longer be invoked against the later trade mark.

SECTION 3

Rights conferred and limitations

Article 10

Rights conferred by a trade mark

1. The registration of a trade mark shall confer on the proprietor exclusive rights therein.

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered;

(b) the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) the sign is identical with, or similar to, the trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to, or not similar to, those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

3. The following, in particular, may be prohibited under paragraph 2:

(a) affixing the sign to the goods or to the packaging thereof;

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(b) offering the goods or putting them on the market, or stocking them for those purposes, under the sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign;

(d) using the sign as a trade or company name or part of a trade or company name;

(e) using the sign on business papers and in advertising;

(f) using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC.

4. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall also be entitled to prevent all third parties from bringing goods, in the course of trade, into the Member State where the trade mark is registered, without being released for free circulation there, where such goods, including the packaging thereof, come from third countries and bear without authorisation a trade mark which is identical with the trade mark registered in respect of such goods, or which cannot be distinguished in its essential aspects from that trade mark.

The entitlement of the trade mark proprietor pursuant to the first subparagraph shall lapse if, during the proceedings to determine whether the registered trade mark has been infringed, initiated in accordance with Regulation (EU) No 608/2013, evidence is provided by the declarant or the holder of the goods that the proprietor of the registered trade mark is not entitled to prohibit the placing of the goods on the market in the country of final destination.

5. Where, under the law of a Member State, the use of a sign under the conditions referred to in paragraph 2 (b) or (c) could not be prohibited before the date of entry into force of the provisions necessary to comply with Directive 89/104/EEC in the Member State concerned, the rights conferred by the trade mark may not be relied on to prevent the continued use of the sign.

6. Paragraphs 1, 2, 3 and 5 shall not affect provisions in any Member State relating to the protection against the use of a sign other than use for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Article 11

The right to prohibit preparatory acts in relation to the use of packaging or other means

Where the risk exists that the packaging, labels, tags, security or authenticity features or devices, or any other means to which the trade mark is affixed, could be used in relation to goods or services and that use would constitute an infringement of the rights of the proprietor of a trade mark under Article 10(2) and (3), the proprietor of that trade mark shall have the right to prohibit the following acts if carried out in the course of trade:

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(a)affixing a sign identical with, or similar to, the trade mark on packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark may be affixed;

(b)offering or placing on the market, or stocking for those purposes, or importing or exporting, packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark is affixed.

Article 12

Reproduction of trade marks in dictionaries

If the reproduction of a trade mark in a dictionary, encyclopaedia or similar reference work, in print or electronic form, gives the impression that it constitutes the generic name of the goods or services for which the trade mark is registered, the publisher of the work shall, at the request of the proprietor of the trade mark, ensure that the reproduction of the trade mark is, without delay, and in the case of works in printed form at the latest in the next edition of the publication, accompanied by an indication that it is a registered trade mark.

Article 13

Prohibition of the use of a trade mark registered in the name of an agent or representative

1. Where a trade mark is registered in the name of the agent or representative of a person who is the proprietor of that trade mark, without the proprietor's consent, the latter shall be entitled to do either or both of the following:

(a) oppose the use of the trade mark by his agent or representative;

(b) demand the assignment of the trade mark in his favour.

2. Paragraph 1 shall not apply where the agent or representative justifies his action.

Article 14

Limitation of the effects of a trade mark

1. A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade:

(a) the name or address of the third party, where that third party is a natural person;

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(b) signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services;

(c) the trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of the trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

2. Paragraph 1 shall only apply where the use made by the third party is in accordance with honest practices in industrial or commercial matters.

3. A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality, if that right is recognised by the law of the Member State in question and the use of that right is within the limits of the territory in which it is recognised.

Article 15

Exhaustion of the rights conferred by a trade mark

1. A trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark by the proprietor or with the proprietor's consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

Article 16

Use of trade marks

1. If, within a period of five years following the date of the completion of the registration procedure, the proprietor has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during a continuous five-year period, the trade mark shall be subject to the limits and sanctions provided for in Article 17, Article 19(1), Article 44(1) and (2), and Article 46(3) and (4), unless there are proper reasons for non-use.

2. Where a Member State provides for opposition proceedings following registration, the five-year period referred to in paragraph 1 shall be calculated from the date when the mark can no longer be opposed or, in the event that an opposition has been lodged, from the date when a decision terminating the opposition proceedings became final or the opposition was withdrawn.

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3. With regard to trade marks registered under international arrangements and having effect in the Member State, the five-year period referred to in paragraph 1 shall be calculated from the date when the mark can no longer be rejected or opposed. Where an opposition has been lodged or when an objection on absolute or relative grounds has been notified, the period shall be calculated from the date when a decision terminating the opposition proceedings or a ruling on absolute or relative grounds for refusal became final or the opposition was withdrawn.

4. The date of commencement of the five-year period, as referred to in paragraphs 1 and 2, shall be entered in the register.

5. The following shall also constitute use within the meaning of paragraph 1:

(a) use of the trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, regardless of whether or not the trade mark in the form as used is also registered in the name of the proprietor;

(b) affixing of the trade mark to goods or to the packaging thereof in the Member State concerned solely for export purposes.

6. Use of the trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.

Article 17

Non-use as defence in infringement proceedings

The proprietor of a trade mark shall be entitled to prohibit the use of a sign only to the extent that the proprietor's rights are not liable to be revoked pursuant to Article 19 at the time the infringement action is brought. If the defendant so requests, the proprietor of the trade mark shall furnish proof that, during the five-year period preceding the date of bringing the action, the trade mark has been put to genuine use as provided in Article 16 in connection with the goods or services in respect of which it is registered and which are cited as justification for the action, or that there are proper reasons for non-use, provided that the registration procedure of the trade mark has at the date of bringing the action been completed for not less than five years.

Article 18

Intervening right of the proprietor of a later registered trade mark as defence in infringement proceedings

1. In infringement proceedings, the proprietor of a trade mark shall not be entitled to prohibit the use of a later registered mark where that later trade mark would not be declared invalid pursuant to Article 8, Article 9(1) or (2) or Article 46(3).

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2. In infringement proceedings, the proprietor of a trade mark shall not be entitled to prohibit the use of a later registered EU trade mark where that later trade mark would not be declared invalid pursuant to Article 53(1), (3) or (4), 54(1) or (2) or 57(2) of Regulation (EC) No 207/2009.

3. Where the proprietor of a trade mark is not entitled to prohibit the use of a later registered trade mark pursuant to paragraph 1 or 2, the proprietor of that later registered trade mark shall not be entitled to prohibit the use of the earlier trade mark in infringement proceedings, even though that earlier right may no longer be invoked against the later trade mark.

SECTION 4

Revocation of trade mark rights

Article 19

Absence of genuine use as ground for revocation

1. A trade mark shall be liable to revocation if, within a continuous five-year period, it has not been put to genuine use in the Member State in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use.

2. No person may claim that the proprietor's rights in a trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application for revocation, genuine use of the trade mark has been started or resumed.

3. The commencement or resumption of use within the three-month period preceding the filing of the application for revocation which began at the earliest on expiry of the continuous five-year period of non-use shall be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application for revocation may be filed.

Article 20

Trade mark having become generic or misleading indication as grounds for revocation

A trade mark shall be liable to revocation if, after the date on which it was registered:

(a) as a result of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service in respect of which it is registered;

(b) as a result of the use made of it by the proprietor of the trade mark or with the proprietor's consent in respect of the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

Article 21

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Revocation relating to only some of the goods or services

Where grounds for revocation of a trade mark exist in respect of only some of the goods or services for which that trade mark has been registered, revocation shall cover those goods or services only.

SECTION 5

Trade marks as objects of property

Article 22

Transfer of registered trade marks

1. A trade mark may be transferred, separately from any transfer of the undertaking, in respect of some or all of the goods or services for which it is registered.

2. A transfer of the whole of the undertaking shall include the transfer of the trade mark except where there is agreement to the contrary or circumstances clearly dictate otherwise. This provision shall apply to the contractual obligation to transfer the undertaking.

3. Member States shall have procedures in place to allow for the recordal of transfers in their registers.

Article 23

***Rights* in rem**

1. A trade mark may, independently of the undertaking, be given as security or be the subject of rights *in rem*.

2. Member States shall have procedures in place to allow for the recordal of rights *in rem* in their registers.

Article 24

Levy of execution

1. A trade mark may be levied in execution.

2. Member States shall have procedures in place to allow for the recordal of levy of execution in their registers.

Article 25

Licensing

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1. A trade mark may be licensed for some or all of the goods or services for which it is registered and for the whole or part of the Member State concerned. A licence may be exclusive or non-exclusive.

2. The proprietor of a trade mark may invoke the rights conferred by that trade mark against a licensee who contravenes any provision in his licensing contract with regard to:

(a) its duration;

(b) the form covered by the registration in which the trade mark may be used;

(c) the scope of the goods or services for which the licence is granted;

(d) the territory in which the trade mark may be affixed; or

(e) the quality of the goods manufactured or of the services provided by the licensee.

3. Without prejudice to the provisions of the licensing contract, the licensee may bring proceedings for infringement of a trade mark only if its proprietor consents thereto. However, the holder of an exclusive licence may bring such proceedings if the proprietor of the trade mark, after formal notice, does not himself bring infringement proceedings within an appropriate period.

4. A licensee shall, for the purpose of obtaining compensation for damage suffered by him, be entitled to intervene in infringement proceedings brought by the proprietor of the trade mark.

5. Member States shall have procedures in place to allow for the recordal of licences in their registers.

Article 26

Applications for a trade mark as an object of property

Articles 22 to 25 shall apply to applications for trade marks.

SECTION 6

Guarantee or certification marks and collective marks

Article 27

Definitions

For the purposes of this Directive, the following definitions apply:

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(a)‘guarantee or certification mark’ means a trade mark which is described as such when the mark is applied for and is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified;

(b)‘collective mark’ means a trade mark which is described as such when the mark is applied for and is capable of distinguishing the goods or services of the members of an association which is the proprietor of the mark from the goods or services of other undertakings.

Article 28

Guarantee or certification marks

1. Member States may provide for the registration of guarantee or certification marks.

2. Any natural or legal person, including institutions, authorities and bodies governed by public law, may apply for guarantee or certification marks provided that such person does not carry on a business involving the supply of goods or services of the kind certified.

Member States may provide that a guarantee or certification mark is not to be registered unless the applicant is competent to certify the goods or services for which the mark is to be registered.

3. Member States may provide that guarantee or certification marks are not to be registered, or are to be revoked or declared invalid, on grounds other than those specified in Articles 4, 19 and 20, where the function of those marks so requires.

4. By way of derogation from Article 4(1)(c), Member States may provide that signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute guarantee or certification marks. Such a guarantee or certification mark shall not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided that third party uses them in accordance with honest practices in industrial or commercial matters. In particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

5. The requirements laid down in Article 16 shall be satisfied where genuine use of a guarantee or certification mark in accordance with Article 16 is made by any person who has the authority to use it.

Article 29

Collective marks

1. Member States shall provide for the registration of collective marks.

2. Associations of manufacturers, producers, suppliers of services or traders, which, under the terms of the law governing them, have the capacity in their own name to have rights and

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obligations, to make contracts or accomplish other legal acts, and to sue and be sued, as well as legal persons governed by public law, may apply for collective marks.

3. By way of derogation from Article 4(1)(c), Member States may provide that signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute collective marks. Such a collective mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, such signs or indications, provided that third party uses them in accordance with honest practices in industrial or commercial matters. In particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

Article 30

Regulations governing use of a collective mark

1. An applicant for a collective mark shall submit the regulations governing its use to the office.

2. The regulations governing use shall specify at least the persons authorised to use the mark, the conditions of membership of the association and the conditions of use of the mark, including sanctions. The regulations governing use of a mark referred to in Article 29(3) shall authorise any person whose goods or services originate in the geographical area concerned to become a member of the association which is the proprietor of the mark, provided that the person fulfils all the other conditions of the regulations.

Article 31

Refusal of an application

1. In addition to the grounds for refusal of a trade mark application provided for in Article 4, where appropriate with the exception of Article 4(1)(c) concerning signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, and Article 5,and without prejudice to the right of an office not to undertake examination *ex officio* of relative grounds, an application for a collective mark shall be refused where the provisions of point (b) of Article 27, Article 29 or Article 30 are not satisfied, or where the regulations governing use of that collective mark are contrary to public policy or to accepted principles of morality.

2. An application for a collective mark shall also be refused if the public is liable to be misled as regards the character or the significance of the mark, in particular if it is likely to be taken to be something other than a collective mark.

3. An application shall not be refused if the applicant, as a result of amendment of the regulations governing use of the collective mark, meets the requirements referred to in paragraphs 1 and 2.

Article 32

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Use of collective marks

The requirements of Article 16 shall be satisfied where genuine use of a collective mark in accordance with that Article is made by any person who has authority to use it.

Article 33

Amendments to the regulations governing use of a collective mark

1. The proprietor of a collective mark shall submit to the office any amended regulations governing use.

2. Amendments to the regulations governing use shall be mentioned in the register unless the amended regulations do not satisfy the requirements of Article 30 or involve one of the grounds for refusal referred to in Article 31.

3. For the purposes of this Directive, amendments to the regulations governing use shall take effect only from the date of entry of the mention of those amendments in the register.

Article 34

Persons entitled to bring an action for infringement

1. Article 25(3) and (4) shall apply to every person who has the authority to use a collective mark.

2. The proprietor of a collective mark shall be entitled to claim compensation on behalf of persons who have authority to use the mark where those persons have sustained damage as a result of unauthorised use of the mark.

Article 35

Additional grounds for revocation

In addition to the grounds for revocation provided for in Articles 19 and 20, the rights of the proprietor of a collective mark shall be revoked on the following grounds:

(a) the proprietor does not take reasonable steps to prevent the mark being used in a manner that is incompatible with the conditions of use laid down in the regulations governing use, including any amendments thereto mentioned in the register;

(b) the manner in which the mark has been used by authorised persons has caused it to become liable to mislead the public in the manner referred to in Article 31(2);

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(c) an amendment to the regulations governing use of the mark has been mentioned in the register in breach of Article 33(2), unless the proprietor of the mark, by further amending the regulations governing use, complies with the requirements of that Article.

Article 36

Additional grounds for invalidity

In addition to the grounds for invalidity provided for in Article 4, where appropriate with the exception of Article 4(1)(c) concerning signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, and Article 5, a collective mark which is registered in breach of Article 31 shall be declared invalid unless the proprietor of the mark, by amending the regulations governing use, complies with the requirements of Article 31.

CHAPTER 3

PROCEDURES

SECTION 1

Application and registration

Article 37

Application requirements

1. An application for registration of a trade mark shall contain at least all of the following:

(a) a request for registration;

(b) information identifying the applicant;

(c) a list of the goods or services in respect of which the registration is requested;

(d) a representation of the trade mark, which satisfies the requirements set out in point (b) of Article 3.

2. The application for a trade mark shall be subject to the payment of a fee determined by the Member State concerned.

Article 38

Date of filing

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1. The date of filing of a trade mark application shall be the date on which the documents containing the information specified in Article 37(1) are filed with the office by the applicant.

2. Member States may, in addition, provide that the accordance of the date of filing is to be subject to the payment of a fee as referred to in Article 37(2).

Article 39

Designation and classification of goods and services

1. The goods and services in respect of which trade mark registration is applied for shall be classified in conformity with the system of classification established by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957 ('the Nice Classification').

2. The goods and services for which protection is sought shall be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that sole basis, to determine the extent of the protection sought.

3. For the purposes of paragraph 2, the general indications included in the class headings of the Nice Classification or other general terms may be used, provided that they comply with the requisite standards of clarity and precision set out in this Article.

4. The office shall reject an application in respect of indications or terms which are unclear or imprecise, where the applicant does not suggest an acceptable wording within a period set by the office to that effect.

5. The use of general terms, including the general indications of the class headings of the Nice Classification, shall be interpreted as including all the goods or services clearly covered by the literal meaning of the indication or term. The use of such terms or indications shall not be interpreted as comprising a claim to goods or services which cannot be so understood.

6. Where the applicant requests registration for more than one class, the applicant shall group the goods and services according to the classes of the Nice Classification, each group being preceded by the number of the class to which that group of goods or services belongs, and shall present them in the order of the classes.

7. Goods and services shall not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification. Goods and services shall not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

Article 40

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Observations by third parties

1. Member States may provide that prior to registration of a trade mark, any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the office written observations, explaining on which grounds the trade mark should not be registered *ex officio*.

Persons and groups or bodies, as referred to in the first subparagraph, shall not be parties to the proceedings before the office.

2. In addition to the grounds referred to in paragraph 1 of this Article, any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the office written observations based on the particular grounds on which the application for a collective mark should be refused under Article 31(1) and (2). This provision may be extended to cover certification and guarantee marks where regulated in Member States.

Article 41

Division of applications and registrations

The applicant or proprietor may divide a national trade mark application or registration into two or more separate applications or registrations by sending a declaration to the office and indicating for each divisional application or registration the goods or services covered by the original application or registration which are to be covered by the divisional applications or registrations.

Article 42

Class fees

Member States may provide that the application and renewal of a trade mark is to be subject to an additional fee for each class of goods and services beyond the first class.

SECTION 2

Procedures for opposition, revocation and invalidity

Article 43

Opposition procedure

1. Member States shall provide for an efficient and expeditious administrative procedure before their offices for opposing the registration of a trade mark application on the grounds provided for in Article 5.

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2. The administrative procedure referred to in paragraph 1 of this Article shall at least provide that the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c) shall be entitled to file a notice of opposition. A notice of opposition may be filed on the basis of one or more earlier rights, provided that they all belong to the same proprietor, and on the basis of part or the totality of the goods or services in respect of which the earlier right is protected or applied for, and may be directed against part or the totality of the goods or services in respect of which the contested mark is applied for.

3. The parties shall be granted, at their joint request, a minimum of two months in the opposition proceedings in order to allow for the possibility of a friendly settlement between the opposing party and the applicant.

Article 44

Non-use as defence in opposition proceedings

1. In opposition proceedings pursuant to Article 43, where at the filing date or date of priority of the later trade mark, the five-year period within which the earlier trade mark must have been put to genuine use as provided for in Article 16 had expired, at the request of the applicant, the proprietor of the earlier trade mark who has given notice of opposition shall furnish proof that the earlier trade mark has been put to genuine use as provided for in Article 16 during the five-year period preceding the filing date or date of priority of the later trade mark, or that proper reasons for non-use existed. In the absence of proof to this effect, the opposition shall be rejected.

2. If the earlier trade mark has been used in relation to only part of the goods or services for which it is registered, it shall, for the purpose of the examination of the opposition as provided for in paragraph 1, be deemed to be registered in respect of that part of the goods or services only.

3. Paragraphs 1 and 2 of this Article shall also apply where the earlier trade mark is an EU trade mark. In such a case, the genuine use of the EU trade mark shall be determined in accordance with Article 15 of Regulation (EC) No 207/2009.

Article 45

Procedure for revocation or declaration of invalidity

1. Without prejudice to the right of the parties to appeal to the courts, Member States shall provide for an efficient and expeditious administrative procedure before their offices for the revocation or declaration of invalidity of a trade mark.

2. The administrative procedure for revocation shall provide that the trade mark is to be revoked on the grounds provided for in Articles 19 and 20.

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3. The administrative procedure for invalidity shall provide that the trade mark is to be declared invalid at least on the following grounds:

(a) the trade mark should not have been registered because it does not comply with the requirements provided for in Article 4;

(b) the trade mark should not have been registered because of the existence of an earlier right within the meaning of Article 5(1) to (3).

4. The administrative procedure shall provide that at least the following are to be entitled to file an application for revocation or for a declaration of invalidity:

(a) in the case of paragraph 2 and paragraph 3(a), any natural or legal person and any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, and which, under the terms of the law governing it, has the capacity to sue in its own name and to be sued;

(b) in the case of paragraph 3(b) of this Article, the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c).

5. An application for revocation or for a declaration of invalidity may be directed against a part or the totality of the goods or services in respect of which the contested mark is registered.

6. An application for a declaration of invalidity may be filed on the basis of one or more earlier rights, provided they all belong to the same proprietor.

Article 46

Non-use as a defence in proceedings seeking a declaration of invalidity

1. In proceedings for a declaration of invalidity based on a registered trade mark with an earlier filing date or priority date, if the proprietor of the later trade mark so requests, the proprietor of the earlier trade mark shall furnish proof that, during the five-year period preceding the date of the application for a declaration of invalidity, the earlier trade mark has been put to genuine use, as provided for in Article 16, in connection with the goods or services in respect of which it is registered and which are cited as justification for the application, or that there are proper reasons for non-use, provided that the registration process of the earlier trade mark has at the date of the application for a declaration of invalidity been completed for not less than five years.

2. Where, at the filing date or date of priority of the later trade mark, the five-year period within which the earlier trade mark was to have been put to genuine use, as provided for in Article 16, had expired, the proprietor of the earlier trade mark shall, in addition to the proof required under paragraph 1 of this Article, furnish proof that the trade mark was put to genuine use during

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the five-year period preceding the filing date or date of priority, or that proper reasons for non-use existed.

3. In the absence of the proof referred to in paragraphs 1 and 2, an application for a declaration of invalidity on the basis of an earlier trade mark shall be rejected.

4. If the earlier trade mark has been used in accordance with Article 16 in relation to only part of the goods or services for which it is registered, it shall, for the purpose of the examination of the application for a declaration of invalidity, be deemed to be registered in respect of that part of the goods or services only.

5. Paragraphs 1 to 4 of this Article shall also apply where the earlier trade mark is an EU trade mark. In such a case, genuine use of the EU trade mark shall be determined in accordance with Article 15 of Regulation (EC) No 207/2009.

Article 47

Consequences of revocation and invalidity

1. A registered trade mark shall be deemed not to have had, as from the date of the application for revocation, the effects specified in this Directive, to the extent that the rights of the proprietor have been revoked. An earlier date, on which one of the grounds for revocation occurred, may be fixed in the decision on the application for revocation, at the request of one of the parties.

2. A registered trade mark shall be deemed not to have had, as from the outset, the effects specified in this Directive, to the extent that the trade mark has been declared invalid.

SECTION 3

Duration and renewal of registration

Article 48

Duration of registration

1. Trade marks shall be registered for a period of 10 years from the date of filing of the application.

2. Registration may be renewed in accordance with Article 49 for further 10-year periods.

Article 49

Renewal

1. Registration of a trade mark shall be renewed at the request of the proprietor of the trade mark or any person authorised to do so by law or by contract, provided that the renewal fees

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have been paid. Member States may provide that receipt of payment of the renewal fees is to be deemed to constitute such a request.

2. The office shall inform the proprietor of the trade mark of the expiry of the registration at least six months before the said expiry. The office shall not be held liable if it fails to give such information.

3. The request for renewal shall be submitted and the renewal fees shall be paid within a period of at least six months immediately preceding the expiry of the registration. Failing that, the request may be submitted within a further period of six months immediately following the expiry of the registration or of the subsequent renewal thereof. The renewal fees and an additional fee shall be paid within that further period.

4. Where the request is submitted or the fees paid in respect of only some of the goods or services for which the trade mark is registered, registration shall be renewed for those goods or services only.

5. Renewal shall take effect from the day following the date on which the existing registration expires. The renewal shall be recorded in the register.

SECTION 4

Communication with the office

Article 50

Communication with the office

Parties to the proceedings or, where appointed, their representatives, shall designate an official address for all official communication with the office. Member States shall have the right to require that such an official address be situated in the European Economic Area.

CHAPTER 4

ADMINISTRATIVE COOPERATION

Article 51

Cooperation in the area of trade mark registration and administration

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in order to promote convergence of practices and tools in relation to the examination and registration of trade marks.

Article 52

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Cooperation in other areas

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in all areas of their activities other than those referred to in Article 51 which are of relevance for the protection of trade marks in the Union.

CHAPTER 5
FINAL PROVISIONS

Article 53

Data protection

The processing of any personal data carried out in the Member States in the framework of this Directive shall be subject to national law implementing Directive 95/46/EC.

Article 54

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 3 to 6, Articles 8 to 14, Articles 16, 17 and 18, Articles 22 to 39, Article 41, Articles 43 to 50 by 14 January 2019. Member States shall bring into force the laws, regulations and administrative provisions to comply with Article 45 by 14 January 2023. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 55

Repeal

Directive 2008/95/EC is repealed with effect from 15 January 2019, without prejudice to the obligations of the Member States relating to the time limit for the transposition into national law of Directive 89/104/EEC set out in Part B of Annex I to Directive 2008/95/EC.

