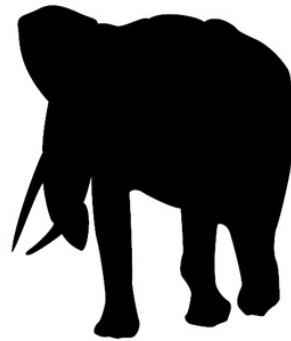


CJEU case law on the GDPR: Traits, Trends and Troubles

In memory of
Jon Bing



Christopher Docksey

Oslo, 8 June 2023



Maastricht University

European Centre on Privacy and Cybersecurity (ECPC)

bothersome data protection legislation

**Jon Bing 1981
A Meeting in Georgetown
World Omnibus of Science Fiction
Penguin 1981 pp 111-120**

Traits, trends and troubles

Preface

1. Governance

2. Relationship with national law

3. Accountability - definitions and scope

4. The right to be forgotten

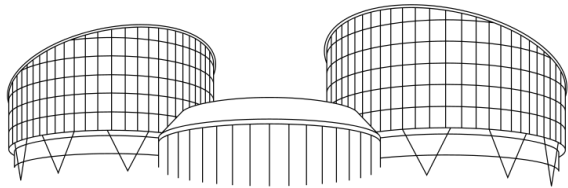
Epilogue - national security

Preface

law and courts

increasing tempo

European Courts and procedures



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ECHR art. 8 private life

Convention 108(+)

- Inter-state cases
- **Applications by individuals against contracting states**
- Advisory opinions



EU Charter art. 7 private life
Art. 8 protection of personal data

GDPR, LED, EUDPR, EU PNR, ePrivacy Directive

- Infringement proceedings
- Actions for annulment
- Actions for damages
- **Preliminary rulings**
- Opinions



EEA Agreement

Constitutional and case law development

- **Lisbon Treaty 2009**
 - Constitutional status to Charter
 - art 16 TFEU - legal basis for GDPR
- **Landmark cases**
 - *Google Spain* (2014) & *CNIL* rulings (2019)
 - *DRI* (2014) & *PI/LQDN* (2020)
 - *Schrems I* (2015) & *II* (2020)
 - *Wirtschaftsakademie* (2018), *Planet49* (2019)
 - *Facebook Ireland* (2021)



Fundamental Rights cases
1964-2009 | 2010-2014

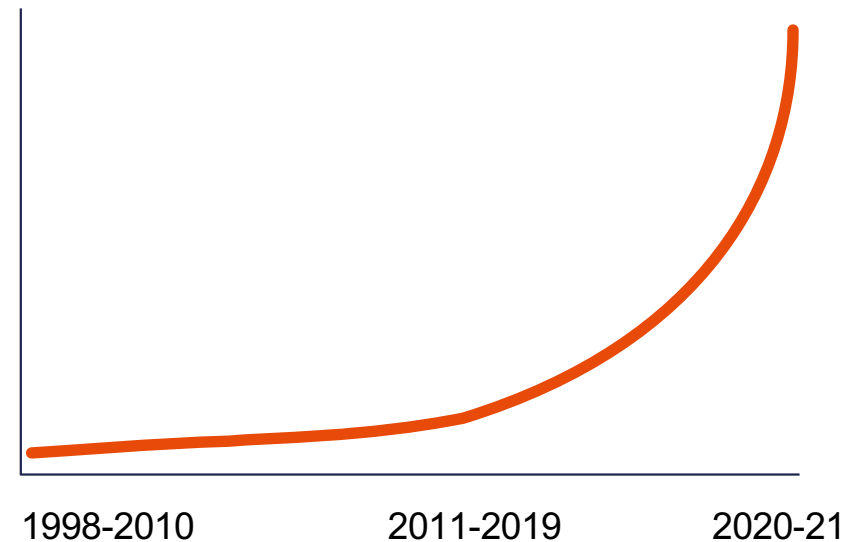
CJEU Data Protection Case Load 1998 - 2021

