Chapter 13
Remarks and Considerations on the CJEU Decision on Biometric Passports

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ABSTRACT

Biometric passports, namely passports including a storage medium that contains the facial image and two fingerprints of their owner, became mandatory when Regulation (EC) 2252/2004 entered into force. In the case C-291/12, the Court of Justice of the European Union was asked to examine whether biometric passports constitute a possible infringement of the fundamental right to the protection of personal data. This chapter aims at analyzing the aforementioned Judgment of the CJEU, focusing in particular on the application of the proportionality principle. The authors attempt to formulate some additional remarks and considerations on the critical matters of that case, and to this end, they especially focus on the processing of multiple biometric elements, the existence of alternative and less intrusive means, as well as the security of the biometric passports.

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INTRODUCTION

In the case Michael Schwarz v. Stadt Bochum (C-291/12) the Court of Justice of the European Union (hereinafter CJEU) was asked to examine the validity of article 1(2) of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1), as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 142, p. 1). Specifically, the referring German Court (Verwaltungsgericht Gelsenkirchen) decided to stay the proceedings and refer a question for a preliminary ruling concerning the validity of the aforementioned provision on three grounds: a) the lack of a legal basis of the Regulation (article 62 paragraph 2 point a EC), b) the existence of a procedural irregularity vitiating the adoption of the Regulation (lack of consultation with the European Parliament under article 67 EC) and c) the possible infringement of the fundamental rights to respect for private life and to the protection of personal data. The CJEU primarily rejected the first two grounds of invalidity and focused its analysis on the third one. The Court, having acknowledged that the obligation of collecting and storing fingerprints laid down by the Regulation constitutes a limitation of fundamental rights, proceeded in the assessment of the legitimacy of this processing under the principle of proportionality and finally concluded that there is no evidence contradicting the validity of article 1(2) of the Regulation.

This paper aims at analyzing the aforementioned Judgment of the CJEU, focusing in particular on the application of the proportionality principle. Therefore, after a brief reference to the key role of proportionality in the protection of biometric data, the paper presents the specific line followed by the Court in the proportionality assessment of case C-291/12, together with some relevant critical remarks of the authors.

THE RIGHT TO THE PROTECTION OF PERSONAL DATA AND THE PROPORTIONALITY PRINCIPLE AS A LIMITATION OF THE INFRINGEMENT

Article 8 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter), which pursuant to Article 6 (1) of the TUE has the status of primary law of the EU after the entry into force of the Lisbon Treaty, recognizes the right to the protection of personal data. As to the interpretation of rights and principles established, one can observe that the Charter itself, both in its preamble and in article 52, sets out rules for the interpretation of its provisions (Skouris, 2011). In particular, article 52 (7) states that the courts of the European Union and the Member States shall take due account of the explanations drawn up to provide guidance