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References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in the Annex.

Article 56

Entry into Force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 1, 7, 15, 19, 20, 21 and 54 to 57 shall apply from 15 January 2019.

Article 57

Addressees

This Directive is addressed to the Member States.

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8.2. CJEU decision in C-523/10 Wintersteiger

JUDGMENT OF THE COURT (First Chamber)

19 April 2012 (*)

In Case C-523/10,

Wintersteiger AG

v

Products 4U Sondermaschinenbau GmbH,

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in proceedings between Wintersteiger AG ('Wintersteiger'), established in Austria, and Products 4U Sondermaschinenbau GmbH ('Products 4U'), established in Germany, concerning Wintersteiger's application to prevent Products 4U from using the Austrian trade mark 'Wintersteiger' as a keyword on the website of a paid referencing service provider.

Legal context[…]

The dispute in the main proceedings and the questions referred for a preliminary ruling

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10 Wintersteiger is an undertaking established in Austria which manufactures and sells worldwide ski and snowboard servicing tools, together with replacement parts and accessories. Since 1993 it is the proprietor of the Austrian trade mark Wintersteiger.

11 Products 4U, which is established in Germany, also develops and sells ski and snowboard servicing tools. In addition, it sells accessories for tools made by other manufacturers, in particular Wintersteiger. Those accessories, which Products 4U describes as 'Wintersteiger-Zubehör' ('Wintersteiger accessories') are neither produced by, nor are they authorised by, Wintersteiger. Like the applicant, Products 4U operates on a worldwide basis and also sells its goods in Austria.

12 Since 1 December 2008, Products 4U has reserved the keyword ('AdWord') 'Wintersteiger' in the advertising system developed by the referencing service provider on Google Internet. Following that reservation, which was limited to Google's German top-level domain, namely the website 'google.de', an internet user who enters the keyword 'Wintersteiger' into the search engine of that referencing service receives a link to Wintersteiger's website as the first search result. However, doing a search of that same term also leads to an advertisement for Products 4U appearing on the right-hand side of the screen with the heading 'Anzeige' ('advertisement'). The text of the advertisement bears the heading 'Skiwerkstattzubehör' ('Ski workshop accessories'), underlined and in blue font. It also contains the words 'Ski und Snowboardmaschinen' ('ski and snowboard tools') and 'Wartung und Reparatur' ('maintenance and repair') in two lines. Products 4U's website address is given in green lettering in the last line. Clicking on the heading 'Skiwerkstattzubehör' ('Ski workshop accessories') brings up the 'Wintersteiger-Zubehör' ('Wintersteiger accessories') on offer on Products 4U's website. The advertisement on 'google.de' does not give any indication that there are no economic links between Wintersteiger and Products 4U. On the other hand, Products 4U has not entered any advertisement linked to the search term 'Wintersteiger' in Google's Austrian top-level domain, namely the website 'google.at'.

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13 Wintersteiger brought an action for injunction in the Austrian courts claiming that, by placing the advertisement on 'google.de', Products 4U infringed its Austrian trade mark. In respect of the jurisdiction of those courts to hear its application, Wintersteiger relied on Article 5(3) of Regulation No 44/2001. It argued that 'google.de' can also be accessed in Austria and that the referencing service is configured in German.

14 Products 4U contested the international jurisdiction of the Austrian courts, and, in the alternative, infringement of the trade mark Wintersteiger. According to that company, since 'google.de' is directed exclusively at German users, the advertisement at issue is therefore also intended only for German customers.

15 The court at first instance considered that, even though 'google.de' can be accessed via the internet in Austria, as Google offers its services under country-specific top-level domains the 'google.de' website was directed at Germany only and, therefore the Austrian courts did not have jurisdiction to hear the application brought by Wintersteiger. The court of appeal, by contrast, found that it did have international jurisdiction, but held that Wintersteiger had no claim and, for that reason, dismissed its application.

16 The Oberster Gerichtshof (Austrian Supreme Court), seised of an appeal on a point of law, asks in the present case under what conditions the advertising by use of the Austrian trade mark Wintersteiger on a website operating under a country-specific top-level domain '.de' may confer jurisdiction on the Austrian courts under Article 5(3) of Regulation No 44/2001 to hear an action for an injunction against use of an Austrian trade mark. In those circumstances the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the case of an alleged infringement by a person established in another Member State of a trade mark granted in the State of the court seised through the use of a keyword (AdWord)

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identical to that trade mark in an internet search engine which offers its services under various country-specific top-level domains, is the phrase 'place where the harmful event occurred or may occur' in Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that:

(a) jurisdiction is established only if the keyword is used on the search engine website the top-level domain of which is that of the State of the court seised;

(b) jurisdiction is established only if the search engine website on which the keyword is used can be accessed in the State of the court seised;

(c) jurisdiction is dependent on the satisfaction of other requirements additional to the accessibility of the website?

(2) If [question 1(c)] is answered in the affirmative:

Which criteria are to be used to determine whether jurisdiction under Article 5(3) of [Regulation No 44/2001] is established where a trade mark granted in the State of the court seised is used as an AdWord on a search engine website with a country-specific top-level domain different from that of the State of the court seised?'

Consideration of the questions referred

17 By its questions, which it is appropriate to examine together, the national court is asking, in essence, what criteria are to be used to determine jurisdiction under Article 5(3) of Regulation No 44/2001 to hear an action relating to an alleged infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on the website of an internet search engine operating under a top-level domain different from that of the Member State where the trade mark is registered.

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18 In that regard, it must be noted at the outset that the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of the defendant, in Article 5(3) of the regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-10269, paragraph 40).

19 It should also be noted that the expression 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (*eDate Advertising and Others*, paragraph 41 and the case-law cited).

20 Those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings (*eDate Advertising and Others*, paragraph 41 and the case-law cited).

The place where the damage occurred

21 As regards, first, the place where the damage occurred, the Court has already held that it is the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage (Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917, paragraph 26).

22 In the context of the internet, the Court has also held that, in the event of an alleged infringement of personality rights, the person who considers that his rights have been infringed by

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means of content placed online on a website has the option of bringing an action for liability, in respect of all the damage caused, before the courts of the Member State in which the centre of his interests is based (see *eDate Advertising and Others*, paragraph 52).

23 As the Court noted on that occasion, the criterion of centre of interests of the person whose rights have been infringed is in accordance with the objective of foreseeability of jurisdiction in so far as it enables the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (*eDate Advertising and Others*, paragraph 50).

24 However, as the Advocate General pointed out at paragraph 20 of his Opinion, that assessment, made in the particular context of infringements of personality rights, does not apply also to the determination of jurisdiction in respect of infringements of intellectual property rights, such as those alleged in the main proceedings.

25 Contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory.

26 Nevertheless, the question whether the use, for advertising, of a sign identical to a national mark on a website operating solely under a country-specific top-level domain different from that of the Member State in which the trade mark is registered in fact infringes that mark falls within the scope of the examination of the substance of the action that the court having jurisdiction will undertake in light of the applicable substantive law.

27 With regard to jurisdiction to hear a claim of infringement of a national mark in a situation such as that in the main proceedings, it must be considered that both the objective of foreseeability and that of sound administration of justice militate in favour of conferring

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jurisdiction, in respect of the damage occurred, on the courts of the Member State in which the right at issue is protected.

28 It is the courts of the Member State in which the trade mark at issue is registered which are best able to assess, taking account of the interpretation of Directive 2008/95 in, inter alia, Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-2417, and Case C-324/09 *L'Oréal and Others* [2011] ECR I-6011, whether a situation such as that in the main proceedings actually infringes the protected national mark. Those courts have the power to determine all the damage allegedly caused to the proprietor of the protected right because of an infringement of it and to hear an application seeking cessation of all infringements of that right.

29 Therefore it must be held that an action relating to infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before the courts of the Member State in which the trade mark is registered.

The place where the event giving rise to the damage occurred

30 As regards, second, the place where the event occurred which gives rise to an alleged infringement of a national mark through the use of a keyword identical to that trade mark on a search engine operating under a country-specific top-level domain of another Member State, it should be noted that the territorial limitation of the protection of a national mark is not such as to exclude the international jurisdiction of courts other than the courts of the Member State in which that trade mark is registered.

31 It is settled case-law that the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose (*eDate Advertising and Others*, paragraph 38

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and the case-law cited), which include the foreseeability of conferring jurisdiction, ensuring sound administration of justice and efficacious conduct of proceedings.

32 It is, in particular, established that the place where the event giving rise to an alleged damage occurred may constitute a significant connecting factor from the point of view of jurisdiction, since it could be particularly helpful in relation to the evidence and the conduct of proceedings.

33 In a situation such as that in the main proceedings, the advantage presented by the place where the event giving rise to an alleged infringement occurred includes the ease with which the court there may gather evidence relating to that event.

34 In the case of an alleged infringement of a national trade mark registered in a Member State because of the display, on the search engine website, of an advertisement using a keyword identical to that trade mark, it is the activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications which should be considered to be the event giving rise to an alleged infringement, and not the display of the advertisement itself.

35 As the Court has already held in the context of interpretation of the directive to approximate the laws of the Member States relating to trade marks, it is the advertiser choosing a keyword identical to the trade mark, and not the provider of the referencing service, who uses it in the course of trade (*Google France and Google*, paragraphs 52 and 58). The event giving rise to a possible infringement of trade mark law therefore lies in the actions of the advertiser using the referencing service for its own commercial communications.

36 It is true that the technical display process by the advertiser is activated, ultimately, on a server belonging to the operator of the search engine used by the advertiser. However, in view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be

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the place where the event giving rise to the damage occurred for the purpose of the application of Article 5(3) of Regulation No 44/2001.

37 By contrast, since it is a definite and identifiable place, both for the applicant and for the defendant, and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings, it must be held that the place of establishment of the advertiser is the place where the activation of the display process is decided.

38 It follows from the foregoing that an action relating to alleged infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may also be brought before the courts of the Member State of the place of establishment of the advertiser.

39 In view of all the foregoing considerations, Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that an action relating to infringement of a trade mark registered in a Member State because of the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before either the courts of the Member State in which the trade mark is registered or the courts of the Member State of the place of establishment of the advertiser.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action relating to infringement of a trade mark registered in a Member State because of the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before either the courts of the Member State in which the trade mark is registered or the courts of the Member State of the place of establishment of the advertiser.

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8.3. CJEU decision in cases C-236/08 to C-238/08 Google France and Google

JUDGMENT OF THE COURT (Grand Chamber)

23 March 2010

In Joined Cases C-236/08 to C-238/08,

Google France SARL, Google Inc.

v

Louis Vuitton Malletier SA (C-236/08),

Google France SARL

v

Viaticum SA, Luteciel SARL (C-237/08),

and

Google France SARL

v

Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08),

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Judgment

1 These references for a preliminary ruling concern the interpretation of Article 5(1) and (2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), Article 9(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) and Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

2 The references have been made in the course of proceedings between, in Case C-236/08, the companies Google France SARL and Google Inc. (individually or jointly 'Google') and the company Louis Vuitton Malletier SA ('Vuitton') and, in Cases C-237/08 and C-238/08, between Google and the companies Viaticum SA ('Viaticum'), Luteciel SARL ('Luteciel'), Centre national de recherche en relations humaines (CNRRH) SARL ('CNRRH') and Tiger SARL ('Tiger'), and two natural persons, Mr Thonet and Mr Raboin, concerning the display on the internet of advertising links on the basis of keywords corresponding to trade marks.

I – Legal context […]

II – The disputes in the main proceedings and the questions referred for a preliminary ruling

A – The 'AdWords' referencing service

22 Google operates an internet search engine. When an internet user performs a search on the basis of one or more words, the search engine will display the sites which appear best to correspond to those words, in decreasing order of relevance. These are referred to as the 'natural' results of the search.

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23 In addition, Google offers a paid referencing service called ‘AdWords’. That service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing, in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user, of an advertising link to its site. That advertising link appears under the heading ‘sponsored links’, which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results.

24 That advertising link is accompanied by a short commercial message. Together, that link and that message constitute the advertisement (‘ad’) displayed under the abovementioned heading.

25 A fee for the referencing service is payable by the advertiser for each click on the advertising link. That fee is calculated on the basis, in particular, of the ‘maximum price per click’ which the advertiser agreed to pay when concluding with Google the contract for the referencing service, and on the basis of the number of times that link is clicked on by internet users.

26 A number of advertisers can reserve the same keyword. The order in which their advertising links are then displayed is determined according to, in particular, the maximum price per click, the number of previous clicks on those links and the quality of the ad as assessed by Google. The advertiser can at any time improve its ranking in the display by fixing a higher maximum price per click or by trying to improve the quality of its ad.

27 Google has set up an automated process for the selection of keywords and the creation of ads. Advertisers select the keywords, draft the commercial message, and input the link to their site.

B – Case C-236/08

28 Vuitton, which markets, in particular, luxury bags and other leather goods, is the proprietor of

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the Community trade mark 'Vuitton' and of the French national trade marks 'Louis Vuitton' and 'LV'. It is common ground that those marks enjoy a certain reputation.

29 At the beginning of 2003, Vuitton became aware that the entry, by internet users, of terms constituting its trade marks into Google's search engine triggered the display, under the heading 'sponsored links', of links to sites offering imitation versions of Vuitton's products. It was also established that Google offered advertisers the possibility of selecting not only keywords which correspond to Vuitton's trade marks, but also those keywords in combination with expressions indicating imitation, such as 'imitation' and 'copy'.

30 Vuitton brought proceeding against Google with a view, inter alia, to obtaining a declaration that Google had infringed its trade marks.

31 Google was found guilty of infringing Vuitton's trade marks by a judgment of 4 February 2005 of the Tribunal de grande instance de Paris (Regional Court, Paris), and subsequently, on appeal, by judgment of 28 June 2006 of the Cour d'appel de Paris (Court of Appeal, Paris). Google has brought an appeal on a point of law (cassation) against that latter judgment.

32 In those circumstances, the Cour de cassation (French Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 5(1)(a) and (b) of [Directive 89/104] and Article 9(1)(a) and (b) of [Regulation No 40/94] be interpreted as meaning that a provider of a paid referencing service who makes available to advertisers keywords reproducing or imitating registered trade marks and arranges by the referencing agreement to create and favourably display, on the basis of those keywords, advertising links to sites offering infringing goods is using those trade marks in a manner which their proprietor is entitled to prevent?

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2. In the event that the trade marks have a reputation, may the proprietor oppose such use under Article 5(2) of [Directive 89/104] and Article 9(1)(c) of [Regulation No 40/94]?

3. In the event that such use does not constitute a use which may be prevented by the trade mark proprietor under [Directive 89/104] or [Regulation No 40/94], may the provider of the paid referencing service be regarded as providing an information society service consisting of the storage of information provided by the recipient of the service, within the meaning of Article 14 of [Directive 2000/31], so that that provider cannot incur liability until it has been notified by the trade mark proprietor of the unlawful use of the sign by the advertiser?'

C – Case C-237/08

33 Viaticum is the proprietor of the French trade marks 'Bourse des Vols', 'Bourse des Voyages' and 'BDV', registered for travel-arrangement services.

34 Luteciel is a provider of information-technology services to travel agencies. It publishes and maintains Viaticum's internet site.

35 Viaticum and Luteciel became aware that the entry, by internet users, of terms constituting the abovementioned trade marks into Google's search engine triggered the display, under the heading 'sponsored links', of links to sites of competitors of Viaticum. It was also established that Google offered advertisers the possibility of selecting, to that end, keywords which correspond to those trade marks.

36 Viaticum and Luteciel brought proceedings against Google. By judgment of 13 October 2003, the Tribunal de grande instance de Nanterre (Regional Court, Nanterre) found Google guilty of infringement of trade marks and ordered it to compensate Viaticum and Luteciel for the losses which they had suffered. Google appealed to the Cour d'appel de Versailles (Court of Appeal, Versailles). That court ruled, by judgment of 10 March 2005, that Google had acted as an accessory to

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infringement, and it upheld the judgment of 13 October 2003. Google has brought an appeal in cassation against the judgment of the Cour d'appel de Versailles.

37 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 5(1)(a) and (b) of [Directive 89/104] be interpreted as meaning that a provider of a paid referencing service who makes available to advertisers keywords reproducing or imitating registered trade marks and arranges by the referencing agreement to create and favourably display, on the basis of those keywords, advertising links to sites offering goods identical or similar to those covered by the trade mark registration is using those trade marks in a manner which their proprietor is entitled to prevent?

2. In the event that such use does not constitute a use which may be prevented by the trade mark proprietor under [Directive 89/104] or [Regulation No 40/94], may the provider of the paid referencing service be regarded as providing an information society service consisting of the storage of information provided by the recipient of the service, within the meaning of Article 14 of [Directive 2000/31], so that that provider cannot incur liability before it has been informed by the trade mark proprietor of the unlawful use of the sign by the advertiser?'

D – Case C-238/08

38 Mr Thonet is the proprietor of the French trade mark 'Eurochallenges', registered for, inter alia, matrimonial agency services. CNRRH is a matrimonial agency and holds a licence, granted by Mr Thonet, under the abovementioned mark.

39 During 2003, Mr Thonet and CNRRH became aware that the entry, by internet users, of terms constituting the abovementioned trade mark into Google's search engine triggered the display, under the heading 'sponsored links', of links to sites of competitors of CNRRH, operated by Mr

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Raboin and Tiger respectively. It was also established that Google offered advertisers the possibility of selecting that term as a keyword for that purpose.

40 On the application of Mr Thonet and CNRRH, Mr Raboin, Tiger and Google were found guilty of infringement of the trade mark by judgment of 14 December 2004 of the Tribunal de grande instance de Nanterre, and subsequently, on appeal, by judgment of 23 March 2006 of the Cour d'appel de Versailles. Google has lodged an appeal in cassation against that latter judgment.

41 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the reservation by an economic operator, by means of an agreement on paid internet referencing, of a keyword triggering, in the case of a request using that word, the display of a link proposing connection to a site operated by that operator in order to offer for sale goods or services, and which reproduces or imitates a trade mark registered by a third party in order to designate identical or similar goods, without the authorisation of the proprietor of that trade mark, constitute in itself an infringement of the exclusive right guaranteed to the latter by Article 5 of [Directive 89/104]?

2. Must Article 5(1)(a) and (b) of [Directive 89/104] be interpreted as meaning that a provider of a paid referencing service who makes available to advertisers keywords reproducing or imitating registered trade marks and arranges by the referencing agreement to create and favourably display, on the basis of those keywords, advertising links to sites offering goods identical or similar to those covered by the trade mark registration is using those trade marks in a manner which their proprietor is entitled to prevent?

3. In the event that such use does not constitute a use which may be prevented by the trade mark proprietor under [Directive 89/104] or [Regulation No 40/94], may the provider of the paid referencing service be regarded as providing an information society service consisting of the storage of information provided by the recipient of the service, within the meaning of Article

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14 of [Directive 2000/31], so that that provider cannot incur liability before it has been informed by the trade mark proprietor of the unlawful use of the sign by the advertiser?'

III – Consideration of the questions referred

A – Use, in an internet referencing service, of keywords corresponding to trade marks of other persons

1. Preliminary considerations

42 It is common ground that the disputes in the main proceedings arise from the use, as keywords in an internet referencing service, of signs which correspond to trade marks, without consent having been given by the proprietors of those trade marks. Those keywords have been chosen by clients of the referencing service provider and accepted and stored by that provider. The clients in question either market imitations of the products of the trade mark proprietor (Case C-236/08) or are, quite simply, competitors of the trade mark proprietor (Cases C-237/08 and C-238/08).

43 By its first question in Case C-236/08, first question in Case C-237/08 and first and second questions in Case C-238/08, which it is appropriate to consider together, the Cour de cassation asks, in essence, whether Article 5(1)(a) and (b) of Directive 89/104 and Article 9(1)(a) and (b) of Regulation No 40/94 are to be interpreted as meaning that the proprietor of a trade mark is entitled to prohibit a third party from displaying, or arranging for the display of, on the basis of a keyword identical with, or similar to, that trade mark which that third party has, without the consent of that proprietor, selected or stored in connection with an internet referencing service, an ad for goods or services identical with, or similar to, those for which that mark is registered.

44 The first question in Case C-236/08, first question in Case C-237/08 and second question in Case C-238/08 focus, in that regard, on the storage of such a keyword by the provider of the referencing service and its organisation of the display of its client's ad on the basis of that word, while the first question in Case C-238/08 relates to the selection of the sign as a keyword by the advertiser

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and the display, by means of the referencing mechanism, of the ad which results from that selection.

45 Article 5(1)(a) and (b) of Directive 89/104 and Article 9(1)(a) and (b) of Regulation No 40/94 entitle proprietors of trade marks, subject to certain conditions, to prohibit third parties from using signs identical with, or similar to, their trade marks for goods or services identical with, or similar to, those for which those trade marks are registered.

46 In the disputes in the main proceedings, the use of signs corresponding to trade marks as keywords has the object and effect of triggering the display of advertising links to sites on which goods or services are offered which are identical with those for which those trade marks are registered, namely, leather goods, travel-arrangement services and matrimonial agency services respectively.

47 Accordingly, the Court will examine the question referred to in paragraph 43 of the present judgment principally from the angle of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94 and only incidentally from the angle of the respective paragraphs (1)(b) thereof, since the latter provisions cover, in the case of signs identical with the trade mark, the situation in which the third party's goods or services are merely similar to those for which the trade mark is registered.

48 Following that examination, it will be appropriate to answer the second question in Case C-236/08, by which the Court is asked to examine the same problem from the angle of Article 5(2) of Directive 89/104 and Article 9(1)(c) of Regulation No 40/94, which concern the rights conferred by reputable trade marks. Subject to verification by the Cour de cassation, it appears from the reference for a preliminary ruling that the legislation applicable in France includes the rule referred to in Article 5(2) of Directive 89/104. Furthermore, the Court has stated that that provision of the directive must be interpreted not solely on the basis of its wording, but also in the light of the overall scheme and objectives of the system of which it is a part. Accordingly, the rule referred to in Article 5(2) of

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Directive 89/104 concerns not only situations in which a third party uses a sign identical with, or similar to, a sign which has a reputation for goods or services which are not similar to those for which that trade mark is registered, but also situations in which such use is made for goods or services which are identical with, or similar to, those for which that trade mark is registered (Case C-292/00 *Davidoff* [2003] ECR I-389, paragraphs 24 to 30, and Case C-102/07 *adidas and adidas Benelux* [2008] ECR I-2439, paragraph 37).

2. The interpretation of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94

49 By application of Article 5(1)(a) of Directive 89/104 or, in the case of Community trade marks, of Article 9(1)(a) of Regulation No 40/94, the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trade mark when that use is in the course of trade, is in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered, and affects, or is liable to affect, the functions of the trade mark (see, inter alia, Case C-17/06 *Céline*[2007] ECR I-7041, paragraph 16; order in Case C-62/08 *UDV North America* [2009] ECR I-0000, paragraph 42; and Case C-487/07 *L'Oréal and Others* [2009] ECR I-0000, paragraph 58).

a) Use in the course of trade

50 The use of a sign identical with a trade mark constitutes use in the course of trade where it occurs in the context of commercial activity with a view to economic advantage and not as a private matter (Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, paragraph 40; *Céline*, paragraph 17; and *UDV North America*, paragraph 44).

51 With regard, firstly, to the advertiser purchasing the referencing service and choosing as a keyword a sign identical with another's trade mark, it must be held that that advertiser is using that sign within the meaning of that case-law.

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52 From the advertiser's point of view, the selection of a keyword identical with a trade mark has the object and effect of displaying an advertising link to the site on which he offers his goods or services for sale. Since the sign selected as a keyword is the means used to trigger that ad display, it cannot be disputed that the advertiser indeed uses it in the context of commercial activity and not as a private matter.

53 With regard, next, to the referencing service provider, it is common ground that it is carrying out a commercial activity with a view to economic advantage when it stores as keywords, for certain of its clients, signs which are identical with trade marks and arranges for the display of ads on the basis of those keywords.

54 It is also common ground that that service is not supplied only to the proprietors of those trade marks or to operators entitled to market their goods or services, but, at least in the proceedings in question, is provided without the consent of the proprietors and is supplied to their competitors or to imitators.

55 Although it is clear from those factors that the referencing service provider operates 'in the course of trade' when it permits advertisers to select, as keywords, signs identical with trade marks, stores those signs and displays its clients' ads on the basis thereof, it does not follow, however, from those factors that that service provider itself 'uses' those signs within the terms of Article 5 of Directive 89/104 and Article 9 of Regulation No 40/94.

