

The GDPR in Full Force: Priorities of the Supervisory Authorities and How to Prepare for Litigation

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WilmerHale Seminar
Palo Alto, June 27, 2018

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Overview

- General Background: Status since May 25, 2018
- Activities and priorities of the supervisory authorities
- Complaints and litigation since May 25, 2018
- A detailed look at the procedure under the GDPR
 - Complaints
 - Regulatory litigation
 - Litigation brought by individuals
- Current legislative developments



- **General Background: Status since May 25, 2018**
- **Activities and priorities of the supervisory authorities**
- **Complaints and litigation since May 25, 2018**



General Background: Status since May 25, 2018

- Directive 95/46/EC is repealed, GDPR has full legal effects, directly applicable in the European Union
- Article 29 Working Party no longer exists, replaced by the European Data Protection Supervisory Board (“EDPB”)
- Not all national laws have been modified in light of GDPR
- Brexit: Current EU position: UK will be a “third country” after Brexit, needs to apply for an adequacy finding (or a treaty-based solution)
- Ongoing political discussions regarding the ePrivacy Regulation (which would replace the “Cookie”-Directive 2002/58/EC)
- Pending cases against Privacy Shield and the Standard Contractual Clauses



Meeting of the Supervisory Authorities on May 24/25

- The first plenary of the EDPB was held on May 25 in Brussels
- The EDPB website is live at: <https://edpb.europa.eu/>
- The EDPB has adopted rules of procedure and guiding principles
- Chair of the EDPB: Andrea Jelinek (Austria)
- Vice-chairs: Ventsislav Karadjov (Bulgaria) and Willem Debeuckelaere (Belgium)
- A number of Article 29 Working Party documents were “endorsed”
- Next meeting: July 4/5, 2018

Endorsed Documents of the Article 29 WP (1)

- Guidelines on consent under Regulation 2016/679, **WP259 rev.01**
- Guidelines on transparency under Regulation 2016/679, **WP260 rev.01**
- Guidelines on Automated individual decision making and Profiling for the purposes of Regulation 2016/679, **WP251 rev.01**
- Guidelines on personal data breach notification under Regulation 2016/679, **WP250 rev.01**
- Guidelines on the right to data portability under Regulation 2016/679, **WP242 rev.01**
- Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679, **WP248 rev.01**
- Guidelines on Data Protection Officers (‘DPO’), **WP243 rev.01**
- Guidelines for identifying a controller or processor’s lead supervisory authority, **WP259 rev.01**
- Position Paper on the derogations from the obligation to maintain records of processing activities pursuant to Article 30(5) GDPR
- Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679, **WP 253**

Endorsed Documents of the Article 29 WP (2)

- Working Document Setting Forth a Co-Operation Procedure for the approval of “Binding Corporate Rules” for controllers and processors under the GDPR, **WP 263 rev.01**
- Recommendation on the Standard Application for Approval of Controller Binding Corporate Rules for the Transfer of Personal Data, **WP 264**
- Recommendation on the Standard Application form for Approval of Processor Binding Corporate Rules for the Transfer of Personal Data, **WP 265**
- Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules, **WP 256 rev.01**
- Working Document setting up a table with the elements and principles to be found in Processor Binding Corporate Rules, **WP 257 rev.01**
- Adequacy Referential, **WP 254 rev.01**



Guidance Documents – Current Pipeline of Topics

- Interpretation of Art. 3 GDPR (latest information: expected for September)
- Black-/Whitelists for Data Protection Impact Assessments (likely: July meeting)
- Further statements regarding Privacy Shield
- Cooperation in cross-border cases
- Video surveillance



Enforcement Priorities

- Publication of several draft whitelists and blacklists for purposes of Art. 35/36 GDPR by various authorities, EDPB alignment is pending
- Blog posts by various supervisory authorities



ICO, Draft “Draft Regulatory Action Policy”

<https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/draft-regulatory-action-policy/>

For the coming year, we have identified the following areas as priorities for our action.

1. Large scale data and cyber security breaches involving financial or sensitive information
2. AI, big data and automated decision making
3. Web and cross device tracking for marketing (including for political purposes)
4. Privacy impacts for children (including Internet of Things connected toys and social media / marketing apps aimed at children)
5. Facial recognition technology applications
6. Credit reference agencies and data broking
7. Use and sharing of law enforcement data, including intelligence systems
8. Right to be forgotten / erasure applications



Complaints to Supervisory Authorities: Current Status

- Jelinek WSJ interview (June 18, 2018): currently, there are about 24 transborder complaints, especially regarding forced consent
- No predictions regarding duration, no comment whether these will lead to fines



Known Complaints since May 25

NOYB (Max Schrems) (www.noyb.eu)

- Google/Android (France)
- Instagram (Belgium)
- WhatsApp (Hamburg, Germany)
- Facebook (Austria)

La Quadrature du Net (www.laquadrature.net)

- Facebook (France)
- Google (Gmail, YouTube, Search) (France)
- Apple (France)
- Amazon (France)
- LinkedIn (France)

Privacy International www.privacyinternational.org



Litigation Since May 25

- ICANN lawsuit regarding WHOIS (Germany)
- First (limited) wave of warning letters under unfair trade practices laws in Germany
- Coordinated "class action" lawsuits in Belgium (*Test Achats*), Italy (*Altroconsumo*), Portugal (*Deco-Protteste*) and Spain (*OCU*) against Facebook (Cambridge Analytica): "At least" EUR 200 per user