Exponential growth

1998-2010 = 11 11%

2011-2019 = 53 55%

2020-2021 = 33 34%



+ 2 EFTA Court (GDPR) and 8 General Court (EUDPR)

to keep track, see www.dpcuria.eu



New rulings and referred cases in last 9 months

Latest preliminary rulings

- 04 May 2023 : [C-487/21](#) (Österreichische Datenschutzbe...)
- 04 May 2023 : [C-300/21](#) (Österreichische Post)
- 30 Mar 2023 : [C-34/21](#) (Hauptpersonalrat der Lehrerinn...)
- 02 Mar 2023 : [C-268/21](#) (Norra Stockholm Bygg)
- 16 Feb 2023 : [C-349/21](#) (HYA and Others (Motivation de...))
- 09 Feb 2023 : [C-453/21](#) (X-FAB Dresden)
- 26 Jan 2023 : [C-205/21](#) (Ministerstvo na vatrešnite raboti)
- 12 Jan 2023 : [C-154/21](#) (Österreichische Post)
- 12 Jan 2023 : [C-132/21](#) (Nemzeti Adatvédelmi és Infor...)
- 08 Dec 2022 : [C-180/21](#) (Inspektor v Inspektorata kam V...)
- 08 Dec 2022 : [C-460/20](#) (Google)
- 08 Dec 2022 : [C-694/20](#) (Orde van Vlaamse Balies and Others)
- 22 Nov 2022 : [C-37/20](#) (Luxembourg Business Registers)
- 27 Oct 2022 : [C-129/21](#) (Proximus)
- 20 Oct 2022 : [C-306/21](#) (Koalitsia Demokratichna Bulgar...)

Latest referrals

- 25 May 2023 : [C-332/23](#) (Inspektorat kam Visshia sadebe...)
- 23 May 2023 : [C-316/23](#) (Inspektorat kam Visshia sadebe...)
- 22 May 2023 : [C-312/23](#) (Addiko Bank)
- 22 May 2023 : [C-313/23](#) (Inspektorat kam Visshia sadebe...)
- 18 Apr 2023 : [C-247/23](#) (Deldits)
- 28 Mar 2023 : [C-200/23](#) (Agentsia po vpisvaniyata)
- 17 Mar 2023 : [C-169/23](#) (Másdí)
- 14 Feb 2023 : [C-80/23](#) (Ministerstvo na vatrešnite raboti)
- 08 Feb 2023 : [C-65/23](#) (K GmbH)
- 02 Feb 2023 : [C-57/23](#) (Policejní prezidium)
- 31 Jan 2023 : [C-46/23](#) (Újpesti Polgármesteri Hivatal)
- 19 Jan 2023 : [C-21/23](#) (Lindenapotheke)
- 15 Dec 2022 : [C-757/22](#) (Meta Platforms Ireland)
- 02 Dec 2022 : [C-740/22](#) (Endemol Shine Finland)
- 10 Nov 2022 : [C-693/22](#) (I.)



Chapter I

Governance

Consistency and cooperation

Facebook Ireland v GBA/APD, C-645/19, 15 June 2021

- Art 56(1) LSA is *primus inter partes* but:
- Sincere and effective cooperation between LSA and CSAs required

WhatsApp Ireland v EDPB, Case T-709/21, 7 December 2022 (GC)

- EDPB decision challenged, DPC fine increased from €30-€50m to €225m – action inadmissible. Parallel proceedings, reference.

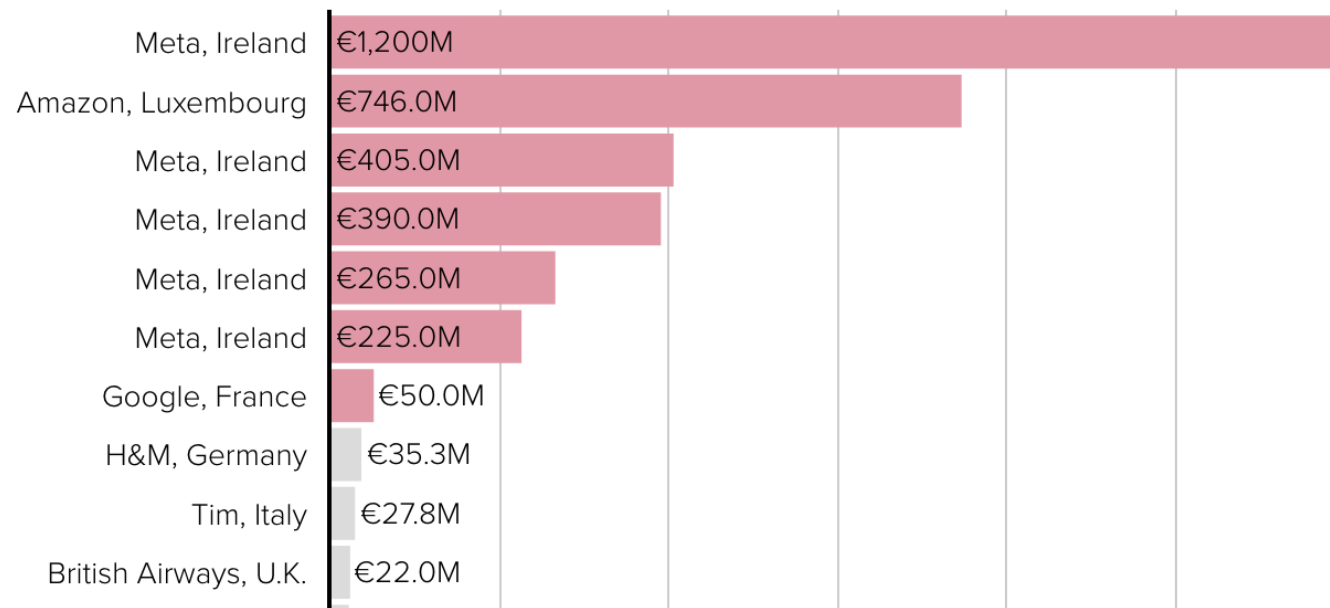
DPC Final Decision on Meta Platforms Ireland, 12 May 2023