56 In that regard, suffice it to note that the use, by a third party, of a sign identical with, or similar to, the proprietor's trade mark implies, at the very least, that that third party uses the sign in its own commercial communication. A referencing service provider allows its clients to use signs which are identical with, or similar to, trade marks, without itself using those signs.

57 That conclusion is not called into question by the fact that that service provider is paid by its clients for the use of those signs. The fact of creating the technical conditions necessary

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for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign. To the extent to which it has permitted its client to make such a use of the sign, its role must, as necessary, be examined from the angle of rules of law other than Article 5 of Directive 89/104 and Article 9 of Regulation No 40/94, such as those referred to in paragraph 107 of the present judgment.

58 It follows from the foregoing that a referencing service provider is not involved in use in the course of trade within the meaning of the abovementioned provisions of Directive 89/104 and of Regulation No 40/94.

59 Consequently, the conditions relating to use 'in relation to goods or services' and to the effect on the functions of the trade mark need to be examined only in relation to the use, by the advertiser, of the sign identical with the mark.

b) Use 'in relation to goods or services'

60 The expression 'in relation to goods or services' identical with those for which the trade mark is registered, which features in Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, relates, in principle, to goods or services of third parties who use a sign identical with the mark (see Case C-48/05 *Adam Opel* [2007] ECR I-1017, paragraphs 28 and 29, and Case C-533/06 *O2 Holdings and O2 (UK)* [2008] ECR I-4231, paragraph 34). As appropriate, it can also refer to goods or services of another person on whose behalf the third party is acting (order in *UDV North America*, paragraphs 43 to 51).

61 As the Court has already held, the types of conduct listed in Article 5(3) of Directive 89/104 and Article 9(2) of Regulation No 40/94, namely, the affixing of a sign identical to the trade mark onto goods and the offering of the goods, the importing or exporting of the goods under the sign and the

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use of the sign on business papers and in advertising, constitute use in relation to the goods or services (see *Arsenal Football Club*, paragraph 41, and *Adam Opel*, paragraph 20).

62 The facts giving rise to the dispute in the main proceedings in Case C-236/08 are similar to certain of the situations described in those provisions of Directive 89/104 and of Regulation No 40/94, namely the offering of goods by a third party under a sign identical with the trade mark and the use of that sign in advertising. It is apparent from the file that signs identical with Vuitton's trade marks have appeared in ads displayed under the heading 'sponsored links'.

63 In Cases C-237/08 and C-238/08, by contrast, there is no use in the third party's ad of a sign identical with the trade mark.

64 Google submits that, in the absence of any mention of a sign in the actual ad, it cannot be argued that use of that sign as a keyword equates to use in relation to goods or services. The trade mark proprietors challenging Google and the French Government take the opposite view.

65 In this connection, it should be borne in mind that Article 5(3) of Directive 89/104 and Article 9(2) of Regulation No 40/94 provide only a non-exhaustive list of the kinds of use which the proprietor may prohibit (*Arsenal Football Club*, paragraph 38; Case C-228/03 *Gillette Company and Gillette Group Finland* [2005] ECR I-2337, paragraph 28; and *Adam Opel*, paragraph 16). Accordingly, the fact that the sign used by the third party for advertising purposes does not appear in the ad itself cannot of itself mean that that use falls outside the concept of '[use] … in relation to goods or services' within the terms of Article 5 of Directive 89/104.

66 Furthermore, an interpretation according to which only the uses mentioned in that list are relevant would fail to have regard for the fact that that list was drawn up before the full emergence of electronic commerce and the advertising produced in that context. It is those electronic forms of

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commerce and advertising which can, by means of computer technology, typically give rise to uses which differ from those listed in Article 5(3) of Directive 89/104 and Article 9(2) of Regulation No 40/94.

67 In the case of the referencing service, it is common ground that the advertiser, having chosen as a keyword a sign identical with another person's trade mark, intends that internet users who enter that word as a search term should click not only on the links displayed which come from the proprietor of the trade mark, but also on the advertising link of that advertiser.

68 It is also clear that in most cases an internet user entering the name of a trade mark as a search term is looking for information or offers on the goods or services covered by that trade mark. Accordingly, when advertising links to sites offering goods or services of competitors of the proprietor of that mark are displayed beside or above the natural results of the search, the internet user may, if he does not immediately disregard those links as being irrelevant and does not confuse them with those of the proprietor of the mark, perceive those advertising links as offering an alternative to the goods or services of the trade mark proprietor.

69 In that situation, characterised by the fact that a sign identical with a trade mark is selected as a keyword by a competitor of the proprietor of the mark with the aim of offering internet users an alternative to the goods or services of that proprietor, there is a use of that sign in relation to the goods or services of that competitor.

70 It must be borne in mind, in that regard, that the Court has already held that the use by an advertiser, in a comparative advertisement, of a sign identical with, or similar to, the mark of a competitor for the purposes of identifying the goods and services offered by the latter and to compare its own goods or services therewith, is use 'in relation to goods or services' for the purposes of Article 5(1) of Directive 89/104 (see *O2 Holdings and O2 (UK)*, paragraphs 35, 36 and 42, and *L'Oréal and Others*, paragraphs 52 and 53).

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71 Without its being necessary to examine whether or not advertising on the internet on the basis of keywords which are identical with competitors' trade marks constitutes a form of comparative advertising, it is clear in any event that, as has been held in the case-law cited in the preceding paragraph, the use made by the advertiser of a sign identical with the trade mark of a competitor in order that internet users become aware not only of the goods or services offered by that competitor but also of those of the advertiser constitutes a use in relation to the goods or services of that advertiser.

72 In addition, even in cases in which the advertiser does not seek, by its use, as a keyword, of a sign identical with the trade mark, to present its goods or services to internet users as an alternative to the goods or services of the proprietor of the trade mark but, on the contrary, seeks to mislead internet users as to the origin of its goods or services by making them believe that they originate from the proprietor of the trade mark or from an undertaking economically connected to it, there is use 'in relation to goods or services'. As the Court has previously held, such use exists in any event where the third party uses the sign identical with the trade mark in such a way that a link is established between that sign and the goods marketed or the services provided by the third party (*Céline*, paragraph 23, and order in *UDV North America*, paragraph 47).

73 It follows from all of the foregoing that use by an advertiser of a sign identical with a trade mark as a keyword in the context of an internet referencing service falls within the concept of use 'in relation to goods or services' within the meaning of Article 5(1)(a) of Directive 89/104.

74 Likewise, there is use 'in relation to goods or services' within the meaning of Article 9(1)(a) of Regulation No 40/94 where the sign so used is identical with a Community trade mark.

c) Use liable to have an adverse effect on the functions of the trade mark

75 The exclusive right under Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94 was conferred in order to enable the trade mark proprietor to protect

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his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its function. The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark (see, inter alia, *Arsenal Football Club*, paragraph 51; *Adam Opel*, paragraphs 21 and 22; and *L'Oréal and Others*, paragraph 58).

76 It follows from that case-law that the proprietor of the mark cannot oppose the use of a sign identical with the mark if that use is not liable to cause detriment to any of the functions of that mark (*Arsenal Football Club*, paragraph 54, and *L'Oréal and Others*, paragraph 60).

77 Those functions include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services ('the function of indicating origin'), but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising (*L'Oréal and Others*, paragraph 58).

78 The protection conferred by Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94 is, in this regard, more extensive than that provided for in the respective paragraphs (1)(b) of those articles, the application of which requires that there be a likelihood of confusion (see, to that effect, *Davidoff*, paragraph 28, and *L'Oréal and Others*, paragraph 59).

79 It is apparent from the case-law cited above that in the situation envisaged in Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, in which a third party uses a sign identical with a trade mark in relation to goods or services which are identical with those for which that mark is registered, the proprietor of the mark is entitled to prohibit that use if it is liable to have an adverse effect on one of the functions of the mark, whether that be the function of indicating origin or one of the other functions.

80 It is true that the proprietor of the trade mark is not entitled to prohibit such use in the

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situations listed as exceptions in Articles 6 and 7 of Directive 89/104 and in Articles 12 and 13 of Regulation No 40/94. However, it has not been claimed that any of those exceptions is applicable in the context of the present cases.

81 In the present context, the relevant functions to be examined are the function of indicating origin and the function of advertising.

i) Adverse effect on the function of indicating origin

82 The essential function of a trade mark is to guarantee the identity of the origin of the marked goods or service to the consumer or end user by enabling him to distinguish the goods or service from others which have another origin (see, to that effect, Case C-39/97 *Canon*[1998] ECR I-5507, paragraph 28, and Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 23).

83 The question whether that function of the trade mark is adversely affected when internet users are shown, on the basis of a keyword identical with a mark, a third party's ad, such as that of a competitor of the proprietor of that mark, depends in particular on the manner in which that ad is presented.

84 The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party (see, to that effect, *Céline*, paragraph 27 and the case-law cited).

85 In such a situation, which is, moreover, characterised by the fact that the ad in question appears immediately after entry of the trade mark as a search term by the internet user concerned and is displayed at a point when the trade mark is, in its capacity as a search term, also displayed on the screen, the internet user may err as to the origin of the goods or services in question. In those

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circumstances, the use by the third party of the sign identical with the mark as a keyword triggering the display of that ad is liable to create the impression that there is a material link in the course of trade between the goods or services in question and the proprietor of the trade mark (see, by way of analogy, *Arsenal Football Club*, paragraph 56, and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 60).

86 Still with regard to adverse effect on the function of indicating origin, it is worthwhile noting that the need for transparency in the display of advertisements on the internet is emphasised in the European Union legislation on electronic commerce. Having regard to the interests of fair trading and consumer protection, referred to in recital 29 in the preamble to Directive 2000/31, Article 6 of that directive lays down the rule that the natural or legal person on whose behalf a commercial communication which is part of an information society service is made must be clearly identifiable.

87 Although it thus proves to be the case that advertisers on the internet can, as appropriate, be made liable under rules governing other areas of law, such as the rules on unfair competition, the fact nonetheless remains that the allegedly unlawful use on the internet of signs identical with, or similar to, trade marks lends itself to examination from the perspective of trade-mark law. Having regard to the essential function of a trade mark, which, in the area of electronic commerce, consists in particular in enabling internet users browsing the ads displayed in response to a search relating to a specific trade mark to distinguish the goods or services of the proprietor of that mark from those which have a different origin, that proprietor must be entitled to prohibit the display of third-party ads which internet users may erroneously perceive as emanating from that proprietor.

88 It is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it indicate adverse effects, or a risk thereof, on the function of indicating origin as described in paragraph 84 of the present judgment.

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89 In the case where a third party's ad suggests that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.

90 In the case where the ad, while not suggesting the existence of an economic link, is vague to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the proprietor of the trade mark or, on the contrary, economically linked to that proprietor, the conclusion must also be that there is an adverse effect on that function of the trade mark.

ii) Adverse effect on the advertising function

91 Since the course of trade provides a varied offer of goods and services, the proprietor of a trade mark may have not only the objective of indicating, by means of that mark, the origin of its goods or services, but also that of using its mark for advertising purposes designed to inform and persuade consumers.

92 Accordingly, the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with its trade mark in relation to goods or services which are identical with those for which that trade mark is registered, in the case where that use adversely affects the proprietor's use of its mark as a factor in sales promotion or as an instrument of commercial strategy.

93 With regard to the use by internet advertisers of a sign identical with another person's trade mark as a keyword for the purposes of displaying advertising messages, it is clear that that use is liable to have certain repercussions on the advertising use of that mark by its proprietor and on the latter's commercial strategy.

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94 Having regard to the important position which internet advertising occupies in trade and commerce, it is plausible that the proprietor of a trade mark may register its own trade mark as a keyword with a referencing service provider in order to have an ad appear under the heading 'sponsored links'. Where that is the case, the proprietor of the mark must, as necessary, agree to pay a higher price per click than certain other economic operators if it wishes to ensure that its ad appears before those of those operators which have also selected its mark as a keyword. Furthermore, even if the proprietor of the mark is prepared to pay a higher price per click than that offered by third parties which have also selected that trade mark, the proprietor cannot be certain that its ad will appear before those of those third parties, given that other factors are also taken into account in determining the order in which the ads are displayed.

95 Nevertheless, those repercussions of use by third parties of a sign identical with the trade mark do not of themselves constitute an adverse effect on the advertising function of the trade mark.

96 In accordance with the Cour de cassation's own findings, the situation covered in the questions referred is that of the display of advertising links following the entry by internet users of a search term corresponding to the trade mark selected as a keyword. It is also common ground, in these cases, that those advertising links are displayed beside or above the list of the natural results of the search. Finally, it is not in dispute that the order in which the natural results are set out results from the relevance of the respective sites to the search term entered by the internet user and that the search engine operator does not claim any remuneration for displaying those results.

97 It follows from those factors that, when internet users enter the name of a trade mark as a search term, the home and advertising page of the proprietor of that mark will appear in the list of the natural results, usually in one of the highest positions on that list. That display, which is, moreover, free of charge, means that the visibility to internet users of the goods or services of the

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proprietor of the trade mark is guaranteed, irrespective of whether or not that proprietor is successful in also securing the display, in one of the highest positions, of an ad under the heading 'sponsored links'.

98 Having regard to those facts, it must be concluded that use of a sign identical with another person's trade mark in a referencing service such as that at issue in the cases in the main proceedings is not liable to have an adverse effect on the advertising function of the trade mark.

d) Conclusion

99 In the light of the foregoing, the answer to the first question in Case C-236/08, the first question in Case C-237/08 and the first and second questions in Case C-238/08 is that:

– Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94 must be interpreted as meaning that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical with those for which that mark is registered, in the case where that ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party;

– an internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organises the display of ads on the basis of that keyword does not use that sign within the meaning of Article 5(1) of Directive 89/104 or of Article 9(1)(a) and (b) of Regulation No 40/94.

3. The interpretation of Article 5(2) of Directive 89/104 and Article 9(1)(c) of Regulation No 40/94

100 By its second question in Case C-236/08, the Cour de cassation asks, in essence, whether an internet referencing service provider which stores, as a keyword, a sign corresponding to a

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reputable trade mark and organises the display of ads on the basis of that keyword uses that sign in a way which the proprietor of that mark is entitled to prohibit under Article 5(2) of Directive 89/104 or, in the case where that sign is identical with a reputable Community trade mark, under Article 9(1)(c) of Regulation No 40/94.

101 According to the findings of the Cour de cassation, it is established in this case that Google permitted advertisers offering to internet users imitations of Vuitton's goods to select keywords corresponding to Vuitton's trade marks, in combination with keywords such as 'imitation' and 'copy'.

102 The Court has already held, in the case of offers of imitations for sale, that, where a third party attempts, through the use of a sign which is identical with, or similar to, a reputable mark, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of its own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark (*L'Oréal and Others*, paragraph 49).

103 That case-law is relevant in cases where advertisers on the internet offer for sale, through the use of signs identical with reputable trade marks such as 'Louis Vuitton' or 'Vuitton', goods which are imitations of the goods of the proprietor of those marks.

104 However, with regard to the question whether a referencing service provider, when it stores those signs, in combination with terms such as 'imitation' and 'copy', as keywords and permits the display of ads on the basis thereof, itself uses those signs in a way which the proprietor of those marks is entitled to prohibit, it must be borne in mind, as has been pointed out in paragraphs 55 to 57 of the present judgment, that those acts of the service provider do not constitute use for the purposes of Article 5 of Directive 89/104 and Article 9 of Regulation No 40/94.

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105 Accordingly, the answer to the second question referred in Case C-236/08 is that an internet referencing service provider which stores, as a keyword, a sign identical with a reputable trade mark and arranges the display of ads on the basis of that keyword does not use that sign within the meaning of Article 5(2) of Directive 89/104 or of Article 9(1)(c) of Regulation No 40/94.

B – The liability of the referencing service provider

106 By its third question in Case C-236/08, its second question in Case C-237/08 and its third question in Case C-238/08, the Cour de cassation asks, in essence, whether Article 14 of Directive 2000/31 is to be interpreted as meaning that an internet referencing service constitutes an information society service consisting in the storage of information supplied by the advertiser, with the result that that information is the subject of 'hosting' within the meaning of that article and that the referencing service provider therefore cannot be held liable prior to its being informed of the unlawful conduct of that advertiser.

107 Section 4 of Directive 2000/31, comprising Articles 12 to 15 and entitled 'Liability of intermediary service providers', seeks to restrict the situations in which intermediary service providers may be held liable pursuant to the applicable national law. It is therefore in the context of that national law that the conditions under which such liability arises must be sought, it being understood, however, that, by virtue of Section 4 of that directive, certain situations cannot give rise to liability on the part of intermediary service providers. Since the expiry of the period within which that directive had to be transposed, the rules of national law on the liability of such service providers must include the restrictions set out in those articles.

108 Vuitton, Viaticum and CNRRH submit, however, that a referencing service such as AdWords is not an information society service within the terms of those provisions of Directive 2000/31, with the result that the provider of such a service cannot under any circumstances avail itself of those

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restrictions on liability. Google and the Commission of the European Communities take the opposite view.

109 The restriction on liability set out in Article 14(1) of Directive 2000/31 applies to cases '[w]here an information society service is provided that consists of the storage of information provided by a recipient of the service' and means that the provider of such a service cannot be held liable for the data which it has stored at the request of a recipient of that service unless that service provider, after having become aware, because of information supplied by an injured party or otherwise, of the unlawful nature of those data or of activities of that recipient, fails to act expeditiously to remove or to disable access to those data.

110 As has been stated in paragraphs 14 and 15 of the present judgment, the legislature defined the concept of 'information society service' as covering services which are provided at a distance, by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services, and normally in return for remuneration. Regard being had to the characteristics, summarised in paragraph 23 of this judgment, of the referencing service at issue in the cases in the main proceedings, the conclusion must be that that service features all of the elements of that definition.

111 In addition, it cannot be disputed that a referencing service provider transmits information from the recipient of that service, namely the advertiser, over a communications network accessible to internet users and stores, that is to say, holds in memory on its server, certain data, such as the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser's site.

112 In order for the storage by a referencing service provider to come within the scope of Article 14 of Directive 2000/31, it is further necessary that the conduct of that service provider should be limited

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to that of an ‘intermediary service provider’ within the meaning intended by the legislature in the context of Section 4 of that directive.

113 In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.

114 Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.

115 With regard to the referencing service at issue in the cases in the main proceedings, it is apparent from the files and from the description in paragraph 23 et seq. of the present judgment that, with the help of software which it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which Google controls. Thus, Google determines the order of display according to, inter alia, the remuneration paid by the advertisers.

116 It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31.

117 Likewise, concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.

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118 By contrast, in the context of the examination referred to in paragraph 114 of the present judgment, the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.

119 It is in the light of the foregoing considerations that the national court, which is best placed to be aware of the actual terms on which the service in the cases in the main proceedings is supplied, must assess whether the role thus played by Google corresponds to that described in paragraph 114 of the present judgment.

120 It follows that the answer to the third question in Case C-236/08, the second question in Case C-237/08 and the third question in Case C-238/08 is that Article 14 of Directive 2000/31 must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

IV – Costs

121 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks and Article 9(1)(a) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark must be interpreted as meaning

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that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical with those for which that mark is registered, in the case where that advertisement does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

2. An internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organises the display of advertisements on the basis of that keyword does not use that sign within the meaning of Article 5(1) and (2) of Directive 89/104 or of Article 9(1) of Regulation No 40/94.

3. Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

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8.4. Directive on electronic commerce

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof, […] HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer

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interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

- the representation of a client and defence of his interests before the courts,

- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

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(a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) "service provider": any natural or legal person providing an information society service;

(c) "established service provider": a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) "recipient of the service": any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) "commercial communication": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) "regulated profession": any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-

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education diplomas awarded on completion of professional education and training of at least three-years' duration(26) or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC(27);

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

- requirements applicable to goods as such,

- requirements applicable to the delivery of goods,

- requirements applicable to services not provided by electronic means.

Article 3

Internal market

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1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,

- public security, including the safeguarding of national security and defence,

- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

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(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

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1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(28).

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

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(f) as concerns the regulated professions:

- any professional body or similar institution with which the service provider is registered,

- the professional title and the Member State where it has been granted,

- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment(29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

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(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8

Regulated professions

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1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by

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electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

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(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

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2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

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3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with

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Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

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1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III

IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

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(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim

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measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

"11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)."

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use

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of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV

FINAL PROVISIONS

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime

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prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

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Article 24

Addressees

This Directive is addressed to the Member States.

8.5. DIRECTIVE 2011/83/EU on Consumer Rights

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32011L0083

8.6. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0770

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9. Privacy and data protection in the in the information society

Guided Reading:

Andrew Murray (2016) Information Technology law, pp. 541-615

Additional Reading:

9.1. General Data Protection Regulation

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof, […]

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General provisions

Article 1

Subject-matter and objectives

"This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 722482".

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.

2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.

3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

Article 2

Material scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;

(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

(c) by a natural person in the course of a purely personal or household activity;

(d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

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3. For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98.

4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.

Article 3

Territorial scope

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.

Article 4

Definitions

For the purposes of this Regulation:

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(1)‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(2)‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

(3)‘restriction of processing’ means the marking of stored personal data with the aim of limiting their processing in the future;

(4)‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;

(5)‘pseudonymisation’ means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

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(6)‘filing system’ means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(7)‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

(8)‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

(9)‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;

(10)‘third party’ means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data;

(11)‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

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(12)‘personal data breach’ means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;

(13)‘genetic data’ means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;

(14)‘biometric data’ means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;

(15)‘data concerning health’ means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;

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(16)‘main establishment’ means:

(a)as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment;

(b)as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;

(17)‘representative’ means a natural or legal person established in the Union who, designated by the controller or processor in writing pursuant to Article 27, represents the controller or processor with regard to their respective obligations under this Regulation;

(18)‘enterprise’ means a natural or legal person engaged in an economic activity, irrespective of its legal form, including partnerships or associations regularly engaged in an economic activity;

(19) ‘group of undertakings’ means a controlling undertaking and its controlled undertakings;

(20)‘binding corporate rules’ means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity;

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(21)‘supervisory authority’ means an independent public authority which is established by a Member State pursuant to Article 51;

(22)‘supervisory authority concerned’ means a supervisory authority which is concerned by the processing of personal data because:

(a)the controller or processor is established on the territory of the Member State of that supervisory authority;

(b)data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or

(c) a complaint has been lodged with that supervisory authority;

(23)‘cross-border processing’ means either:

(a)processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or

(b)processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

(24)‘relevant and reasoned objection’ means an objection to a draft decision as to whether there is an infringement of this Regulation, or whether envisaged action in relation to the controller or processor complies with this Regulation, which clearly demonstrates the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union;

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(25)‘information society service’ means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council ([19]);

(26)‘international organisation’ means an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries.

CHAPTER II

Principles

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a)processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);

(b)collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’);

(c)adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’);

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(d)accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e)kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f)processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a)the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

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(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law; or

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(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;

(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;

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(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;

(d) the possible consequences of the intended further processing for data subjects;

(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Article 7

Conditions for consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

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Article 8

Conditions applicable to child's consent in relation to information society services

1. Where point (a) of Article 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

2. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

3. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

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(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;

(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

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(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;

(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;

(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

3. Personal data referred to in paragraph 1 may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies.

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4. Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

Article 10

Processing of personal data relating to criminal convictions and offences

Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

Article 11

Processing which does not require identification

1. If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation.

2. Where, in cases referred to in paragraph 1 of this Article, the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification.

CHAPTER III

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Rights of the data subject

Section 1

Transparency and modalities

Article 12

Transparent information, communication and modalities for the exercise of the rights of the data subject

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.

2. The controller shall facilitate the exercise of data subject rights under Articles 15 to 22. In the cases referred to in Article 11(2), the controller shall not refuse to act on the request of the data subject for exercising his or her rights under Articles 15 to 22, unless the controller demonstrates that it is not in a position to identify the data subject.

3. The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where

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the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.

4. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

(a)charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or

(b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

6. Without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

7. The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

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8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

Section 2

Information and access to personal data

Article 13

Information to be provided where personal data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(e) the recipients or categories of recipients of the personal data, if any;

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(f)where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

(a)the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b)the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;

(c)where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(d) the right to lodge a complaint with a supervisory authority;

(e)whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;

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(f)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 shall not apply where and insofar as the data subject already has the information.

