

The GDPR One Year Later

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Outline of presentation

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- Topics I will discuss:
 - Application of the GDPR.
 - International impact of the GDPR.
 - The GDPR and technology.
 - Experience with the GDPR: general comments, important court judgements and pending cases, and enforcement.
 - The GDPR and digital innovation.
 - Conclusions.

Application of the GDPR (1)



- The EU General Data Protection Regulation 2016/679 (GDPR) is a long and complex (approximately 100 pages) piece of EU legislation.
- It regulates the processing of data that can be tied to an identifiable individual (personal data).
- Since digital innovation depends on data processing, the GDPR has an important impact on research and innovation.

Application of the GDPR (2)

- The GDPR applies to the public and private sectors in the EU (with some exceptions).
- It can also apply extraterritorially in some cases (i.e., when a company outside the EU offers goods or services to individuals in the EU, or monitors their behaviour).
- The GDPR became fully applicable on 25 May 2018 (a little over one year ago), which provides the chance to consider what the experience has been with it, and what its effects can be on digital innovation.

The GDPR has international impact

- The influence of EU data protection law can be seen in the laws of over 100 countries (including Japan).
- The European Commission approved an adequacy decision for Japan on 23 January 2019, which allows personal data to be freely transferred to Japan.
- The continued validity of the adequacy decision depends on Japan staying close to EU data protection standards.
- Result: developments concerning the GDPR have a direct impact on Japan.

The GDPR and technology

- The GDPR is technology-neutral (i.e., it does not focus on specific technologies).
- However, many provisions of the GDPR were specifically designed to deal with privacy challenges posed by technology.
 - Examples: Article 3 (territorial scope of the GDPR), Article 7 (definition of consent), Article 25 (data protection by design and by default), and Article 32 (security of processing).
- The GDPR generally applies to scientific research.
 - Derogations from GDPR for data processing in the public interest and for scientific research purposes are limited and subject to national law (Article 89).

Experience with the GDPR: general comments

- The GDPR has become an accepted part of the legal landscape in the EU.
- Predictions of businesses shutting down and damage to the Internet have not come true.
- The first year of the GDPR has proved to be largely a year of “wait and see”, i.e., it is too soon to say definitively what its effects will be.

Experience with the GDPR: important court judgments

- The Court of Justice of the EU (CJEU) has issued some important judgments since the GDPR became applicable, here are a few examples.
- Two judgments deal with who has legal responsibility when data are collected:
 - *Wirtschaftsakademie*, Case C-210/16, 5 June 2018: An individual or company that sets up a Facebook page can be a controller of the page that is jointly responsible together with Facebook for the collection of data that occurs on it.
 - *Jehova's Witnesses*, Case C-25/17, 10 July 2018: A religious community is a data controller jointly with its members who collect data when they engage in door-to-door preaching.
- Another judgment deals with online journalism:
 - *Buivids*, Case 345/17, 14 February 2019: Posting a video on YouTube of a speech made in a police station constituted the processing of personal data for journalistic purposes, and thus was exempt from certain obligations under the predecessor to the GDPR.

Experience with the GDPR: pending CJEU cases

- There are also several data protection cases pending before the CJEU that will answer important questions, for example:
- *Google v. CNIL*, Case C-507/17: Does the right to de-referencing of search engine results (“right to be forgotten”) also apply extraterritorially to domains outside the EU?
- *G.C. and others v. CNIL*, Case C-136/17: Is there a duty of search engines to agree in all cases to de-reference sensitive data (such as health data or data about sex life) that is revealed in search results?
- *Planet 49*, C-673/17: Does a pre-checked box constitute valid consent in online services, and is it permissible to use a take-it-or-leave-it cookie policy?

Experience with the GDPR: enforcement

- The GDPR has brought increased fines and enforcement of data protection law (see https://edpb.europa.eu/sites/edpb/files/files/file1/19_2019_edpb_written_report_to_libe_en.pdf).
- NGOs have also filed lawsuits against online companies (example: lawsuits filed in Austria against companies that run streaming services including Amazon, Apple, Netflix, Spotify and others).
- Everyone expects that US Internet companies will likely be the subject of large fines in the near future.
- There is also pressure by business partners to adopt the protections of the GDPR.

