

# UK High Court Imparts GDPR Risk Insight For US Companies

By **Kate Paine** (February 5, 2021)

On Jan. 15, the High Court of England and Wales issued a decision in *Soriano v. Forensic News LLC*[1] interpreting and applying Article 3 of the EU General Data Protection Regulation — the provision that gives the EU's strict data protection law its extraterritorial reach and sets it apart from similar laws around the globe.

Despite the fact that we are approaching three years since the GDPR took effect, until *Soriano*, no data protection authority or court had seemingly been called on to interpret Article 3, leaving non-EU/U.K. businesses with only limited, pre-GDPR, authority to consult when assessing whether and when the regulation applies to their processing activities.



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Considering that GDPR-regulated entities failing to comply with the regulation's strict data protection rules can be held liable to the tune of up to a whopping 4% of global annual turnover, the real-world insight into when and whether judges will apply the GDPR to the data-processing activities of companies outside the EU and the U.K. that *Soriano* provides should be welcomed by companies and privacy practitioners alike.

## The Soriano Decision

*Soriano*, a British citizen, sued Forensic News, a California-based journalism website, along with its sole member and several of its contributors — all of whom were U.S. residents — raising the claim, among others, that a number of Forensic News articles in which he was portrayed in a negative light infringed the GDPR. To obtain the judicial permission needed to serve his claims on the defendants in the U.S., Soriano first had to convince the High Court that those claims had a real prospect of success.

In contending that Forensic News was established in the U.K. and thus subject to the GDPR, Soriano focused heavily on the fact that the Forensic News website solicited donations in British pound sterling and was equipped to deliver branded merchandise to the U.K. — and may have shipped one baseball cap to a U.K. resident.

Evidence was also presented that Forensic News had received three one-time donations from U.K. readers through Patreon Inc.'s subscription platform and also had three regular U.K. Patreon subscribers.

Influenced by the lack of any Forensic News employees in either the U.K. and the EU, and finding the not minimal U.K. readership of the website of "no more than marginal relevance," the High Court refused to:

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 fulfill the language and spirit of article 3.1 and amount to being "stable." [2]

The High Court also rejected Soriano's claim that, by making its articles and merchandise available in the U.K., and by allowing its website to "place ... cookies on readers' devices

and process their personal data using Facebook Inc. and Google Inc. analytics for the purpose of targeting advertisements." [3]

Forensic News satisfied Article 3's targeting and monitoring prongs. In so concluding, the High Court was guided primarily by the European Data Protection Board's guidelines on the territorial scope of the GDPR, which sets forth nine targeting factors and seven monitoring factors to consider. [4]

Of the nine targeting factors, Soriano had potentially demonstrated only one: the shipment of merchandise to the U.K. The sale of a baseball cap simply could not be deemed, in the High Court's view, related to Forensic News' core activity of journalism.

And while recognizing that geolocation activities for marketing purposes and online tracking through use of cookies are two of the seven factors indicative of the type of monitoring contemplated by GDPR Article 3, the High Court was ultimately persuaded by the lack of evidence that Forensic News' use of cookies for advertising purposes had anything to do with the plaintiff's true grievance: that Forensic News had processed his personal data for its own journalistic purposes.

Finding the plaintiff to therefore lack a real prospect of success in demonstrating that the GDPR applied to the defendants, the court denied leave to serve the data protection claims in the U.S. [5]

### **Takeaways for U.S. Companies and Privacy Practitioners**

Despite the relatively short GDPR discussion and highly fact-driven outcome, Soriano provides crucial insight into how courts and regulators may apply Article 3 going forward and delivers key takeaways for legal practitioners and their U.S. clients.

U.S. entities whose websites are accessed by EU or U.K. residents or that make occasional sales there, but that have little other connection to either jurisdiction, can breathe a measured sigh of relief: Despite the data-subject-centric approach of the GDPR, courts appear unwilling to stretch the long arm of the data protection regime beyond the letter and spirit of the law itself — at least if Soriano is any indication.