Article 14

Information to be provided where personal data have not been obtained from the data subject

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

(a)the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c)the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) the categories of personal data concerned;

(e) the recipients or categories of recipients of the personal data, if any;

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(f)where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject:

(a)the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b)where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(c)the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability;

(d)where processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(e) the right to lodge a complaint with a supervisory authority;

(f)from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;

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(g)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. The controller shall provide the information referred to in paragraphs 1 and 2:

(a)within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;

(b)if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or

(c)if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

4. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

5. Paragraphs 1 to 4 shall not apply where and insofar as:

(a) the data subject already has the information;

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(b)the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available;

(c)obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or

(d)where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.

Article 15

Right of access by the data subject

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

(a) the purposes of the processing;

(b) the categories of personal data concerned;

(c)the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;

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(d)where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;

(e)the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;

(f) the right to lodge a complaint with a supervisory authority;

(g)where the personal data are not collected from the data subject, any available information as to their source;

(h)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

Section 3

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Rectification and erasure

Article 16

Right to rectification

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

Article 17

Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

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(e)the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f)the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b)for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c)for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d)for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims.

Article 18

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Right to restriction of processing

1. The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:

(a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;

(b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;

(c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;

(d) the data subject has objected to processing pursuant to Article 21(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.

2. Where processing has been restricted under paragraph 1, such personal data shall, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.

3. A data subject who has obtained restriction of processing pursuant to paragraph 1 shall be informed by the controller before the restriction of processing is lifted.

Article 19

Notification obligation regarding rectification or erasure of personal data or restriction of processing

The controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each

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recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it.

Article 20

Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

(a)the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and

(b) the processing is carried out by automated means.

2. In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible.

3. The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

4. The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.

Section 4

Right to object and automated individual decision-making

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Article 21

Right to object

1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.

3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.

4. At the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information.

5. In the context of the use of information society services, and notwithstanding Directive 2002/58/EC, the data subject may exercise his or her right to object by automated means using technical specifications.

6. Where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89(1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless

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the processing is necessary for the performance of a task carried out for reasons of public interest.

Article 22

Automated individual decision-making, including profiling

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a)is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b)is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

(c) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

Section 5

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Restrictions

Article 23

Restrictions

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

(e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security;

(f) the protection of judicial independence and judicial proceedings;

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(g)the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;

(h)a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);

(i) the protection of the data subject or the rights and freedoms of others;

(j) the enforcement of civil law claims.

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

(a) the purposes of the processing or categories of processing;

(b) the categories of personal data;

(c) the scope of the restrictions introduced;

(d) the safeguards to prevent abuse or unlawful access or transfer;

(e) the specification of the controller or categories of controllers;

(f)the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h)the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

CHAPTER IV

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Controller and processor

Section 1

General obligations

Article 24

Responsibility of the controller

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

2. Where proportionate in relation to processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

3. Adherence to approved codes of conduct as referred to in Article 40 or approved certification mechanisms as referred to in Article 42 may be used as an element by which to demonstrate compliance with the obligations of the controller.

Article 25

Data protection by design and by default

1. Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement

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appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

3. An approved certification mechanism pursuant to Article 42 may be used as an element to demonstrate compliance with the requirements set out in paragraphs 1 and 2 of this Article.

Article 26

Joint controllers

1. Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects.

2. The arrangement referred to in paragraph 1 shall duly reflect the respective roles and

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relationships of the joint controllers *vis-à-vis* the data subjects. The essence of the arrangement shall be made available to the data subject.

3. Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

Article 27

Representatives of controllers or processors not established in the Union

1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union.

2. The obligation laid down in paragraph 1 of this Article shall not apply to:

(a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or

(b) a public authority or body.

3. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are.

4. The representative shall be mandated by the controller or processor to be addressed in addition to or instead of the controller or the processor by, in particular, supervisory authorities and data subjects, on all issues related to processing, for the purposes of ensuring compliance with this Regulation.

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5. The designation of a representative by the controller or processor shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves.

Article 28

Processor

1. Where processing is to be carried out on behalf of a controller, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.

2. The processor shall not engage another processor without prior specific or general written authorisation of the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.

3. Processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular, that the processor:

(a)processes the personal data only on documented instructions from the controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;

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(b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;

(c) takes all measures required pursuant to Article 32;

(d) respects the conditions referred to in paragraphs 2 and 4 for engaging another processor;

(e) taking into account the nature of the processing, assists the controller by appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;

(f) assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor;

(g) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;

(h) makes available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.

With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

4. Where a processor engages another processor for carrying out specific processing activities on behalf of the controller, the same data protection obligations as set out in the contract or other legal act between the controller and the processor as referred to in paragraph 3 shall be imposed on that other processor by way of a contract or other legal act under Union or Member State law, in

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particular providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Regulation. Where that other processor fails to fulfil its data protection obligations, the initial processor shall remain fully liable to the controller for the performance of that other processor's obligations.

5. Adherence of a processor to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate sufficient guarantees as referred to in paragraphs 1 and 4 of this Article.

6. Without prejudice to an individual contract between the controller and the processor, the contract or the other legal act referred to in paragraphs 3 and 4 of this Article may be based, in whole or in part, on standard contractual clauses referred to in paragraphs 7 and 8 of this Article, including when they are part of a certification granted to the controller or processor pursuant to Articles 42 and 43.

7. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the examination procedure referred to in Article 93(2).

8. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the consistency mechanism referred to in Article 63.

9. The contract or the other legal act referred to in paragraphs 3 and 4 shall be in writing, including in electronic form.

10. Without prejudice to Articles 82, 83 and 84, if a processor infringes this Regulation by determining the purposes and means of processing, the processor shall be considered to be a controller in respect of that processing.

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Article 29

Processing under the authority of the controller or processor

The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law.

Article 30

Records of processing activities

1. Each controller and, where applicable, the controller's representative, shall maintain a record of processing activities under its responsibility. That record shall contain all of the following information:

(a) the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer;

(b) the purposes of the processing;

(c) a description of the categories of data subjects and of the categories of personal data;

(d) the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations;

(e) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;

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(f) where possible, the envisaged time limits for erasure of the different categories of data;

(g) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

2. Each processor and, where applicable, the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, containing:

(a) the name and contact details of the processor or processors and of each controller on behalf of which the processor is acting, and, where applicable, of the controller's or the processor's representative, and the data protection officer;

(b) the categories of processing carried out on behalf of each controller;

(c) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;

(d) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

3. The records referred to in paragraphs 1 and 2 shall be in writing, including in electronic form.

4. The controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request.

5. The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing

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includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.

Article 31

Cooperation with the supervisory authority

The controller and the processor and, where applicable, their representatives, shall cooperate, on request, with the supervisory authority in the performance of its tasks.

Section 2

Security of personal data

Article 32

Security of processing

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:

(a) the pseudonymisation and encryption of personal data;

(b)the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;

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(c)the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d)a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.

4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law.

Article 33

Notification of a personal data breach to the supervisory authority

1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

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2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.

3. The notification referred to in paragraph 1 shall at least:

(a) describe the nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;

(b) communicate the name and contact details of the data protection officer or other contact point where more information can be obtained;

(c) describe the likely consequences of the personal data breach;

(d) describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

4. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.

5. The controller shall document any personal data breaches, comprising the facts relating to the personal data breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

Article 34

Communication of a personal data breach to the data subject

1. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay.

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2. The communication to the data subject referred to in paragraph 1 of this Article shall describe in clear and plain language the nature of the personal data breach and contain at least the information and measures referred to in points (b), (c) and (d) of Article 33(3).

3. The communication to the data subject referred to in paragraph 1 shall not be required if any of the following conditions are met:

(a) the controller has implemented appropriate technical and organisational protection measures, and those measures were applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption;

(b) the controller has taken subsequent measures which ensure that the high risk to the rights and freedoms of data subjects referred to in paragraph 1 is no longer likely to materialise;

(c) it would involve disproportionate effort. In such a case, there shall instead be a public communication or similar measure whereby the data subjects are informed in an equally effective manner.

4. If the controller has not already communicated the personal data breach to the data subject, the supervisory authority, having considered the likelihood of the personal data breach resulting in a high risk, may require it to do so or may decide that any of the conditions referred to in paragraph 3 are met.

Section 3

Data protection impact assessment and prior consultation

Article 35

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Data protection impact assessment

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:

(a)a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;

(b)processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or

(c) a systematic monitoring of a publicly accessible area on a large scale.

4. The supervisory authority shall establish and make public a list of the kind of processing operations which are subject to the requirement for a data protection impact assessment pursuant to paragraph 1. The supervisory authority shall communicate those lists to the Board referred to in Article 68.

5. The supervisory authority may also establish and make public a list of the kind of processing

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operations for which no data protection impact assessment is required. The supervisory authority shall communicate those lists to the Board.

6. Prior to the adoption of the lists referred to in paragraphs 4 and 5, the competent supervisory authority shall apply the consistency mechanism referred to in Article 63 where such lists involve processing activities which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

7. The assessment shall contain at least:

(a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;

(b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;

(c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and

(d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.

8. Compliance with approved codes of conduct referred to in Article 40 by the relevant controllers or processors shall be taken into due account in assessing the impact of the processing operations performed by such controllers or processors, in particular for the purposes of a data protection impact assessment.

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9. Where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of processing operations.

10. Where processing pursuant to point (c) or (e) of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities.

11. Where necessary, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations.

Article 36

Prior consultation

1. The controller shall consult the supervisory authority prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

2. Where the supervisory authority is of the opinion that the intended processing referred to in paragraph 1 would infringe this Regulation, in particular where the controller has insufficiently identified or mitigated the risk, the supervisory authority shall, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in Article 58. That period may be extended by six weeks, taking into account the complexity of the intended processing. The

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supervisory authority shall inform the controller and, where applicable, the processor, of any such extension within one month of receipt of the request for consultation together with the reasons for the delay. Those periods may be suspended until the supervisory authority has obtained information it has requested for the purposes of the consultation.

3. When consulting the supervisory authority pursuant to paragraph 1, the controller shall provide the supervisory authority with:

(a) where applicable, the respective responsibilities of the controller, joint controllers and processors involved in the processing, in particular for processing within a group of undertakings;

(b) the purposes and means of the intended processing;

(c) the measures and safeguards provided to protect the rights and freedoms of data subjects pursuant to this Regulation;

(d) where applicable, the contact details of the data protection officer;

(e) the data protection impact assessment provided for in Article 35; and

(f) any other information requested by the supervisory authority.

4. Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.

5. Notwithstanding paragraph 1, Member State law may require controllers to consult with, and obtain prior authorisation from, the supervisory authority in relation to processing by a controller for the performance of a task carried out by the controller in the public interest, including processing in relation to social protection and public health.

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Section 4

Data protection officer

Article 37

Designation of the data protection officer

1. The controller and the processor shall designate a data protection officer in any case where:

(a) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;

(b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or

(c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences referred to in Article 10.

2. A group of undertakings may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment.

3. Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size.

4. In cases other than those referred to in paragraph 1, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by

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Union or Member State law shall, designate a data protection officer. The data protection officer may act for such associations and other bodies representing controllers or processors.

5. The data protection officer shall be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks referred to in Article 39.

6. The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract.

7. The controller or the processor shall publish the contact details of the data protection officer and communicate them to the supervisory authority.

Article 38

Position of the data protection officer

1. The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.

2. The controller and processor shall support the data protection officer in performing the tasks referred to in Article 39 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.

3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.

4. Data subjects may contact the data protection officer with regard to all issues related to

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processing of their personal data and to the exercise of their rights under this Regulation.

5. The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law.

6. The data protection officer may fulfil other tasks and duties. The controller or processor shall ensure that any such tasks and duties do not result in a conflict of interests.

Article 39

Tasks of the data protection officer

1. The data protection officer shall have at least the following tasks:

(a) to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions;

(b) to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits;

(c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35;

(d) to cooperate with the supervisory authority;

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(e)to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, with regard to any other matter.

2. The data protection officer shall in the performance of his or her tasks have due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing.

Section 5

Codes of conduct and certification

Article 40

Codes of conduct

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises.

2. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to:

(a) fair and transparent processing;

(b) the legitimate interests pursued by controllers in specific contexts;

(c) the collection of personal data;

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(d) the pseudonymisation of personal data;

(e) the information provided to the public and to data subjects;

(f) the exercise of the rights of data subjects;

(g)the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained;

(h)the measures and procedures referred to in Articles 24 and 25 and the measures to ensure security of processing referred to in Article 32;

(i)the notification of personal data breaches to supervisory authorities and the communication of such personal data breaches to data subjects;

(j) the transfer of personal data to third countries or international organisations; or

(k)out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79.

3. In addition to adherence by controllers or processors subject to this Regulation, codes of conduct approved pursuant to paragraph 5 of this Article and having general validity pursuant to paragraph 9 of this Article may also be adhered to by controllers or processors that are not subject to this Regulation pursuant to Article 3 in order to provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (e) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards including with regard to the rights of data subjects.

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4. A code of conduct referred to in paragraph 2 of this Article shall contain mechanisms which enable the body referred to in Article 41(1) to carry out the mandatory monitoring of compliance with its provisions by the controllers or processors which undertake to apply it, without prejudice to the tasks and powers of supervisory authorities competent pursuant to Article 55 or 56.

5. Associations and other bodies referred to in paragraph 2 of this Article which intend to prepare a code of conduct or to amend or extend an existing code shall submit the draft code, amendment or extension to the supervisory authority which is competent pursuant to Article 55. The supervisory authority shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation and shall approve that draft code, amendment or extension if it finds that it provides sufficient appropriate safeguards.

6. Where the draft code, or amendment or extension is approved in accordance with paragraph 5, and where the code of conduct concerned does not relate to processing activities in several Member States, the supervisory authority shall register and publish the code.

7. Where a draft code of conduct relates to processing activities in several Member States, the supervisory authority which is competent pursuant to Article 55 shall, before approving the draft code, amendment or extension, submit it in the procedure referred to in Article 63 to the Board which shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation or, in the situation referred to in paragraph 3 of this Article, provides appropriate safeguards.

8. Where the opinion referred to in paragraph 7 confirms that the draft code, amendment or extension complies with this Regulation, or, in the situation referred to in paragraph 3, provides appropriate safeguards, the Board shall submit its opinion to the Commission.

9. The Commission may, by way of implementing acts, decide that the approved code of conduct, amendment or extension submitted to it pursuant to paragraph 8 of this Article have

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general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

10. The Commission shall ensure appropriate publicity for the approved codes which have been decided as having general validity in accordance with paragraph 9.

11. The Board shall collate all approved codes of conduct, amendments and extensions in a register and shall make them publicly available by way of appropriate means.

Article 41

Monitoring of approved codes of conduct

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, the monitoring of compliance with a code of conduct pursuant to Article 40 may be carried out by a body which has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for that purpose by the competent supervisory authority.

2. A body as referred to in paragraph 1 may be accredited to monitor compliance with a code of conduct where that body has:

(a) demonstrated its independence and expertise in relation to the subject-matter of the code to the satisfaction of the competent supervisory authority;

(b) established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its operation;

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(c) established procedures and structures to handle complaints about infringements of the code or the manner in which the code has been, or is being, implemented by a controller or processor, and to make those procedures and structures transparent to data subjects and the public; and

(d) demonstrated to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interests.

3. The competent supervisory authority shall submit the draft criteria for accreditation of a body as referred to in paragraph 1 of this Article to the Board pursuant to the consistency mechanism referred to in Article 63.

4. Without prejudice to the tasks and powers of the competent supervisory authority and the provisions of Chapter VIII, a body as referred to in paragraph 1 of this Article shall, subject to appropriate safeguards, take appropriate action in cases of infringement of the code by a controller or processor, including suspension or exclusion of the controller or processor concerned from the code. It shall inform the competent supervisory authority of such actions and the reasons for taking them.

5. The competent supervisory authority shall revoke the accreditation of a body as referred to in paragraph 1 if the conditions for accreditation are not, or are no longer, met or where actions taken by the body infringe this Regulation.

6. This Article shall not apply to processing carried out by public authorities and bodies.

Article 42

Certification

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation

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of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account.

2. In addition to adherence by controllers or processors subject to this Regulation, data protection certification mechanisms, seals or marks approved pursuant to paragraph 5 of this Article may be established for the purpose of demonstrating the existence of appropriate safeguards provided by controllers or processors that are not subject to this Regulation pursuant to Article 3 within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (f) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards, including with regard to the rights of data subjects.

3. The certification shall be voluntary and available via a process that is transparent.

4. A certification pursuant to this Article does not reduce the responsibility of the controller or the processor for compliance with this Regulation and is without prejudice to the tasks and powers of the supervisory authorities which are competent pursuant to Article 55 or 56.

5. A certification pursuant to this Article shall be issued by the certification bodies referred to in Article 43 or by the competent supervisory authority, on the basis of criteria approved by that competent supervisory authority pursuant to Article 58(3) or by the Board pursuant to Article 63. Where the criteria are approved by the Board, this may result in a common certification, the European Data Protection Seal.

6. The controller or processor which submits its processing to the certification mechanism shall provide the certification body referred to in Article 43, or where applicable, the competent supervisory authority, with all information and access to its processing activities which are necessary to conduct the certification procedure.

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7. Certification shall be issued to a controller or processor for a maximum period of three years and may be renewed, under the same conditions, provided that the relevant requirements continue to be met. Certification shall be withdrawn, as applicable, by the certification bodies referred to in Article 43 or by the competent supervisory authority where the requirements for the certification are not or are no longer met.

8. The Board shall collate all certification mechanisms and data protection seals and marks in a register and shall make them publicly available by any appropriate means.

Article 43

Certification bodies

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, certification bodies which have an appropriate level of expertise in relation to data protection shall, after informing the supervisory authority in order to allow it to exercise its powers pursuant to point (h) of Article 58(2) where necessary, issue and renew certification. Member States shall ensure that those certification bodies are accredited by one or both of the following:

(a) the supervisory authority which is competent pursuant to Article 55 or 56;

(b) the national accreditation body named in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council [20] in accordance with EN-ISO/IEC 17065/2012 and with the additional requirements established by the supervisory authority which is competent pursuant to Article 55 or 56.

2. Certification bodies referred to in paragraph 1 shall be accredited in accordance with that paragraph only where they have:

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(a) demonstrated their independence and expertise in relation to the subject-matter of the certification to the satisfaction of the competent supervisory authority;

(b) undertaken to respect the criteria referred to in Article 42(5) and approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63;

(c) established procedures for the issuing, periodic review and withdrawal of data protection certification, seals and marks;

(d) established procedures and structures to handle complaints about infringements of the certification or the manner in which the certification has been, or is being, implemented by the controller or processor, and to make those procedures and structures transparent to data subjects and the public; and

(e) demonstrated, to the satisfaction of the competent supervisory authority, that their tasks and duties do not result in a conflict of interests.

3. The accreditation of certification bodies as referred to in paragraphs 1 and 2 of this Article shall take place on the basis of criteria approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63. In the case of accreditation pursuant to point (b) of paragraph 1 of this Article, those requirements shall complement those envisaged in Regulation (EC) No 765/2008 and the technical rules that describe the methods and procedures of the certification bodies.

4. The certification bodies referred to in paragraph 1 shall be responsible for the proper assessment leading to the certification or the withdrawal of such certification without prejudice to the responsibility of the controller or processor for compliance with this Regulation. The accreditation shall be issued for a maximum period of five years and may be renewed on the same conditions provided that the certification body meets the requirements set out in this Article.

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5. The certification bodies referred to in paragraph 1 shall provide the competent supervisory authorities with the reasons for granting or withdrawing the requested certification.

6. The requirements referred to in paragraph 3 of this Article and the criteria referred to in Article 42(5) shall be made public by the supervisory authority in an easily accessible form. The supervisory authorities shall also transmit those requirements and criteria to the Board. The Board shall collate all certification mechanisms and data protection seals in a register and shall make them publicly available by any appropriate means.

7. Without prejudice to Chapter VIII, the competent supervisory authority or the national accreditation body shall revoke an accreditation of a certification body pursuant to paragraph 1 of this Article where the conditions for the accreditation are not, or are no longer, met or where actions taken by a certification body infringe this Regulation.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of specifying the requirements to be taken into account for the data protection certification mechanisms referred to in Article 42(1).

9. The Commission may adopt implementing acts laying down technical standards for certification mechanisms and data protection seals and marks, and mechanisms to promote and recognise those certification mechanisms, seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

CHAPTER V

Transfers of personal data to third countries or international organisations

Article 44

General principle for transfers

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Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.

Article 45

Transfers on the basis of an adequacy decision

1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

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(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

(b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and

(c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral

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application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2).

4. The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3 of this Article and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC.

5. The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 93(3).

6. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7. A decision pursuant to paragraph 5 of this Article is without prejudice to transfers of personal data to the third country, a territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 46 to 49.

8. The Commission shall publish in the *Official Journal of the European Union* and on its website a list of the third countries, territories and specified sectors within a third country and international

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organisations for which it has decided that an adequate level of protection is or is no longer ensured.

9. Decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by a Commission Decision adopted in accordance with paragraph 3 or 5 of this Article.

Article 46

Transfers subject to appropriate safeguards

1. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a supervisory authority, by:

(a) a legally binding and enforceable instrument between public authorities or bodies;

(b) binding corporate rules in accordance with Article 47;

(c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2);

(d) standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93(2);

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(e)an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights; or

(f)an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a)contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or

(b)provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

4. The supervisory authority shall apply the consistency mechanism referred to in Article 63 in the cases referred to in paragraph 3 of this Article.

5. Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed, if necessary, by that supervisory authority. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed, if necessary, by a Commission Decision adopted in accordance with paragraph 2 of this Article.

Article 47

Binding corporate rules

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1. The competent supervisory authority shall approve binding corporate rules in accordance with the consistency mechanism set out in Article 63, provided that they:

(a) are legally binding and apply to and are enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees;

(b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data; and

(c) fulfil the requirements laid down in paragraph 2.

2. The binding corporate rules referred to in paragraph 1 shall specify at least:

(a) the structure and contact details of the group of undertakings, or group of enterprises engaged in a joint economic activity and of each of its members;

(b) the data transfers or set of transfers, including the categories of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;

(c) their legally binding nature, both internally and externally;

(d) the application of the general data protection principles, in particular purpose limitation, data minimisation, limited storage periods, data quality, data protection by design and by default, legal basis for processing, processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies not bound by the binding corporate rules;

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(e) the rights of data subjects in regard to processing and the means to exercise those rights, including the right not to be subject to decisions based solely on automated processing, including profiling in accordance with Article 22, the right to lodge a complaint with the competent supervisory authority and before the competent courts of the Member States in accordance with Article 79, and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;

(f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage;

(g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in addition to Articles 13 and 14;

(h) the tasks of any data protection officer designated in accordance with Article 37 or any other person or entity in charge of the monitoring compliance with the binding corporate rules within the group of undertakings, or group of enterprises engaged in a joint economic activity, as well as monitoring training and complaint-handling;

(i) the complaint procedures;

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(j)the mechanisms within the group of undertakings, or group of enterprises engaged in a joint economic activity for ensuring the verification of compliance with the binding corporate rules. Such mechanisms shall include data protection audits and methods for ensuring corrective actions to protect the rights of the data subject. Results of such verification should be communicated to the person or entity referred to in point (h) and to the board of the controlling undertaking of a group of undertakings, or of the group of enterprises engaged in a joint economic activity, and should be available upon request to the competent supervisory authority;

(k)the mechanisms for reporting and recording changes to the rules and reporting those changes to the supervisory authority;

(l)the cooperation mechanism with the supervisory authority to ensure compliance by any member of the group of undertakings, or group of enterprises engaged in a joint economic activity, in particular by making available to the supervisory authority the results of verifications of the measures referred to in point (j);

(m)the mechanisms for reporting to the competent supervisory authority any legal requirements to which a member of the group of undertakings, or group of enterprises engaged in a joint economic activity is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules; and

(n)the appropriate data protection training to personnel having permanent or regular access to personal data.

3. The Commission may specify the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

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Article 48

Transfers or disclosures not authorised by Union law

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

Article 49

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a)the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b)the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c)the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

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(d) the transfer is necessary for important reasons of public interest;

(e) the transfer is necessary for the establishment, exercise or defence of legal claims;

(f)the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

(g)the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register.

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Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30.

Article 50

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:

(a)develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;

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(b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;

(c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;

(d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

CHAPTER VI

Independent supervisory authorities

Section 1

Independent status

Article 51

Supervisory authority

1. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority').

2. Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and the Commission in accordance with Chapter VII.