The GDPR and digital innovation (1)

- Technology regulation in the EU (such as the GDPR) is based on constitutional principles, such as the following:
 - Human dignity: Technology must serve mankind, rather than the opposite.
 - The non-derogable nature of fundamental rights:
Fundamental rights such as privacy cannot be bargained away.
 - Proportionality: There must be a fair balance between fundamental rights.

The GDPR and digital innovation (2)

- Using AI as an example, the application of these principles to technology finds expression in certain provisions of the GDPR, such as the following:
 - **Restrictions on the use of consent (Article 7).** Consent may not be used unless it is freely given, informed, and unambiguous, and it may be withdrawn at any time.
 - **Information to be given when data are processed (Articles 12-14).** Individuals must be given certain information about data processing.
 - **Individual rights.** Individuals have rights with regard to the processing of their data, such as a right to access (Article 15) and a right to rectification (Article 16).
 - **Protections for automated decisions (Article 22).** Individuals have the right not to be subject to automated processing.

The GDPR and digital innovation (3)

- These principles raise questions for innovative technologies such as AI (with the relevant GDPR articles in parentheses):
 - What is the legal basis for processing personal data in AI applications (Article 6)?
 - Can individuals be informed in a meaningful way about how their data are processed (Articles 12-14)?
 - What happens if an individual wants to correct or erase their personal data that are being processed by an AI application (Articles 16-22)?
 - Do individuals have a right to object when AI applications make decisions about them (Article 22)?

The GDPR and digital innovation (4)

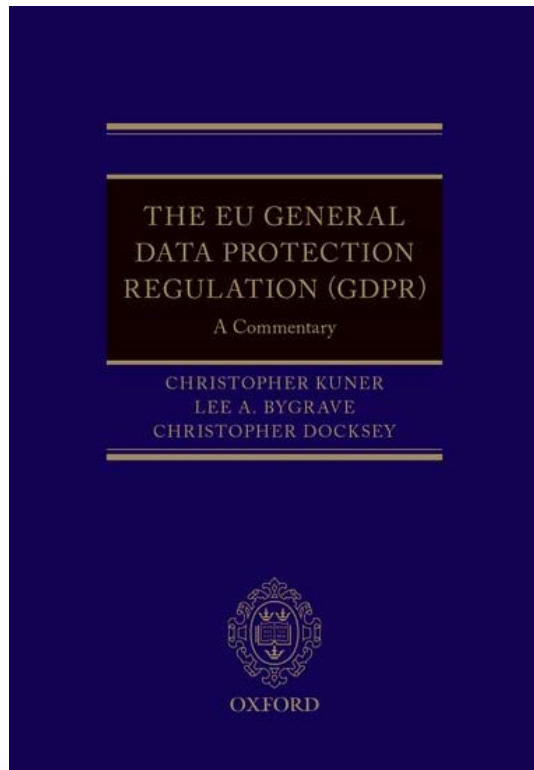
- There are conflicting views about the effect of the GDPR on digital innovation and research:
 - Some believe that it does not hinder research or even makes it too easy, for example with regard to research using genetic data (see article by Pormeister, 7 IDPL 137 (2017)) and automated contracting (see article by Finck, 9 IDPL ____ 2019 (forthcoming)).
 - Others have worried that the GDPR will hinder scientific research, for example with regard to critical care research (see article by Timmers et al., 27 Medical Law Review 59 (2018)).
- More experience will be needed to evaluate these claims.

Conclusions

- It is too early to draw firm conclusions about the effectiveness and effects of the GDPR.
- The GDPR has become an accepted part of the legal landscape in the EU.
- Significant enforcement has already occurred, and larger penalties are likely in the near future.
- The GDPR's effect on digital innovation is the subject of debate, but there is no agreement on it yet.
- The question is whether the GDPR will spur innovation or hinder it.
- Japan should watch the EU's experience with the GDPR closely when deciding on its own regulation of new technologies.

Further information on the GDPR

- Forthcoming in November 2019: Kuner/Bygrave/Docksey (eds.), *The EU General Data Protection Regulation: A Commentary* (Oxford University Press), approximately 1,400 pages



Draft commentaries on 10 selected GDPR articles from the book are available for free download:

<https://works.bepress.com/christopher-kuner/1/>