



IT AND TELECOM CONTACT PARTNERS AT SORAINEN

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EU NEWS

DATA PROTECTION

ECJ rules on rights to privacy as against rights of owners of intellectual property

In its judgment of 29 January 2008 in Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, the European Court of Justice ruled that EC law (intellectual property, e-commerce and copyright directives) does not require the Member States to render communication of personal data in the context of civil proceedings mandatory. It is left to the Member States to ensure the balance between the rights of internet users to privacy and the rights of music producers or publishers' rights to have their intellectual property infringed. The Member States are not obliged to create a legal duty on internet service providers to disclose personal data (identities and physical addresses) of file sharers, if IP address and time of connection is known, to owners of intellectual property rights which have been infringed.

Facts of the case related to civil proceedings in Spain where Promusicae, a non-profit making association of music producers and publishers, requested national court to order preliminary measures on Telefonica, an internet service provider company, to disclose the identities and physical addresses of certain persons, whose IP address and date and time of connection were known. Those persons allegedly used the KaZaA file exchange program (P2P) and provided access in shared files of personal computers to phonograms in which the members of Promusicae held the exploitation rights. Telefonica appealed against that order on the basis of Spanish law which permitted such communication of only in a criminal investigation for purpose of safeguarding public security and national defence. Promusicae wanted to find out this information to be able to bring civil proceedings against these persons. Thus national court referred to ECJ the question whether EC law requires MS to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

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Article 29 Working Party issues opinion on search engines

On 4 April 2008 the Article 29 Working Party set issued an opinion on privacy issues raised by search engines such as Google or Yahoo. The Opinion identifies a clear set of responsibilities under the Data Protection Directive (95/46/EC) for search engine providers as controllers of user data.

The Opinion addresses the definition of search engines, the kinds of data processed in the provision of search services, the legal framework, purposes/grounds for legitimate processing, the obligation to inform data subjects, and the rights of data subjects.

The Opinion concludes, inter alia, that:

- The Data Protection Directive applies to the processing of personal data by search engines, even when their headquarters are outside of the EEA.
- The Data Retention Directive (2006/24/EC) does not apply to internet search engines.
- Search engines may only process personal data for legitimate purposes and the amount of data has to be relevant and not excessive in respect of the various purposes to be achieved.
- Search engine providers must delete or anonymise (irreversibly and efficiently) personal data once they are no longer necessary for the purpose for which they were collected.
- Data retention periods should be minimised and be proportionate to each purpose put forward by search engine providers. The Working Party concluded that it does not see a basis for a retention period beyond 6 months.
- If search engine providers use cookies, their lifetime should be no longer than demonstrably necessary.
- Search engine providers must give users clear and intelligible information about their identity and location and about the data they intend to collect, store, or transmit, as well as the purpose for which they are collected.
- Enrichment of user profiles with data not provided by users themselves is to be based on consent of users.
- Users of search engine services have the right to access, inspect, and correct if necessary all their personal data, including their profiles and search history, under Article 12 of the Data Protection Directive (95/46/EC).
- Cross-correlation of data originating from different services belonging to the search engine provider may only be performed if consent has been granted by the user for that specific service.

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Proposed amendments to rules regulating research of telecommunication market

On 1 April 2008 amendments to the rules regulating procedures of telecom markets came into force. These were adopted by the Lithuanian Communications Regulatory Authority in response to the Commission's new Recommendation.

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LEGAL UPDATE

Previously, 18 retail and wholesale markets were subject to specific *ex-ante* (prior) regulation – i.e., these markets had to be regularly analysed by national telecoms regulators and notified to the Commission. The new Recommendation reduces the list of subject telecoms markets by 50%.

The following telecom markets are excluded from the scope of *ex-ante* regulation:

- National/ local residential telephone services from a landline (Market 3).
- International residential telephone services from a landline (Market 4).
- National/ local business telephone services from a landline (Market 5).
- International business telephone services from a landline (Market 6).
- The minimum set of leased lines (Market 7).
- Transit services in a fixed telephone network (Market 10).
- Wholesale trunk segments of leased lines (Market 14).
- Access and call origination on mobile networks (Market 15).
- International roaming on mobile networks (Market 17).
- Broadcasting transmission (Market 18).

