

Data Privacy and Cybersecurity

How Wide is the Territorial Application of the GDPR? The English High Court Offers Some Guidance

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By now, it is generally understood that the General Data Protection Regulation (GDPR)^[1] can apply extraterritorially; that is to say that it can apply to entities established outside of the European Union. The true extent of this extraterritorial application, however, has not often been tested, and as the English High Court's decision in *Soriano v Forensic News LLC and Others*^[2] (*Soriano*) has shown, will take time to be determined as data protection authorities and private litigants bring proceedings against non-European controllers and processors. Ultimately, *Soriano* is useful in that it identifies some benchmarks as to what is not sufficient to trigger extraterritorial application of GDPR. However, given how fact-dependant the ruling is, *Soriano* leaves much to the imagination with respect to other fact patterns that might result in a different result.

Background

Walter Soriano is a resident of England, who holds dual English and Israeli citizenship. He issued proceedings in the English High Court against Forensic News, a California based company, and five individual defendants, all of whom are residents of the United States. Mr Soriano made a number of allegations against the defendants related to articles, podcasts, and social media posts about him, including claims for libel, misuse of private information, malicious falsehood, harassment, and for breaches of data protection legislation. Because all of the defendants are resident outside of England, Mr Soriano was required to apply for the Court's permission to serve proceedings on the defendants in the United States. The judgment of Mr Justice Jay in *Soriano* was given in connection with this application for service out.

Mr Soriano's position on the application of the GDPR

Mr Soriano maintained that the GDPR applied to Forensic News and the other defendants, even though they were all established in or residents of the United States. Specifically, Mr Soriano claimed that because Article 79(2) of the GDPR provides that a data subject may bring a claim either in the courts of the EU Member State where the data controller or processor has an establishment, or in the courts of the Member State in which the data subject is habitually resident, he was entitled to bring a claim against the defendants in England.

The Judge's conclusions

Although Jay J accepted that the GDPR offers claimants a choice of court, he held that this choice only comes into play once it has been established that the GDPR actually applies to the prospective defendant under Article 3. And in that regard, Jay J disagreed with Mr Soriano, and found that the GDPR did not apply to Forensic News or any of the defendants.

As regards Article 3(1) (the establishment criterion), Jay J found that there was no Forensic News establishment within the European Union. Decisions of the Court of Justice of the European Union on the meaning of "establishment" have held that there must be real and effective activity – even if minimal – exercised through stable arrangements. Mr Soriano submitted that these stable arrangements were shown by:

- The publications he complained of being written in English;
- The Forensic News website soliciting donations in sterling and in euro;
- The Forensic News website including a “store” with its own branded merchandising, accepting shipping addresses in the United Kingdom; and
- A tweet sent by one of the defendants inviting pledges to Patreon, a subscription platform, from readers in the United Kingdom and the European Union.

Jay J held that these factors were not sufficient to constitute stable arrangements and therefore an establishment in the United Kingdom. He specifically noted that Forensic News had no employees or representatives in the UK and that its journalistic endeavours were not oriented towards the UK in any relevant respect. In rejecting Mr Soriano’s assertion, Jay J stated: *“I cannot accept the proposition that less than a handful of UK subscriptions to a platform which solicits payment for services on an entirely generic basis, and which in any event can be cancelled at any time, amounts to arrangements which are sufficient in nature, number and type to fulfil the language and spirit of article 3.1 and amount to being ‘stable’”*.

In relation to Article 3.2(a) (the targeting criterion), Mr Soriano maintained that the defendants offer services to readers in the UK irrespective of payment. In respect of Article 3.2(b) (the monitoring criterion), he contended that the Forensic News website places cookies on readers’ devices and processes their personal data using third-party analytics for the purpose of targeting advertisements, and that the defendants were monitoring Mr Soriano’s behaviour within the United Kingdom and the European Union with a view to making publishing decisions about him.

Both of these arguments were rejected by the Judge. He held that there is nothing to suggest that Forensic News is targeting the United Kingdom as regards the goods and services it offers. In doing so, he referred to the list of factors to be taken into account when determining if goods and services are being targeted at EU markets found in the European Data Protection Board’s Guidelines on the Territorial Scope of the GDPR (the Guidelines)^[3]. Although Mr Soriano could show that the United Kingdom was a potential shipping destination for merchandise, this was insufficient. None of the other indicia in the Guidelines were capable of being demonstrated by Mr Soriano.

The Judge also held that Mr Soriano needed to demonstrate that the offering of goods and services is related to Forensic News’ core activity, namely its journalism. He held that it is not. It was not enough for Mr Soriano to show that Forensic News may have carried out some processing that is related to the offering of goods and services in this jurisdiction merely in the context of its core activity.

The Judge accepted that there was an arguable case that Forensic News’ use of cookies is for the purpose of behavioural profiling or monitoring, but he held that the use was purely in the context of directing advertisement content. However, Mr Soriano’s real complaint was about Forensic News’ journalism; the use of cookies had nothing at all to do with that activity. Such monitoring as there may have been by Forensic News was in fact unrelated to his complaint.

Conclusion

The *Soriano* case provides useful guidance on how the English Court will approach the issue of the extraterritorial application of the GDPR. It is helpful to know that the Court considers the absence of employees or representatives in the jurisdiction relevant to the question of whether an establishment exists, and that the mere fact that goods can be delivered to the United Kingdom is insufficient to fulfil the “targeting” criterion. However, if one imagines a spectrum of fact patterns related to cross-border data processing and the targeting of goods and services, the *Soriano* case sits fairly close to one end of that spectrum. There will undoubtedly be cases that are factually more complex and which will involve a more detailed decision by the Court and therefore provide additional guidance on this important question.

[1] Regulation (EU) 2016/689

[2] [2021] EWHC 56 (QB)

[3] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf

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