Case Study of the GDPR Violation by the Austrian Post

Nam Do
Brown University

Abstract

On October 23th 2019, the Österreichische Post (ÖPAG, Austria) was fined €18 million for breaching Article 5(1)a, and 6 of the General Data Protection Regulation (GDPR). Specifically, ÖPAG was illegally processing information of individuals (age, addresses, frequency of packages) to calculate the political affinity of 2.2 million data subjects, and selling the information without the subjects' knowledge or consent to third parties. Such activity had been going on for a while, and was only uncovered by an investigative journalistic piece. On a semi-separate thread, an Austrian privacy lawyer named Christian Wirthensohn filed a lawsuit against ÖPAG for GDPR violation, citing Article 9, 14 and 82, and demanding €2,500. It is remarkable how the lawsuit started by the lawyer ended up not earning him any money, even after a Regional Court had awarded the plaintiff €800, due to there not being sufficient evidence for harm being done to the individual. Secondly, it is also remarkable how the data for which ÖPAG violated multiple GDPR articles was not obtained from the users, but were **inferred**, using the data that ÖPAG legally had control over.

1 Introduction

Since 2001, the Österreichische Post (ÖPAG, Austria) has been operating a marketing service that earns them an annual revenue of €200 million [5], where they would handle mailing advertising mails of various companies to the right customers [4]. The position of ÖPAG as the *data controller* and the *data processor* over customers (*data subjects*) had not been something new and illegal until January 2019 [4], when an Austrian investigative journalism platform Addendum reported that ÖPAG was (1) selling the data of over 3 million customers to marketing companies, (2) calculating the political affinities of 2.2 million customers without their consent, and (3) storing and selling this information [4, 5]. According to Article 9 of the GDPR, data processing that is done with "a political, philosophical, religious or trade union aim", or that reveals such information, shall not be done without consent (unless done under some national/European legislation) [4].

On a semi-separate thread, a lawyer in Dornbirn, Vorarlberg, Austria filed a report claiming that his data had been illegally processed by ÖPAG, as ÖPAG was processing his data to figure out his political preference without his consent or any legal basis [9]. The lawyer further claimed that ÖPAG had violated Article 14, claiming that he was not made aware of ÖPAG having control over data that was obtained not from him, a data subject; and that ÖPAG had violated Article 82, insisting that he had suffered immaterial damage ("adversity", "uncertainty", and "disadvantage") from the breach. The plaintiff demanded €2,500 in damages [7].

Almost immediately after the Addendum report, on January 8th 2019, the Austrian Data Protection Authority (DSB) launched an open investigation into the matter. One day later, the ÖPAG Management announced that they would immediately stop their mishandling of data, and delete all inference of users' political affiliation across their databases [4]. According to the GDPR enforcement tracker, the Austrian Data Protection Authority concluded their investigation and ordered a fine for the ÖPAG on October 23rd, 2019.

2 GDPR Violation

According to the GDPR enforcement tracker, the DSB concluded that the ÖPAG violated Article 5(1)a and 6 of the GDPR. The violation could have been prevented had the ÖPAG reached out to their over 3 million customers to ask them to grant the permission for the ÖPAG to share their data with third party organizations, or to calculate and store in the database their political affinity.

Many publications described this violation as the ÖPAG making "educated guess" over their data subjects' political affinity [5]. More technically, the ÖPAG conducted statistical analysis on features such as geographical location, age demographics, answers to opinion surveys, and voting statistics, to determine the probability that a data subject would identify with a political affiliation [1, 5]. An example of this

kind of data is: (45% social democratic, 20% conservative, 5% Green Party) [2]. The inference step could have been done using some regression or weakly supervised learning algorithm. The data, then, is stored in ÖPAG's database and sold to third parties.

The violation of Article 5(1)a and 6 was also due to the ÖPAG's further processing of data on package frequency and frequency of data subjects' relocation for direct marketing purposes without data subjects' awareness and permission [3]. Additionally, way before January 2019, a data subject sent a data access request to the ÖPAG, and ÖPAG failed to comply. However, the violation did not result in a fine (and hence was separate from the €18 million fine above) as such data was provided by the defendant at the complaint proceedings that followed the claim [9].

3 Settlement

3.1 Regional Court decision

While the fine issued by the DSB was straightforward, the compensation for the lawyer who filed a lawsuit against the ÖPAG was not. The Regional Court of Feldkirch, where the lawyer filed the lawsuit, only awarded the data subject €800 of the €2,500 claimed [6]. The compensation amount was decided by the Regional Court based on (1) the impact on the claimant, (2) the data categories involved, (3) the gravity and duration of the infringement, and (4) whether the data were transmitted to any third party [9]. While political opinion of a person is sensitive data, the court explained that €800 was enough because the claimant's party preferences have not been communicated to third parties [9].

3.2 Appeal process

On another thread, during the DSB investigation process, a well-known Austrian organization was preparing a mass claim law suit for more than 1600 customers, claiming up to €3000 for each affected customer as compensation for alleged immaterial harm [6]. In September 2019, they filed a model claim for an ÖPAG data subject. This made things a lot tricker for Austrian judicial and litigation system: if the courts allowed substantial amounts of compensation for immaterial damages to be claimed without requiring the claimant to prove the actual immaterial harm suffered, it would lead to a flood of GDPR litigation [6].