These markets should now be primarily dealt with by competition authorities using *ex-post* instruments. The Commission and national regulators will now concentrate their efforts on those markets where competition is still not effective and where consumer benefits are still largely lacking, i.e.:

- Access to a fixed telephone network (formerly Market 1 and 2).
- Call origination on a fixed telephone network (formerly Market 8).
- Call termination on individual fixed telephone networks (formerly Market 9).
- Wholesale access to a local loop (formerly Market 11).
- Wholesale broadband access (formerly Market 12).
- Wholesale terminating segments of leased lines (formerly Market 13).
- Voice call termination on individual mobile networks (formerly Market 16).

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ESTONIA

INFORMATION SOCIETY SERVICES

Estonian Consumer Protection Board (CPB) issues advisory guidelines for e-merchants

In an effort to raise awareness among consumers as well as e-merchants of the legislation and good business customs applicable to e-commerce, the CPB has issued advisory guidelines for e-merchants. According to the CPB, issuing of the said guidelines was induced by serious issues and a growing number of consumer complaints in the e-commerce sector. The supervision proceedings carried out in the past years by the CPB have clearly indicated, that e-merchants are often unaware of current legislation, the information displayed on websites of e-shops is insufficient and consumer rights are not adequately guaranteed.

While the guidelines are of advisory nature and are not by themselves legally binding, the CPB states, that following them, is a sign of good business customs. The guidelines contain relevant advice, requirements provided by law and interpretations and clarifications of legal norms. The guidelines are based on Law of Obligations Act, Consumer

Protection Act, Trading Act and Advertising Act. The guidelines provide a general overview of the duties of e-merchants in relation to the obligation to register in the Register of Economic Activities; the main requirements in e-commerce; the aspects of concluding consumer contracts online; the correct price indication method and the process of settling consumer complaints.

The CPB hopes that the said guidelines will help in harmonising the local e-commerce market.

Electronic Communications Act amended

Two sets of amendments to the Electronic Communications Act have been adopted by the Estonian Parliament. Firstly, on 15 November 2007 the Parliament adopted amendments to the Electronic Communications Act. *Inter alia* the process of applying for frequency permits was simplified; the duty of confidentiality, which is related to access and interconnection, was detailed; written form was made compulsory for access- and interconnection contracts; electronic communications undertaking's duty to retain data and to release such information to law enforcement agencies was detailed; etc.

Additionally a principle was enacted, whereby, when assigning duties to the undertakings with significant market power, recommendations and opinions of the European Commission and other regulators of the telecoms market have to be taken into account. A good example of the said principle in action is the methodology for calculating reasonable WACC (Weighted Average Cost of Capital) in regulated telecoms markets issued by the Estonian Competition Authority. According to the Estonian Competition Authority reasonable WACC is formed by adding Estonian country risk to the WACC of the previous calendar year in the EU electronic communications sector, which is based on the reports published by the European Regulators Group. Estonian country risk is calculated by comparing the average differences of TALIBOR and EURIBOR in the past five years.

The said amendments are effective as of 17 November 2007, except some provisions entered into force on 1 January 2008 and some will enter into force on 1 June 2008 and 15 March 2009.

Estonian Regulatory and Supervision Authorities Reform

On 22 November 2007 the Parliament adopted legislation whereby the current Estonian Energy Market Inspectorate, the Estonian Competition Board, the Estonian Railway Inspectorate, the Estonian National Communications Board and the Technical Inspectorate were merged into two new organisations - the Estonian Competition Authority, which is responsible for economic regulatory issues of non-competitive markets, and the Estonian Technical Surveillance Authority, which is responsible for technical safety, use of radio frequencies and numbering and telecommunication networks issues. Therefore, the Estonian Technical Surveillance Authority and the Estonian Competition Authority assumed the duties previously in the domain of the Communications Board.

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DATA PROTECTION

New Personal Data Protection Act

On 15 February 2007 the Estonian Parliament adopted the new Personal Data Protection Act, which entered into force on 1 January 2008. The purpose of the new act was to improve the Personal Data

Protection Act of 2003. In order to maintain good legislative quality, structural changes in the new act were unavoidable. Therefore, a new act was created instead of amending the old one. The new act generally retains the principles and solutions of the 2003 act, which was also based on directive 95/46/EC.

Some of the more important amendments to the existing framework of personal data protection legislation include the following: the concept of personal data no longer differentiates private personal data as a separate third category of personal data – in accordance with the directive the new act only differentiates between personal data and sensitive personal data; the procedure of processing personal identity codes is no longer subject to special provisions and general rules are applicable to such processing; biometric data is added to the list sensitive personal data; special provisions are established to regulate the use of personal data for scientific research and national statistics.

