Bird & Bird

Protection of personal data in the context of competition policy

Takeshige Sugimoto
Partner
Brussels Office
Bird & Bird LLP
Direct +32 (0)2 282 6076
Mobile +32 (0)499 054619
takeshige.sugimoto@twobirds.com

Table of Contents

Bird & Bird

I. BASIC CONCEPT OF GDPR

Bird & Bird

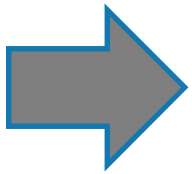
From EU Data Protection Directive to GDPR

- **GDPR (General Data Protection Regulation) aims at protecting the fundamental human rights of the right to the protection of personal data, which is guaranteed by the law constituting the basis of the EU legal system, "The Charter of Fundamental Rights of the European Union".**
- **In case of the violation of GDPR, there are two types of maximum amount of administrative fine, and the GDPR may also apply to government organisations and association of undertakings**
  - Up to €10 million or 2% of the company's total worldwide annual turnover, whichever is higher, where the company
  - Up to €20 million or 4% of the company's total worldwide annual turnover, whichever is higher, where the company

EU Data Protection Directive 95/46/EC

(Until 24th May, 2018)

- Individual member states' implementing laws can vary widely. There are 31 data protection laws as the member state legislation.
- Around 40 Data Protection Supervisory Authorities
- The Art. 29 Working Party (being composed of the representatives of data protection authorities in member states, European Commission Directorate General for Justice Office for Personal Data Protection) brings some harmonisation of interpretation on EEA member states data protection law by providing common interpretations and analysis of certain issues.
- Limited enforcement and penalties



GDPR

(Commencement of application from 25th May, 2018)

- Abolishing the member states data protection laws (however, in certain areas including employment, journalism and research, the member states may establish their data protection law, and actually have established.
- Extend the scope of EEA data protection law from the Directive
- Provide more uniformity
- Introduce new accountability obligations for businesses
- Increase and strengthen individuals' rights
- Increase penalties and enforcement (Introduction of potentially huge amount of administrative fine)
- Reformation from Art. 29 WP to European Data Protection Board (EDPB).

Bird & Bird

GDPR covers the "Processing" and "Transfer" of "Personal Data"

- **The GDPR lays down the legal requirements that need to be met in order to process personal data within the EEA and to transfer such data out of the EEA** (28 EU member state + Iceland, Liechtenstein, Norway). In principle, transfer of personal data is prohibited and it is exceptionally legalised.

Concept	Explanation	Example
Personal Data (Art. 4(1) and Recitals 26 and 30)	**Any information relating to an identified or identifiable natural person** (**"data subject"**). **An identifiable person** is one who can be identified, directly or indirectly. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, either by the **controller** or by another person to identify the natural person directly or indirectly.	- Name - Identification number - Location data - Professional email address - Online identifiers (IP address / cookie identifiers) - Factors specific to the physical / physiological / genetic / mental / economic / cultural / social identity
Processing (Art. 4(2))	The GDPR applies to the processing of personal data in the context of the activities of an establishment of a **controller** or a **processor** in the EU, regardless of whether the processing takes place in the EU or not (Art. 3(1) GDPR; Google Spain, C-131/12) Processing means **any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means**	- **Store** credit card details - **Collect** email addresses - **Modify** clients' contact details - **Disclose** clients' names - **Consult** a supervisor's assessment of an employee's work performance - **Erase** a data subject's online identifier - **Create a directory** containing the names of all employees, their function in the company, their business addresses and their photograph
Transfer	Neither the Directive nor the GDPR define the concept of "transfer of personal data." **All the cases where a controller takes action in order to make personal data available to a person located outside the EEA**	- Send paper or electronic documents containing personal data by post or e-mail from within the EEA to a country outside the EEA - Accessing data stored in a system in another entity or server located in a country outside the EEA.

Why is it important to comply with the GDPR?

- Key point: "The total worldwide annual turnover of undertakings" entails the ultimate parent company of the undertaking's group and such ultimate parent's company's group. For instance, in case of the violation of the GDPR by a European subsidiary of a Japanese company, it is the total worldwide annual turnover of the group of the Japanese company.

