

Businesses as 'data controllers' under the GDPR for personal data processed through business 'social media' pages (through the lens of Facebook Pages)

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Importance of question

Why the capacity of (business) Facebook Page Administrators as 'data controllers' is important?

- ▶ Number of (business) Facebook Pages in 2018: 80 million (DMR statistics)
- ▶ The monthly active Facebook users in the second quarter of 2018 in Europe is nearly 400 million – worldwide, it is 2.23 billion (Statista 2018) – huge market for businesses with a Facebook Page – lots of data subjects too
- ▶ Indeed, number of visitors to Facebook Pages monthly in 2016: 400 million (DMR statistics)
- ▶ Those businesses based in the EU or offering their services/goods to EU-based individuals are subject to the GDPR (Article 3, GPDR – territorial scope of the GPDR)
- ▶ The 'data controller' is the party burdened with all of the (heavy) obligations of the GDPR – resources, expertise, policies, procedures and forms are required
- ▶ The 'data controller' can be imposed with (heavy) fines if he/she/it violates one of those obligations

Necessary background: personal processing through Facebook Pages

Obvious data processing

processing

Personal data processing through Facebook Pages

Obvious processing
(user comments, shares, likes, messages)

Background processing
(Facebook Insights)



Necessary background: personal processing through Facebook Pages

Facebook Insights

- Very important feature of Facebook Pages
- Facebook promotes it heavily and explains it clearly



Necessary background: personal processing through Facebook Pages

Facebook Insights

See how people are connecting with your Page

Click on your Page Insights tab to get reports on:

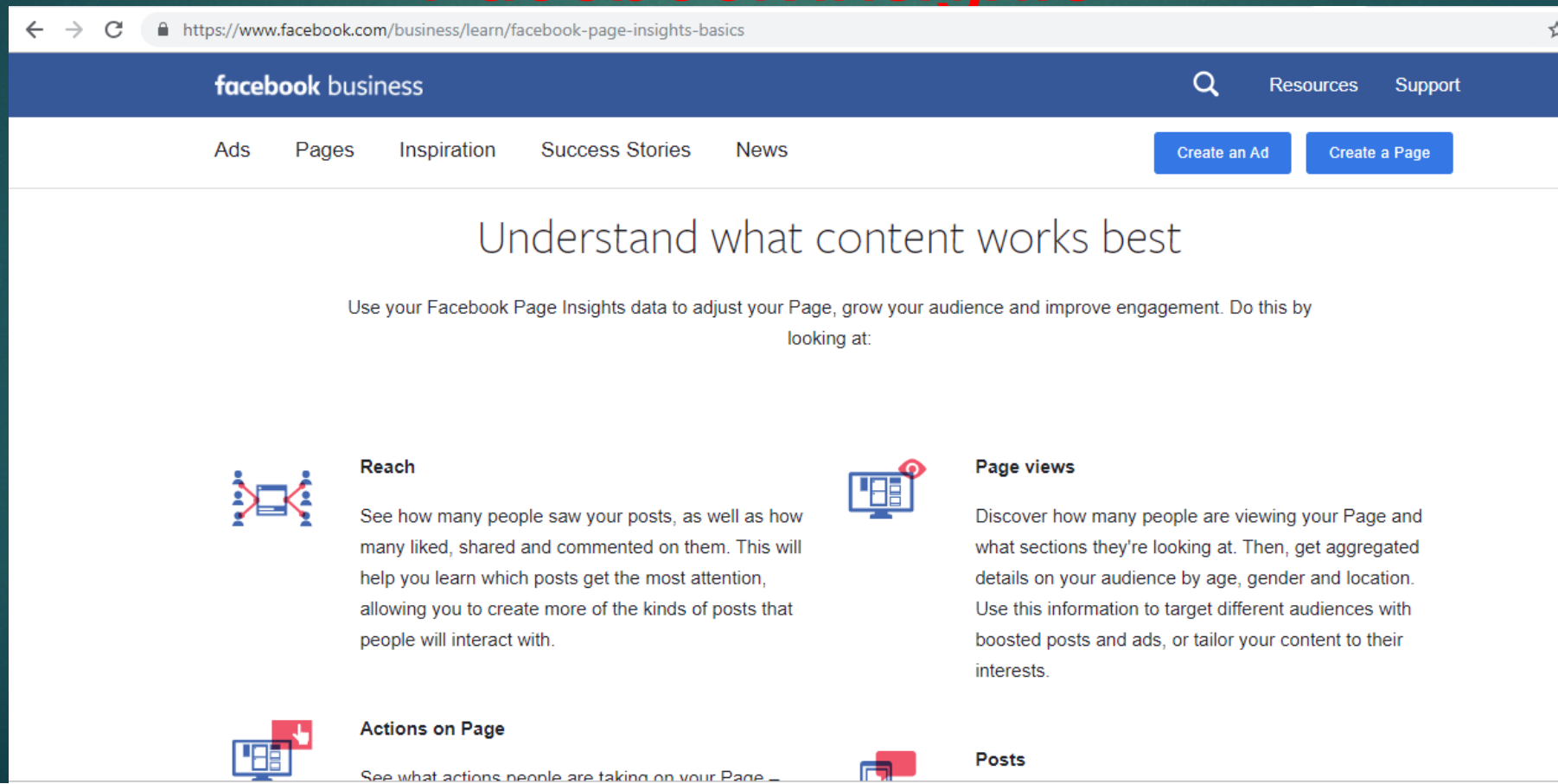
- How many people your posts reached, and how many people engaged with your posts
- The number of people who called your business from your Page
- The number of times that you responded to customers and your average response time
- The number of check-ins people made to your business with their posts

