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DATA PROTECTION MATTERS

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- Mark Getty, the grandson of Paul Getty who made his fortune in oil, said “intellectual property is the oil of the twenty first century. The economy has shifted. We extract a lot of value from what is inside people’s heads”

- The scandal of Cambridge Analytica has brought into sharp focus the significance of that statement.

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- In 2004, when starting to build Facebook, Mark Zuckerberg sent a series of instant messages to his Harvard friends in which he marvelled at the fact that 4,000 people had volunteered their personal information to his project.
- He said "People just submitted it, …. I don't know why……They "trust me"…. Dumb f**ks."

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- 14 years later, that number has grown from 4,000 to 2 billion.

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- Facebook's business model is to collect, share and exploit as much user data as possible, all without informed consent.

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- In 2011, an Austrian law student, Max Schrems requested his personal data from Facebook which Facebook was legally required to provide to him under EU law.
- He was horrified to discover that Facebook had amassed 1200 pages – everything he had ever "liked" and every private message that he had ever sent.

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- He complained to the Irish Data Protection Commissioner because Facebook has its international headquarters in Dublin.
- While some steps were taken to address his complaints, he did not consider they went far enough and took legal action. The case ended up in the European Court of Justice.

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- The decision in *Schrems v Data Protection Commissioner C-362/14* makes clear that mass surveillance is illegal in terms of the Charter of Fundamental Rights of The European Union.

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- Article 7 states:
- “Everyone has the right to respect for his or her private and family life, home and communications”;

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Article 8 states:

- “Everyone has the right to the protection of personal data concerning him or her.
- Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

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- Compliance with these rules shall be subject to control by an independent authority."

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THE GENERAL DATA PROTECTION REGULATION

- The Regulation was approved on 14 April 2016 and comes into force on 25 May 2018.
- It is the most comprehensive privacy regulation in the world.
- It replaces the Data Protection Directive 95/46/EC and was designed to harmonise data privacy laws across Europe, to protect and empower all EU citizens' data privacy and to reshape the way organisations approach data privacy.

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- The aim of the GDPR is to protect all EU citizens from privacy and data breaches.

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THE KEY CHANGES

- **Extra-territorial applicability (Chapter 5, Articles 44-50)**
- The GDPR applies to all companies processing the personal data of data subjects residing in the Union, regardless of the company's location.

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- It applies to the processing of personal data by controllers and processors in the EU, regardless of whether the processing takes place in the EU or not.

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- It also applies to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to: offering goods or services to EU citizens and the monitoring of behaviour that takes place within the EU.
- Non-EU businesses processing the data of EU citizens must appoint a representative in the EU.

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Penalties (Article 83)

- In terms of GDPR, organisations in breach of GDPR can be fined up to 4% of annual global turnover or €20 Million (whichever is greater).
- For Facebook that would amount to a fine of £1.14bn based on its 2017 turnover.

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Other costs

- Reputational damage
- Loss of valuation of the business.
- Facebook's shares dropped almost 7% in the wake of the scandal taking £25.7bn off the company's valuation.
- Clients suing in addition to the administrative penalties that can be imposed in term of GDPR

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- The maximum fine can be imposed for the most serious infringements such as
- not having sufficient customer consent to process data; and
- violating the core of Privacy by Design concepts.
- It will be interesting to see how Facebook adapts its business model.

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- There is a tiered approach to fines e.g. a company can be fined 2% for not having their records in order (article 28), and not notifying the supervising authority and data subject about a breach or not conducting impact assessment.
- The rules apply to both controllers and processors -- meaning 'clouds' will not be exempt from GDPR enforcement.

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Consent (Article 7)

- Where processing is based on consent, the controller must be able to demonstrate the data subject has consented.
- If consent is given in a written declaration that also concerns other matters, it must be clear and distinguishable from those other matters and provided in an intelligible and easily accessible form, using clear and plain language.

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- Consent can be withdrawn at any time
- It must be as easy to withdraw consent as it is to give it.
- The data subject must be informed of that prior to giving consent.