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3. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which is to represent those authorities in the Board and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Article 63.

4. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to this Chapter, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

Article 52

Independence

1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation.

2. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.

3. Member or members of each supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.

4. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.

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5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned.

6. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.

Article 53

General conditions for the members of the supervisory authority

1. Member States shall provide for each member of their supervisory authorities to be appointed by means of a transparent procedure by:

— their parliament;

— their government;

— their head of State; or

— an independent body entrusted with the appointment under Member State law.

2. Each member shall have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform its duties and exercise its powers.

3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement, in accordance with the law of the Member State concerned.

4. A member shall be dismissed only in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.

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Article 54

Rules on the establishment of the supervisory authority

1. Each Member State shall provide by law for all of the following:

(a) the establishment of each supervisory authority;

(b) the qualifications and eligibility conditions required to be appointed as member of each supervisory authority;

(c) the rules and procedures for the appointment of the member or members of each supervisory authority;

(d) the duration of the term of the member or members of each supervisory authority of no less than four years, except for the first appointment after 24 May 2016, part of which may take place for a shorter period where that is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure;

(e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment;

(f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.

2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office, with regard to any confidential information which has come to their knowledge in the course of the performance of their tasks or exercise of their powers. During their term of office, that

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duty of professional secrecy shall in particular apply to reporting by natural persons of infringements of this Regulation.

Section 2

Competence, tasks and powers

Article 55

Competence

1. Each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State.

2. Where processing is carried out by public authorities or private bodies acting on the basis of point (c) or (e) of Article 6(1), the supervisory authority of the Member State concerned shall be competent. In such cases Article 56 does not apply.

3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.

Article 56

Competence of the lead supervisory authority

1. Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60.

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2. By derogation from paragraph 1, each supervisory authority shall be competent to handle a complaint lodged with it or a possible infringement of this Regulation, if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State.

3. In the cases referred to in paragraph 2 of this Article, the supervisory authority shall inform the lead supervisory authority without delay on that matter. Within a period of three weeks after being informed the lead supervisory authority shall decide whether or not it will handle the case in accordance with the procedure provided in Article 60, taking into account whether or not there is an establishment of the controller or processor in the Member State of which the supervisory authority informed it.

4. Where the lead supervisory authority decides to handle the case, the procedure provided in Article 60 shall apply. The supervisory authority which informed the lead supervisory authority may submit to the lead supervisory authority a draft for a decision. The lead supervisory authority shall take utmost account of that draft when preparing the draft decision referred to in Article 60(3).

5. Where the lead supervisory authority decides not to handle the case, the supervisory authority which informed the lead supervisory authority shall handle it according to Articles 61 and 62.

6. The lead supervisory authority shall be the sole interlocutor of the controller or processor for the cross-border processing carried out by that controller or processor.

Article 57

Tasks

1. Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

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(a) monitor and enforce the application of this Regulation;

(b) promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing. Activities addressed specifically to children shall receive specific attention;

(c) advise, in accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing;

(d) promote the awareness of controllers and processors of their obligations under this Regulation;

(e) upon request, provide information to any data subject concerning the exercise of their rights under this Regulation and, if appropriate, cooperate with the supervisory authorities in other Member States to that end;

(f) handle complaints lodged by a data subject, or by a body, organisation or association in accordance with Article 80, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;

(g) cooperate with, including sharing information and provide mutual assistance to, other supervisory authorities with a view to ensuring the consistency of application and enforcement of this Regulation;

(h) conduct investigations on the application of this Regulation, including on the basis of information received from another supervisory authority or other public authority;

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(i) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices;

(j) adopt standard contractual clauses referred to in Article 28(8) and in point (d) of Article 46(2);

(k) establish and maintain a list in relation to the requirement for data protection impact assessment pursuant to Article 35(4);

(l) give advice on the processing operations referred to in Article 36(2);

(m) encourage the drawing up of codes of conduct pursuant to Article 40(1) and provide an opinion and approve such codes of conduct which provide sufficient safeguards, pursuant to Article 40(5);

(n) encourage the establishment of data protection certification mechanisms and of data protection seals and marks pursuant to Article 42(1), and approve the criteria of certification pursuant to Article 42(5);

(o) where applicable, carry out a periodic review of certifications issued in accordance with Article 42(7);

(p) draft and publish the criteria for accreditation of a body for monitoring codes of conduct pursuant to Article 41 and of a certification body pursuant to Article 43;

(q) conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 41 and of a certification body pursuant to Article 43;

(r) authorise contractual clauses and provisions referred to in Article 46(3);

(s) approve binding corporate rules pursuant to Article 47;

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(t) contribute to the activities of the Board;

(u) keep internal records of infringements of this Regulation and of measures taken in accordance with Article 58(2); and

(v) fulfil any other tasks related to the protection of personal data.

2. Each supervisory authority shall facilitate the submission of complaints referred to in point (f) of paragraph 1 by measures such as a complaint submission form which can also be completed electronically, without excluding other means of communication.

3. The performance of the tasks of each supervisory authority shall be free of charge for the data subject and, where applicable, for the data protection officer.

4. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

Article 58

Powers

1. Each supervisory authority shall have all of the following investigative powers:

(a) to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks;

(b) to carry out investigations in the form of data protection audits;

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(c) to carry out a review on certifications issued pursuant to Article 42(7);

(d) to notify the controller or the processor of an alleged infringement of this Regulation;

(e)to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;

(f)to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance with Union or Member State procedural law.

2. Each supervisory authority shall have all of the following corrective powers:

(a)to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;

(b)to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;

(c)to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;

(d)to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;

(e) to order the controller to communicate a personal data breach to the data subject;

(f) to impose a temporary or definitive limitation including a ban on processing;

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(g)to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19;

(h)to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met;

(i)to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;

(j)to order the suspension of data flows to a recipient in a third country or to an international organisation.

3. Each supervisory authority shall have all of the following authorisation and advisory powers:

(a)to advise the controller in accordance with the prior consultation procedure referred to in Article 36;

(b)to issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data;

(c)to authorise processing referred to in Article 36(5), if the law of the Member State requires such prior authorisation;

(d) to issue an opinion and approve draft codes of conduct pursuant to Article 40(5);

(e) to accredit certification bodies pursuant to Article 43;

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(f) to issue certifications and approve criteria of certification in accordance with Article 42(5);

(g) to adopt standard data protection clauses referred to in Article 28(8) and in point (d) of Article 46(2);

(h) to authorise contractual clauses referred to in point (a) of Article 46(3);

(i) to authorise administrative arrangements referred to in point (b) of Article 46(3);

(j) to approve binding corporate rules pursuant to Article 47.

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.

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.

6. Each Member State may provide by law that its supervisory authority shall have additional powers to those referred to in paragraphs 1, 2 and 3. The exercise of those powers shall not impair the effective operation of Chapter VII.

Article 59

Activity reports

Each supervisory authority shall draw up an annual report on its activities, which may include a list of types of infringement notified and types of measures taken in accordance with Article 58(2). Those reports shall be transmitted to the national parliament, the government and other authorities

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as designated by Member State law. They shall be made available to the public, to the Commission and to the Board.

CHAPTER VII

Cooperation and consistency

Section 1

Cooperation

Article 60

Cooperation between the lead supervisory authority and the other supervisory authorities concerned

1. The lead supervisory authority shall cooperate with the other supervisory authorities concerned in accordance with this Article in an endeavour to reach consensus. The lead supervisory authority and the supervisory authorities concerned shall exchange all relevant information with each other.

2. The lead supervisory authority may request at any time other supervisory authorities concerned to provide mutual assistance pursuant to Article 61 and may conduct joint operations pursuant to Article 62, in particular for carrying out investigations or for monitoring the implementation of a measure concerning a controller or processor established in another Member State.

3. The lead supervisory authority shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. It shall without delay submit a draft decision to the other supervisory authorities concerned for their opinion and take due account of their views.

4. Where any of the other supervisory authorities concerned within a period of four weeks after having been consulted in accordance with paragraph 3 of this Article, expresses a relevant and reasoned objection to the draft decision, the lead supervisory authority shall, if it does not

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follow the relevant and reasoned objection or is of the opinion that the objection is not relevant or reasoned, submit the matter to the consistency mechanism referred to in Article 63.

5. Where the lead supervisory authority intends to follow the relevant and reasoned objection made, it shall submit to the other supervisory authorities concerned a revised draft decision for their opinion. That revised draft decision shall be subject to the procedure referred to in paragraph 4 within a period of two weeks.

6. Where none of the other supervisory authorities concerned has objected to the draft decision submitted by the lead supervisory authority within the period referred to in paragraphs 4 and 5, the lead supervisory authority and the supervisory authorities concerned shall be deemed to be in agreement with that draft decision and shall be bound by it.

7. The lead supervisory authority shall adopt and notify the decision to the main establishment or single establishment of the controller or processor, as the case may be and inform the other supervisory authorities concerned and the Board of the decision in question, including a summary of the relevant facts and grounds. The supervisory authority with which a complaint has been lodged shall inform the complainant on the decision.

8. By derogation from paragraph 7, where a complaint is dismissed or rejected, the supervisory authority with which the complaint was lodged shall adopt the decision and notify it to the complainant and shall inform the controller thereof.

9. Where the lead supervisory authority and the supervisory authorities concerned agree to dismiss or reject parts of a complaint and to act on other parts of that complaint, a separate decision shall be adopted for each of those parts of the matter. The lead supervisory authority shall adopt the decision for the part concerning actions in relation to the controller, shall notify it to the main establishment or single establishment of the controller or processor on the territory of its Member State and shall inform the complainant thereof, while the supervisory authority of the complainant shall

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adopt the decision for the part concerning dismissal or rejection of that complaint, and shall notify it to that complainant and shall inform the controller or processor thereof.

10. After being notified of the decision of the lead supervisory authority pursuant to paragraphs 7 and 9, the controller or processor shall take the necessary measures to ensure compliance with the decision as regards processing activities in the context of all its establishments in the Union. The controller or processor shall notify the measures taken for complying with the decision to the lead supervisory authority, which shall inform the other supervisory authorities concerned.

11. Where, in exceptional circumstances, a supervisory authority concerned has reasons to consider that there is an urgent need to act in order to protect the interests of data subjects, the urgency procedure referred to in Article 66 shall apply.

12. The lead supervisory authority and the other supervisory authorities concerned shall supply the information required under this Article to each other by electronic means, using a standardised format.

Article 61

Mutual assistance

1. Supervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective cooperation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations.

2. Each supervisory authority shall take all appropriate measures required to reply to a request of another supervisory authority without undue delay and no later than one month after receiving the

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request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation.

3. Requests for assistance shall contain all the necessary information, including the purpose of and reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.

4. The requested supervisory authority shall not refuse to comply with the request unless:

(a) it is not competent for the subject-matter of the request or for the measures it is requested to execute; or

(b) compliance with the request would infringe this Regulation or Union or Member State law to which the supervisory authority receiving the request is subject.

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress of the measures taken in order to respond to the request. The requested supervisory authority shall provide reasons for any refusal to comply with a request pursuant to paragraph 4.

6. Requested supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means, using a standardised format.

7. Requested supervisory authorities shall not charge a fee for any action taken by them pursuant to a request for mutual assistance. Supervisory authorities may agree on rules to indemnify each other for specific expenditure arising from the provision of mutual assistance in exceptional circumstances.

8. Where a supervisory authority does not provide the information referred to in paragraph 5 of this Article within one month of receiving the request of another supervisory authority, the requesting supervisory authority may adopt a provisional measure on the territory of its Member State in

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accordance with Article 55(1). In that case, the urgent need to act under Article 66(1) shall be presumed to be met and require an urgent binding decision from the Board pursuant to Article 66(2).

9. The Commission may, by means of implementing acts, specify the format and procedures for mutual assistance referred to in this Article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board, in particular the standardised format referred to in paragraph 6 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

Article 62

Joint operations of supervisory authorities

1. The supervisory authorities shall, where appropriate, conduct joint operations including joint investigations and joint enforcement measures in which members or staff of the supervisory authorities of other Member States are involved.

2. Where the controller or processor has establishments in several Member States or where a significant number of data subjects in more than one Member State are likely to be substantially affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in joint operations. The supervisory authority which is competent pursuant to Article 56(1) or (4) shall invite the supervisory authority of each of those Member States to take part in the joint operations and shall respond without delay to the request of a supervisory authority to participate.

3. A supervisory authority may, in accordance with Member State law, and with the seconding supervisory authority's authorisation, confer powers, including investigative powers on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the law of

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the Member State of the host supervisory authority permits, allow the seconding supervisory authority's members or staff to exercise their investigative powers in accordance with the law of the Member State of the seconding supervisory authority. Such investigative powers may be exercised only under the guidance and in the presence of members or staff of the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the Member State law of the host supervisory authority.

4. Where, in accordance with paragraph 1, staff of a seconding supervisory authority operate in another Member State, the Member State of the host supervisory authority shall assume responsibility for their actions, including liability, for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.

5. The Member State in whose territory the damage was caused shall make good such damage under the conditions applicable to damage caused by its own staff. The Member State of the seconding supervisory authority whose staff has caused damage to any person in the territory of another Member State shall reimburse that other Member State in full any sums it has paid to the persons entitled on their behalf.

6. Without prejudice to the exercise of its rights *vis-à-vis* third parties and with the exception of paragraph 5, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement from another Member State in relation to damage referred to in paragraph 4.

7. Where a joint operation is intended and a supervisory authority does not, within one month, comply with the obligation laid down in the second sentence of paragraph 2 of this Article, the other supervisory authorities may adopt a provisional measure on the territory of its Member State in accordance with Article 55. In that case, the urgent need to act under Article 66(1) shall be presumed

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to be met and require an opinion or an urgent binding decision from the Board pursuant to Article 66(2).

Section 2

Consistency

Article 63

Consistency mechanism

In order to contribute to the consistent application of this Regulation throughout the Union, the supervisory authorities shall cooperate with each other and, where relevant, with the Commission, through the consistency mechanism as set out in this Section.

Article 64

Opinion of the Board

1. The Board shall issue an opinion where a competent supervisory authority intends to adopt any of the measures below. To that end, the competent supervisory authority shall communicate the draft decision to the Board, when it:

(a) aims to adopt a list of the processing operations subject to the requirement for a data protection impact assessment pursuant to Article 35(4);

(b) concerns a matter pursuant to Article 40(7) whether a draft code of conduct or an amendment or extension to a code of conduct complies with this Regulation;

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(c)aims to approve the criteria for accreditation of a body pursuant to Article 41(3) or a certification body pursuant to Article 43(3);

(d)aims to determine standard data protection clauses referred to in point (d) of Article 46(2) and in Article 28(8);

(e) aims to authorise contractual clauses referred to in point (a) of Article 46(3); or

(f) aims to approve binding corporate rules within the meaning of Article 47.

2. Any supervisory authority, the Chair of the Board or the Commission may request that any matter of general application or producing effects in more than one Member State be examined by the Board with a view to obtaining an opinion, in particular where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62.

3. In the cases referred to in paragraphs 1 and 2, the Board shall issue an opinion on the matter submitted to it provided that it has not already issued an opinion on the same matter. That opinion shall be adopted within eight weeks by simple majority of the members of the Board. That period may be extended by a further six weeks, taking into account the complexity of the subject matter. Regarding the draft decision referred to in paragraph 1 circulated to the members of the Board in accordance with paragraph 5, a member which has not objected within a reasonable period indicated by the Chair, shall be deemed to be in agreement with the draft decision.

4. Supervisory authorities and the Commission shall, without undue delay, communicate by electronic means to the Board, using a standardised format any relevant information, including as the case may be a summary of the facts, the draft decision, the grounds which make the enactment of such measure necessary, and the views of other supervisory authorities concerned.

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5. The Chair of the Board shall, without undue, delay inform by electronic means:

(a) the members of the Board and the Commission of any relevant information which has been communicated to it using a standardised format. The secretariat of the Board shall, where necessary, provide translations of relevant information; and

(b) the supervisory authority referred to, as the case may be, in paragraphs 1 and 2, and the Commission of the opinion and make it public.

6. The competent supervisory authority shall not adopt its draft decision referred to in paragraph 1 within the period referred to in paragraph 3.

7. The supervisory authority referred to in paragraph 1 shall take utmost account of the opinion of the Board and shall, within two weeks after receiving the opinion, communicate to the Chair of the Board by electronic means whether it will maintain or amend its draft decision and, if any, the amended draft decision, using a standardised format.

8. Where the supervisory authority concerned informs the Chair of the Board within the period referred to in paragraph 7 of this Article that it does not intend to follow the opinion of the Board, in whole or in part, providing the relevant grounds, Article 65(1) shall apply.

Article 65

Dispute resolution by the Board

1. In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases:

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(a)where, in a case referred to in Article 60(4), a supervisory authority concerned has raised a relevant and reasoned objection to a draft decision of the lead authority or the lead authority has rejected such an objection as being not relevant or reasoned. The binding decision shall concern all the matters which are the subject of the relevant and reasoned objection, in particular whether there is an infringement of this Regulation;

(b)where there are conflicting views on which of the supervisory authorities concerned is competent for the main establishment;

(c)where a competent supervisory authority does not request the opinion of the Board in the cases referred to in Article 64(1), or does not follow the opinion of the Board issued under Article 64. In that case, any supervisory authority concerned or the Commission may communicate the matter to the Board.

2. The decision referred to in paragraph 1 shall be adopted within one month from the referral of the subject-matter by a two-thirds majority of the members of the Board. That period may be extended by a further month on account of the complexity of the subject-matter. The decision referred to in paragraph 1 shall be reasoned and addressed to the lead supervisory authority and all the supervisory authorities concerned and binding on them.

3. Where the Board has been unable to adopt a decision within the periods referred to in paragraph 2, it shall adopt its decision within two weeks following the expiration of the second month referred to in paragraph 2 by a simple majority of the members of the Board. Where the members of the Board are split, the decision shall by adopted by the vote of its Chair.

4. The supervisory authorities concerned shall not adopt a decision on the subject matter submitted to the Board under paragraph 1 during the periods referred to in paragraphs 2 and 3.

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5. The Chair of the Board shall notify, without undue delay, the decision referred to in paragraph 1 to the supervisory authorities concerned. It shall inform the Commission thereof. The decision shall be published on the website of the Board without delay after the supervisory authority has notified the final decision referred to in paragraph 6.

6. The lead supervisory authority or, as the case may be, the supervisory authority with which the complaint has been lodged shall adopt its final decision on the basis of the decision referred to in paragraph 1 of this Article, without undue delay and at the latest by one month after the Board has notified its decision. The lead supervisory authority or, as the case may be, the supervisory authority with which the complaint has been lodged, shall inform the Board of the date when its final decision is notified respectively to the controller or the processor and to the data subject. The final decision of the supervisory authorities concerned shall be adopted under the terms of Article 60(7), (8) and (9). The final decision shall refer to the decision referred to in paragraph 1 of this Article and shall specify that the decision referred to in that paragraph will be published on the website of the Board in accordance with paragraph 5 of this Article. The final decision shall attach the decision referred to in paragraph 1 of this Article.

Article 66

Urgency procedure

1. In exceptional circumstances, where a supervisory authority concerned considers that there is an urgent need to act in order to protect the rights and freedoms of data subjects, it may, by way of derogation from the consistency mechanism referred to in Articles 63, 64 and 65 or the procedure referred to in Article 60, immediately adopt provisional measures intended to produce legal effects on its own territory with a specified period of validity which shall not exceed three months. The supervisory authority shall, without delay, communicate those measures and the reasons for adopting them to the other supervisory authorities concerned, to the Board and to the Commission.

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2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion or an urgent binding decision from the Board, giving reasons for requesting such opinion or decision.

3. Any supervisory authority may request an urgent opinion or an urgent binding decision, as the case may be, from the Board where a competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the rights and freedoms of data subjects, giving reasons for requesting such opinion or decision, including for the urgent need to act.

4. By derogation from Article 64(3) and Article 65(2), an urgent opinion or an urgent binding decision referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the Board.

Article 67

Exchange of information

The Commission may adopt implementing acts of general scope in order to specify the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board, in particular the standardised format referred to in Article 64.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

Section 3

European data protection board

Article 68

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European Data Protection Board

1. The European Data Protection Board (the 'Board') is hereby established as a body of the Union and shall have legal personality.

2. The Board shall be represented by its Chair.

3. The Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor, or their respective representatives.

4. Where in a Member State more than one supervisory authority is responsible for monitoring the application of the provisions pursuant to this Regulation, a joint representative shall be appointed in accordance with that Member State's law.

5. The Commission shall have the right to participate in the activities and meetings of the Board without voting right. The Commission shall designate a representative. The Chair of the Board shall communicate to the Commission the activities of the Board.

6. In the cases referred to in Article 65, the European Data Protection Supervisor shall have voting rights only on decisions which concern principles and rules applicable to the Union institutions, bodies, offices and agencies which correspond in substance to those of this Regulation.

Article 69

Independence

1. The Board shall act independently when performing its tasks or exercising its powers pursuant to Articles 70 and 71.

2. Without prejudice to requests by the Commission referred to in point (b) of Article 70(1) and in

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Article 70(2), the Board shall, in the performance of its tasks or the exercise of its powers, neither seek nor take instructions from anybody.

Article 70

Tasks of the Board

1. The Board shall ensure the consistent application of this Regulation. To that end, the Board shall, on its own initiative or, where relevant, at the request of the Commission, in particular:

(a) monitor and ensure the correct application of this Regulation in the cases provided for in Articles 64 and 65 without prejudice to the tasks of national supervisory authorities;

(b) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;

(c) advise the Commission on the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules;

(d) issue guidelines, recommendations, and best practices on procedures for erasing links, copies or replications of personal data from publicly available communication services as referred to in Article 17(2);

(e) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation;

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(f)issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for further specifying the criteria and conditions for decisions based on profiling pursuant to Article 22(2);

(g)issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for establishing the personal data breaches and determining the undue delay referred to in Article 33(1) and (2) and for the particular circumstances in which a controller or a processor is required to notify the personal data breach;

(h)issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph as to the circumstances in which a personal data breach is likely to result in a high risk to the rights and freedoms of the natural persons referred to in Article 34(1).

(i)issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for the purpose of further specifying the criteria and requirements for personal data transfers based on binding corporate rules adhered to by controllers and binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned referred to in Article 47;

(j)issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for the purpose of further specifying the criteria and requirements for the personal data transfers on the basis of Article 49(1);

(k)draw up guidelines for supervisory authorities concerning the application of measures referred to in Article 58(1), (2) and (3) and the setting of administrative fines pursuant to Article 83;

(l)review the practical application of the guidelines, recommendations and best practices referred to in points (e) and (f);

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(m) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for establishing common procedures for reporting by natural persons of infringements of this Regulation pursuant to Article 54(2);

(n) encourage the drawing-up of codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Articles 40 and 42;

(o) carry out the accreditation of certification bodies and its periodic review pursuant to Article 43 and maintain a public register of accredited bodies pursuant to Article 43(6) and of the accredited controllers or processors established in third countries pursuant to Article 42(7);

(p) specify the requirements referred to in Article 43(3) with a view to the accreditation of certification bodies under Article 42;

(q) provide the Commission with an opinion on the certification requirements referred to in Article 43(8);

(r) provide the Commission with an opinion on the icons referred to in Article 12(7);

(s) provide the Commission with an opinion for the assessment of the adequacy of the level of protection in a third country or international organisation, including for the assessment whether a third country, a territory or one or more specified sectors within that third country, or an international organisation no longer ensures an adequate level of protection. To that end, the Commission shall provide the Board with all necessary documentation, including correspondence with the government of the third country, with regard to that third country, territory or specified sector, or with the international organisation.

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(t) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in Article 64(1), on matters submitted pursuant to Article 64(2) and to issue binding decisions pursuant to Article 65, including in cases referred to in Article 66;

(u) promote the cooperation and the effective bilateral and multilateral exchange of information and best practices between the supervisory authorities;

(v) promote common training programmes and facilitate personnel exchanges between the supervisory authorities and, where appropriate, with the supervisory authorities of third countries or with international organisations;

(w) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide.

(x) issue opinions on codes of conduct drawn up at Union level pursuant to Article 40(9); and

(y) maintain a publicly accessible electronic register of decisions taken by supervisory authorities and courts on issues handled in the consistency mechanism.

2. Where the Commission requests advice from the Board, it may indicate a time limit, taking into account the urgency of the matter.

3. The Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 93 and make them public.

4. The Board shall, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period. The Board shall, without prejudice to Article 76, make the results of the consultation procedure publicly available.