Reach
July 20 - July 26
113 ▲1,030%
People Reached

Post Engagements
July 20 - July 26
10 ▼47%
Post Engagement

Necessary background: personal processing through Facebook Pages

Facebook Insights



The screenshot shows the Facebook Business Insights page. The browser address bar displays the URL: <https://www.facebook.com/business/learn/facebook-page-insights-basics>. The page header includes the 'facebook business' logo, a search icon, and links for 'Resources' and 'Support'. Below the header, there are navigation links for 'Ads', 'Pages', 'Inspiration', 'Success Stories', and 'News', along with 'Create an Ad' and 'Create a Page' buttons. The main content area features the heading 'Understand what content works best' and a sub-heading 'Use your Facebook Page Insights data to adjust your Page, grow your audience and improve engagement. Do this by looking at:'. Four key metrics are listed: 'Reach', 'Page views', 'Actions on Page', and 'Posts', each with a brief description and an icon.

facebook business

Resources Support

Ads Pages Inspiration Success Stories News

Create an Ad Create a Page

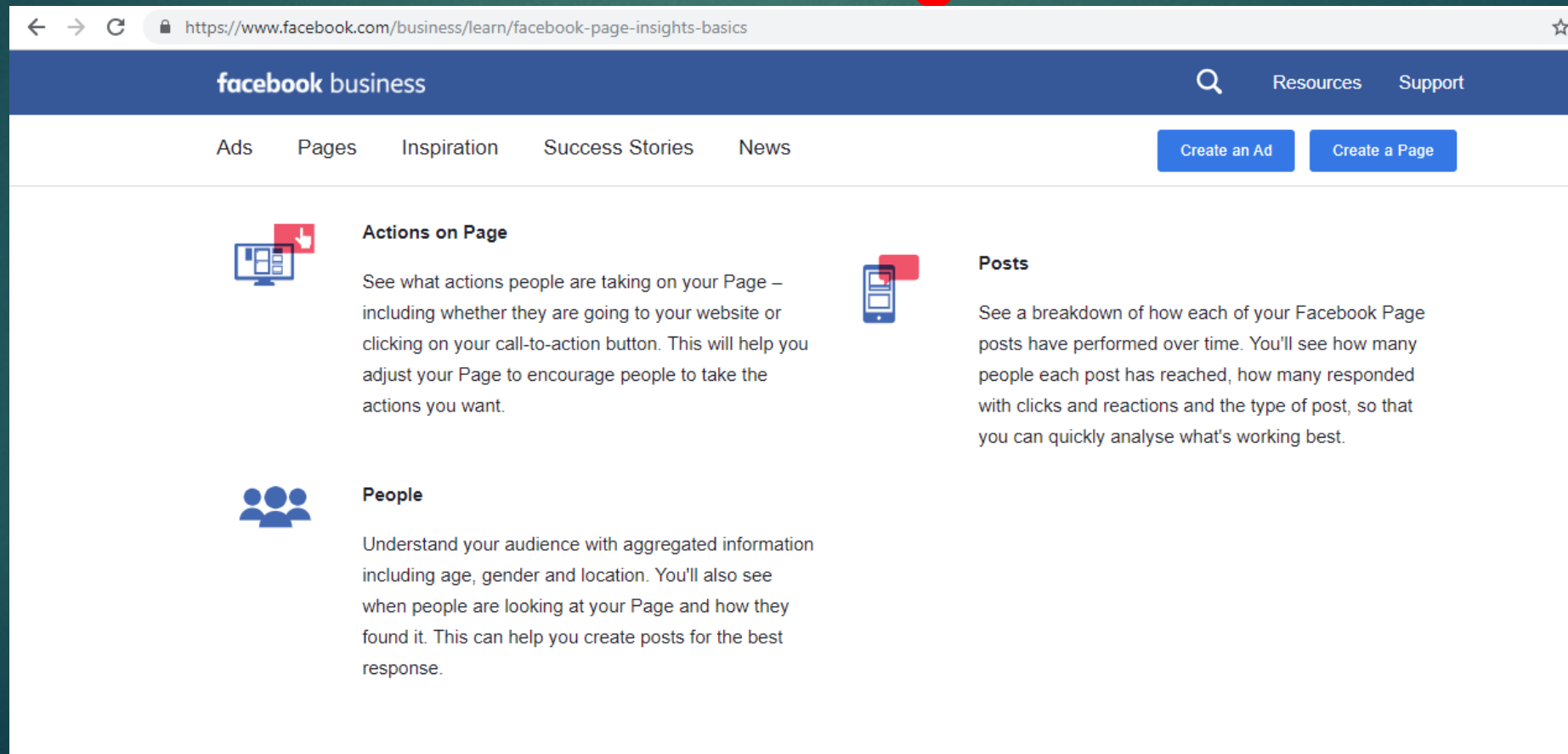
Understand what content works best

Use your Facebook Page Insights data to adjust your Page, grow your audience and improve engagement. Do this by looking at:

- Reach**
See how many people saw your posts, as well as how many liked, shared and commented on them. This will help you learn which posts get the most attention, allowing you to create more of the kinds of posts that people will interact with.
- Page views**
Discover how many people are viewing your Page and what sections they're looking at. Then, get aggregated details on your audience by age, gender and location. Use this information to target different audiences with boosted posts and ads, or tailor your content to their interests.
- Actions on Page**
See what actions people are taking on your Page.
- Posts**

Necessary background: personal processing through Facebook Pages

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Actions on Page

See what actions people are taking on your Page – including whether they are going to your website or clicking on your call-to-action button. This will help you adjust your Page to encourage people to take the actions you want.

Posts

See a breakdown of how each of your Facebook Page posts have performed over time. You'll see how many people each post has reached, how many responded with clicks and reactions and the type of post, so that you can quickly analyse what's working best.

People

Understand your audience with aggregated information including age, gender and location. You'll also see when people are looking at your Page and how they found it. This can help you create posts for the best response.

Necessary background: personal processing through Facebook Pages

Facebook Insights

How Insights are made possible?