- suspend US transfers after 5 m, fine increased from €0 to €1.2bn

DPC v EDPB, Case T-111/23, lodged 24 February 2023

- Irl DPA challenge to EDPB order to conduct a fresh investigation, on grounds of excess of powers

Ten largest DPA fines since the GDPR entered into force



SOURCE: GDPR Enforcement Tracker, POLITICO research, Politico 22 May 2023

Third party enforcement by NGOs and CAs

C-319/20 *Meta (FB) v Verbraucherzentrale Bundesverband*,

28 April 2022

- VZB has standing to bring consumer cases without specific mandate, not precluded under art 80(2) from suing for violation of DP rules, contributes to ensuring a high level of protection

C-252/21, *Meta Platforms v Bundeskartellamt (BKA)*

AG Athanasios Rantos , 20 September 2022

- CA has no jurisdiction to rule on GDPR but may *take account* of GDPR compatibility of commercial practice, subject to sincere cooperation with competent DPA

Independent supervision

EU Charter art 8(3) / art 16(2) TFEU: independent supervision

Case C-518/07, Commission v Germany

- DPAs must be free from any external influence, direct or indirect

Case C-614/10, Commission v Austria

- DPAs must remain above all suspicion of partiality, prior compliance

Case C-288/12, Commission v Hungary

- DPA cannot be replaced before end of mandate

Opinion 1/15 EU-Canada PNR

- Impartial body is not *independent*

EDPS v EP and Council, T-578/22, lodged 16 September 2022

- Europol Regulation amended to reverse EDPS order to delete data
- Threatens DPA independence: anticipation, political pressure

Chapter II

Relationship with

national law

DPO: dismissal and conflict of interest

C-534/20, *Leistriz* 22 June 2022

- DPO dismissed after 6 months for restructuring. Lawful under art 38(3) 2d sentence, unlawful under DE law.
- GDPR complements national law, does not cover overall employment relationship

X-FAB, C-453/21, 9 February 2023

- DPOs can maintain other tasks and duties within their role, if they do not result in a conflict of interest: tasks or duties which would result in DPO determining objectives and methods for controller
- a matter for the national court to determine

Compensation for material or non-material damage – art 82(1) GDPR

C-340/21, *Natsionalna agentsia za prihodite (BU)* AG 27 April 2023

- Worries and upset suffered, accountability

C-667/21, *Krankenversicherung Nordrhein (DE)* AG 25 May 2023

- Employee health - degree of fault in assessment of non-material damage

C-687/21, *Saturn Electro (FIN)* 16 Nov 2021

- burden of proof on individual, non-reading of document containing personal data

C741/21, *Juris (DE)* 1 Dec 2021

- assessment of compensation for non-material damage – art 83 criteria for fines

C-182/22 and C-189/22, *Scalable Capital (DE)* 10 and 11 Mar 2022

- identity theft, nature of compensation: symbolic, satisfaction, punitive/dissuasive

C-590/22, *PS (DE)* 9 September 2022 (ibid C-741/21)

- Burden of proof to show actual adverse effect of a certain magnitude

Compensation for material or non-material damage

1. Nature of compensation under art 82(1): symbolic, purely compensatory, OR preventive, punitive or dissuasive (like fines)?
2. Material damage: threshold of certain magnitude required?
 - or mere violation of the right to data protection sufficient?
 - or worries, fears and anxieties about possible future misuse of PD?
3. Burden of proof on individual to show non-material damage?
4. Criteria for assessment of compensation for non-material damage:
 - degree of fault?
 - based on art 83 fines criteria?

