Consumer and Competition Policy in Times of Rising Corporate Power

The view of a Data Protection Commissioner

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Setting of ULD

• Data Protection Authority (DPA) for both the public and private sector
• Also responsible for freedom of information

Source: en.wikipedia.org/wiki/Schleswig-Holstein
Source: www.maps-for-free.com
**General Data Protection Regulation**

- **Idea:**
  - One for All
  - and
  - All for One

- **Objective:**
  - real harmonisation

- **But:** 70 opening clauses
  - (“variables” for Member States)

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**GDPR as “Game Changer”**

- **Market location principle** (Art. 3 GDPR)
- **Responsibility** (Art. 24 GDPR)
- **Data protection by design** (Art. 25(1) GDPR)
- **Data protection by default** (Art. 25(2) GDPR)
- **Security** (Art. 32 GDPR)
- **Data protection impact assessment**
  - (Art. 35 GDPR – “Rights and freedoms of natural persons”)
- **Certification** (Art. 42+43 GDPR)
- **Fines & sanctions** by Data Protection Commissioners (Art. 83+84 GDPR)
- **Courts**
Data protection principles

Whenever personal data are processed, Art. 5 (1) GDPR:

a) ‘lawfulness, fairness and transparency’

b) ‘purpose limitation’

c) ‘data minimisation’

d) ‘accuracy’

e) ‘storage limitation’

f) ‘integrity and confidentiality’

Art. 5 (2) GDPR: ‘accountability’

Lawfulness

Art. 6 GDPR:

a) consent by the data subject

b) processing is necessary for a contract

c) processing is necessary for legal obligation

d) processing is necessary in order to protect the interests of the controller

e) processing is necessary for the performance of a task carried out in the public interest

f) processing is necessary for the purposes of the legitimate interests pursued by the controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject

“Dark Patterns”!

Forbrukerrådet (Norway 2018): Report „Deceived by Design“, https://www.forbrukerradet.no/dark-patterns/
Rights of the data subject

Strengthening the rights of the data subject:

• Art. 7: Consent: freely given, informed, withdrawable
• Art. 12: Transparent information [...]
• Art. 13+14: Information obligations
• Art. 15: Right of access by the data subject
• Art. 16: Right to rectification
• Art. 17: Right to erasure ("right to be forgotten")
• Art. 18: Right to restriction of processing
• Art. 19: Notification obligation w.r.t. 17/18
• Art. 20: Right to data portability
• Art. 21: Right to object
• Art. 22: Automated decision making / profiling

GDPR: leverage on business? High fines. Theory or reality?

Article 83

General conditions for imposing administrative fines

1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.
**GDPR: leverage on business? High fines. Theory or reality?**

*Article 83*

**General conditions for imposing administrative fines**

5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;

(b) the data subjects' rights pursuant to Articles 12 to 22;

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**ECJ case on Facebook fan pages**

Question:
Is a company (co-)responsible for Facebook's data processing when administering a fan page?

- No, never?
- In a controller-processor relationship?
- Joint controllership?

Original Schleswig-Holstein case in 2011
ECJ ruling: Joint controllership

- Broad definition of the controller to protect individuals: alone or jointly with others determines purposes and means of the processing
  - Primarily Facebook controller (No. 30)
- And the fan page administrator?
  - Processing enables advertising business model
  - Processing enables fan page administrator to obtain statistics:
    - Definition of parameter for producing statistics (No. 36)
    - In particular demographic data (No. 37)
    - Opportunity to place cookies (No. 35)
  - Fan page administrator takes part in determination of purposes and means (Rn. 39)

ECJ case on Facebook fan pages

Question:
Is a company (co-)responsible for Facebook's data processing when administering a fan page?
- No, never
- In a controller-processor relationship
- Joint controllership! (Art. 26 GDPR)

Note: own purposes of FB
Transposition to other providers?!
“Leaving Facebook”

**Public service as role model**

- Chances by and for different business models
- For instance:
  - Payment by those who want to present themselves for legally compliant services (nothing new, is it?). E.g. no tracking by the platform, built-in privacy
  - Interoperability
- Because of GDPR not a minority position

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**Data Protection by Default**

*Article 25*

*Data protection by design and by default*

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual’s intervention to an indefinite number of natural persons.

“by default”: data protection-friendly pre-settings as a starting point for all data processing!
Conclusion

- Data protection by design and by default
  - Demanded by the GDPR
  - Thereby to be demanded by the controllers

- GDPR as game changer?
  - Promise of a level playing field
  - Innovation with data protection should conquer ignorant or even privacy-invasive services

- Standing shoulder-to-shoulder with consumer protection + anti-trust regulators