Article 71

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Reports

1. The Board shall draw up an annual report regarding the protection of natural persons with regard to processing in the Union and, where relevant, in third countries and international organisations. The report shall be made public and be transmitted to the European Parliament, to the Council and to the Commission.

2. The annual report shall include a review of the practical application of the guidelines, recommendations and best practices referred to in point (l) of Article 70(1) as well as of the binding decisions referred to in Article 65.

Article 72

Procedure

1. The Board shall take decisions by a simple majority of its members, unless otherwise provided for in this Regulation.

2. The Board shall adopt its own rules of procedure by a two-thirds majority of its members and organise its own operational arrangements.

Article 73

Chair

1. The Board shall elect a chair and two deputy chairs from amongst its members by simple majority.

2. The term of office of the Chair and of the deputy chairs shall be five years and be renewable once.

Article 74

Tasks of the Chair

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1. The Chair shall have the following tasks:

(a) to convene the meetings of the Board and prepare its agenda;

(b)to notify decisions adopted by the Board pursuant to Article 65 to the lead supervisory authority and the supervisory authorities concerned;

(c)to ensure the timely performance of the tasks of the Board, in particular in relation to the consistency mechanism referred to in Article 63.

2. The Board shall lay down the allocation of tasks between the Chair and the deputy chairs in its rules of procedure.

Article 75

Secretariat

1. The Board shall have a secretariat, which shall be provided by the European Data Protection Supervisor.

2. The secretariat shall perform its tasks exclusively under the instructions of the Chair of the Board.

3. The staff of the European Data Protection Supervisor involved in carrying out the tasks conferred on the Board by this Regulation shall be subject to separate reporting lines from the staff involved in carrying out tasks conferred on the European Data Protection Supervisor.

4. Where appropriate, the Board and the European Data Protection Supervisor shall establish and publish a Memorandum of Understanding implementing this Article, determining the terms of their cooperation, and applicable to the staff of the European Data Protection Supervisor involved in carrying out the tasks conferred on the Board by this Regulation.

5. The secretariat shall provide analytical, administrative and logistical support to the Board.

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6. The secretariat shall be responsible in particular for:

(a) the day-to-day business of the Board;

(b) communication between the members of the Board, its Chair and the Commission;

(c) communication with other institutions and the public;

(d) the use of electronic means for the internal and external communication;

(e) the translation of relevant information;

(f) the preparation and follow-up of the meetings of the Board;

(g)the preparation, drafting and publication of opinions, decisions on the settlement of disputes between supervisory authorities and other texts adopted by the Board.

Article 76

Confidentiality

1. The discussions of the Board shall be confidential where the Board deems it necessary, as provided for in its rules of procedure.

2. Access to documents submitted to members of the Board, experts and representatives of third parties shall be governed by Regulation (EC) No 1049/2001 of the European Parliament and of the Council [(21)].

CHAPTER VIII

Remedies, liability and penalties

Article 77

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Right to lodge a complaint with a supervisory authority

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.

Article 78

Right to an effective judicial remedy against a supervisory authority

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.

3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.

4. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.

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Article 79

Right to an effective judicial remedy against a controller or processor

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.

2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

Article 80

Representation of data subjects

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that

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Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.

Article 81

Suspension of proceedings

1. Where a competent court of a Member State has information on proceedings, concerning the same subject matter as regards processing by the same controller or processor, that are pending in a court in another Member State, it shall contact that court in the other Member State to confirm the existence of such proceedings.

2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, any competent court other than the court first seized may suspend its proceedings.

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.

Article 82

Right to compensation and liability

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only

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where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.

5. Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2.

6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2).

Article 83

General conditions for imposing administrative fines

1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.

2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2).

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When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:

(a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;

(b) the intentional or negligent character of the infringement;

(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;

(d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;

(e) any relevant previous infringements by the controller or processor;

(f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;

(g) the categories of personal data affected by the infringement;

(h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;

(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;

(j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and

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(k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

3. If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.

4. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the obligations of the controller and the processor pursuant to Articles 8, 11, 25 to 39 and 42 and 43;

(b) the obligations of the certification body pursuant to Articles 42 and 43;

(c) the obligations of the monitoring body pursuant to Article 41(4).

5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;

(b) the data subjects' rights pursuant to Articles 12 to 22;

(c) the transfers of personal data to a recipient in a third country or an international organisation pursuant to Articles 44 to 49;

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(d) any obligations pursuant to Member State law adopted under Chapter IX;

(e) non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 58(2) or failure to provide access in violation of Article 58(1).

6. Non-compliance with an order by the supervisory authority as referred to in Article 58(2) shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

7. Without prejudice to the corrective powers of supervisory authorities pursuant to Article 58(2), each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

8. The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.

9. Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by 25 May 2018 and, without delay, any subsequent amendment law or amendment affecting them.

Article 84

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Penalties

1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.

2. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

CHAPTER IX

Provisions relating to specific processing situations

Article 85

Processing and freedom of expression and information

1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

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3. Each Member State shall notify to the Commission the provisions of its law which it has adopted pursuant to paragraph 2 and, without delay, any subsequent amendment law or amendment affecting them.

Article 86

Processing and public access to official documents

Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.

Article 87

Processing of the national identification number

Member States may further determine the specific conditions for the processing of a national identification number or any other identifier of general application. In that case the national identification number or any other identifier of general application shall be used only under appropriate safeguards for the rights and freedoms of the data subject pursuant to this Regulation.

Article 88

Processing in the context of employment

1. Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective

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agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

2. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

Article 89

Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes

1. Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.

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2. Where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

3. Where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

4. Where processing referred to in paragraphs 2 and 3 serves at the same time another purpose, the derogations shall apply only to processing for the purposes referred to in those paragraphs.

Article 90

Obligations of secrecy

1. Member States may adopt specific rules to set out the powers of the supervisory authorities laid down in points (e) and (f) of Article 58(1) in relation to controllers or processors that are subject, under Union or Member State law or rules established by national competent bodies, to an obligation of professional secrecy or other equivalent obligations of secrecy where this is necessary and proportionate to reconcile the right of the protection of personal data with the obligation of secrecy. Those rules shall apply only with regard to personal data which the controller or processor has received as a result of or has obtained in an activity covered by that obligation of secrecy.

2. Each Member State shall notify to the Commission the rules adopted pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

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Article 91

Existing data protection rules of churches and religious associations

1. Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of natural persons with regard to processing, such rules may continue to apply, provided that they are brought into line with this Regulation.

2. Churches and religious associations which apply comprehensive rules in accordance with paragraph 1 of this Article shall be subject to the supervision of an independent supervisory authority, which may be specific, provided that it fulfils the conditions laid down in Chapter VI of this Regulation.

CHAPTER X

Delegated acts and implementing acts

Article 92

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Article 12(8) and Article 43(8) shall be conferred on the Commission for an indeterminate period of time from 24 May 2016.

3. The delegation of power referred to in Article 12(8) and Article 43(8) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following that of its

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publication in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 12(8) and Article 43(8) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

Article 93

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

CHAPTER XI

Final provisions

Article 94

Repeal of Directive 95/46/EC

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1. Directive 95/46/EC is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation.

Article 95

Relationship with Directive 2002/58/EC

This Regulation shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive 2002/58/EC.

Article 96

Relationship with previously concluded Agreements

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to 24 May 2016, and which comply with Union law as applicable prior to that date, shall remain in force until amended, replaced or revoked.

Article 97

Commission reports

1. By 25 May 2020 and every four years thereafter, the Commission shall submit a report on the evaluation and review of this Regulation to the European Parliament and to the Council. The reports shall be made public.

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2. In the context of the evaluations and reviews referred to in paragraph 1, the Commission shall examine, in particular, the application and functioning of:

(a) Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 45(3) of this Regulation and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC;

(b) Chapter VII on cooperation and consistency.

3. For the purpose of paragraph 1, the Commission may request information from Member States and supervisory authorities.

4. In carrying out the evaluations and reviews referred to in paragraphs 1 and 2, the Commission shall take into account the positions and findings of the European Parliament, of the Council, and of other relevant bodies or sources.

5. The Commission shall, if necessary, submit appropriate proposals to amend this Regulation, in particular taking into account of developments in information technology and in the light of the state of progress in the information society.

Article 98

Review of other Union legal acts on data protection

The Commission shall, if appropriate, submit legislative proposals with a view to amending other Union legal acts on the protection of personal data, in order to ensure uniform and consistent protection of natural persons with regard to processing. This shall in particular concern the rules relating to the protection of natural persons with regard to processing by Union institutions, bodies, offices and agencies and on the free movement of such data.

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Article 99

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 25 May 2018.

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9.2. CJEU decision in C-101/01 Bodil Lindqvist

JUDGMENT OF THE COURT

6 November 2003 (1)

In Case C-101/01,

REFERENCE to the Court under Article 234 EC by the Göta hovrätt (Sweden) for a preliminary ruling in the criminal proceedings before that court against

Bodil Lindqvist,

on, inter alia, the interpretation of Directive 95/46/EC of the European Parliament and of the Council 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 (OJ 1995 L 281, p. 31),

Judgment

1

By order of 23 February 2001, received at the Court on 1 March 2001, the Göta hovrätt (Göta Court of Appeal) referred to the Court for a preliminary ruling under Article 234 EC seven questions concerning inter alia the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24

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October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2

Those questions were raised in criminal proceedings before that court against Mrs Lindqvist, who was charged with breach of the Swedish legislation on the protection of personal data for publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church.

Legal background[…]

The main proceedings and the questions referred

12

In addition to her job as a maintenance worker, Mrs Lindqvist worked as a catechist in the parish of Alseda (Sweden). She followed a data processing course on which she had inter alia to set up a home page on the internet. At the end of 1998, Mrs Lindqvist set up internet pages at home on her personal computer in order to allow parishioners preparing for their confirmation to obtain information they might need. At her request, the administrator of the Swedish Church's website set up a link between those pages and that site.

13

The pages in question contained information about Mrs Lindqvist and 18 colleagues in the parish, sometimes including their full names and in other cases only their first names. Mrs Lindqvist also described, in a mildly humorous manner, the jobs held by her colleagues and their hobbies. In many cases family circumstances and telephone numbers and other matters were mentioned. She also stated that one colleague had injured her foot and was on half-time on medical grounds.

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Mrs Lindqvist had not informed her colleagues of the existence of those pages or obtained their consent, nor did she notify the Datainspektionen (supervisory authority for the protection of electronically transmitted data) of her activity. She removed the pages in question as soon as she became aware that they were not appreciated by some of her colleagues.

15

The public prosecutor brought a prosecution against Mrs Lindqvist charging her with breach of the PUL on the grounds that she had:

–

processed personal data by automatic means without giving prior written notification to the Datainspektionen (Paragraph 36 of the PUL);

–

processed sensitive personal data (injured foot and half-time on medical grounds) without authorisation (Paragraph 13 of the PUL);

–

transferred processed personal data to a third country without authorisation (Paragraph 33 of the PUL).

16

Mrs Lindqvist accepted the facts but disputed that she was guilty of an offence. Mrs Lindqvist was fined by the Eksjö tingsrätt (District Court) (Sweden) and appealed against that sentence to the referring court.

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The amount of the fine was SEK 4 000, which was arrived at by multiplying the sum of SEK 100, representing Mrs Lindqvist's financial position, by a factor of 40, reflecting the severity of the offence. Mrs Lindqvist was also sentenced to pay SEK 300 to a Swedish fund to assist victims of crimes.

18

As it had doubts as to the interpretation of the Community law applicable in this area, inter alia Directive 95/46, the Göta hovrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1)

Is the mention of a person – by name or with name and telephone number – on an internet home page an action which falls within the scope of [Directive 95/46]? Does it constitute the processing of personal data wholly or partly by automatic means to list on a self-made internet home page a number of persons with comments and statements about their jobs and hobbies etc.?

(2)

If the answer to the first question is no, can the act of setting up on an internet home page separate pages for about 15 people with links between the pages which make it possible to search by first name be considered to constitute the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system within the meaning of Article 3(1)?

If the answer to either of those questions is yes, the hovrätt also asks the following questions:

(3)

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Can the act of loading information of the type described about work colleagues onto a private home page which is none the less accessible to anyone who knows its address be regarded as outside the scope of [Directive 95/46] on the ground that it is covered by one of the exceptions in Article 3(2)?

(4)

Is information on a home page stating that a named colleague has injured her foot and is on half-time on medical grounds personal data concerning health which, according to Article 8(1), may not be processed?

(5)

[Directive 95/46] prohibits the transfer of personal data to third countries in certain cases. If a person in Sweden uses a computer to load personal data onto a home page stored on a server in Sweden – with the result that personal data become accessible to people in third countries – does that constitute a transfer of data to a third country within the meaning of the directive? Would the answer be the same even if, as far as known, no one from the third country had in fact accessed the data or if the server in question was actually physically in a third country?

(6)

Can the provisions of [Directive 95/46], in a case such as the above, be regarded as bringing about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the EU and are enshrined in inter alia Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms?

Finally, the hovrätt asks the following question:

(7)

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Can a Member State, as regards the issues raised in the above questions, provide more extensive protection for personal data or give it a wider scope than the directive, even if none of the circumstances described in Article 13 exists?

The first question

19

By its first question, the referring court asks whether the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46.

Observations submitted to the Court

20

Mrs Lindqvist submits that it is unreasonable to take the view that the mere mention by name of a person or of personal data in a document contained on an internet page constitutes automatic processing of data. On the other hand, reference to such data in a keyword in the meta tags of an internet page, which makes it possible to create an index and find that page using a search engine, might constitute such processing.

21

The Swedish Government submits that the term the processing of personal data wholly or partly by automatic means in Article 3(1) of Directive 95/46, covers all processing in computer format, in other words, in binary format. Consequently, as soon as personal data are processed by computer, whether

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using a word processing programme or in order to put them on an internet page, they have been the subject of processing within the meaning of Directive 95/46.

22

The Netherlands Government submits that personal data are loaded onto an internet page using a computer and a server, which are essential elements of automation, so that it must be considered that such data are subject to automatic processing.

23

The Commission submits that Directive 95/46 applies to all processing of personal data referred to in Article 3 thereof, regardless of the technical means used. Accordingly, making personal data available on the internet constitutes processing wholly or partly by automatic means, provided that there are no technical limitations which restrict the processing to a purely manual operation. Thus, by its very nature, an internet page falls within the scope of Directive 95/46.

Reply of the Court

24

The term personal data used in Article 3(1) of Directive 95/46 covers, according to the definition in Article 2(a) thereof, any information relating to an identified or identifiable natural person. The term undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.

25

According to the definition in Article 2(b) of Directive 95/46, the term processing of such data used in Article 3(1) covers any operation or set of operations which is performed upon personal data, whether or not by automatic means. That provision gives several examples of such

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operations, including disclosure by transmission, dissemination or otherwise making data available. It follows that the operation of loading personal data on an internet page must be considered to be such processing.

26

It remains to be determined whether such processing is wholly or partly by automatic means. In that connection, placing information on an internet page entails, under current technical and computer procedures, the operation of loading that page onto a server and the operations necessary to make that page accessible to people who are connected to the internet. Such operations are performed, at least in part, automatically.

27

The answer to the first question must therefore be that the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by automatic means within the meaning of Article 3(1) of Directive 95/46.

The second question

28

As the first question has been answered in the affirmative, there is no need to reply to the second question, which arises only in the event that the first question is answered in the negative.

The third question

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By its third question, the national court essentially seeks to know whether processing of personal data such as that described in the first question is covered by one of the exceptions in Article 3(2) of Directive 95/46.

Observations submitted to the Court

30

Mrs Lindqvist submits that private individuals who make use of their freedom of expression to create internet pages in the course of a non-profit-making or leisure activity are not carrying out an economic activity and are thus not subject to Community law. If the Court were to hold otherwise, the question of the validity of Directive 95/46 would arise, as, in adopting it, the Community legislature would have exceeded the powers conferred on it by Article 100a of the EC Treaty (now, after amendment, Article 95 EC). The approximation of laws, which concerns the establishment and functioning of the common market, cannot serve as a legal basis for Community measures regulating the right of private individuals to freedom of expression on the internet.

31

The Swedish Government submits that, when Directive 95/46 was implemented in national law, the Swedish legislature took the view that processing of personal data by a natural person which consisted in publishing those data to an indeterminate number of people, for example through the internet, could not be described as a purely personal or household activity within the meaning of the second indent of Article 3(2) of Directive 95/46. However, that Government does not rule out that the exception provided for in the first indent of that paragraph might cover cases in which a natural person publishes personal data on an internet page solely in the exercise of his freedom of expression and without any connection with a professional or commercial activity.

32

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According to the Netherlands Government, automatic processing of data such as that at issue in the main proceedings does not fall within any of the exceptions in Article 3(2) of Directive 95/46. As regards the exception in the second indent of that paragraph in particular, it observes that the creator of an internet page brings the data placed on it to the knowledge of a generally indeterminate group of people.

33

The Commission submits that an internet page such as that at issue in the main proceedings cannot be considered to fall outside the scope of Directive 95/46 by virtue of Article 3(2) thereof, but constitutes, given the purpose of the internet page at issue in the main proceedings, an artistic and literary creation within the meaning of Article 9 of that Directive.

34

It takes the view that the first indent of Article 3(2) of Directive 95/46 lends itself to two different interpretations. The first consists in limiting the scope of that provision to the areas cited as examples, in other words, to activities which essentially fall within what are generally called the second and third pillars. The other interpretation consists in excluding from the scope of Directive 95/46 the exercise of any activity which is not covered by Community law.

35

The Commission argues that Community law is not limited to economic activities connected with the four fundamental freedoms. Referring to the legal basis of Directive 95/46, to its objective, to Article 6 EU, to the Charter of fundamental rights of the European Union proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), and to the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, it concludes that that directive is intended to regulate the free movement of personal data in the exercise not only

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of an economic activity, but also of social activity in the course of the integration and functioning of the common market.

36

It adds that to exclude generally from the scope of Directive 95/46 internet pages which contain no element of commerce or of provision of services might entail serious problems of demarcation. A large number of internet pages containing personal data intended to disparage certain persons with a particular end in view might then be excluded from the scope of that directive.

Reply of the Court

37

Article 3(2) of Directive 95/46 provides for two exceptions to its scope.

38

The first exception concerns the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union, and in any case processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.

39

As the activities of Mrs Lindqvist which are at issue in the main proceedings are essentially not economic but charitable and religious, it is necessary to consider whether they constitute the processing of personal data in the course of an activity which falls outside the scope of Community law within the meaning of the first indent of Article 3(2) of Directive 95/46.

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40

The Court has held, on the subject of Directive 95/46, which is based on Article 100a of the Treaty, that recourse to that legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis (see Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 41, and the case-law cited therein).

41

A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations (*Österreichischer Rundfunk and Others* , cited above, paragraph 42).

42

Against that background, it would not be appropriate to interpret the expression activity which falls outside the scope of Community law as having a scope which would require it to be determined in each individual case whether the specific activity at issue directly affected freedom of movement between Member States.

43

The activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 (in other words, the activities provided for by Titles V and VI of the Treaty on European Union and processing operations concerning public security, defence, State security and activities in areas of criminal law) are, in any event, activities of the State or of State authorities and unrelated to the fields

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of activity of individuals.

44

It must therefore be considered that the activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 are intended to define the scope of the exception provided for there, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (*ejusdem generis*).

45

Charitable or religious activities such as those carried out by Mrs Lindqvist cannot be considered equivalent to the activities listed in the first indent of Article 3(2) of Directive 95/46 and are thus not covered by that exception.

46

As regards the exception provided for in the second indent of Article 3(2) of Directive 95/46, the 12th recital in the preamble to that directive, which concerns that exception, cites, as examples of the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses.

47

That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.

48

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The answer to the third question must therefore be that processing of personal data such as that described in the reply to the first question is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

The fourth question

49

By its fourth question, the referring court seeks to know whether reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

50

In the light of the purpose of the directive, the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual.

51

The answer to the fourth question must therefore be that reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

The fifth question

52

By its fifth question the referring court seeks essentially to know whether there is any transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site

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on which the page can be consulted and which is hosted by a natural or legal person (the hosting provider) who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country. The referring court also asks whether the reply to that question would be the same if no one from the third country had in fact accessed the data or if the server where the page was stored was physically in a third country.

Observations submitted to the Court

53

The Commission and the Swedish Government consider that the loading, using a computer, of personal data onto an internet page, so that they become accessible to nationals of third countries, constitutes a transfer of data to third countries within the meaning of Directive 95/46. The answer would be the same if no one from the third country had in fact accessed the data or if the server where it was stored was physically in a third country.

54

The Netherlands Government points out that the term transfer is not defined by Directive 95/46. It takes the view, first, that that term must be understood to refer to the act of intentionally transferring personal data from the territory of a Member State to a third country and, second, that no distinction can be made between the different ways in which data are made accessible to third parties. It concludes that loading personal data onto an internet page using a computer cannot be considered to be a transfer of personal data to a third country within the meaning of Article 25 of Directive 95/46.

55

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The United Kingdom Government submits that Article 25 of Directive 95/46 concerns the transfer of data to third countries and not their accessibility from third countries. The term transfer connotes the transmission of personal data from one place and person to another place and person. It is only in the event of such a transfer that Article 25 of Directive 95/46 requires Member States to ensure an adequate level of protection of personal data in a third country.

Reply of the Court

56

Directive 95/46 does not define the expression transfer to a third country in Article 25 or any other provision, including Article 2.

57

In order to determine whether loading personal data onto an internet page constitutes a transfer of those data to a third country within the meaning of Article 25 of Directive 95/46 merely because it makes them accessible to people in a third country, it is necessary to take account both of the technical nature of the operations thus carried out and of the purpose and structure of Chapter IV of that directive where Article 25 appears.

58

Information on the internet can be consulted by an indefinite number of people living in many places at almost any time. The ubiquitous nature of that information is a result inter alia of the fact that the technical means used in connection with the internet are relatively simple and becoming less and less expensive.

59

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Under the procedures for use of the internet available to individuals like Mrs Lindqvist during the 1990s, the author of a page intended for publication on the internet transmits the data making up that page to his hosting provider. That provider manages the computer infrastructure needed to store those data and connect the server hosting the site to the internet. That allows the subsequent transmission of those data to anyone who connects to the internet and seeks access to it. The computers which constitute that infrastructure may be located, and indeed often are located, in one or more countries other than that where the hosting provider is established, without its clients being aware or being in a position to be aware of it.

60

It appears from the court file that, in order to obtain the information appearing on the internet pages on which Mrs Lindqvist had included information about her colleagues, an internet user would not only have to connect to the internet but also personally carry out the necessary actions to consult those pages. In other words, Mrs Lindqvist's internet pages did not contain the technical means to send that information automatically to people who did not intentionally seek access to those pages.

61

It follows that, in circumstances such as those in the case in the main proceedings, personal data which appear on the computer of a person in a third country, coming from a person who has loaded them onto an internet site, were not directly transferred between those two people but through the computer infrastructure of the hosting provider where the page is stored.

62

It is in that light that it must be examined whether the Community legislature intended, for the purposes of the application of Chapter IV of Directive 95/46, to include within the expression transfer [of data] to a third country within the meaning of Article 25 of that directive activities such as

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those carried out by Mrs Lindqvist. It must be stressed that the fifth question asked by the referring court concerns only those activities and not those carried out by the hosting providers.

63

Chapter IV of Directive 95/46, in which Article 25 appears, sets up a special regime, with specific rules, intended to allow the Member States to monitor transfers of personal data to third countries. That Chapter sets up a complementary regime to the general regime set up by Chapter II of that directive concerning the lawfulness of processing of personal data.

64

The objective of Chapter IV is defined in the 56th to 60th recitals in the preamble to Directive 95/46, which state inter alia that, although the protection of individuals guaranteed in the Community by that Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection, the adequacy of such protection must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations. Where a third country does not ensure an adequate level of protection the transfer of personal data to that country must be prohibited.

65

For its part, Article 25 of Directive 95/46 imposes a series of obligations on Member States and on the Commission for the purposes of monitoring transfers of personal data to third countries in the light of the level of protection afforded to such data in each of those countries.

66

In particular, Article 25(4) of Directive 95/46 provides that, where the Commission finds that a third

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country does not ensure an adequate level of protection, Member States are to take the measures necessary to prevent any transfer of personal data to the third country in question.

67

Chapter IV of Directive 95/46 contains no provision concerning use of the internet. In particular, it does not lay down criteria for deciding whether operations carried out by hosting providers should be deemed to occur in the place of establishment of the service or at its business address or in the place where the computer or computers constituting the service's infrastructure are located.