Fines	Obligations
Up to €10 million or 2% of the company's total worldwide annual turnover, whichever is higher, where the company (Art. 83(4)):	▪ Does not comply with the conditions applicable to child's consent (Art. 8) ▪ Does not implement appropriate technical and organisational measures in order to meet the GDPR requirements or use a processor that has not implemented such measures (Art. 25 and 28) ▪ Does not designate a representative in the EU (Art. 27) ▪ Does not maintain a record of processing activities under its responsibility (Art. 30) ▪ Does not cooperate with the SA (Art. 31) ▪ Does not implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk (Art. 32), ▪ Does not notify a security breach to the SA (Art. 33) and the data subject (Art. 34) ▪ Does not carry out an impact assessment (Art. 35) ▪ Does not consult the SA prior to the processing where indicated by the impact assessment (Art. 36) ▪ Does not designate a DPO or does not respect its position and tasks (Art. 37-39)
Up to €20 million or 4% of the company's total worldwide annual turnover, whichever is higher, where the company (Art. 83(5)):	▪ Does not comply with the principles relating to data processing (Art. 5) ▪ Does not process personal data lawfully (Art. 6) ▪ Does not comply with the conditions for consent (Art. 7) ▪ Does not comply with the conditions for processing special categories of personal data (Art. 9) ▪ Does not respect the data subject's rights and the modalities for exercising them (Art. 12-22) ▪ Does not comply with the conditions for transferring personal data (Art. 44-49) ▪ Does not comply with the SA's orders (Art. 58(1) and (2)) ▪ Does not comply with obligations pursuant to Member State law (Chapter IX)

Bird & Bird

Scope of application under the GDPR

GDPR may apply to Japanese companies in Japan

1. GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

- When the companies in Japan processes (including collection) personal data of individuals in the EEA and such processing is in the context of activities of establishments, the GDPR may apply even the companies in Japan.

2. GDPR applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union

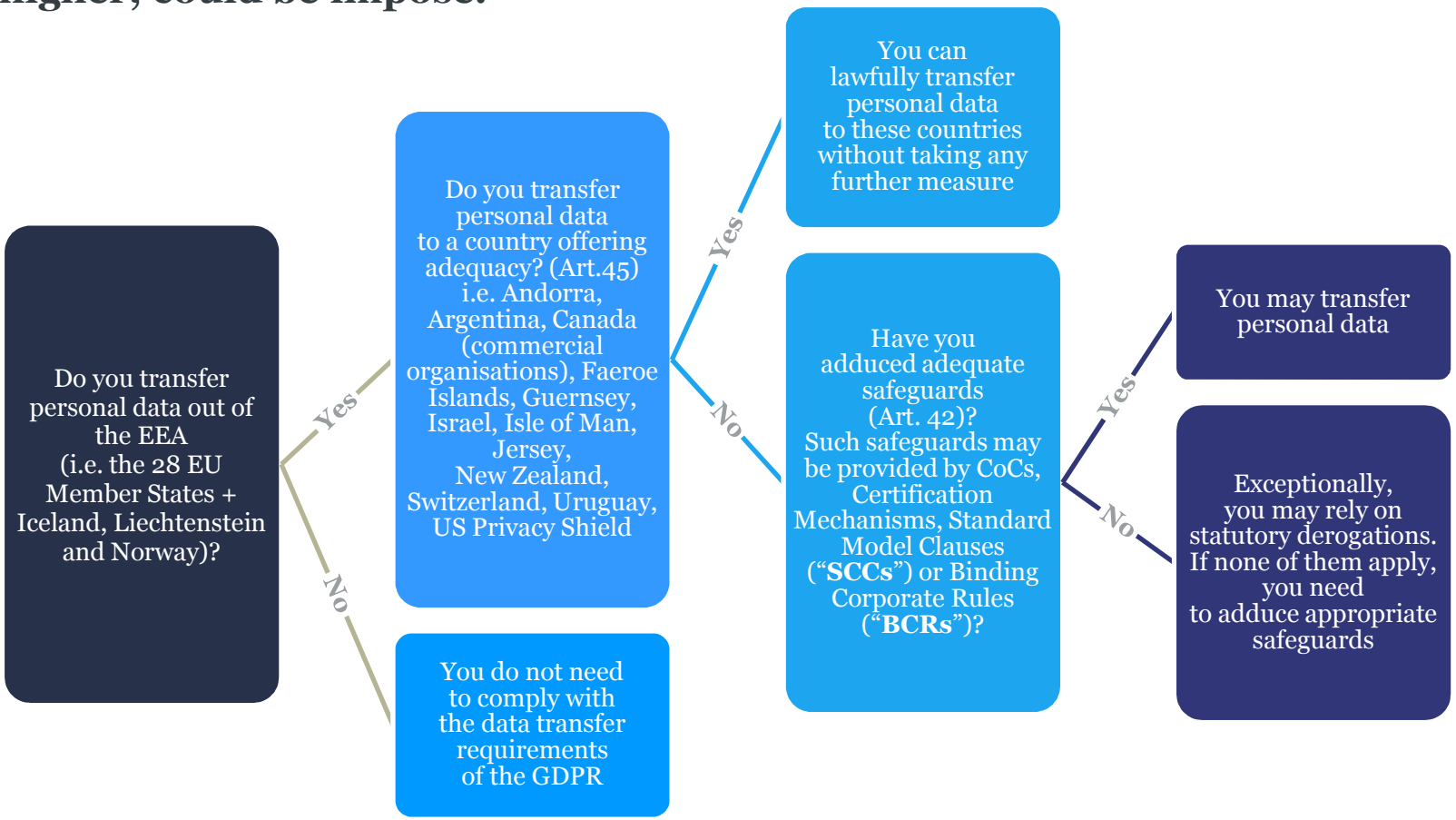
- When the companies in Japan processes (including collection) personal data of individuals in the EEA, the GDPR may apply to the companies even though they do not have any establishments in the EEA.

