
IN NORWAY THE LEGALITY OF SCREENING AGAINST OFAC LISTS IS CURRENTLY ABOUT TO BE DECIDED. IN SEVERAL OPINIONS ISSUED BY THE NORWEGIAN DATA INSPECTORATE (THE NORWEGIAN REGULATOR) IN RESPONSE TO QUERIES FROM US BASED COMPANIES, I.A. CONOCOPHILLIPS, THE NORWEGIAN REGULATOR HELD THAT SUCH PROCESSING WOULD BE PROCESSING OF SENSITIVE DATA AND NOT IN COMPLIANCE WITH NORWEGIAN DATA PRIVACY LAW. IN THE OPINION, THE NORWEGIAN REGULATOR CONSIDERED WHETHER OR NOT A SPECIFIC STATUTE WOULD ALLOW FOR PROCESSING TO TAKE PLACE. THE PROVISION READS: “THE DATA INSPECTORATE MAY DECIDE THAT SENSITIVE PERSONAL DATA MAY ALSO BE PROCESSED IN OTHER CASES IF THIS IS WARRANTED BY IMPORTANT PUBLIC INTERESTS AND STEPS ARE TAKEN TO PROTECT THE INTERESTS OF THE DATA SUBJECT.” THE NORWEGIAN REGULATOR STATED THAT THE SCREENING INVOLVED SCREENING OF CUSTOMERS AGAINST LISTS WHICH NORWEGIAN AUTHORITIES CANNOT CONTROL THE QUALITY AND RELIABILITY OF AND ALSO THAT FUNDAMENTAL CRIMINAL PROCEDURAL REQUIREMENTS WILL NOT BE FULLFILLED. THE NORWEGIAN REGULATOR CONTINUED BY STATING THAT THE PROCESSING MAY CONSTITUTE A BREACH OF FUNDAMENTAL LEGAL SAFEGUARDS, AND MAY FURTHERMORE LEAD TO UNPREDICTABLE CONSEQUENCES FOR THE AFFECTED PERSONS, INCLUDING A CIRCUMVENTION OF THE REGULATIONS INTENDED TO MAINTAIN LEGAL SAFEGUARDS FOR BOTH NATURAL AND LEGAL PERSONS. THE OPINION HAS BEEN APPEALED TO THE APPELLATE BODY (PERSONVERNNEMNDA) AND IS LIKELY TO BE CONSIDERED IN ITS NEXT MEETING SCHEDULED FOR 26 MAY. IF THE OPINION IS NOT OVERTURNED IN PERSONVERNNEMNDA, IT WILL HAVE THE EFFECT THAT US CORPORATIONS WILL HAVE A CHOICE OF BEING COMPLIANT EITHER WITH THE US ANTI-TERRORIST SCREENING OBLIGATIONS OR THE LOCAL NORWEGIAN DATA PRIVACY LAWS.

IN SWEDEN THERE IS A GENERAL PROHIBITION ON PROCESSING PERSONAL DATA CONCERNING LEGAL OFFENCES INVOLVING CRIME, JUDGMENTS IN CRIMINAL CASES, COERCIVE PENAL PROcedURAL MEASURES OR ADMINISTRATIVE DEPRIVATION OF LIBERTY, CF THE SWEDISH DATA PROTECTION ACT, SECTION 21. PROCESSING OF THE DATA CONTAINED IN SO-CALLED BLACK LISTS, FOR INSTANCE THE OFAC LIST, FOR CROSS-CHECKING PURPOSES AGAINST CUSTOMER-TRANSACTIONS, LISTS OF EMPLOYEES, SUPPLIERS OR SIMILAR HAS BEEN DEEMED BY SWEDISH AUTHORITIES (THE DATA INSPECTION BOARD AND THE FINANCIAL SUPERVISORY AUTHORITY) TO CONSTITUTE PROCESSING OF PERSONAL DATA CONCERNING LEGAL OFFENCES ETC. Thus, the processing of the data contained in the OFAC lists for purposes stated above would most probably be deemed as constituting a breach against the Swedish Data Protection Act. However, pursuant to the Swedish Personal Data Ordinance, section 8, the Swedish data inspection board may decide in individual cases on exemptions from the prohibition mentioned above, and i.a. allow screening
against OFAC. The Swedish Bankers’ Association (Sw. Svenska Bankföreningen) applied in 2006 and was granted an exemption to process personal data with regards to OFAC lists. The exemption granted to the Swedish Bankers’ Association is however limited in time (it has already been prolonged once) and is only valid for the members of the mentioned association. In the resolution to grant this exemption, the Data Inspection Board also elaborates on the reasoning behind the exemption grant. From the reasoning it is clear that an individual exemption is required for each black list, of which OFAC is one. The exemption granted to the Swedish Bankers’ Association is currently under review, and a new resolution by the Data Inspection Board is expected some time in June, 2010.

In Denmark, some of the OFAC lists cover activities are likely to be considered illegal in Denmark and the point of departure is therefore that the assessment should be made based on the fact that the OFAC lists to some extent contain information about criminal offences. Processing of personal data about criminal offences may normally only take place if the data subject has given her explicit consent, see section 8 (4) of the Danish Data Protection Act. As an exemption to the rule, processing may also take place if it is necessary for pursuing a legitimate interest and this interest clearly overrides the interests of the data subject. This would be if the processing e.g. is necessary for the establishment, exercise or defence of legal claims or where the processing of data takes place for reasons of substantial public interests. If the processing takes place for reasons of substantial public interest, the Danish DPA shall give its authorisation. See section 8 (6) and 7 (2) and (7) of the Danish Data Protection Act. When it comes to the OFAC list, this list has authority in laws in the US. However, the laws of other states cannot be considered as part of Danish legislation, and it is therefore likely that the OFAC screening must be based on consent from the data subject. Further, processing of sensitive information covered by sections 7 and 8 of the Act is only legal if the processing has been notified to the Danish DPA and the DPA has given a permission for the processing, see section 50 (1) of the Act.

In Finland there is no case law or official statements on this topic but there is reason to believe that the Finnish Data Protection Ombudsman will consider that this kind of screening would most likely be in conflict with the Finnish Data Protection Act and the Finnish Act on Background Checks and that the situation therefore will be similar to that in Norway.

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