Of course, despite the GDPR's goal of consistency, different courts and adjudicatory bodies will not always agree in their approaches to enforcement. [6]

Soriano also gives judicial bite to the persuasive but not binding guidelines [7] — and particularly to the position that GDPR applicability is not an all-or-nothing determination, that is, "a data controller may be subject to the GDPR in respect of some of its processing activities and not others." [8] Non-EU/U.K. entities that have been operating under the belief that none, or, conversely, all, of their data processing activities are regulated by the GDPR may consider revisiting that conclusion.

For the privacy practitioner, that the High Court took the step of distinguishing the in the context of the activities language used in Article 3.1's establishment prong from the stricter "related to the activities" language in Article 3.2's targeting prong should not go overlooked.

Cannons of statutory construction familiar to U.S. attorneys — here, that the use of disparate language in different sections of the same law is presumed to be an intentional and purposeful decision, to be considered when interpreting the law — may prove an important addition to a GDPR practitioner's tool belt.

Still, the High Court's decision leaves open as many questions as it informs:

- Would having a handful of U.K.-based employees — or even just one — whose job it was to provide on-the-ground information back to Forensic News, but with no accompanying goal of orienting the website toward the U.K. in any relevant respect<sup>[9]</sup> have been enough to show minimal activity through stable arrangements and satisfy the establishment prong?
- Is the High Court's so-called targeting test, which seemingly requires the plaintiff to "demonstrate that the ... the offering of goods and services[] is related to the [defendant's] core activity,"<sup>[10]</sup> too stringent, considering that the face of Article 3 contains no such requirement, let alone the phrase "core activities"?
- If Forensic News had sold and shipped 100 baseball caps and 25 hooded sweatshirts to U.K. residents, would that have altered the outcome?
- Is it fair for a company to now assume that the mere fact its website collects cookies for third-party- targeted advertising will not, on its own, trigger the monitoring prong of Article 3, so long as engaging in targeted advertising is not one of the company's own core business activities?

Quick answers to these questions are not expected. The environment in the U.K. and EU tends to be significantly less litigious than the U.S. It also seems unlikely — although possible — that a GDPR complaint proceeding before a data protection authority, and that the regulator ultimately concludes is not subject to the GDPR, would result in a substantive opinion interpreting and applying Article 3.

Now would be a good time for entities with a presence in the U.K. or the EU, no matter how limited, to reassess in-house, or with outside counsel, the GDPR risks their data-processing activities create. Indeed, Soriano reminds us that just because the GDPR ultimately may be deemed inapplicable to an organization's processing activities, this does not provide a license to process personal data with impunity.

Forensic News, its owner and some of its employees were still sued — and still had to defend themselves, including hiring attorneys and presenting evidence — in a foreign jurisdiction, all because Soriano believed his rights under the GDPR had "been infringed as a result of the processing of his or personal data in non-compliance with this Regulation."<sup>[11]</sup>

The High Court in fact granted the plaintiff permission to serve two of his other claims on the defendants in the U.S. In today's global marketplace, entities with even a minimal international reach could end up GDPR targets.

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[1] <https://www.bailii.org/ew/cases/EWHC/QB/2021/56.html>.

[2] Id. ¶ 64. The High Court applied the "real and effective activity . . . exercised through stable arrangements" test for establishment set forth in the CJEU's pre-GDPR *Weltimmo* decision, which can be accessed at: <http://curia.europa.eu/juris/document/document.jsf?docid=168944&doclang=EN>.

[3] Id. ¶ 60.

[4] [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_3\\_2018\\_territorial\\_scope\\_after\\_public\\_consultation\\_en\\_1.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf).

[5] Interestingly, the High Court made no mention of Brexit or Brexit's effect on the UK's data protection regime in its opinion.

[6] [https://edpb.europa.eu/news/news/2020/edpb-adopts-first-art-65-decision\\_en](https://edpb.europa.eu/news/news/2020/edpb-adopts-first-art-65-decision_en).

[7] Endnote 3, ¶ 67.

[8] Id. ¶ 55.

[9] Id. ¶ 64.

[10] Id. 67.

[11] GDPR Art. 79(2). Although it may be of modest comfort, defendants that find themselves in this position may be able to recover some of the costs of successfully contesting applications for permission to serve claims out of the jurisdiction, pursuant to the "loser pays" rule of England and Wales.