Key point of GDPR (Rules on processing and transfer of personal data

Exterritorial application	GDPR applies not only to companies within the European region but also to overseas companies that provide or monitor services to residents within the European region from outside Europe
Application to subcontractors	GDPR applies not only to controllers who manage personal data, but also to processors who are entrusted with data processing (collection, storage, etc.). Certain contract obligations between controller and processor
Data protection impact assessment	Data protection impact assessment to be conducted for high risk processing to data protection for using new technology
Rules on data transfer to third countries	In principle, prohibiting data transfer to third countries, and legalising the transfer in case of meeting certain conditions (including adequacy decision, SCC)
Strengthen individual's rights	It is necessary to have legal basis for collection and use of personal data. Further, the obligations to provide information of purpose and legal basis for processing to data subjects, rights to data portability and the rights to be forgotten are provided for.
Appointment of data protection officer	Appointment of data protection officer (DPO) with knowledge and expertise in data protection, and notification and communication of the contact details to the authorities
Data breach notification	In case of personal data breach, notification to the authorities within 72 hours, and also to the data subjects where the data breach may significantly affect the individual's rights
High amount of fines	Up to €20 million or 4% of the company's total worldwide annual turnover, whichever is higher, on companies violating GDPR

Overview: Regulation on transfer of personal data

- **In case of violation of the regulation on transfer of personal data, the administrative fines up to €20 million or 4% of the company's total worldwide annual turnover when a undertaking is at issue, whichever is higher, could be impose.**



Bird & Bird

GDPR: Relations of adequacy decision with SCC / BCR

Safeguards	Overview	Relation with adequacy decision
SCC **Standard Contractual Clauses**	The model clauses of the data transfer agreement decided by the European Commission is executed between the data exporter (within the EEA) and the data importer (outside the EEA).	• In the case of relying on adequacy decision, it is only necessary to comply with supplementary rules for transferring personal data from EEA to Japan. No need to use SCC or BCR. • Necessary to use SCC or BCR for data transfer from the EEA to third countries other than Japan • Not necessary to comply with the supplementary rules for processing personal data transferred under SCC / BCR. • SCC /BCR are not affected by litigations relating to adequacy decision in the European courts or the review of adequacy decision by the Commission
BCR **Binding Corporate Rules**	With respect to the data protection rules of the group company as a whole, after being reviewed by the European data protection supervisory authority, followed by the approval, it is possible to freely transfer the personal data within the group company.	

Development of enforcement under the GDPR after May, 2018

- On 17th July 2018, the Dutch data protection supervisory authority announced that it had started investigation against 30 large companies which were elected randomly from 10 different sectors (Industry, Water Supply, Construction, Retail, Hospitality, Travel, Telecom, Finance, Business Service, Healthcare) regarding compliance with the preparation and management obligation of records of processing under Article 30 of GDPR. The results of this survey have not come out yet.

