

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

Martin Braun Hans-Georg Kamann Vanessa Wettner

WilmerHale Seminar
Boston, November 7, 2018

Attorney Advertising



WILMER CUTLER PICKERING HALE AND DORR LLP ©



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- Directive 95/46/EC is repealed, GDPR has full legal effects, directly applicable in the European Union and the EEA
- Article 29 Working Party no longer exists, replaced by the European Data Protection Board (“EDPB”)
- Most 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



Meetings of the Supervisory Authorities since May 2018

- So far, meetings in May, July, and September 2018
- 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”
- September plenary meeting agreed on opinions regarding national DPIA lists and document on territorial applicability of GDPR (not published yet)
- EDPB will change to monthly meetings



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, **WP251rev.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**



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”

(Final version at <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf> does not include this list)



Complaints to Supervisory Authorities: Current Status

- There are more than 260 transborder complaints, especially regarding forced consent. Allegedly, more than half are with the Irish and the Luxembourg supervisory authority
- No predictions regarding duration, no comment whether these will lead to fines
- Supervisory authorities are expected to issue a first round of (national) fining decisions in late 2018/early 2019
- The supervisory authority in Portugal has fined a hospital EUR 400,000 for an inadequate IT platform



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

- On 1 November 2018, a new German “class action”-type legislation for consumers-related matters came into force: 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



Martin Braun

martin.braun@wilmerhale.com

+49 (69) 27107-8019



Hans-Georg Kamann

hans-georg.kamann@wilmerhale.com

+49 (69) 27107-8004



Vanessa Wettner

vanessa.wettner@wilmerhale.com

+49 (69) 27107-8005

**WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional credit in New York. This program, therefore, is not approved for New York newly admitted attorneys. Attendees of this program also may be able to claim England & Wales Unaccredited CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.*

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at www.sra.org.uk/solicitors/code-of-conduct.page. A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2004-2018 Wilmer Cutler Pickering Hale and Dorr LLP