Compensation for material or non-material damage

C-300/21, *UI v Österreichische Post*

- Data collected concluded that UI's political affinities were far-right.
- UI claimed €1,000 compensation for insult and damage to reputation
- Austrian law: damage was below “materiality” threshold

CJEU, 4 May 2023

1. GDPR infringement does not *per se* generate compensable damage
2. art 82(1) precludes any *de minimis* “threshold of seriousness”, but individual must demonstrate that suffered negative consequences
3. National law lays down the criteria of assessment, subject to EU law principles of equivalence and effectiveness

Chapter III

Accountability

definitions and scope

C-340/21, *Natsionalna agentsia za prihodite*

AG Pitruzzella , Opinion of 27 April 2023

The principle of accountability is one of the pillars of the Regulation and one of its most significant innovations.

It places the responsibility on the controller to take proactive measures to ensure compliance of the processing operation with the Regulation and to be able to demonstrate such compliance.

CJEU: *ensure effective and complete protection*

President Lenaerts: *by way of high levels of accountability in view of the central theme of accountability*

Art 2(2)(c) processing of PD by a natural person in the course of a *purely personal or household activity*

Ryneš v. UPOOU, C-212/13 , 11 December 2014

Excludes anything *directed outwards from the private setting*

Jehovan todistajat, C-25/17, 10 July 2018

Doorstep evangelizing, sometimes invited in. Freedom of religion

Art 3(1) processing of personal data *in the context of the activities of an establishment in the Union*

Google Spain v. AEPD, C-131/12, 13 May 2014

where a search engine sets up a branch or subsidiary in an EU MS to sell advertising which directs its activity at its inhabitants

Art 4(1) personal data - any information relating to an identified or identifiable person

Case C-101/01, *Lindqvist*, 6/11/03

Case C-275/06, *Promusicae v Telefonica* 29/1/08

Case C-70/10, *Scarlet v SABAM*, 24/11/11

Cases C-141 & C-373/12, *YS v Minister voor Immigratie*, 17/7/14

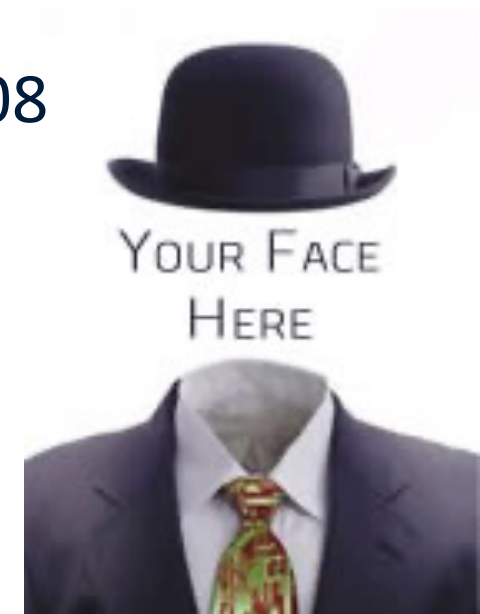
Case C-582/14, *Breyer v Germany*, 19/10/16

C-434/16 Nowak v. DPC, 20/12/17

Case C-78/18, *Commission v Hungary*, 18/6/20

Case T-384/20, *OC v Commission* (GC), 4 May 2022 > *C-479/22 P*

Case T-557/20, *SRB v EDPS* (GC), 26 April 2023



Nowak ruling on concept of Personal Data

- **personal data covers both objective and subjective data** (i.e. opinions and assessments)
- **personal data has a wide scope of** (“any information”); not limited to sensitive or private personal data.
- **WP29 Opinion 4/2007**, 3 tests for “relates to”:
 - **content** (knowledge, handwriting),
 - **purpose** (assessment) and/or
 - **effect** (on career)
- **pseudonymised information is personal data** (“identifiable”)
- Cf art 15(3) right to a copy of the *personal data* (not a *document*)
 - Case C-487/21, **F.F. v ,ÖDSB (CRIF)**, 4 May 2023

Articles 9 and 10 and recital 51: personal data which are, by their nature, particularly sensitive