✓ Investigation under the GDPR has started against normal companies other than American IT companies.

✓ Unless companies review each processing of personal data by each purpose in entities in Europe and timely update the record, the companies may face the risk of violating the obligation to prepare for and maintain the record of processing activities, and being imposed administrative fines under the GDPR.

- Enforcement record of administrative fine imposed by the European data protection supervisory authorities under the GDPR: The Portugal authority fined 400,000 Euro (over 50 million Japanese yen) on 17th July 2018 (announced in the last week of October 2018)

✓ The reason for the decision is that the hospital did not take appropriate technical and organisational measures to protect data of patients. The amount of fine is not so high, but it shows that the GDPR is also enforced against companies other than American IT companies at this early stage.

II. HOW DATA PROTECTION ISSUES ARE DEALT WITH IN THE CONTEXT OF COMPETITION POLICY IN EUROPE

Bird & Bird

How data protection issues are dealt with in the context of competition policy in Europe

1. Obtaining market dominance through the rules on protection of personal data
2. Competition by standard of protection of privacy
3. Improvement of competition by promotion of protection of personal data
4. Achievement of protection of personal data through enforcement of competition law and promotion of competition policy

1. Obtaining market dominance through the rules on protection of personal data

Investigation of Bundeskartellamt on Facebook

- In March 2016, the Bundeskartellamt launched an investigation into Facebook's terms of service to examine whether consumers are sufficiently informed about the type and extent of personal data collected. The Bundeskartellamt suspects that Facebook's terms of service are in violation of data protection law and could thereby also constitute abuse of dominance under competition law by representing an abusive imposition of unfair conditions on users. The investigation forms a first attempt by a competition authority to integrate data protection interests into competition analysis. The investigation seems to be premised on the view that principles from data protection law can be used as benchmarks for assessing whether certain exploitative behaviour of a dominant firm should be considered anticompetitive under Article 102 TFEU.
- In December 2017, the Bundeskartellamt reached the preliminary assessment that Facebook's collection and use of data from third-party sources is abusive. According to the Bundeskartellamt, Facebook is abusing its dominant position by making the use of its social network conditional on it being allowed to collect every kind of data generated by using third-party websites and merge it with the user's Facebook account.
- Considering that users are only given the choice of either accepting the "whole package" or not being able to use Facebook, the Bundeskartellamt takes the view that it cannot be assumed that users effectively consent to this form of data collection and processing. The Bundeskartellamt qualifies the terms of service of Facebook as inappropriate and a violation of data protection provisions. In the authority's assessment, consumers must be give more control over processes whereby data are transmitted from websites and apps to Facebook, and Facebook needs to provide consumers with suitable options to effectively limit this collection of data.
- Especially, it seems that the investigation focused on whether the users of Facebook were sufficiently provided with information to grant consent (GDPR Art. 4(11)).

2. Competition by standard of protection of privacy

4 examples

1) The standard of protection of privacy is becoming considered as a substantial factor in selecting business partners.
2) Cases where unexpected disadvantages to data subjects (consumers) locked in is lowered privacy policy
3) Cartel relating to privacy policy
4) Forming the rules relating to protection of personal data in each sector and activities to standardize processing of personal data

2. Competition by standard of protection of privacy

1) The standard of protection of privacy is becoming considered as a substantial factor in selecting business partners

- Facebook/WhatsApp（3 Oct. 2014）
  - Privacy was only regarded as one of the many parameters of competition applicable to the case along with price, reliability of the communications service, the user base and perceived trendiness of the app.
  - Microsoft/LinkedIn (6 Dec. 2016)
  - According to the Commission, the market investigation revealed the fact that privacy was an important parameter of competition between professional social networks on the market, which could promote the customer's selection.
- TomTom/Tele Atlas (14 May 2008)
  - The value of a product may decrease due to concerns relating to how customer information is used.

2. Competition by standard of protection of privacy

2) Cases where unexpected disadvantages to data subjects (consumers) locked in is lowered privacy policy

- Update of WhatsApp's privacy policy in August 2016
  - Using its competition law competences, the European Commission imposed a 110 million euro fine on Facebook for providing incorrect or misleading information during the 2014 merger investigation.
  - While Facebook had informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts, WhatsApp's updates to its terms of service in August 2016 included the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.
  - On that basis, the Commission found that the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014 and that Facebook staff were aware of such a possibility.

