

The background features a dark blue gradient with faint, light blue circular patterns and a scale on the left side. The scale has markings from 140 to 260 in increments of 10. There are also several circular arrows and dashed lines scattered across the background.

DATA PROTECTION & CONSUMER LAW: THE PERFECT MATCH?

RALF BENDRATH (EP) - AGUSTIN REYNA (BEUC)

SO WE THOUGHT IT WAS DONE...

4.5.2016

EN

Official Journal of the European Union

L 119/1

I

(Legislative acts)

REGULATIONS

REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 April 2016

on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

(Text with EEA relevance)

BAD TIMING

- last trilogue on the GDPR: 15th December 2015
- including consent for the processing of personal data
- ...where we got in a prohibition of tying:

Article 7

Conditions for consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.
2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.
4. When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

BAD TIMING

- 9th December 2015: COM (2015) 634 final
- Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the supply of digital content
- additional consumer rights for digital content
- well intended

Article 3

Scope

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.
2. This Directive shall apply to any contract for the supply of digital product developed according to consumer's specifications.
3. With the exception of Articles 5 and 11, this Directive shall apply to any durable medium incorporating digital content where the durable medium has been used exclusively as carrier of digital content.
4. This Directive shall not apply to digital content provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.

LOADS OF QUESTIONS IN THE EP

- Is this legal under the GDPR prohibition of tying?
- Legal basis for personal data processing – consent, contract, ...?
- What happens to the contract if I object to the processing or withdraw my consent?
- Data portability of anonymous content vs personal data minimisation?
- COM: „two separate universes“
- But now we're talking...

DIGITAL CONTENT DIRECTIVE

- Scope of application: paid digital content & “data (including personal data) *actively* (!) provided as a *counter-performance* for a service.
- This proposal is about conformity rights: what happens if the digital content is defective?
- Objective criteria for conformity: security obligations – software liability etc.
- Termination of the contract = data retrieval
- Without prejudice to data subject rights (will data protection take precedence?)
- Withdrawal of consent = breach of contract? (as I would be taking back what I gave as a “counter-performance”)

Some KEY Differences...

Data Protection	Consumer Law
<p>Public Law</p> <p>Legality (for data collection and processing)</p> <p>Principle-based + data subject rights</p> <p>Consent (main legal basis)</p> <p>Fundamental rights dimension</p>	<p>Private Law</p> <p>Fairness (in B2C contract)</p> <p>Statutory rights</p> <p>Agreement (to enter into a contract)</p> <p>Economic dimension (protection of the consumers' transactional decision)</p>

