Implementation of GDPR: consistency, flexibility, guidelines

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A Reg or a Di-reg?

- More of a hybrid between a Regulation and a Directive
- Contains over 50 articles which allow Member States wiggle room when implementing
- No longer a predictable regime across the 28 member states
- How can we ensure that some of the Member States will not enact a “GDPR lite”?
Winfried Weile’s Mind Map (German Federal Ministry of the Interior)
- So who is responsible for issuing guidance – national authorities, EDPB?
- When does the process to ensure consistency kick in?
- What about mixed cases – national laws with cross-border effect?
- Or will all these be decided – eventually – by the courts?
So we set to work

- An EDRi team analysed the “flexible” articles
- Highlighted the most problematic:
  - Capable of undermining all basic rights
  - Or potential impact on the digital single market
- Here are three important examples
Research and sensitive data (Art 9(2)(j))

- Concern: may create serious loophole in the protection of very sensitive data and lead to serious abuses.

- Risk of such data also obtained for commercial research purposes.

- We recommend:
  - EDPS to issue clear/detailed guidance.
  - Not include commercial research purposes as exception for consent.
Restrictions on data subject rights (Art 23)

- Concern that this article can render most of the Regulation null and void, including the basic principles; excessively vague and permissive terms.
- Can be used to exempt companies from their obligations re data subject rights.
- We recommend:
  - MSs must inform the public how they use this and which laws apply (info held e.g. by EDPB).
  - DPAs/EDPB – detailed guidelines on how restrictions to be interpreted.
Concern that NGO’s rights for enforcement in some countries but not others will create inequalities in terms of rights

NGOs can still act on behalf of an individual, but the purpose of class action is to avoid remedy only for one individual when many are affected

NGOs already deal with complaints re consumer protection in many countries, and most effectively

We urge all authorities (EDPS, EDPB, DPAs!) to encourage governments to support enforcement actions by NGOs – an extra support to overworked authorities and deterrent against infringement for controllers.
Conclusion

- A number of ‘red-flagged’ articles containing flexibilities should be addressed by common guidance or actions.

- Early EDPB action on such detailed actionable guidance is crucial, and before 2018.