2. Competition by standard of protection of privacy

3) Cartel relating to privacy policy

- As an example, horizontal restrictive agreement on competition by lowering the standard of personal data protection between the undertakings.
- Although the fact that the authorities including the European Commission enforced against cartel relating to privacy policies in Europe has not been found for the moment, it should be noted.

2. Competition by standard of protection of privacy

4) Forming the rules relating to protection of personal data in each sector and activities to standardize processing of personal data

- If there are excessive and restraining protection rules, there is concern that aspects of concerted practices of avoiding competition and restricting business activities may come out. However, in Europe the fact that the competition authorities including the European Commission enforced the competition law based on that aspect has not been seen. Thus, it still remains as a theoretical issue.
- Article 40 of the GDPR provides for the rules of Codes of Conduct. Codes of conduct is to reflect various needs of processing in sectors or small-mid sized companies and for association of undertakings or associations of sector to assist the entities in such sector to comply with the GDPR in an efficient and more cost-effective manner. The European Commission may decide whether the code of conduct is valid in all of EU member states. When the code of conduct cover 2 or no less than 2 EU member states, the Supervisory Authorities submit such code of conducts to the European Data Protection Board (EDPB), and EDPB issues its opinion on the code of conducts to the European Commission.

→ When the code of conduct approved by the European Commission (DG Justice) based on the GDPR is incompatible with the EU competition law, is it possible that the European Commission (DG Comp) may enforce against the undertakings and the associations which act upon the code of conducts?

3. Improvement of competition by promotion of protection of personal data

Data protection as regulation to exclude realisation of concerns about competition

- Microsoft/LinkedIn (6 Dec. 2016)
  - When assessing the competitive impact of a possible post-merger combination of the datasets relating to online advertising, the Commission as a preliminary remark noted that "any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules", and "newly adopted General Data Protection Regulation is directly applicable and therefore the scope for divergence between Member States' national data protection laws will be reduced, including in their enforcement".
  - It was held on the assumption that the GDPR would be applicable even before the commencement of application and the data sets would be not combined in a way of violating the GDPR. Thus, since it is assumed that the companies would comply with the European data protection laws, it seems that the analysis started from the assumption that processing of personal data having an effect of restricting competition would be unlikely conducted.
  - In this regard, it would be advisable to set out form of consideration that the parties to merger control should prove their compliance with data protection rules rather than having assumption that they would comply with the GDPR and data protection laws in the EEA member states. This idea is compatible with the principle of accountability under the GDPR.

3. Improvement of competition by promotion of protection of personal data

Data Portability

- Rights to data portability :constituting the right to receive from the controller his/her personal data in a structured, commonly used, machine readable form, and the right to have the data transferred by the controller to another controller without disturbance.
- From the perspective of competition law, data portability would be the first important step to promote the competition between controllers, since this incentivise data subjects to switch their service providers because of the reduction of switching cost due to data portability.
- Sanofi/Google/DMI JV (23 Feb. 2016)
  - The Commission concluded that the risk of the a joint venture offering services for the management and treatment of diabetes using an integrated digital e-medicine platform locking-in patients to the Services appears unlikely to materialize in the foreseeable future. As the reasoning for this, the fact that users will have the right to ask for portability of their data under the, at that time still, draft GDPR was raised.
  - It is problematic to deny concerns about competition by relying on new rights provided for the Bill. Such concerns should be addressed by employing remedies which oblige the parties to the merger controls to take structural or behavioural measures with the same effect as exercise of data portability rights after the mergers.
  - It seems that the right of data portability have the negative effect on competition as well, which may end up maintenance of status of existing dominant companies, depending on the timing of application and the objects.

3. Improvement of competition by promotion of protection of personal data

Restrictions on profiling

- **Profiling means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.**
- **Profiling may be used in the three following scenarios. In all of (1) to (3), profiling is in principle prohibited and only allowed when meeting the exceptional requirements.**

1) Fully automated decision making which includes profiling (e.g., automated decision making of whether it should execute loan agreements based on certain algorism without intervention of human beings and contact the customers)
2) General profiling (e.g., Preparation for profile concerning reliability of customers for screening for loan agreements by automated processing of personal data inserted by the customers)
3) Decision making based on profiling (e.g., decision making on execution of loan agreements is conducted by human beings based on profile automatically created as above.)

