DIRITTI COMPARATI
Comparare i diritti fondamentali in Europa

THE UK SUPREME COURT RULING ON PRIVACY, PROPORTIONALITY AND SCALPERS' RIGHT TO ANONYMITY.

Posted on 14 Dicembre 2012 by ***Filippo Fontanelli***

Tickets for major sport events are scarce and sought-after. Scarcity and passion drive their price up, at least the price that someone is willing to pay in spite of their face value. This price differential is the backbone of the secondary market, in which trade actors better known as scalpers provide their questionable – and yet often providential – service. Even for sold-out events, of one thing we can be certain, if we have heard of Ronald Coase (see here): regardless of who happen to buy the tickets from the issuers in the first place, these tickets will belong in the end to those who are ready to pay the highest amount. As Scott Simon puts it, 'ithout obstacles to this process, a series of bargains will be struck until all tickets are in the hands of the highest-valuing users'. Along with scalpers, it follows, other subjects are in the business of facilitating the operation of this market, namely those who remove the 'obstacle to this process,' ie transaction costs.

Among them is Viagogo, 'the ticket marketplace,' a company providing an online platform for individuals to exchange and sell tickets. The price of tickets on offer on Viagogo, *ça va sans dire*, follows closely the laws of

supply and demand, and prices much above face value are routinely asked and paid for. When the organizers deliberately issue under-priced tickets or set a capped price, for instance to encourage purchase by low-income customers, or enhance the popularity of one sport, the secondary market nullifies the effect of these subsidy-like policies. Notably, resellers are able to speculate, and monetize the value-surplus inherent in the ticket purchased at face-value. It is no surprise, therefore, that primary sellers are typically against the very existence of an uncontrolled secondary market, which frustrates customer-building strategies and, more generally, enervates legions of average customers, who are not happy or ready to pay a mark-up for tickets that at times remained on sale for just minutes.

The Rugby Football Union (RFU) is the body responsible for issuing tickets for rugby matches at the Twickenham Stadium. RFU's sale conditions stipulate that tickets are void, for breach of contract, if resold above face value. Monitoring private transactions, however, is a Sisyphean task, and RFU's attention focused on overt and massive reselling practices, like those carried out through Viagogo.

In an attempt to monitor and fight illicit reselling, the RFU sought and obtained from the UK High Court an order requiring Viagogo to disclose the identity of the users engaging anonymously in the sale of over-priced rugby tickets. Viagogo appealed the court order and invoked *inter alia* the European Charter of Fundamental Rights, arguing that the ordered disclosure represented a disproportionate interference with the protection of personal data of the persons concerned, in breach of Art. 8 of the Charter. In the appeal decision, the Court of Appeal rejected this argument, declaring that RFU had no alternative means of monitoring illicit conduct, and therefore the disclosure was a proportionate measure through which RFU sought legitimately to vindicate its contractual rights.

The Supreme Court (UK SC), seised of a challenge of the appeal judgment, handed down its decision, in the person of Lord Kerr, on 21 November 2012. Two points of the decision will be explored here: the application of the Charter to the specific situation, and the proportionality assessment

carried out by the UK SC.

As for the application of the Charter, the UK SC had to pass through the bottleneck of Art. 51(1): the Charter applies to Member States only when they *implement* EU law. The wording is vague enough to allow for everlasting speculation as to the exact meaning of this provision. Suffice it to say that there are at least two schools of thought on what *implementation* means under Art. 51(1) of the Charter, and both take cuse from the case-law on general principles, which also apply to State measures only when these implement EU law.

The first school follows closely the case-law of the Court of Justice of the European Union (CJEU), which has clarified over time that the concept of implementation is such that Member States are bound by general principles when they i) implement EU law directly (*Wachauf*), but also when they ii) adopt measures in derogation of EU commitments (*ERT*). Said derogation might be justified by virtue of an express specific exception (like those listed in Art. 36 TFEU, or those envisaged in a Directive or a Regulation, see the recent *NS* case), a general one (*Familiapress*; *Rutili*), or a mandatory requirement (*Cassis de Dijon*).