A detailed look at the procedure under the GDPR

- **Complaints**
- **Regulatory litigation**
- **Civil litigation**



Details of the Complaints Procedure under the GDPR

- Art. 77 – Right to lodge a complaint to the supervisory authority
 - Complainant may choose supervisory authority in any member state
 - Authorities have a duty to investigate
- Art. 80 – Representation of data subjects
- Art. 60 – Cooperation among supervisory authorities, one-stop shop
 - Lead supervisory authority for cross-border processing
- Art. 65 – Dispute resolution by the Board
 - Binding decisions by the European Data Protection Supervisory Board in the event of disagreements among the supervisory authorities
- Art. 66 – Interim measures



Regulatory Litigation under the GDPR

- Art. 58 – Powers of the supervisory authorities
- Art. 83 – Administrative fines
 - Up to 4% of global annual revenue of the respective group of companies
- Art. 78 – Right to an effective judicial remedy against a supervisory authority
- **Recital 143 – Action for annulment of decisions of the Board**
 - (de facto:) Necessity for controller/complainant to bring direct action before the European General Court in Luxembourg
 - Significant increase of European Court litigation



Litigation brought by Private Parties under the GDPR (1)

- Additional rights of data subjects
 - Right to be forgotten
 - Right to data portability
- Art. 79 – Right to an effective judicial remedy against the controller and processor
 - Venue: either courts at place of residence of data subject or location where controller / processor has an establishment



Litigation brought by Private Parties under the GDPR (2)

- Art. 82 – Damage claims by “any person”
 - Damages now include “immaterial damages”
example: EUR 1,000 for two months of illegal video recording at university
 - Joint liability of joint controllers and processors
- Art. 80 – Representation of data subjects
- Art. 81 – Suspension of proceedings
- Expectations for the coming months and years



Putting it All Together, or: the Worst-Case Scenario (1)

Example: Data breach (at a processor) with affected users in several EU member states

- Breach notification obligation to regulators and users, Art. 33/34 GDPR
- Investigations by supervisory authorities
- Individual complaints to supervisory authorities (including by Art. 80 GDPR organizations)
 - With “one stop shop”: one lead authority, otherwise full independence of each supervisory authority
- Disagreement among supervisory authorities, dispute resolution through the Board
 - Need to attack the decision of the Board, Recital 143



Putting it All Together, or: the Worst-Case Scenario (2)

- Formal decision by lead authority against the controller
 - Order to modify practices
 - Fine
- Decisions by other supervisory authorities to complainants
 - Lawsuits against these decisions
- Lawsuits by data subjects for "effective remedy"
- Lawsuits by Art. 80 organizations for "effective remedy" (without mandate)
- Damage claims litigation by "any person", Art. 82(1)
- Damage claims by Art. 80 organizations (only with mandate of data subject)



Putting it All Together, or: the Worst-Case Scenario (3)

- Follow-on litigation between different controllers and processors
 - Art. 82(4) and Art. 82(5) GDPR
 - Contractual claims
- (at least in Germany:) Different venues for each of these proceedings
- Art. 81 GDPR



Current legislative developments

- **Germany**
- **European Union**



New German Mass Litigation Option

- In June 2018, German parliament adopted a new “class action”-type legislation for consumers-related matters: Model declaratory judgment action (*Musterfeststellungsklage*)
- So far, only very limited areas with collective redress mechanism in Germany
 - e.g. Capital Markets Model Case Act which only covers claims for false, misleading or omitted public capital markets information
- But as a consequence of “Dieselgate”, enormous pressure by politicians and consumer associations to introduce collective redress mechanism to make law enforcement for consumers easier and more effective



Differences to US-Style Class Action

- Only parties who take legal action, i.e. who bring their case to court, can participate in a model case (“opt-in” model)
- A decision in the model case only has binding effect for the parties involved in the model case (no *erga omnes* effect)
- No jury verdicts
- No claim for punitive damages
- No US style discovery rules
- “Loser pays” rule



Model Declaratory Judgment Action (Germany)

- Only “qualified” consumer associations which are registered for at least four years are entitled to bring claims
- Model case procedure is restricted to abstract factual and legal questions relevant to determine the possible liability of the defending company
 - Model claimant must demonstrate that the factual and legal questions concern at least 10 consumers
 - At least 50 consumers must have registered their claims in the official claims’ register
 - Upon termination of the procedure, consumers have to bring an individual action to enforce their claim



Legal Effects of German Model Case Procedure

- To recap the benefits of the model case procedure, consumers must register their claims in the official claims' register
 - only very low level of substantiation required for registration of claim
 - registration will lead to a suspension of the limitation period of claim
- Court decision has a binding effect for all registered consumers and the defending company
 - Court decision is however not binding for non-consumers
 - Non-consumers need to demonstrate individually that the decision is relevant for their claim
- Settlement has also a binding effect for all registered consumers, unless consumer withdraws within a certain period of time



Preliminary Evaluation of German Model Case Procedure

- Due to the lack of financial incentives, highly specialized law firms are prevented from representing consumers in the model case procedure
- It remains unclear how consumer associations will finance and organize these highly sophisticated mass proceedings
- It is left open whether consumer associations can be held liable
- The new act does not provide for any mechanism to accelerate the model case procedure



European Mass Litigation Proposal

- European Commission published a “New Deal for Consumers” in April 2018 which also includes a proposal for a directive on collective redress mechanism
- Proposed directive will not be directly applicable in the EU member states but will have to be implemented into national law first
- New German act may then have to be modified again to comply with the European collective redress standards



Main Principles of Proposed European Directive

- Only “qualified entities” shall be entitled to bring representative actions
 - But less restrictive formal requirements than those provided for in German act
- Final and binding decision generally deemed as irrefutably establishing the existence of an infringement for other actions seeking redress before national courts of any Member State
 - Cross-border effect of national court decision
- Directive also entitles Member States to set out rules for effective, proportionate and dissuasive penalties in case the defending company does not comply with the final decision
 - Under German law, penalties for non-compliance with court decision are typically rather low



Thank you for your attention



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