68

Given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence, in Chapter IV, of criteria applicable to use of the internet, one cannot presume that the Community legislature intended the expression transfer [of data] to a third country to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them.

69

If Article 25 of Directive 95/46 were interpreted to mean that there is transfer [of data] to a third country every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet.

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70

Accordingly, it must be concluded that Article 25 of Directive 95/46 is to be interpreted as meaning that operations such as those carried out by Mrs Lindqvist do not as such constitute a transfer [of data] to a third country. It is thus unnecessary to investigate whether an individual from a third country has accessed the internet page concerned or whether the server of that hosting service is physically in a third country.

71

The reply to the fifth question must therefore be that there is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.

The sixth question

72

By its sixth question the referring court seeks to know whether the provisions of Directive 95/46, in a case such as that in the main proceedings, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined in inter alia Article 10 of the ECHR.

Observations submitted to the Court

73

Citing inter alia Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, Mrs Lindqvist submits that Directive 95/46 and the PUL, in so far as they lay down requirements of prior consent and

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prior notification of a supervisory authority and a principle of prohibiting processing of personal data of a sensitive nature, are contrary to the general principle of freedom of expression enshrined in Community law. More particularly, she argues that the definition of processing of personal data wholly or partly by automatic means does not fulfil the criteria of predictability and accuracy.

74

She argues further that merely mentioning a natural person by name, revealing their telephone details and working conditions and giving information about their state of health and hobbies, information which is in the public domain, well-known or trivial, does not constitute a significant breach of the right to respect for private life. Mrs Lindqvist considers that, in any event, the constraints imposed by Directive 95/46 are disproportionate to the objective of protecting the reputation and private life of others.

75

The Swedish Government considers that Directive 95/46 allows the interests at stake to be weighed against each other and freedom of expression and protection of private life to be thereby safeguarded. It adds that only the national court can assess, in the light of the facts of each individual case, whether the restriction on the exercise of the right to freedom of expression entailed by the application of the rules on the protection of the rights of others is proportionate.

76

The Netherlands Government points out that both freedom of expression and the right to respect for private life are among the general principles of law for which the Court ensures respect and that the ECHR does not establish any hierarchy between the various fundamental rights. It therefore considers that the national court must endeavour to balance the various fundamental rights at issue by taking account of the circumstances of the individual case.

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77

The United Kingdom Government points out that its proposed reply to the fifth question, set out in paragraph 55 of this judgment, is wholly in accordance with fundamental rights and avoids any disproportionate restriction on freedom of expression. It adds that it is difficult to justify an interpretation which would mean that the publication of personal data in a particular form, that is to say, on an internet page, is subject to far greater restrictions than those applicable to publication in other forms, such as on paper.

78

The Commission also submits that Directive 95/46 does not entail any restriction contrary to the general principle of freedom of expression or other rights and freedoms applicable in the European Union corresponding inter alia to the right provided for in Article 10 of the ECHR.

Reply of the Court

79

According to the seventh recital in the preamble to Directive 95/46, the establishment and functioning of the common market are liable to be seriously affected by differences in national rules applicable to the processing of personal data. According to the third recital of that directive the harmonisation of those national rules must seek to ensure not only the free flow of such data between Member States but also the safeguarding of the fundamental rights of individuals. Those objectives may of course be inconsistent with one another.

80

On the one hand, the economic and social integration resulting from the establishment and functioning of the internal market will necessarily lead to a substantial increase in cross-

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border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States, whether businesses or public authorities of the Member States. Those so involved will, to a certain extent, need to have access to personal data to perform their transactions or carry out their tasks within the area without internal frontiers which the internal market constitutes.

81

On the other hand, those affected by the processing of personal data understandably require those data to be effectively protected.

82

The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 95/46 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for. Second, they result from the adoption, by the Member States, of national provisions implementing that directive and their application by the national authorities.

83

As regards Directive 95/46 itself, its provisions are necessarily relatively general since it has to be applied to a large number of very different situations. Contrary to Mrs Lindqvist's contentions, the directive quite properly includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options.

84

It is true that, in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46. However, there is nothing to suggest that the regime it provides for lacks

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predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order.

85

Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.

86

In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site.

87

Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.

88

Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality. That is so *a fortiori*since the scope of

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Directive 95/46 is very wide and the obligations of those who process personal data are many and significant.

89

It is for the referring court to take account, in accordance with the principle of proportionality, of all the circumstances of the case before it, in particular the duration of the breach of the rules implementing Directive 95/46 and the importance, for the persons concerned, of the protection of the data disclosed.

90

The answer to the sixth question must therefore be that the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

The seventh question

91

By its seventh question, the referring court essentially seeks to know whether it is permissible for the Member States to provide for greater protection for personal data or a wider scope than are required under Directive 95/46.

Observations submitted to the Court

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92

The Swedish Government states that Directive 95/46 is not confined to fixing minimum conditions for the protection of personal data. Member States are obliged, in the course of implementing that directive, to attain the level of protection dictated by it and are not empowered to provide for greater or less protection. However, account must be taken of the discretion which the Member States have in implementing the directive to lay down in their domestic law the general conditions for the lawfulness of the processing of personal data.

93

The Netherlands Government submits that Directive 95/46 does not preclude Member States from providing for greater protection in certain areas. It is clear, for example, from Article 10, Article 11(1), subparagraph (a) of the first paragraph of Article 14, Article 17(3), Article 18(5) and Article 19(1) of that directive that the Member States may make provision for wider protection. Moreover, the Member States are free to apply the principles of Directive 95/46 also to activities which do not fall within its scope.

94

The Commission submits that Directive 95/46 is based on Article 100a of the Treaty and that, if a Member State wishes to maintain or introduce legislation which derogates from such a harmonising directive, it is obliged to notify the Commission pursuant to Article 95(4) or 95(5) EC. The Commission therefore submits that a Member State cannot make provision for more extensive protection for personal data or a wider scope than are required under the directive.

Reply of the Court

95

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Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.

96

The harmonisation of those national laws is therefore not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive 95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate.

97

It is true that Directive 95/46 allows the Member States a margin for manoeuvre in certain areas and authorises them to maintain or introduce particular rules for specific situations as a large number of its provisions demonstrate. However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.

98

On the other hand, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it.

99

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In the light of those considerations, the answer to the seventh question must be that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

Costs

100

The costs incurred by the Swedish, Netherlands and United Kingdom Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Göta hovrätt by order of 23 February 2001, hereby rules:

1.

The act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data wholly or partly by

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automatic means within the meaning of Article 3(1) of Directive 95/46/EC of the European Parliament and of the Council 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.

2.

Such processing of personal data is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

3.

Reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

4.

There is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.

5.

The provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and

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interests in question, including the fundamental rights protected by the Community legal order.

6.

Measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

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9.3. CJEU decision in C-362/14 Schrems

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2015

In Case C-362/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 17 July 2014, received at the Court on 25 July 2014, in the proceedings

Maximillian Schrems

v

Data Protection Commissioner,

joined party:

Digital Rights Ireland Ltd,

Judgment

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1This request for a preliminary ruling relates to the interpretation, in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 25(6) and 28 of Directive 95/46/EC of the European Parliament and of the Council 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 (OJ 1995 L 281, p. 31), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 95/46'), and, in essence, to the validity of Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).

2The request has been made in proceedings between Mr Schrems and the Data Protection Commissioner ('the Commissioner') concerning the latter's refusal to investigate a complaint made by Mr Schrems regarding the fact that Facebook Ireland Ltd ('Facebook Ireland') transfers the personal data of its users to the United States of America and keeps it on servers located in that country.

Legal context […]

The dispute in the main proceedings and the questions referred for a preliminary ruling

26Mr Schrems, an Austrian national residing in Austria, has been a user of the Facebook social network ('Facebook') since 2008.

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27 Any person residing in the European Union who wishes to use Facebook is required to conclude, at the time of his registration, a contract with Facebook Ireland, a subsidiary of Facebook Inc. which is itself established in the United States. Some or all of the personal data of Facebook Ireland's users who reside in the European Union is transferred to servers belonging to Facebook Inc. that are located in the United States, where it undergoes processing.

28 On 25 June 2013 Mr Schrems made a complaint to the Commissioner by which he in essence asked the latter to exercise his statutory powers by prohibiting Facebook Ireland from transferring his personal data to the United States. He contended in his complaint that the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities. Mr Schrems referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA').

29 Since the Commissioner took the view that he was not required to investigate the matters raised by Mr Schrems in the complaint, he rejected it as unfounded. The Commissioner considered that there was no evidence that Mr Schrems' personal data had been accessed by the NSA. He added that the allegations raised by Mr Schrems in his complaint could not be profitably put forward since any question of the adequacy of data protection in the United States had to be determined in accordance with Decision 2000/520 and the Commission had found in that decision that the United States ensured an adequate level of protection.

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30Mr Schrems brought an action before the High Court challenging the decision at issue in the main proceedings. After considering the evidence adduced by the parties to the main proceedings, the High Court found that the electronic surveillance and interception of personal data transferred from the European Union to the United States serve necessary and indispensable objectives in the public interest. However, it added that the revelations made by Edward Snowden had demonstrated a 'significant over-reach' on the part of the NSA and other federal agencies.

31According to the High Court, Union citizens have no effective right to be heard. Oversight of the intelligence services' actions is carried out within the framework of an *ex parte* and secret procedure. Once the personal data has been transferred to the United States, it is capable of being accessed by the NSA and other federal agencies, such as the Federal Bureau of Investigation (FBI), in the course of the indiscriminate surveillance and interception carried out by them on a large scale.

32The High Court stated that Irish law precludes the transfer of personal data outside national territory save where the third country ensures an adequate level of protection for privacy and fundamental rights and freedoms. The importance of the rights to privacy and to inviolability of the dwelling, which are guaranteed by the Irish Constitution, requires that any interference with those rights be proportionate and in accordance with the law.

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33 The High Court held that the mass and undifferentiated accessing of personal data is clearly contrary to the principle of proportionality and the fundamental values protected by the Irish Constitution. In order for interception of electronic communications to be regarded as consistent with the Irish Constitution, it would be necessary to demonstrate that the interception is targeted, that the surveillance of certain persons or groups of persons is objectively justified in the interests of national security or the suppression of crime and that there are appropriate and verifiable safeguards. Thus, according to the High Court, if the main proceedings were to be disposed of on the basis of Irish law alone, it would then have to be found that, given the existence of a serious doubt as to whether the United States ensures an adequate level of protection of personal data, the Commissioner should have proceeded to investigate the matters raised by Mr Schrems in his complaint and that the Commissioner was wrong in rejecting the complaint.

34 However, the High Court considers that this case concerns the implementation of EU law as referred to in Article 51 of the Charter and that the legality of the decision at issue in the main proceedings must therefore be assessed in the light of EU law. According to the High Court, Decision 2000/520 does not satisfy the requirements flowing both from Articles 7 and 8 of the Charter and from the principles set out by the Court of Justice in the judgment in Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238). The right to respect for private life, guaranteed by Article 7 of the Charter and by the core values common to the traditions of the Member States, would be rendered meaningless if the State authorities were authorised to access electronic communications on a casual and generalised basis without any objective justification based on considerations of national security or the prevention of crime that are specific to the individual concerned and without those practices being accompanied by appropriate and verifiable safeguards.

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35The High Court further observes that in his action Mr Schrems in reality raises the legality of the safe harbour regime which was established by Decision 2000/520 and gives rise to the decision at issue in the main proceedings. Thus, even though Mr Schrems has not formally contested the validity of either Directive 95/46 or Decision 2000/520, the question is raised, according to the High Court, as to whether, on account of Article 25(6) of Directive 95/46, the Commissioner was bound by the Commission's finding in Decision 2000/520 that the United States ensures an adequate level of protection or whether Article 8 of the Charter authorised the Commissioner to break free, if appropriate, from such a finding.

36In those circumstances the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1)Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in [Decision 2000/520] having regard to Article 7, Article 8 and Article 47 of [the Charter], the provisions of Article 25(6) of Directive [95/46] notwithstanding?

(2)Or, alternatively, may and/or must the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission decision was first published?'

Consideration of the questions referred

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37By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether and to what extent Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, prevents a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from being able to examine the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

The powers of the national supervisory authorities, within the meaning of Article 28 of Directive 95/46, when the Commission has adopted a decision pursuant to Article 25(6) of that directive

38It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter (see judgments in Österreichischer Rundfunk and Others, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68; Google Spain and Google, C-131/12, EU:C:2014:317, paragraph 68; and Ryneš, C-212/13, EU:C:2014:2428, paragraph 29).

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39It is apparent from Article 1 of Directive 95/46 and recitals 2 and 10 in its preamble that that directive seeks to ensure not only effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the fundamental right to respect for private life with regard to the processing of personal data, but also a high level of protection of those fundamental rights and freedoms. The importance of both the fundamental right to respect for private life, guaranteed by Article 7 of the Charter, and the fundamental right to the protection of personal data, guaranteed by Article 8 thereof, is, moreover, emphasised in the case-law of the Court (see judgments in Rijkeboer, C-553/07, EU:C:2009:293, paragraph 47; Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 53; and Google Spain and Google, C-131/12, EU:C:2014:317, paragraphs, 53, 66, 74 and the case-law cited).

40As regards the powers available to the national supervisory authorities in respect of transfers of personal data to third countries, it should be noted that Article 28(1) of Directive 95/46 requires Member States to set up one or more public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of such data. In addition, that requirement derives from the primary law of the European Union, in particular Article 8(3) of the Charter and Article 16(2) TFEU (see, to this effect, judgments in Commission v Austria, C-614/10, EU:C:2012:631, paragraph 36, and Commission v Hungary, C-288/12, EU:C:2014:237, paragraph 47).

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41The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the monitoring of compliance with the provisions concerning protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. The establishment in Member States of independent supervisory authorities is therefore, as stated in recital 62 in the preamble to Directive 95/46, an essential component of the protection of individuals with regard to the processing of personal data (see judgments in Commission v Germany, C-518/07, EU:C:2010:125, paragraph 25, and Commission v Hungary, C-288/12, EU:C:2014:237, paragraph 48 and the case-law cited).

42In order to guarantee that protection, the national supervisory authorities must, in particular, ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data (see, to this effect, judgments in Commission v Germany, C-518/07, EU:C:2010:125, paragraph 24, and Commission v Hungary, C-288/12, EU:C:2014:237, paragraph 51).

43The national supervisory authorities have a wide range of powers for that purpose. Those powers, listed on a non-exhaustive basis in Article 28(3) of Directive 95/46, constitute necessary means to perform their duties, as stated in recital 63 in the preamble to the directive. Thus, those authorities possess, in particular, investigative powers, such as the power to collect all the information necessary for the performance of their supervisory duties, effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data, and the power to engage in legal proceedings.

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44 It is, admittedly, apparent from Article 28(1) and (6) of Directive 95/46 that the powers of the national supervisory authorities concern processing of personal data carried out on the territory of their own Member State, so that they do not have powers on the basis of Article 28 in respect of processing of such data carried out in a third country.

45 However, the operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46 (see, to this effect, judgment in Parliament v Council and Commission, C-317/04 and C-318/04, EU:C:2006:346, paragraph 56) carried out in a Member State. That provision defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means' and mentions, by way of example, 'disclosure by transmission, dissemination or otherwise making available'.

46 Recital 60 in the preamble to Directive 95/46 states that transfers of personal data to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to the directive. In that regard, Chapter IV of the directive, in which Articles 25 and 26 appear, has set up a regime intended to ensure that the Member States oversee transfers of personal data to third countries. That regime is complementary to the general regime set up by Chapter II of the directive laying down the general rules on the lawfulness of the processing of personal data (see, to this effect, judgment in Lindqvist, C-101/01, EU:C:2003:596, paragraph 63).

47 As, in accordance with Article 8(3) of the Charter and Article 28 of Directive 95/46, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46.

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48 Whilst acknowledging, in recital 56 in its preamble, that transfers of personal data from the Member States to third countries are necessary for the expansion of international trade, Directive 95/46 lays down as a principle, in Article 25(1), that such transfers may take place only if the third country ensures an adequate level of protection.

49 Furthermore, recital 57 states that transfers of personal data to third countries not ensuring an adequate level of protection must be prohibited.

50 In order to control transfers of personal data to third countries according to the level of protection accorded to it in each of those countries, Article 25 of Directive 95/46 imposes a series of obligations on the Member States and the Commission. It is apparent, in particular, from that article that the finding that a third country does or does not ensure an adequate level of protection may, as the Advocate General has observed in point 86 of his Opinion, be made either by the Member States or by the Commission.

51 The Commission may adopt, on the basis of Article 25(6) of Directive 95/46, a decision finding that a third country ensures an adequate level of protection. In accordance with the second subparagraph of that provision, such a decision is addressed to the Member States, who must take the measures necessary to comply with it. Pursuant to the fourth paragraph of Article 288 TFEU, it is binding on all the Member States to which it is addressed and is therefore binding on all their organs (see, to this effect, judgments in Albako Margarinefabrik, 249/85, EU:C:1987:245, paragraph 17, and Mediaset, C-69/13, EU:C:2014:71, paragraph 23) in so far as it has the effect of authorising transfers of personal data from the Member States to the third country covered by it.

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52 Thus, until such time as the Commission decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, admittedly cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (judgment in Commission v Greece, C-475/01, EU:C:2004:585, paragraph 18 and the case-law cited).

53 However, a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, such as Decision 2000/520, cannot prevent persons whose personal data has been or could be transferred to a third country from lodging with the national supervisory authorities a claim, within the meaning of Article 28(4) of that directive, concerning the protection of their rights and freedoms in regard to the processing of that data. Likewise, as the Advocate General has observed in particular in points 61, 93 and 116 of his Opinion, a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) of the Charter and Article 28 of the directive.

54 Neither Article 8(3) of the Charter nor Article 28 of Directive 95/46 excludes from the national supervisory authorities' sphere of competence the oversight of transfers of personal data to third countries which have been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46.

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55 In particular, the first subparagraph of Article 28(4) of Directive 95/46, under which the national supervisory authorities are to hear 'claims lodged by any person … concerning the protection of his rights and freedoms in regard to the processing of personal data', does not provide for any exception in this regard where the Commission has adopted a decision pursuant to Article 25(6) of that directive.

56 Furthermore, it would be contrary to the system set up by Directive 95/46 and to the objective of Articles 25 and 28 thereof for a Commission decision adopted pursuant to Article 25(6) to have the effect of preventing a national supervisory authority from examining a person's claim concerning the protection of his rights and freedoms in regard to the processing of his personal data which has been or could be transferred from a Member State to the third country covered by that decision.

57 On the contrary, Article 28 of Directive 95/46 applies, by its very nature, to any processing of personal data. Thus, even if the Commission has adopted a decision pursuant to Article 25(6) of that directive, the national supervisory authorities, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the directive.

58 If that were not so, persons whose personal data has been or could be transferred to the third country concerned would be denied the right, guaranteed by Article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim for the purpose of protecting their fundamental rights (see, by analogy, judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 68).

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59A claim, within the meaning of Article 28(4) of Directive 95/46, by which a person whose personal data has been or could be transferred to a third country contends, as in the main proceedings, that, notwithstanding what the Commission has found in a decision adopted pursuant to Article 25(6) of that directive, the law and practices of that country do not ensure an adequate level of protection must be understood as concerning, in essence, whether that decision is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

60In this connection, the Court's settled case-law should be recalled according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights (see, to this effect, judgments in Commission and Others v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 66; Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 91; and Telefónica v Commission, C-274/12 P, EU:C:2013:852, paragraph 56). Commission decisions adopted pursuant to Article 25(6) of Directive 95/46 cannot therefore escape such review.

61That said, the Court alone has jurisdiction to declare that an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, is invalid, the exclusivity of that jurisdiction having the purpose of guaranteeing legal certainty by ensuring that EU law is applied uniformly (see judgments in Melki and Abdeli, C-188/10 and C-189/10, EU:C:2010:363, paragraph 54, and CIVAD, C-533/10, EU:C:2012:347, paragraph 40).

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62 Whilst the national courts are admittedly entitled to consider the validity of an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, they are not, however, endowed with the power to declare such an act invalid themselves (see, to this effect, judgments in Foto-Frost, 314/85, EU:C:1987:452, paragraphs 15 to 20, and IATA and ELFAA, C-344/04, EU:C:2006:10, paragraph 27). A fortiori, when the national supervisory authorities examine a claim, within the meaning of Article 28(4) of that directive, concerning the compatibility of a Commission decision adopted pursuant to Article 25(6) of the directive with the protection of the privacy and of the fundamental rights and freedoms of individuals, they are not entitled to declare that decision invalid themselves.

63 Having regard to those considerations, where a person whose personal data has been or could be transferred to a third country which has been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46 lodges with a national supervisory authority a claim concerning the protection of his rights and freedoms in regard to the processing of that data and contests, in bringing the claim, as in the main proceedings, the compatibility of that decision with the protection of the privacy and of the fundamental rights and freedoms of individuals, it is incumbent upon the national supervisory authority to examine the claim with all due diligence.

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64 In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. Having regard to the case-law cited in paragraphs 61 and 62 of the present judgment, those courts must stay proceedings and make a reference to the Court for a preliminary ruling on validity where they consider that one or more grounds for invalidity put forward by the parties or, as the case may be, raised by them of their own motion are well founded (see, to this effect, judgment in T & L Sugars and Sidul Açúcares v Commission, C-456/13 P, EU:C:2015:284, paragraph 48 and the case-law cited).

65 In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity.

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66 Having regard to the foregoing considerations, the answer to the questions referred is that Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

The validity of Decision 2000/520

67 As is apparent from the referring court's explanations relating to the questions submitted, Mr Schrems contends in the main proceedings that United States law and practice do not ensure an adequate level of protection within the meaning of Article 25 of Directive 95/46. As the Advocate General has observed in points 123 and 124 of his Opinion, Mr Schrems expresses doubts, which the referring court indeed seems essentially to share, concerning the validity of Decision 2000/520. In such circumstances, having regard to what has been held in paragraphs 60 to 63 of the present judgment and in order to give the referring court a full answer, it should be examined whether that decision complies with the requirements stemming from Directive 95/46 read in the light of the Charter.

The requirements stemming from Article 25(6) of Directive 95/46

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68As has already been pointed out in paragraphs 48 and 49 of the present judgment, Article 25(1) of Directive 95/46 prohibits transfers of personal data to a third country not ensuring an adequate level of protection.

69However, for the purpose of overseeing such transfers, the first subparagraph of Article 25(6) of Directive 95/46 provides that the Commission 'may find … that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into …, for the protection of the private lives and basic freedoms and rights of individuals'.

70It is true that neither Article 25(2) of Directive 95/46 nor any other provision of the directive contains a definition of the concept of an adequate level of protection. In particular, Article 25(2) does no more than state that 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' and lists, on a non-exhaustive basis, the circumstances to which consideration must be given when carrying out such an assessment.

71However, first, as is apparent from the very wording of Article 25(6) of Directive 95/46, that provision requires that a third country 'ensures' an adequate level of protection by reason of its domestic law or its international commitments. Secondly, according to the same provision, the adequacy of the protection ensured by the third country is assessed 'for the protection of the private lives and basic freedoms and rights of individuals'.

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72 Thus, Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and, as the Advocate General has observed in point 139 of his Opinion, is intended to ensure that the high level of that protection continues where personal data is transferred to a third country.

73 The word 'adequate' in Article 25(6) of Directive 95/46 admittedly signifies that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order. However, as the Advocate General has observed in point 141 of his Opinion, the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph of the present judgment would be disregarded. Furthermore, the high level of protection guaranteed by Directive 95/46 read in the light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.

74 It is clear from the express wording of Article 25(6) of Directive 95/46 that it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within the European Union.

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75Accordingly, when examining the level of protection afforded by a third country, the Commission is obliged to assess the content of the applicable rules in that country resulting from its domestic law or international commitments and the practice designed to ensure compliance with those rules, since it must, under Article 25(2) of Directive 95/46, take account of all the circumstances surrounding a transfer of personal data to a third country.

76Also, in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted a decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that regard.

77Moreover, as the Advocate General has stated in points 134 and 135 of his Opinion, when the validity of a Commission decision adopted pursuant to Article 25(6) of Directive 95/46 is examined, account must also be taken of the circumstances that have arisen after that decision's adoption.

78In this regard, it must be stated that, in view of, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection, the Commission's discretion as to the adequacy of the level of protection ensured by a third country is reduced, with the result that review of the requirements stemming from Article 25 of Directive 95/46, read in the light of the Charter, should be strict (see, by analogy, judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 47 and 48).