WHEN FREE IS NOT REALLY FREE

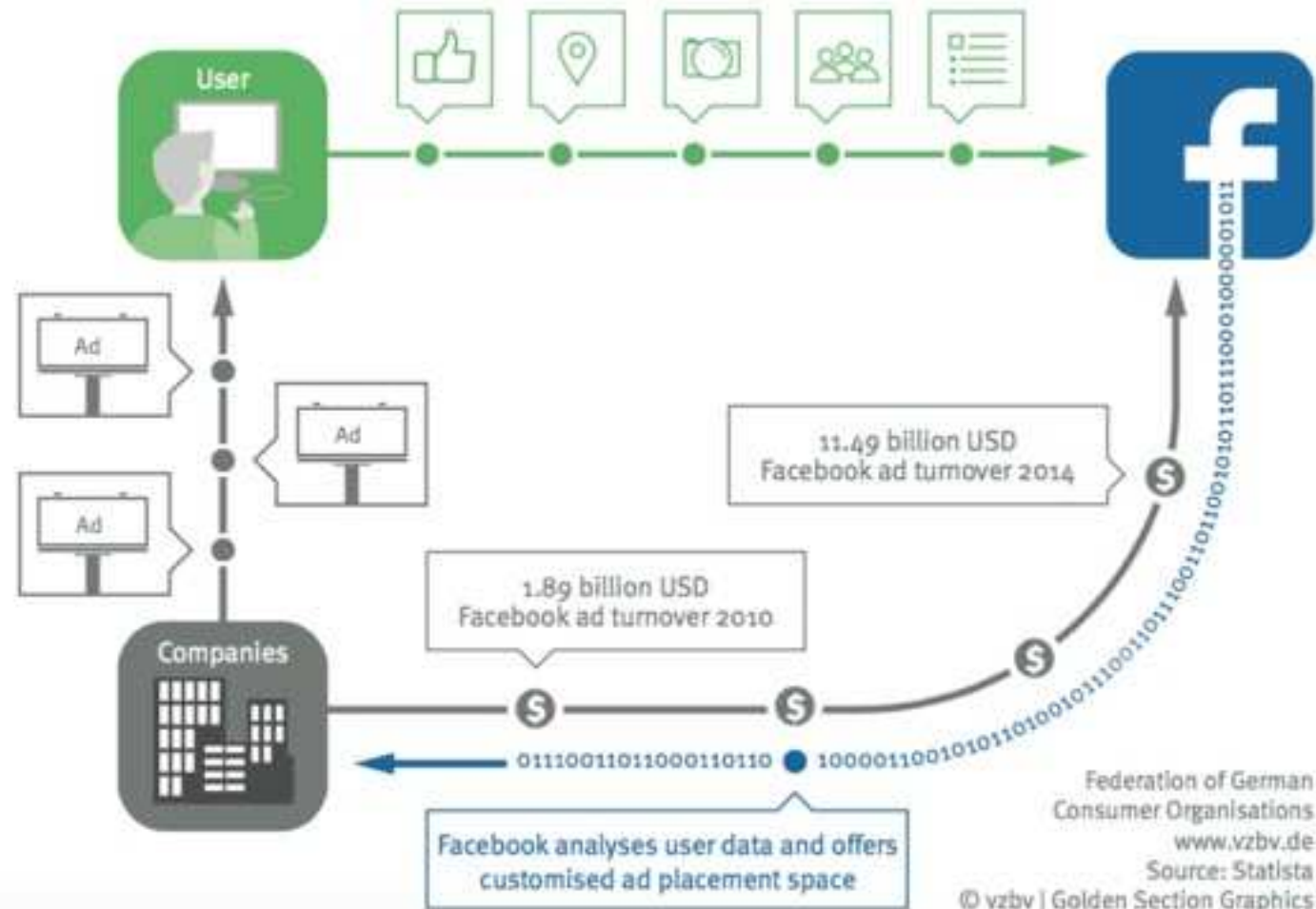
The Facebook currency: **DATA**

Facebook does not charge people for using its service.

However, Facebook uses their data by selling these to companies across the globe in the form of personalised ad spaces.

The rule here is: the more personalised a user profile, the more expensive an ad space can be sold. Every piece of user information therefore equates income for Facebook.

verbraucherzentrale
Bundesverband



FILLING THE GAPS IN CONSUMER LAW

EU Consumer Law	Applicable to digital content contracts?	Applicable to “free” digital contracts?
Consumer Rights Directive (2011) Information, formal requirements, right of withdrawal	YES	UNCLEAR
Consumer Sales Directive (1999) Conformity and remedies	NO	NO
Unfair Commercial Practices Directive (2006)	YES	YES
Unfair Contract Terms Directive (1993)	YES, but incomplete	YES, but incomplete

Some questions...

- Can we talk of “ownership” of personal data?
- Is there a risk that the inclusion of data as a counter performance could make data a tradable asset?
- Could this inclusion undermine data protection principles (e.g. data minimisation)?
- Can data protection (as a fundamental right) inform (for good) the interpretation of consumer law in “free” digital contracts?
- How can consumer and data protection law complement each other?
- How do fundamental rights and contract law inter-link?

</TALK> <DISCUSS>

- Ralf Bendrath ralf.bendrath@europarl.europa.eu - @bendrath
- Agustin Reyna agustin.reyna@beuc.eu - @arcapde