The case was appealed by both parties (the data subject and the ÖPAG), and was later tried at the Higher Regional Court Innsbruck, where the final decision was made on February 13th, 2020 that the claimant would not be awarded any amount of compensation [7]. The reasoning for the decision is as follows: the Austrian Courts had established that compensable damages had to be 'factual' and 'certain'. In his case, the plaintiff only used general statements to describe his immaterial damage, such as 'adversity', 'uncertainty', and 'disadvantage', without proving any concrete emotional impairment, and hence could not be regarded as a compensable damage [7]. Although this might sound contradictory to Article 82 of the GDPR, where it is clearly stated that 'no serious violation of the right of personality is required in order to claim immaterial damage', it was deemed fair that not every GDPR violation need to lead to an obligatory compensation [7].

4 Discussion

The first interesting piece to this case is whether data proccessing that calculates the **prediction** of one's political leaning should be considered a violation of the Article 9 of the GDPR, where only the **revealing** of political opinions is prohibited. If we look at it from a probability perspective (e.g. during testing of the statistical model, it has been proven that the model correctly predicts the political affinity of data subjects for more than 95%), if the chance of correctness is high, it might be reasonable to equate inference with revelation. However, none of the sources that covered ÖPAG's infringement of the GDPR actually mentioned the accuracy of the inference model. Under the probability thought framework, it would be important to determine a specific accuracy threshold that would determine whether an inference procedure has the power of revealing data subjects' political affinity or not. However, going beyond the probability perspective, we have an important question to address: should inference from personal data also be considered personal data, when at the end of the day, those inferences can only act as a "best guess" and not an actual proof of personal identity of the data subjects?

The second interesting piece to this case is the contradiction between the GDPR and Austrian laws/court rulings. With regards to the conflict between the Austrian Union Courts ruling and Article 82 of the GDPR, one reason for why such contradiction happened was because Article 82 never mentioned any threshold for compensation for immaterial damages [9], requiring the Higher Regional Court Innsbruck to consult the Austrian tort law, which requires demonstration of **considerable disadvantage** of the plaintiff's emotional life [7]. Such contradiction might have been averted had Article 82 of the GDPR provided clear guidelines for the permissible amount of compensation. However, even when Article 82 had provided clear instructions for the amount of compensation an affected data subject can rightfully claim, we still have important logistical questions to ask, notably: How can we prevent a scenario where a large amount of data subjects request compensation for non-specific immaterial damage from GDPR infringement?

Additionally, it was alleged that ÖPAG's infringement of the GDPR was due to how they solely relied on Article 151 of the Austrian Business Code of 1994, where political affinity data was not required to be treated differently from the rest:

such processing of data, under the business code, had been legal before the GDPR took effect [2]. Although changes in privacy laws are inevitable, we learn from this case that such privacy violation might not have happened had the GDPR been strategically enforced and monitored straight from the beginning. Such proactive enforcement, however, might be extremely costly for not just the data controllers/processors, but also for the DSB.

It is also very interesting how the ÖPAG was the first data controller/processor to be fined for wrongful inference of political affinity. Prior to the enactment of the GDPR in April 2018, Facebook was also using inference of users' political leaning to display appropriate advertisements to its customers [8]. A hypothesis here would be that while bigger tech companies have the power and culture to proactively keep themselves up-to-date with the newest privacy regulations, many smaller, non-technical companies like the ÖPAG don't have enough resources to constantly maintain their compliance. A good question, hence, would be: How can we provide smaller data processors/data controllers with the right resources to keep them up-to-date with and encourage them to comply with the latest privacy regulations?

References

[1] Data Protection: An Overview of the General Data Protection Regulation Occurences during the month of October. In *Erremme Business Advisors*. http://erremme.com.mt/data-protection/data-protection-an-overview-of-the-general-data-protection-regulation-occurrences-during-the-month-of-october/.

[2] LG Feldkirch - 57 Cg 30/19b-15. https://gdprhub.eu/index.php?title=LG_Feldkirch_-_57_Cg_30/19b_-_15.

[3] Austrian DPA Fines Österreichische Post AG 18 Million Euros. 2019. https://www.huntonprivacyblog.com/2019/11/07/austrian-dpa-fines-osterreichische-post-ag-18-million-euros/#:~:text=The%20European%20Data%20Protection%20Board,EU%20General%20Data%20Protection%20Regulation.

[4] The Austrian Post Filed Its Users According To Their Supposed Political Views. In *Visegrad Post*, 2019. https://visegradpost.com/en/2019/02/25/the-austrian-post-filed-its-users-according-to-their-supposed-political-views/.

[5] Austrian Post ordered to pay up for selling customer data. In *DW*, 2019. https://www.dw.com/en/austrian-post-ordered-to-pay-up-for-selling-customer-data/a-51042259#:~:text=Austrian%20Post%20has%20been%20ordered,about%20customers'%20assumed%20political%20allegiances.&text=In%20January%2C%20the%20investigative%20journalism,million%20customers%20to%20marketing%20companies.

[6] Can I claim damages for hurt feelings under GDPR? An Austrian court says 'yes'. 2019. https://digital.freshfields.com/post/102fth1/can-i-claim-damages-for-hurt-feelings-under-gdpr-an-austrian-court-says-yes.

[7] Austrian court ruling on immaterial damages for GDPR violation - a mere violation of data protection regulations is not enough. 2020. https://inplp.com/latest-news/article/austrian-court-ruling-on-immaterial-damages-for-gdpr-violation-a-mere-violation-of-data-protection-regulations-is-not-enough/.

[8] Jeremy B. Merrill. Liberal, Moderate or Conservative? See How Facebook Labels You. 2016. https://www.nytimes.com/2016/08/24/us/politics/facebook-ads-politics.html.

[9] Thomas Schweiger. EUR 800,– in non-material damages under Article 82 GDPR awarded by Austrian Court for the processing of party preferences without legal basis. 2019. https://www.linkedin.com/pulse/eur-800-non-material-damages-under-art-82-gdpr-court-schweiger/.