An important amendment concerns the processing of personal data which has been lawfully made public. The new regulations grant data subjects with the right to demand the data processor to stop processing personal data, which has been lawfully made public. Although this right is limited and unlike the 2003 act, it enables the data subject to retain at least some control over the processing of such personal data.

The Estonian Data Protection Inspectorate (DPI) issues several guidelines

The DPI has issued the following guidelines and opinion:

- Opinion on "Categories of personal data upon issuing customer cards" (7 January 2008)
- Guidelines on "Presenting birthday greetings through media" (10 March 2008)
- Guidelines on "Photographing in preschool institutions" (10 March 2008)
- Guidelines on "Publishing the names of political parties' financiers" (10 March 2008)
- Guidelines on "Processing of personal data in establishments providing accommodation" (3 April 2008)
- Guidelines on "Processing of personal data of aircraft passengers" (22 April 2008)

The said opinion and guidelines are not legally binding documents and are of advisory nature. However, we strongly recommend complying with them in the process of planning related activities.

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LATVIA

INFORMATION SOCIETY SERVICES

New procedure established for retained data

The Latvian Cabinet of Ministers has adopted regulations No. 820 (2007) on the procedure for access by state institutions to retained data under the Law on Electronic Communications. The Regulations are effective as of 8 December 2007. A provider of electronic communication services has to provide data requested by state institutions, the prosecutors' office, and the court within 30 days to one hour depending on the type of data requested and depending on the date when the data requested were retained. State institutions, the prosecutors' office, and the courts have to ensure that requests for data are justified, necessary, and proportionate. As we noted in the previous legal update, views remain divergent whether

requests for retained data have to be sanctioned by the court. In order to eliminate this, the Prime Minister has established a special working group to ensure that amendments to the legislation are prepared. Under new regulations, electronic communication service providers have to submit statistics to the State Data Inspection about requests from state institutions, the prosecutors' office, and the courts by February 1 for each preceding year.

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DATA PROTECTION

New procedure for training personal data processing specialists

The Cabinet of Ministers has adopted regulations No. 80 (2008) on the procedure for training personal data processing specialists. The Regulations are effective as of 9 February 2008. Under the Law on Personal Data Protection, if a controller appoints a personal data processing specialist and registers it with the State Data Inspection, personal data processing no longer need be registered with the State Data Inspection.

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Amendments to Personal Data Protection Law

Amendments to the Personal Data Protection Law came into force on 1 January 2008 and allow processing of sensitive personal data if necessary for protection of rights and lawful interests requiring a fee under an insurance contract.

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LITHUANIA TELECOMS

President vetoes national Data Retention Directive implementation

On 28 December 2007 Lithuanian president Valdas Adamkus vetoed amendments to the Law on Electronic Communications, which introduced new data retention rules in accordance with Data Retention Directive 2006/24/EC.

Earlier, on 18 December 2007, the Seimas (Lithuanian Parliament) adopted the law, which introduced amendments to the Law on Electronic Communications. The amendments inter alia established that providers of electronic communication services must:

- Retain communications traffic data, accumulated and retained in the course of and for the purposes of their economic activity of providing electronic communication services, for at least six months from the moment of communication; and
- Additionally retain certain communication traffic data specified in Annex 1 of the law (which is identical to the list in Article 5 of the Data Retention Directive) for 12 months from the moment of communication.

The president refused to promulgate such wording of the law and returned the law for re-assessment to the Parliament with the following comments:

"The law amending the Law on Electronic Communications provides that for the purposes of investigation of serious and very serious crimes (as defined by the Lithuanian Criminal Code) traffic data listed in Annex 1 to the law must be retained for 12 months. This provision changes the presently effective regime, which establishes that providers must retain traffic data only to the extent necessary for the provision of services and carrying out their normal economic activity.

The amendments oblige providers to cover the expenses of retaining all extra traffic data (as per Annex 1 to the law), for the purposes of investigation of crimes, and for a period which is longer than necessary for the business purposes the providers."

The President reflected on the provisions of the Constitution of the Republic of Lithuania, reiterating that the Constitution imposes an obligation on the state to ensure public security and public order, as well as an obligation to finance from the state budget activities directed at prevention and investigation of crimes. President Adamkus stressed that the Constitution establishes that there can be no legal rule that would oblige a private person (whether natural or legal) to use its private property for the purposes of carrying out the functions of the state.