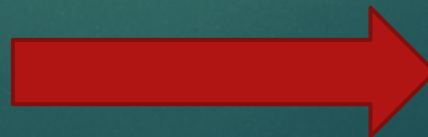
- ❖ With data processing of course!
- ❖ The fuel of Facebook Insights is user data
- ❖ This is mainly clickstream data (recorded clicks and views) and also comments/messages
- ❖ The info (insights) given to the administrator are aggregate and anonymous but...
- ❖ **All user actions as recorded are clearly *personal data*** (are accompanied by full name of Facebook user and/or (in the server logs) by the IP address of the user and cookies – for online identifiers as personal data, see Recital 30, GDPR)
- ❖ The fact that they undergo anonymization by Facebook does not change this (any action on personal data is data processing within the 'data processing' definition of the GDPR (Article 4(2), GDPR: 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data

Are Facebook Page Administrators “data controllers”?

Relevant definitions

- ▶ **‘[Data] controller’** means “the natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purposes and means of the processing of personal data**” – Article 4(7), GDPR
- ▶ Decides **‘why’** and **‘how’** the personal data is to be processed (DPWP Opinion 1/2010)

Let’s try to answer these two questions for the obvious and background personal data processing occurring through (business) Facebook Pages



Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

WHY PERSONAL DATA SHOULD BE PROCESSED (PURPOSES OF PROCESSING)

- ❖ A gifts business/shop decides to use the Facebook platform to reach consumers
- ❖ to make its products known
- ❖ to get them ‘LIKE’ or ‘SHARE’ its page and its posts so that their friends know about it too
- ❖ to create a channel of communication with them through messaging or commenting to its posts (to which messages/comments the business can reply)
- ❖ in some cases, to run competitions or make other specific invitations requiring specific personal data to be provided (‘like, share and comment’ competitions)

WHO?

The Facebook Page Administrator!

Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

HOW PERSONAL DATA SHOULD BE PROCESSED (MEANS OF PROCESSING) (1)

WHO?

- ▶ Less easy or obvious answer here admittedly
- ▶ Perhaps the first answer coming to mind is that *FACEBOOK decides* the means of processing (processing is clearly happening on, by and/or through the platform constructed and administered by Facebook)
- ▶ BUT...
- ▶ “[M]eans” does *not* only refer to the **technical** ways of processing personal data, but also to the “how” of processing, which includes questions like “which data shall be processed”, “which third parties shall have access to this data”, “when data shall data be deleted”, etc.” (DPWP Opinion 1/2010)

Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

HOW PERSONAL DATA SHOULD BE PROCESSED (MEANS OF PROCESSING) (2)

WHO?

- Who decides that the personal data consisting of the fact that Christiana Markou likes a post stating that the gift shop offers 40% discount is to be processed

The Facebook Page Administrator (mainly due to the business choosing and drafting all posts on the Page)

- Who decides that the above personal data is to be seen by the specific persons comprising the other fans of the Page?

The Facebook Page Administrator (mainly due to the fact that it is the active measures of the business which led to the accumulation of those fans and those fans are part of its circle of friends (invite your friends to like your page feature) or people who have been targeted in accordance with criteria specified by the business in the context of paid promotion of the Page

- Who decides when personal data shall be deleted?

The Facebook Page Administrator (comments can easily deleted by Admin)

Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

HOW PERSONAL DATA SHOULD BE PROCESSED (MEANS OF PROCESSING) (3)

The moderating capabilities of Facebook Page Admins further confirm that they have an active role in HOW personal data should be processed:

- ▶ We have tools in place to help you manage what visitors can post on your Page, including the ability for you to block certain words or phrases from appearing on your Page proactively
- ▶ You can decide whether visitors have the ability to post on your Page
- ▶ As a Page admin, you can control what comments are seen by other visitors to your Page
- ▶ You can report reviews that don't follow the Facebook Community Standards or don't focus on the product or service offered by your business.
- ▶ You'll need to be an admin to turn messaging on or off for your Page
- ▶ How do I ban or unban someone from my Page?
- ▶ How do I remove someone who likes my Page?

(<https://www.facebook.com/business/a/page-moderation-tips>)

Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

Still



?

Are Facebook Page Administrators “data controllers”?

