Ms. Andrea Jelinek
Chairwoman of the European Data Protection Board
Director, Österreichische Datenschutzbehörde
By email

Re: How tech companies nudge users into choosing the less privacy friendly options

27 June 2018

Dear Ms. Jelinek,

We would like to bring to your attention a report published today by the Norwegian Consumer Council which examines the information and consent "pop-ups" that Microsoft, Google and Facebook presented to their users as part of the implementation of the General Data Protection Regulation (GDPR).

The conclusion of the report, entitled "Deceived by Design", is that whilst these "pop-ups" provided users with more granular choices regarding consent to uses of their personal data, companies employed numerous tricks and tactics to nudge or push consumers toward giving consent to sharing as much data for as many purposes as possible. These include privacy-intrusive default settings, giving users an illusion of control, dark patterns such as hiding away privacy-friendly choices, and take-it-or-leave-it choices.

A key aim of GDPR is to protect the personal data of individuals and to strengthen individuals' control and rights over their data. However, the findings of the report indicate how the approach of the companies takes away agency from individuals - nudging them towards the less privacy friendly options.

The practices highlighted in this report raise several issues, including in terms of these companies' obligations under GDPR and the use of practices that could potentially be considered unfair under consumer protection legislation.

In particular, we question how the processing of personal data in this context complies with the following requirements of GDPR:

(1) The data protection principles of transparency, purpose limitation and data minimisation (Article 5 GDPR). Individuals are not being given the full picture and the notifications have been designed in such a way as to "hide" important information from them and nudge them into giving consent to the use of as much data as possible for a wide range of purposes.

(2) The lawful basis for processing (Articles 6 and 9) in particular consent (Article 7). Many of the prompts covered in the report appear to be relying on consent as a legal basis for processing. However, the practices deployed by companies raise questions as to whether consent in this case can be considered informed and freely given.

(3) Data protection by design and by default (Article 25). Contrary to the requirements of this principle, the design and operation of the "pop-ups" as described in the report make it difficult for individuals to protect their personal data, nudging them towards more data sharing and with (hidden) default settings being set to options that are not the most privacy friendly ones.

We hope that you will share our concerns about the practices highlighted in this report and urge you to investigate these issues more in depth. The techniques analysed in the report are most likely used on citizens in all European countries and therefore, in our opinion, merit to be discussed by the European Data Protection Board.

The report sheds light on the approach of three of the world's largest technology companies, who process billions of people's data. There is the added risk that where these companies lead (or in this case fail to lead) others will follow.

We look forward to hearing from you.
Yours sincerely,

Amanda Long
Director General
Consumers International

Gus Hosein
Director
Privacy International

Monique Goyens
Director General
The European Consumer Organisation (BEUC)

Finn Lützow-Holm Myrstad
Head of section, Digital Services
Norwegian Consumer Council

Stephen Russell
Secretary General
ANEC

In attachment: "Deceived by Design" – Report