In the light of these arguments, the President concluded that although the providers of public electronic communication services (private persons) may be obliged to retain and to disclose to the competent law enforcement authorities traffic data generated or collected during the course of their business activity, providers may not be obliged to cover the expenses of procuring, using, and maintaining equipment necessary for such retention of traffic data but which is not needed for the normal business activity of providers.

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Proposed amendments to rules regulating research of telecommunication market

On 1 April 2008 amendments to the rules regulating procedures of telecom markets analysis came into force. These amendments were adopted by the Lithuanian Communications Regulatory Authority in response to the Commission's new Recommendation on markets where telecom-specific regulation should be applied.

However, the amendments only stipulate that the Lithuanian rules on telecom markets analysis were prepared in accordance with the new Recommendation. Apart from that, there are no other material changes in the rules. This shows that Lithuanian Communications Regulatory Authority is working rather well, because no matter how much the Commission Recommendation changes, the Lithuanian rules regulating procedures of telecom markets analysis stay in the line with them.

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DATA PROTECTION

Amendments to the Law on Protection of Personal Data adopted by Lithuanian Parliament

The latest amendments to the Law were adopted by the Lithuanian Parliament on 1 February 2008. The amendments come into force on 1 January 2009. The amendments introduce a number of significant novelties into the Lithuanian personal data protection rules. Among these the following must be mentioned:

- Broadening of the scope of application of the Law. Presently, Lithuanian branches and repre-

sentative offices of EU-based companies fall outside the scope of application of the Law. The amendments provide that Lithuanian branches and representative offices of companies having their registered offices in other EU Member States are considered as data controllers and will be fully subject to the requirements of the Law.

- Restrictions on use of personal identification codes. The amendments inter alia explicitly prohibit making personal identification codes publicly available and prohibit the use of personal identification numbers for the purposes of direct marketing.

- Introduction of a new chapter on video surveillance. The respective provisions define the concept of video surveillance and establish rules for processing personal data by means of video surveillance.

- Establishing a special legal regime for processing personal data for the purposes of evaluating creditworthiness. The amendments provide more specific rules regarding exchange of personal data between undertakings which, due to the nature of their services, face financial risk and thus have a legitimate interest in evaluating the creditworthiness of their clients.

- Other important amendments include provisions strengthening the independence of the State Data Protection Inspectorate; provisions introducing a simplified notification procedure where the data controller has a specialized data protection unit (a responsible person or a department); detailed procedure for accepting and examining complaints by the State Data Protection Inspectorate.

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BELARUS

A legal framework for organizing and conducting electronic interactive games was established by the Decree of the President No 6 and Edict of the President No 201, both adopted on 10 April 2008.

The interactive electronic game is defined as a separate type of mass electronic game based on modern-day computer technologies and software, which make it possible to conduct several types of games at a time and are not used especially for lottery games or totalizer-based games.

Edict No 201 provides for a list of legal entities which can act as organizers of interactive electronic games. The list includes government-owned and certain government-controlled legal entities, republican state and social associations. Decree No 6 stipulates that special permits (licenses) need to be obtained to organize and conduct electronic interactive games.

Organizers of the games will have to use profits for a specified purpose: at least two thirds of net profit should be spent on physical education and sports, health care, education, protection of cultural and historical heritage, and other purposes defined by the President. The Decree and the Edict enter into effect on 12 June 2008.

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NEWS IN SORAINEN

Recent deals

Estonian Central Securities Depository develops new software

Tallinn office advised Eesti Vaartpaberikeskus (Estonian Central Securities Depository) in development of new software for Estonian central securities depository, platform for all local securities transactions. Legal framework prepared by Sorainen demanded amalgamated knowledge of IT development, but also specific know how banking and securities regulations Banking and securities advice was provided by senior associate Stefano M. Grace, and IT and contracts issues were solved by Kaupo Lepasepp.

Preparing study on the electronic points of single contact

Vilnius office upon request of the client prepared Study on the electronic points of single contact under the Service Directive. This article requires Member States to implement electronic points of single contact (e.g. a website) by the end of 2009 where service providers covered by the Directive can electronically complete all procedures and formalities in order to be allowed to start or exercise a service activity in that Member State. For this study, we are examining the requirements for three specific types of service providers, specifically travel agencies, architects, and real estate agents. Partner Renata Berzanskiene and associate Sergejs Trofimovs advised the client.