Obvious processing (likes, comments, shares and messages)

The concept of *‘Joint Controllership’* should take any remaining doubt away



A party need not decide the WHY and HOW alone? He can do so *“alone or jointly with others”*, according to Article 4(7), GDPR



the concurrent role of Facebook in the relevant decision-making does not kick the Page Admin out of the ‘data controller’ definition

Are Facebook Page Administrators “data controllers”?

Background processing (Facebook Insights)

WHY PERSONAL DATA SHOULD BE PROCESSED (PURPOSES OF PROCESSING) (1)

Facebook Insights are an unavoidable feature of Facebook Pages (need not be activated and can't be disabled)

They are free of charge – free value-added service

It is Facebook primarily choosing to provide them to help its business users make the most out of their Pages (this increases the chances of trusting Facebook as their e-commerce platform and turn to its *paid* Facebook Ads service)

BUT

The choice of creating a Facebook Page automatically results in the relevant processing

*Facebook Page Admins provide the data upon which the relevant processing occurs – this is the likes, shares, comments on the content **they** create and promote and they can also decide which personal data should be used by specifying the target audience of their posts (according to demographic and interest criteria)*

Are Facebook Page Administrators “data controllers”?

Background processing (Facebook Insights)

WHY PERSONAL DATA SHOULD BE PROCESSED (PURPOSES OF PROCESSING) (2)

Choosing a platform with built-in Insights processing, providing the fuel of Insights processing and benefiting from Insights processing



Make Facebook Page Admins at least *joint* decision-makers regarding the purposes of the processing?



Are Facebook Page Administrators “data controllers”?

Background processing (Facebook Insights)

WHY PERSONAL DATA SHOULD BE PROCESSED (PURPOSES OF PROCESSING) (3)

YES (in my opinion)

Choosing a platform with built-in Insights processing, providing the fuel of Insights processing and benefiting from Insights processing

The example of Google Analytics

- ❑ Facebook Insights is an analytics tool (just like Google Analytics for websites)
- ❑ Website administrators actively choose and take measures to install Google Analytics so that they receive insights as to how their website performs
- ❑ It is uncontroversial that Website administrators are data controllers and Google, a data processor in that context (Google data processing agreement: https://www.google.com/analytics/terms/dpa/dataprocessingamendment_20160909.html - it is actually a joint controller if Google also uses the relevant data for its own benefit)
- ❑ Difficult to see how the choice of a platform with a built-in analytics tool can render the business NOT a data controller (a joint controller – more accurately)

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Background processing (Facebook Insights)