A second school notices that the *ERT*+*Wachauf* test cannot cover many State measures that have nevertheless *some* link with EU law, or at least fall within the scope of EU competences *ratione materiae*. Therefore, many authors have advanced alternative rationales for the 'implementation' test, according to which EU general principles could also apply to at least some of these measures. One of the most innovative suggestions came from Advocate General (AG) Sharpston in *Zambrano*, who suggested to apply general principles to all State measures falling within the scope of EU competences (whether or not the Union had enacted any legislative act on the regulated matter). AG Cruz Villalòn, in the pending *Fransson* case, has proposed that Art. 51(1) should be applied with a grain of salt: regardless of the *ERT*+*Wachauf* test, the Charter applies (and so do general principles) when the Union has a 'specific interest' to impose on States its centralized conception of a fundamental right, by reason of the principal-agent relationship between the Union, on one hand, and Member States

implementing Union law, on the other.

The UK Supreme Court, in the case at hand, seemed to espouse without hesitation the latter, 'expansionary,' view. In gauging whether the order of disclosure could be reviewed against Art. 8 of the Charter, it simply recalled a recent precedent of the High Court, on the point of the interpretation of Art. 51(1) of the Charter:

... the rubric, 'implementing EU law' is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law'.

The UK SC did not elaborate on the reasons supporting this broad interpretation, which in any case yielded an uncontroversial result, since the High Court's order concerned the disclosure of 'personal data,' a concept defined (better, a matter regulated) by the Data Protection Directive (see). Therefore, it is fair to observe that, even endorsing a narrow interpretation of Art. 51(1) of the Charter, the conclusion is the same: national judges issuing disclosure orders must abide by the Charter.

The direct application of Art. 8 of the Charter, however, does not automatically outlaw all limitations to the absolute protection of personal data. Art. 8 itself (second paragraph) envisages the possibility to process personal data 'on the basis of ... other legitimate basis laid down by law '. Moreover, Art. 52(1) of the Charter sets out the possibility to justify interferences with a Charter right, on condition that they be 'provided by law,' respectful of the essence of the right, and 'subject to the principle of proportionality,' which includes an appraisal of necessity.

The recent CJEU's decision in C-461/10 *Bonnier*, which concerned a similar set of facts (disclosure of the identity of internet users suspected of infringing copyrights through downloading pirated audio books), provided some guidance as to which balance should be struck by national authorities:

... legislation must be regarded as likely, in principle, to ensure a fair balance between the protection of intellectual property rights enjoyed by

copyright holders and the protection of personal data enjoyed by internet subscribers or users.

Lord Kerr rejected the idea that the case-by-case analysis of proportionality would implicate by necessity a separate evaluation of each user's relationship with Viagogo, and somehow trump more general considerations. On the contrary, she recognized RFU's primary interest to have access to the sought information, and firmly founded thereon the proportionality analysis:

... The ability to demonstrate that those who contemplate such sale or purchase can be detected is a perfectly legitimate aspiration justifying the disclosure of the information sought. There is no coherent or rational reason that it should not feature in any assessment of the proportionality of the granting of the order.

The UK SC decision also took pains to distinguish the case at bar from the *Goldeneye* domestic precedent, where at stake was an order of disclosure of the personal information of internet customers alleged to have used peer-to-peer services to download and share pornographic material. In that occasion, the disclosure order was found to be disproportionate, due to the uncertainty regarding the actual conduct of the targeted users, the sensitive and embarrassing nature of the accusation, and the unfair and oppressive pressure that a legal claim would exert on possibly innocent users, had the order been issued.

Since none of these elements were at stake in the *RFU v Viagogo* dispute, the Supreme Court held that an 'intense focus' on the individual rights affected would not automatically lead to the conclusion that all disclosure orders are disproportionate. To the contrary, even if there might be cases where the protection of personal information overrides the need to obtain data for the purpose of an investigation, in the present case 'the impact that can reasonably be apprehended on the individuals whose personal data are sought is simply not of the type that could possibly offset the interests of the RFU in obtaining that information' .

The outcome of the balancing exercise is encapsulated in the following

paragraph of the UK SC's reasoning:

... The entirely worthy motive of the RFU in seeking to maintain the price of tickets at a reasonable level not only promotes the sport of rugby, it is in the interests of all those members of the public who wish to avail of the chance to attend international matches. The only possible outcome of the weighing exercise in this case, in my view, is in favour of the grant of the order sought.