- **Although it is possible to consider the violation of the rules on profiling under the GDPR as the abuse of dominant position under the EU competition law, there is a hurdle to determine controllership and "exclusive behaviour".**
- **It seems that the restrictions on profiling have the negative effect on competition as well, which may end up maintenance of status of existing dominant companies, depending on the timing of application and the objects.**

4. Achievement of protection of personal data through enforcement of competition law and promotion of competition policy

- **Statement of the EDPB (European Data Protection Board)on the data protection impacts of economic concentration** (27 Aug. 2018)
  - "EU data protection authorities have noted the Commission's intention to analyse the effects of further concentration of 'commercially sensitive data about customers' personal data in the context of its investigation into the proposed acquisition of Shazam by Apple. We consider it essential to assess longer-term implications for the protection of economic, data protection and consumer rights whenever a significant merger is proposed, particularly in technology sectors of the economy. Increased market concentration in digital markets has the potential to threaten the level of data protection and freedom enjoyed by consumers of digital services. The data protection and privacy interests of individuals are relevant to any assessment of potential abuse of dominance as well as mergers of companies, which may accumulate or which have accumulated significant informational power. Independent data protection authorities can help with the assessment of such an impact on the consumer or society more generally in terms of privacy, freedom of expression and choice. This assessment, as well as the identification of conditions or remedies for mitigating negative impacts on privacy and other freedoms, may be separate to and independent from, or integrated into, the analysis carried out by competition authorities during their assessment under competition law. "
- **Speech by Commissioner Margrethe Vestager in charge of competition policy** (6 Sep, 2018)
  - "Data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition. After thoroughly analysing Shazam's user and music data, we found that their acquisition by Apple would not reduce competition in the digital music streaming market."

III. Conclusion

Bird & Bird

III. Conclusion

- GDPR has a significant impact on not only companies and organisations in Europe but also companies and organisations including Japanese companies outside Europe in terms of data protection compliance.
- As the importance of data in business activities increases, the number of cases where the relationship of application of GDPR and European data protection laws with merger control, regulation on unilateral practice and joint practice under the European competition law is at issue may increase.
- There is no doubt that the issue of protection of personal data in the context of competition policy appears not only in the EU but also in Japan. It is expected that this issue will be independently analysed from the perspective of Japanese law with reference to the perspective in the EU.

Takeshige Sugimoto
Partner

Direct: +32 2 282 6076
M (BEL): +32 499 054619
M (JPN): +81 80 8051 4848
takeshige.sugimoto@twobirds.com

Mr. Sugimoto is recognised as the leading Japanese EU data protection law expert and enjoys a strong reputation as an EU competition lawyer

Takeshige (Take) Sugimoto is a partner in our International Privacy & Data Protection Group and our Competition & EU Law Group, based in Brussels.

A dual-qualified (Japanese and US) lawyer registered with the Brussels Bar, Take specialises in EU Data Protection, EU Cybersecurity and EU Competition law.

Take regularly conducts large-scale GDPR compliance projects including data protection audits for high-profile Japanese clients. He also represents clients in their Binding Corporate Rules application to European Data Protection Authorities, advises on third- party data processing agreements, and assists clients in building their global personal data breach response plans and in selecting a data protection officer.

Take also has a longstanding reputation as an EU competition lawyer. His practice includes merger control, cartel investigations (including internal investigations and leniency applications), as well as complaints against competition law violations and counselling. In particular, he has significant experience in representing clients in EU cartel investigations having been involved in the auto parts, bearings, capacitors and car carrier cartel cases. His in depth knowledge of EU and Japanese competition law was endorsed by the Japan Fair Trade Commission whose Competition Policy Research Centre appointed him as a Visiting Researcher from 2016 to 2017 for conducting research on the EU commitment procedure.

Take holds a Magister Juris (Sasakawa Scholar) from the University of Oxford, a Master of Laws from the University of Chicago Law School and a Bachelor of Law from Keio University. He is admitted to the Bars of Brussels (2013), New York (2013) and Japan (2006).

Bird & Bird

Thank you &Bird&Bird

twobirds.com