Advice to a global IT leader

Tallinn office has been advising the world's largest IT company, in several assignments from simple framework agreements to advising on complex developments. One of the highlights in 2008 has been contracting and sub-contracting advice on purchasing and tailoring a software solution of a self service portal of one of the leading banks in the Baltics. Advice was provided by senior associates Carry Plaks and Kaupo Lepasepp with appraisals from the client.

Successful representation of our client in an international IT case

Tallinn office advised the world's leading provider of multiple Internet platforms for global commerce, payments and communications in procedure originated from patent infringement law suit in the United States. Our team of IT specialists and litigators managed to achieve dismissal of letter of request submitted under the Hague Convention on the taking of evidence abroad in civil or commercial matters (the Hague Convention of 18 March 1970). In addition to litigation expertise our team used extensive knowledge on VoIP services obtained from previous assignments to protect confidentiality of source code of the world's leading VoIP software. Advice was provided by senior associate Kaupo Lepasepp, supported by litigation partner Carri Ginter.

Advising on Christmas promotion lottery

Riga office advised world's leading IT company on compliance of Christmas promotion lottery with local law, regarding IP and tax aspects. The case was supervised by partner Agris Repss.

Advising a world-class platform holder for chemical sourcing and logistics

Riga office advised MolPort in software license agreement conclusion for products and plug-ins developed by a company established in Hungary. The case was handled by Riga office associate Lasma Liede.

Advising world's leading beverages producer

Riga office team, led by Agris Repss, reviewed privacy policy, terms and conditions of one of its products website with respect to compliance with respective laws in the Baltics.

Associate Inga Kvesko advised the client on compliance of interactive promotion with local laws, also regarding IP and personal data protection aspects.

Advising leading telecommunication company on storing log records

Riga office gave legal advice whether under the laws of Baltic Countries it would be allowed to have a system for storing the employees log records regarding the computer system, including databases and internet. The case was handled by Riga office associate Inga Kvesko.

Advice to the leading IT Company in Latvia

Riga office advised the client that negotiates exclusive teaming agreement with other well know and leading IT company, regarding preparation of proposal for provisions of IT services to the third part in Latvia and Lithuania. The case was handled by Riga office partner Agris Repss.

Advising Europe's leading provider of Credit Management Services

Riga office reviewed data processing agreement and complete checklist regarding the data transfer to the Netherlands for Europe's leading provider of credit management services, branch in Latvia. The case was handled by Riga office associate Andis Burkevics.

Advising one of the largest global car manufacturer

Riga office has been advising one of the largest global car manufacturers on the terms and conditions for reservation of the new high performance sports car on-line in Latvia. We also advised the client on the taxation issues arising from the on-line reservation. The case was supervised by Agris Repss.

Other

Sorainen launches office in Minsk

Sorainen opened an office in Minsk, capital of Belarus, on Wednesday 19 March 2008. Sorainen is now the first leading regional law firm in the European Union to open an office in Belarus.

According to Aku Sorainen, Managing Partner, the launch of the Minsk office was occasioned by clients' increasing interest in Belarus. "For many Western-European companies, Belarus is an entirely unexplored area of great potential as its territory exceeds the area of all the Baltic States taken together. The government of Belarus has recently taken a number of measures to open up its business environment for EU businesses and to attract foreign investors to the country. This in its turn increases the demand for high-quality legal assistance in Belarus", says Aku Sorainen.

The Minsk office is fully integrated with Sorainen's other offices, advising clients in business, M&A, and trade law matters. The office specialises in advising on M&A, finance, banking, property, business, and tax law matters.

The newly opened Minsk office employs six lawyers and is already looking for new team members. The office is headed by Partner Maksim Salahub.

Information about other Minsk office employees is available on our webpage: <http://www.sorainen.com/?id=21912>

Conferences and Seminars

Presenting Lithuanian data protection law highlights at Berlin international conference

Associate Sergejs Trofimovs represented Lithuania at the 2nd Annual European Data Protection Intensive 2008 conference in Berlin on 15 and 16 May 2008. During the conference speakers from all 27 EU member states, as well as Norway and Switzerland, together with the representatives of the leading global companies discussed key privacy issues with the participants.

Participation in major international IT&T 2008 Forum: eBaltics

Sorainen partners Agris Repss and Janis Tatkacs delivered presentations at the Baltic IT&T 2008 Forum: eBaltics, a major IT&T event in the Baltic and CEE regions. Agris Repss delivered a presentation on legislation and standards in e-business and Janis Tatkacs talked about taxes in e-business. Over 350 participants attended.