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Breach Notification (Article 33)

- Under the GDPR, breach notification is mandatory in all member states where a data breach is likely to "result in a risk for the rights and freedoms of individuals". This must be done within 72 hours of first having become aware of the breach.
- Data processors will also be required to notify their customers, the controllers, "without undue delay" after first becoming aware of a data breach.

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Right to Access (Article 15)

- Data subjects have the right to obtain from the data controller confirmation as to whether or not personal data concerning them is being processed, where and for what purpose.
- The controller shall provide a copy of the personal data, free of charge, in an electronic format.

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Right to be Forgotten (Article 17)

- The right to be forgotten entitles the data subject to have the data controller erase his/her personal data, cease further dissemination of the data, and potentially have third parties halt processing of the data.

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Data Portability (Article 20)

- The right for a data subject to receive the personal data concerning them, which they have previously provided in a '*commonly used and machine readable format*' and have the right to transmit that data to another controller.

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Privacy by Design

- Privacy by design calls for the inclusion of data protection from the onset of the designing of systems, rather than as an addition.
- The controller is required to implement appropriate technical and organisational measures in an effective way in order to meet the requirements of the Regulation and to protect the rights of data subjects.

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- Article 23 requires controllers to hold and process only the data absolutely necessary for the completion of its duties (data minimisation), as well as limiting the access to personal data to those needing to act out the processing.

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Data Protection Officers (Section 4, Articles 37-39)

- There is a requirement for internal record keeping, and the appointment of DPOs will be mandatory for controllers and processors whose core activities consist of processing operations which require regular and systematic monitoring of data subjects on a large scale or of special categories of data or data relating to criminal convictions and offences.

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What constitutes personal data?

- Any information related to a natural person or 'Data Subject', that can be used to directly or indirectly identify the person. It can be anything from a name, a photo, an email address, bank details, posts on social networking websites, medical information, or a computer IP address.

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Data controller or a data processor?

- A controller is the entity that determines the purposes, conditions and means of the processing of personal data, while the processor is an entity which processes personal data on behalf of the controller.

- The definitions for the purposes of the GDPR are contained in Article 4

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BREXIT

- UK businesses that deal with processing data about individuals in other EU countries must comply with the GDPR, regardless of whether or not the UK retains the GDPR after Brexit.

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THE DATA PROTECTION BILL

- The Data Protection Bill was published on 14 September 2017 and is currently making its way through parliament.
- It has reached the Report Stage, but a date has not yet been announced.

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What does the Bill cover?

- It is divided into 6 parts with part 1 being preliminary matters and parts 2-6 being the operative parts as follows:
- Part 2 – General processing
- Part 3 Law Enforcement processing
- Part 4 Intelligence services processing
- Part 5 the Information Commissioner
- Part 6 Enforcement

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NONE OF YOUR BUSINESS

- Max Schrems thinks privacy is the most unenforced right in Europe.
- He has launched “None of your business” a not for profit organisation that aims to challenge more privacy breaches emboldened by the fines that can be imposed under GDPR.

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noyb sets out its concept, thus:

- "*noyb* will use best practices from consumer rights groups, privacy activists, hackers, and legal tech initiatives and merge them into a stable European enforcement platform. Together with the many new enforcement possibilities under the new EU data protection regulation (GDPR), *noyb* will be able to bring privacy cases in a much more effective way than before. In addition, *noyb* will follow the idea of targeted and strategic litigation to maximize the impact on the future of your right to privacy. When appropriate, *noyb* will use PR and media initiatives to ensure your right to privacy without even going to court. Finally, *noyb* is designed to join forces with existing organizations, resources and structures to maximize impact, while avoiding parallel structures."

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- GDPR also provides for compensation and does not restrict who can lodge a complaint with a supervisory authority.
- Remedies, Liability and Penalties are contained in chapter 8.

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- “noyb” is ready to lodge its first privacy complaint on 25 May.
- As practitioners and individuals, we have a lot to lose by not guarding personal data.

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