

GDPR Case Study: 2019-10-29, Austrian Post, Austria

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Abstract

Österreichische Post (ÖPAG), an Austria Post was found illegal for processing individuals' information from 2.2 million data subjects to calculate political affinity and selling information without subject's knowledge or consent to third parties. Because of its violation of Article 5(1) a and 6 of the General Data Protection Regulation (GDPR), it was fined €18 million by Christian Wirthensohn, an Austrian privacy lawyer, on October 23th, 2019. [1]

1 Background

Österreichische Post AG (ÖPAG), an Austria Postal Service that was mostly owned by the Austria Republic, was accused for selling data subjects' personal data, including their names and addresses, as well as generating their political inclination based on these data. Based on these political likelihood, they can mail specific political parties' propaganda to their customer. [2] They act as both the data controller (for determining the commercial purpose of the processing of personal data) and the data processor (for processing the data to generate their customers' political tendency).

ÖPAG was then condemned for violating the GDPR on October 23th, 2019, and was penalized by the federal Data Protection Authority for Austria (DSB) for €18 millions, the fourth highest amongst the EU. [1] The plaintiffs, however, did not get compensations because there was no proof that their rights of data protection was jeopardized. [2]

The Austria Post explained that the political tendency predictions should not be considered "special category of data" (sensitive), and that they mainly relied on § 151 of the Austrian Business Code of 1994 ("Gewerbeordnung 1994", GewO), which regulates address brokers. The national law does not distinguish between different types of data, and there is a conflict between the national law and the GDPR. [2]

ÖPAG updated a warning to its stock holders, that it was fined a total of €18 millions. [2]

2 GDPR violation

2.1 What happened?

ÖPAG was fined €18 million for violating Articles 5(1)a and 6 of the GDPR for illegally processing 2.2 million customers' personal data to calculate political affinity and selling that data to third parties without their knowledge or consent. [5, 6] The situation was revealed by Addendum, an Austrian investigative journalism website, and a lawyer in Dornbirn filed a report alleging that ÖPAG had improperly processed his data to determine his political preferences without his agreement or legal justification. The Austrian Data Protection Authority opened an open investigation on January 8th, 2019, and finally ended their investigation by ordering a fine for ÖPAG on October 23rd, 2019.

2.2 Who/what is responsible?

The violation occurred because ÖPAG used statistical analysis to assess the likelihood that a data subject would identify with a political affiliation based on factors such as geographic location, age demographics, responses to opinion surveys, and voting records. [3, 6] However, the company does not inform users of application of data and collected data is sold to third parties from ÖPAG without permission of the user. Additionally, a data subject sent a data access request to ÖPAG, and ÖPAG failed to comply. However, violation did not result in a fine as such data was provided by defendant at the complaint proceedings that followed.

2.3 What could have prevented this?

After the DSB opened an investigation, ÖPAG management promised that they will stop misusing data immediately and remove all inferences of users' political affiliation from their databases. [5] Actually, Violators could ask people permission to share their data with third parties to prevent this problem.

3 Discussion

From our perspective, the fine imposed is actually too low. The reason why we derive this conclusion is that company processes information of users to calculate political affinity of 2.2 million data subjects, [5, 6] however, company sells information to third parties without users' permission which violates rules of protecting data privacy of users. Additionally, the company does not inform users about intention or application of collected data which also violates rules of protecting data privacy of users.

However, this case actually leaves a puzzle for people to debate which includes contradiction between nation law and GDPR. The reason why contradiction happens was because Article 82 never mentioned any threshold for compensation for immaterial damage. Furthermore, political affinity data was not required to be treated differently from the rest types of the data under Article 151 of the Austrian Business Code of 1994. [4]

Compensable damages have to be certain, according to Austrian courts. In fact, the plaintiff in this instance simply provided a generic statement to define his immaterial injury without offering any tangible evidence that could not be considered compensable damage. Despite the fact that Article 82 of the GDPR expressly specifies that "no significant violation of the right to privacy is required in order to claim immaterial harm," it was ruled fair that not every GDPR violation must result in an obligation to compensate. [7]

On the other hand, we also consider whether a prediction of a political affiliation is a "special category of data". This is another important place for this case. In our opinion, a political affiliation belongs to political opinions. If our opinion is right, the plaintiff in this instance also need to be increase

the fine under Article 9(1) GDPR.

References

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