Article 1 of Decision 2000/520

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79 The Commission found in Article 1(1) of Decision 2000/520 that the principles set out in Annex I thereto, implemented in accordance with the guidance provided by the FAQs set out in Annex II, ensure an adequate level of protection for personal data transferred from the European Union to organisations established in the United States. It is apparent from that provision that both those principles and the FAQs were issued by the United States Department of Commerce.

80 An organisation adheres to the safe harbour principles on the basis of a system of self-certification, as is apparent from Article 1(2) and (3) of Decision 2000/520, read in conjunction with FAQ 6 set out in Annex II thereto.

81 Whilst recourse by a third country to a system of self-certification is not in itself contrary to the requirement laid down in Article 25(6) of Directive 95/46 that the third country concerned must ensure an adequate level of protection 'by reason of its domestic law or … international commitments', the reliability of such a system, in the light of that requirement, is founded essentially on the establishment of effective detection and supervision mechanisms enabling any infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life and the right to protection of personal data, to be identified and punished in practice.

82 In the present instance, by virtue of the second paragraph of Annex I to Decision 2000/520, the safe harbour principles are 'intended for use solely by US organisations receiving personal data from the European Union for the purpose of qualifying for the safe harbour and the presumption of "adequacy" it creates'. Those principles are therefore applicable solely to self-certified United States organisations receiving personal data from the European Union, and United States public authorities are not required to comply with them.

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83 Moreover, Decision 2000/520, pursuant to Article 2 thereof, 'concerns only the adequacy of protection provided in the United States under the [safe harbour principles] implemented in accordance with the FAQs with a view to meeting the requirements of Article 25(1) of Directive [95/46]', without, however, containing sufficient findings regarding the measures by which the United States ensures an adequate level of protection, within the meaning of Article 25(6) of that directive, by reason of its domestic law or its international commitments.

84 In addition, under the fourth paragraph of Annex I to Decision 2000/520, the applicability of the safe harbour principles may be limited, in particular, 'to the extent necessary to meet national security, public interest, or law enforcement requirements' and 'by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation'.

85 In this connection, Decision 2000/520 states in Part B of Annex IV, with regard to the limits to which the safe harbour principles' applicability is subject, that, '[c]learly, where US law imposes a conflicting obligation, US organisations whether in the safe harbour or not must comply with the law'.

86 Thus, Decision 2000/520 lays down that 'national security, public interest, or law enforcement requirements' have primacy over the safe harbour principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard those principles without limitation where they conflict with those requirements and therefore prove incompatible with them.

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87 In the light of the general nature of the derogation set out in the fourth paragraph of Annex I to Decision 2000/520, that decision thus enables interference, founded on national security and public interest requirements or on domestic legislation of the United States, with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States. To establish the existence of an interference with the fundamental right to respect for private life, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have suffered any adverse consequences on account of that interference (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 33 and the case-law cited).

88 In addition, Decision 2000/520 does not contain any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security.

89 Nor does Decision 2000/520 refer to the existence of effective legal protection against interference of that kind. As the Advocate General has observed in points 204 to 206 of his Opinion, procedures before the Federal Trade Commission — the powers of which, described in particular in FAQ 11 set out in Annex II to that decision, are limited to commercial disputes — and the private dispute resolution mechanisms concern compliance by the United States undertakings with the safe harbour principles and cannot be applied in disputes relating to the legality of interference with fundamental rights that results from measures originating from the State.

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90 Moreover, the foregoing analysis of Decision 2000/520 is borne out by the Commission's own assessment of the situation resulting from the implementation of that decision. Particularly in points 2 and 3.2 of Communication COM(2013) 846 final and in points 7.1, 7.2 and 8 of Communication COM(2013) 847 final, the content of which is set out in paragraphs 13 to 16 and paragraphs 22, 23 and 25 of the present judgment respectively, the Commission found that the United States authorities were able to access the personal data transferred from the Member States to the United States and process it in a way incompatible, in particular, with the purposes for which it was transferred, beyond what was strictly necessary and proportionate to the protection of national security. Also, the Commission noted that the data subjects had no administrative or judicial means of redress enabling, in particular, the data relating to them to be accessed and, as the case may be, rectified or erased.

91 As regards the level of protection of fundamental rights and freedoms that is guaranteed within the European Union, EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55 and the case-law cited).

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92 Furthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52 and the case-law cited).

93 Legislation is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail (see, to this effect, concerning Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57to 61).

94 In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter (see, to this effect, judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 39).

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95 Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in Les Verts v Parliament, 294/83, EU:C:1986:166, paragraph 23; Johnston, 222/84, EU:C:1986:206, paragraphs 18 and 19; Heylens and Others, 222/86, EU:C:1987:442, paragraph 14; and UGT-Rioja and Others, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80).

96 As has been found in particular in paragraphs 71, 73 and 74 of the present judgment, in order for the Commission to adopt a decision pursuant to Article 25(6) of Directive 95/46, it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order, a level that is apparent in particular from the preceding paragraphs of the present judgment.

97 However, 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.

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98Consequently, without there being any need to examine the content of the safe harbour principles, it is to be concluded that Article 1 of Decision 2000/520 fails to comply with the requirements laid down in Article 25(6) of Directive 95/46, read in the light of the Charter, and that it is accordingly invalid.

Article 3 of Decision 2000/520

99It is apparent from the considerations set out in paragraphs 53, 57 and 63 of the present judgment that, under Article 28 of Directive 95/46, read in the light in particular of Article 8 of the Charter, the national supervisory authorities must be able to examine, with complete independence, any claim concerning the protection of a person's rights and freedoms in regard to the processing of personal data relating to him. That is in particular the case where, in bringing such a claim, that person raises questions regarding the compatibility of a Commission decision adopted pursuant to Article 25(6) of that directive with the protection of the privacy and of the fundamental rights and freedoms of individuals.

100However, the first subparagraph of Article 3(1) of Decision 2000/520 lays down specific rules regarding the powers available to the national supervisory authorities in the light of a Commission finding relating to an adequate level of protection, within the meaning of Article 25 of Directive 95/46.

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101 Under that provision, the national supervisory authorities may, '[w]ithout prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive [95/46], … suspend data flows to an organisation that has self-certified its adherence to the [principles of Decision 2000/520]', under restrictive conditions establishing a high threshold for intervention. Whilst that provision is without prejudice to the powers of those authorities to take action to ensure compliance with national provisions adopted pursuant to Directive 95/46, it excludes, on the other hand, the possibility of them taking action to ensure compliance with Article 25 of that directive.

102 The first subparagraph of Article 3(1) of Decision 2000/520 must therefore be understood as denying the national supervisory authorities the powers which they derive from Article 28 of Directive 95/46, where a person, in bringing a claim under that provision, puts forward matters that may call into question whether a Commission decision that has found, on the basis of Article 25(6) of the directive, that a third country ensures an adequate level of protection is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

103 The implementing power granted by the EU legislature to the Commission in Article 25(6) of Directive 95/46 does not confer upon it competence to restrict the national supervisory authorities' powers referred to in the previous paragraph of the present judgment.

104 That being so, it must be held that, in adopting Article 3 of Decision 2000/520, the Commission exceeded the power which is conferred upon it in Article 25(6) of Directive 95/46, read in the light of the Charter, and that Article 3 of the decision is therefore invalid.

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105As Articles 1 and 3 of Decision 2000/520 are inseparable from Articles 2 and 4 of that decision and the annexes thereto, their invalidity affects the validity of the decision in its entirety.

106Having regard to all the foregoing considerations, it is to be concluded that Decision 2000/520 is invalid.

Costs

107Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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1. **Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council 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 as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.**

2. **Decision 2000/520 is invalid.**

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9.4. CJEU decision in Digital Rights Ireland

JUDGMENT OF THE COURT (Grand Chamber)

8 April 2014

In Joined Cases C-293/12 and C-594/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the High Court (Ireland) and the Verfassungsgerichtshof (Austria), made by decisions of 27 January and 28 November 2012, respectively, received at the Court on 11 June and 19 December 2012, in the proceedings

Digital Rights Ireland Ltd (C-293/12)

v

Minister for Communications, Marine and Natural Resources,

Minister for Justice, Equality and Law Reform,

Commissioner of the Garda Síochána,

Ireland,

The Attorney General,

intervener:

Irish Human Rights Commission,

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and

Kärntner Landesregierung (C-594/12),

Michael Seitlinger,

Christof Tschohl and others,

Judgment

1 These requests for a preliminary ruling concern the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

2 The request made by the High Court (Case C-293/12) concerns proceedings between (i) Digital Rights Ireland Ltd. ('Digital Rights') and (ii) the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland and the Attorney General, regarding the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications.

3 The request made by the Verfassungsgerichtshof (Constitutional Court) (Case C-594/12) concerns constitutional actions brought before that court by the Kärntner Landesregierung (Government of the Province of Carinthia) and by Mr Seitlinger, Mr Tschohl and 11 128 other applicants regarding the compatibility with the Federal Constitutional Law (Bundes-Verfassungsgesetz) of the law transposing Directive 2006/24 into Austrian national law.

Legal context […]

The actions in the main proceedings and the questions referred for a preliminary ruling

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Case C-293/12

17 On 11 August 2006, Digital Rights brought an action before the High Court in which it claimed that it owned a mobile phone which had been registered on 3 June 2006 and that it had used that mobile phone since that date. It challenged the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications and asked the national court, in particular, to declare the invalidity of Directive 2006/24 and of Part 7 of the Criminal Justice (Terrorist Offences) Act 2005, which requires telephone communications service providers to retain traffic and location data relating to those providers for a period specified by law in order to prevent, detect, investigate and prosecute crime and safeguard the security of the State.

18 The High Court, considering that it was not able to resolve the questions raised relating to national law unless the validity of Directive 2006/24 had first been examined, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the restriction on the rights of the [p]laintiff in respect of its use of mobile telephony arising from the requirements of Articles 3, 4 … and 6 of Directive 2006/24/EC incompatible with [Article 5(4)] TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of:

(a) Ensuring that certain data are available for the purposes of investigation, detection and prosecution of serious crime?

and/or

(b) Ensuring the proper functioning of the internal market of the European Union?

2. Specifically,

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(i) Is Directive 2006/24 compatible with the right of citizens to move and reside freely within the territory of the Member States laid down in Article 21 TFEU?

(ii) Is Directive 2006/24 compatible with the right to privacy laid down in Article 7 of the [Charter of Fundamental Rights of the European Union ("the Charter")] and Article 8 ECHR?

(iii) Is Directive 2006/24 compatible with the right to the protection of personal data laid down in Article 8 of the Charter?

(iv) Is Directive 2006/24 compatible with the right to freedom of expression laid down in Article 11 of the Charter and Article 10 ECHR?

(v) Is Directive 2006/24 compatible with the right to [g]ood [a]dministration laid down in Article 41 of the Charter?

3. To what extent do the Treaties — and specifically the principle of loyal cooperation laid down in [Article 4(3) TEU] — require a national court to inquire into, and assess, the compatibility of the national implementing measures for [Directive 2006/24] with the protections afforded by the [Charter], including Article 7 thereof (as informed by Article 8 of the ECHR)?'

Case C–594/12

19 The origin of the request for a preliminary ruling in Case C-594/12 lies in several actions brought before the Verfassungsgerichtshof by the Kärntner Landesregierung and by Mr Seitlinger, Mr Tschohl and 11 128 other applicants, respectively, seeking the annulment of Paragraph 102a of the 2003 Law on telecommunications (Telekommunikationsgesetz 2003), which was inserted into that 2003 Law by the federal law amending it (Bundesgesetz, mit dem das Telekommunikationsgesetz 2003 — TKG 2003 geändert wird, BGBl I, 27/2011) for the purpose of transposing Directive 2006/24 into Austrian national law. They take the view, inter alia, that Article 102a of the Telekommunikationsgesetz 2003

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infringes the fundamental right of individuals to the protection of their data.

20 The Verfassungsgerichtshof wonders, in particular, whether Directive 2006/24 is compatible with the Charter in so far as it allows the storing of many types of data in relation to an unlimited number of persons for a long time. The Verfassungsgerichtshof takes the view that the retention of data affects almost exclusively persons whose conduct in no way justifies the retention of data relating to them. Those persons are exposed to a greater risk that authorities will investigate the data relating to them, become acquainted with the content of those data, find out about their private lives and use those data for multiple purposes, having regard in particular to the unquantifiable number of persons having access to the data for a minimum period of six months. According to the referring court, there are doubts as to whether that directive is able to achieve the objectives which it pursues and as to the proportionality of the interference with the fundamental rights concerned.

21 In those circumstances the Verfassungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Concerning the validity of acts of institutions of the European Union:

Are Articles 3 to 9 of [Directive 2006/24] compatible with Articles 7, 8 and 11 of the [Charter]?

2. Concerning the interpretation of the Treaties:

(a) In the light of the explanations relating to Article 8 of the Charter, which, according to Article 52(7) of the Charter, were drawn up as a way of providing guidance in the interpretation of the Charter and to which regard must be given by the Verfassungsgerichtshof, must [Directive 95/46] and Regulation (EC) No 45/2001 of the European Parliament and of the Council [of 18 December 2000] on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [OJ 2001 L 8, p. 1] be taken into

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account, for the purposes of assessing the permissibility of interference, as being of equal standing to the conditions under Article 8(2) and Article 52(1) of the Charter?

(b) What is the relationship between "Union law", as referred to in the final sentence of Article 52(3) of the Charter, and the directives in the field of the law on data protection?

(c) In view of the fact that [Directive 95/26] and Regulation … No 45/2001 contain conditions and restrictions with a view to safeguarding the fundamental right to data protection under the Charter, must amendments resulting from subsequent secondary law be taken into account for the purpose of interpreting Article 8 of the Charter?

(d) Having regard to Article 52(4) of the Charter, does it follow from the principle of the preservation of higher levels of protection in Article 53 of the Charter that the limits applicable under the Charter in relation to permissible restrictions must be more narrowly circumscribed by secondary law?

(e) Having regard to Article 52(3) of the Charter, the fifth paragraph in the preamble thereto and the explanations in relation to Article 7 of the Charter, according to which the rights guaranteed in that article correspond to those guaranteed by Article 8 of the [ECHR], can assistance be derived from the case-law of the European Court of Human Rights for the purpose of interpreting Article 8 of the Charter such as to influence the interpretation of that latter article?'

22 By decision of the President of the Court of 11 June 2013, Cases C-293/12 and C-594/12 were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred

The second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12

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23 By the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12, which should be examined together, the referring courts are essentially asking the Court to examine the validity of Directive 2006/24 in the light of Articles 7, 8 and 11 of the Charter.

The relevance of Articles 7, 8 and 11 of the Charter with regard to the question of the validity of Directive 2006/24

24 It follows from Article 1 and recitals 4, 5, 7 to 11, 21 and 22 of Directive 2006/24 that the main objective of that directive is to harmonise Member States' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter.

25 The obligation, under Article 3 of Directive 2006/24, on providers of publicly available electronic communications services or of public communications networks to retain the data listed in Article 5 of the directive for the purpose of making them accessible, if necessary, to the competent national authorities raises questions relating to respect for private life and communications under Article 7 of the Charter, the protection of personal data under Article 8 of the Charter and respect for freedom of expression under Article 11 of the Charter.

26 In that regard, it should be observed that the data which providers of publicly available electronic communications services or of public communications networks must retain, pursuant to Articles 3 and 5 of Directive 2006/24, include data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or

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registered user, the calling telephone number, the number called and an IP address for Internet services. Those data make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. They also make it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.

27 Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.

28 In such circumstances, even though, as is apparent from Article 1(2) and Article 5(2) of Directive 2006/24, the directive does not permit the retention of the content of the communication or of information consulted using an electronic communications network, it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter.

29 The retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically affects private life and, consequently, the rights guaranteed by Article 7 of the Charter. Furthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, therefore, necessarily has to satisfy the data protection requirements arising from that article (Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 47).

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30 Whereas the references for a preliminary ruling in the present cases raise, in particular, the question of principle as to whether or not, in the light of Article 7 of the Charter, the data of subscribers and registered users may be retained, they also concern the question of principle as to whether Directive 2006/24 meets the requirements for the protection of personal data arising from Article 8 of the Charter.

31 In the light of the foregoing considerations, it is appropriate, for the purposes of answering the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12, to examine the validity of the directive in the light of Articles 7 and 8 of the Charter.

Interference with the rights laid down in Articles 7 and 8 of the Charter

32 By requiring the retention of the data listed in Article 5(1) of Directive 2006/24 and by allowing the competent national authorities to access those data, Directive 2006/24, as the Advocate General has pointed out, in particular, in paragraphs 39 and 40 of his Opinion, derogates from the system of protection of the right to privacy established by Directives 95/46 and 2002/58 with regard to the processing of personal data in the electronic communications sector, directives which provided for the confidentiality of communications and of traffic data as well as the obligation to erase or make those data anonymous where they are no longer needed for the purpose of the transmission of a communication, unless they are necessary for billing purposes and only for as long as so necessary.

33 To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way (see, to that effect, Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 75).

34 As a result, the obligation imposed by Articles 3 and 6 of Directive 2006/24 on providers of publicly available electronic communications services or of public communications networks to retain, for a certain period, data relating to a person's private life and to his

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communications, such as those referred to in Article 5 of the directive, constitutes in itself an interference with the rights guaranteed by Article 7 of the Charter.

35 Furthermore, the access of the competent national authorities to the data constitutes a further interference with that fundamental right (see, as regards Article 8 of the ECHR, Eur. Court H.R., *Leander v. Sweden*, 26 March 1987, § 48, Series A no 116; *Rotaru v. Romania* [GC], no. 28341/95, § 46, ECHR 2000-V; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, ECHR 2006-XI). Accordingly, Articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by Article 7 of the Charter.

36 Likewise, Directive 2006/24 constitutes an interference with the fundamental right to the protection of personal data guaranteed by Article 8 of the Charter because it provides for the processing of personal data.

37 It must be stated that the interference caused by Directive 2006/24 with the fundamental rights laid down in Articles 7 and 8 of the Charter is, as the Advocate General has also pointed out, in particular, in paragraphs 77 and 80 of his Opinion, wide-ranging, and it must be considered to be particularly serious. Furthermore, as the Advocate General has pointed out in paragraphs 52 and 72 of his Opinion, the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.

Justification of the interference with the rights guaranteed by Articles 7 and 8 of the Charter

38 Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to

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the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

39 So far as concerns the essence of the fundamental right to privacy and the other rights laid down in Article 7 of the Charter, it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, it is not such as to adversely affect the essence of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the content of the electronic communications as such.

40 Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because Article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. According to those principles, Member States are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data.

41 As regards the question of whether that interference satisfies an objective of general interest, it should be observed that, whilst Directive 2006/24 aims to harmonise Member States' provisions concerning the obligations of those providers with respect to the retention of certain data which are generated or processed by them, the material objective of that directive is, as follows from Article 1(1) thereof, to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The

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material objective of that directive is, therefore, to contribute to the fight against serious crime and thus, ultimately, to public security.

42 It is apparent from the case-law of the Court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest (see, to that effect, Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* EU:C:2008:461, paragraph 363, and Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* EU:C:2012:711, paragraph 130). The same is true of the fight against serious crime in order to ensure public security (see, to that effect, Case C-145/09 *Tsakouridis* EU:C:2010:708, paragraphs 46 and 47). Furthermore, it should be noted, in this respect, that Article 6 of the Charter lays down the right of any person not only to liberty, but also to security.

43 In this respect, it is apparent from recital 7 in the preamble to Directive 2006/24 that, because of the significant growth in the possibilities afforded by electronic communications, the Justice and Home Affairs Council of 19 December 2002 concluded that data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime.

44 It must therefore be held that the retention of data for the purpose of allowing the competent national authorities to have possible access to those data, as required by Directive 2006/24, genuinely satisfies an objective of general interest.

45 In those circumstances, it is necessary to verify the proportionality of the interference found to exist.

46 In that regard, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives (see, to that effect, Case C-343/09 *Afton*

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Chemical EU:C:2010:419, paragraph 45; *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 74; Cases C-581/10 and C-629/10 *Nelson and Others* EU:C:2012:657, paragraph 71; Case C-283/11 *Sky Österreich* EU:C:2013:28, paragraph 50; and Case C-101/12 *Schaible* EU:C:2013:661, paragraph 29).

47 With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).

48 In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.

49 As regards the question of whether the retention of data is appropriate for attaining the objective pursued by Directive 2006/24, it must be held that, having regard to the growing importance of means of electronic communication, data which must be retained pursuant to that directive allow the national authorities which are competent for criminal prosecutions to have additional opportunities to shed light on serious crime and, in this respect, they are therefore a valuable tool for criminal investigations. Consequently, the retention of such data may be considered to be appropriate for attaining the objective pursued by that directive.

50 That assessment cannot be called into question by the fact relied upon in particular by Mr Tschohl and Mr Seitlinger and by the Portuguese Government in their written observations submitted to the Court that there are several methods of electronic communication which do

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not fall within the scope of Directive 2006/24 or which allow anonymous communication. Whilst, admittedly, that fact is such as to limit the ability of the data retention measure to attain the objective pursued, it is not, however, such as to make that measure inappropriate, as the Advocate General has pointed out in paragraph 137 of his Opinion.

51 As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight.

52 So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (Case C-473/12 *IPI* EU:C:2013:715, paragraph 39 and the case-law cited).

53 In that regard, it should be noted that the protection of personal data resulting from the explicit obligation laid down in Article 8(1) of the Charter is especially important for the right to respect for private life enshrined in Article 7 of the Charter.

54 Consequently, the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *Liberty and Others v. the United Kingdom*, 1 July 2008, no. 58243/00, § 62 and 63; *Rotaru v. Romania*, § 57 to 59, and *S. and Marper v. the United Kingdom*, § 99).

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55 The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data (see, by analogy, as regards Article 8 of the ECHR, *S. and Marper v. the United Kingdom*, § 103, and *M. K. v. France*, 18 April 2013, no. 19522/09, § 35).

56 As for the question of whether the interference caused by Directive 2006/24 is limited to what is strictly necessary, it should be observed that, in accordance with Article 3 read in conjunction with Article 5(1) of that directive, the directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, in accordance with Article 3 of Directive 2006/24, the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population.

57 In this respect, it must be noted, first, that Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.

58 Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

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59 Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.

60 Secondly, not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law.

61 Furthermore, Directive 2006/24 does not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. Article 4 of the directive, which governs the access of those authorities to the data retained, does not expressly provide that that access and the subsequent use of the data in question must be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto; it merely provides that each Member State is to define the procedures to be followed and the conditions to be fulfilled in order to gain access to the retained data in accordance with necessity and proportionality requirements.

62 In particular, Directive 2006/24 does not lay down any objective criterion by which the number of persons authorised to access and subsequently use the data retained is limited to

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what is strictly necessary in the light of the objective pursued. Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits.

63 Thirdly, so far as concerns the data retention period, Article 6 of Directive 2006/24 requires that those data be retained for a period of at least six months, without any distinction being made between the categories of data set out in Article 5 of that directive on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned.

64 Furthermore, that period is set at between a minimum of 6 months and a maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary.

65 It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

66 Moreover, as far as concerns the rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained

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against the risk of abuse and against any unlawful access and use of that data. In the first place, Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to (i) the vast quantity of data whose retention is required by that directive, (ii) the sensitive nature of that data and (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.

67 Article 7 of Directive 2006/24, read in conjunction with Article 4(1) of Directive 2002/58 and the second subparagraph of Article 17(1) of Directive 95/46, does not ensure that a particularly high level of protection and security is applied by those providers by means of technical and organisational measures, but permits those providers in particular to have regard to economic considerations when determining the level of security which they apply, as regards the costs of implementing security measures. In particular, Directive 2006/24 does not ensure the irreversible destruction of the data at the end of the data retention period.

68 In the second place, it should be added that that directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data (see, to that effect, Case C-614/10 *Commission* v *Austria* EU:C:2012:631, paragraph 37).

69 Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.

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70 In those circumstances, there is no need to examine the validity of Directive 2006/24 in the light of Article 11 of the Charter.

71 Consequently, the answer to the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12 is that Directive 2006/24 is invalid.

The first question and the second question, parts (a) and (e), and the third question in Case C-293/12 and the second question in Case C-594/12

72 It follows from what was held in the previous paragraph that there is no need to answer the first question, the second question, parts (a) and (e), and the third question in Case C-293/12 or the second question in Case C-594/12.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid.

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