I v. Finland, ECtHR, 17 July 2008

- no safeguards for staff access to hospital database

V. v European Parliament, F-46/09, 17 July 2008

- casual transfer from one medical service to another

Opinion 1/15 EU-Canada PNR, 26 July 2017

- specific legal basis required

G.C. et al v CNIL, C-136/17, 24 September 2019

- immediate RTBF upon request

O.T. v Chief Official Ethics Commission (CEC), C-184/20, 1

August 2022: • disproportionate disclosure, and

- inference of sexual orientation
- 

Art Art 4(7) *controller* – the body which determines the purposes and means of processing

Article 26(1) joint controllers - jointly determine ...

Google Spain v. AEPD, C-131/12, 13 May 2014

More than simply relaying, enables profiling

C-210/16 Wirtschaftsakademie Schleswig-Holstein 5 June 2018

Fan page user, benefiting from FB insights, joint controller with FB
Controllership not tied to access or complete control

C-40/17 Fashion ID 29 July 2019

Shop embeds “Like” button on website – social media plug-in

Joint controller where has decisive influence, where can exert control
Allocation of responsibility by CJEU

Chapter IV

The Right to be forgotten

Right to be forgotten / Art. 17 GDPR *Right to erasure*

C-131/12 *Google Spain v. AEPD*, 13 May 2014

Balancing of rights, dereferencing where out of date, inaccurate, etc.

C-398/15 *Manni*, 9 March 2017

Original publisher, Company Register

C-136/17 *GC v. CNIL*, 24 September 19

Obligation to delist sensitive data

C-507/17, *Google v CNIL*, idem: No
Extraterritorial jurisdiction under EU law

C-460/20 *Google*, 8 December 2022

Allegedly false or inaccurate information



"They had their names removed using the right to be forgotten"

Right to be forgotten – ECHR case law

Axel Springer AG v. Germany 39954/08 [GC], 7 February 2012

Balancing criteria: public interest, public figure, source/quality of information

Węgrzynowski and Smolczewski v. Poland, 33846/07, 16 July 2013

Add a comment to offending article where public interest against erasure

Delfi AS v. Estonia [GC], 64569/09, 16 June 2015

News site liable for defamatory comments by readers

M.L. and W.W. v. Germany, 60798/10 and 65599/10, 28 June 2018

Essential role of press in democracy, amplifying effect of search engines

Hurbain v. Belgium, 57292/16, 22 June 2021 – GC hearing 9 March 2022

Legitimate RTBF request, but directed against newspaper, not search engine

Biancardi v. Italy, 77419/16, 25 November 2021

RTBF request against small local news site for recent article

RTBF – application to the press

Both rulings: was it necessary to order press to delist?

- no consideration of less intrusive measure, delisting by Google, or
- Google's *obligation* to block known sensitive data from search results
- delisting by Google actually *more* effective

Ruling in *Biancardi*:

- Did not apply *Axel Springer* criteria
- Own 3 criteria misapplied: ***time*** very short; ***criminal proceedings*** still extant; restaurant/owner not "***private persons***" - well known, gave press interviews; real sanction was permitting such lawsuits
- Accepted that complainant can decide when period of public interest is over
- Led to cleansing of press archives – *PrimaDaNoi's* have disappeared

Counter arguments

- Rights to privacy and to an effective judicial remedy

Epilogue

sovereign activity

A Meeting in Georgetown

Jon Bing 1981

If possible, we will use our knowledge to demonstrate that there are other kinds of power than that based on weapons – computer power, control of the computer systems.

We would like to use it to reduce world tension, to increase the possibility of a lasting peace between the superpowers

Was computer power real power, or only a shadow of the power created by real weapons?

2004 EP v Council & Commission (PNR)
2009 Ireland v Council and Parliament (Data Retention Directive)
2014 Digital Rights Ireland and Seitlinger (Data Retention Directive)
2015 Schrems v Data Protection Commissioner
2016 Tele2 Sverige and Watson
2017 Opinion 1/15 (Canada-EU PNR)
2020 DPC v Facebook Ireland Ltd, Maximillian Schrems (July)
2020 La Quadrature du Net and Ordre des barreaux (October)
2020 Privacy International
2021 Centrum för Rättvisa v. Sweden
2021 Big Brother Watch and Others v. The UK
2022 Ligue des droits humains (EU PNR)
2022 Space Net, Telekom Deutschland, Garda Síochána

Thank you