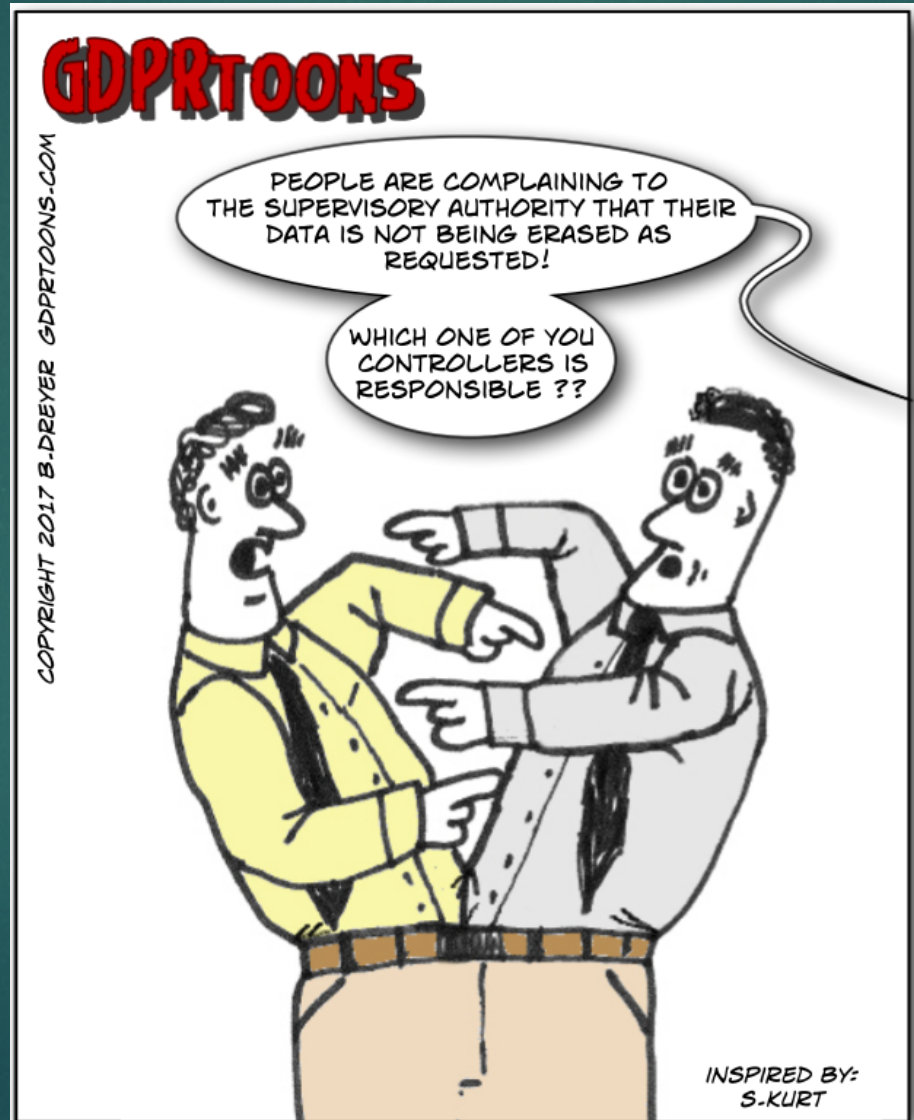
HOW PERSONAL DATA SHOULD BE PROCESSED (MEANS OF PROCESSING) (1)

Do Facebook Page Admins also decide (jointly with Facebook) the means of the processing?

- ▶ No doubt that a large part of the decision-making regarding the means of the processing is made by Facebook
- ▶ But recall...
- ▶ “[M]eans” does *not* only refer to the **technical** ways of processing personal data, but also to the “how” of processing, which includes questions like “which data shall be processed”, “which third parties shall have access to this data”, “when data shall data be deleted”, etc.” (DPWP Opinion 1/2010)
- ▶ *The data processed (or at least part of that data) is provided by the Facebook Page Admins, they decide to give Facebook and its partners access to the data, they can decide to delete that data by deleting their Page*

Conclusion

Facebook Page Admins and Facebook = joint controllers
(in all cases of relevant data processing)



The Conclusion of the CJEU

Facebook Page Admins and Facebook = joint controllers
(in the case of Facebook Insights)

Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH, C-210/16, 5/6/2018

- ▶ While the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network, it must be stated, on the other hand, *that the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page* ... (para 35)
- ▶ ...the creation of a fan page on Facebook involves the definition of parameters by the administrator, depending inter alia on the target audience and the objectives of managing and promoting its activities, which has an influence on the processing of personal data for the purpose of producing statistics based on visits to the fan page... (para 36)
- ▶ The fact that an administrator of a fan page uses the platform provided by Facebook in order to benefit from the associated services cannot exempt it from compliance with its obligations concerning the protection of personal data (para 40)

The creation and administration of a Facebook Page means involvement in the decision-making as to purposes and means of processing – choosing a third party platform to conduct business does not exempt one from legal obligations

Are Facebook Page Administrators “data controllers”?

Answers and consequences

- ✓ Facebook Page Admins are joint data controllers with regards to the processing involved in Facebook Insights, ruled the CJEU
- ✓ Its ruling is correct
- ✓ They are joint controllers with regards to the obvious processing involved in the use of Facebook Page too
- ✓ The higher the degree of involvement, the greater their responsibility under the GDPR (para 43, CJEU)
- ✓ Necessary compliance with (at least) the information requirements of the GDPR through a specific privacy policy displayed on the Page
- ✓ The Facebook-provided privacy policy does not satisfy the requirements (in my opinion)