

# Privacy and Data Protection in the Digital Economy

The fast and furious  
developments

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# The fast and furious developments

1. The European Data Protection Regulation (GDPR)
2. The Personal Information Protection and Electronic Documents Act (PIPEDA) mandatory breach notification
3. The cross walk with competition law

# The driving force: rebalancing power between users and business

*“Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the **digital economy** to develop across the internal market.”*

*“Natural persons should have **control** of their own personal data. Legal and practical...”*

*Recital 7, GDPR*

# The factors of imbalance:

- Intrinsic to digital:
  - Abstraction of the internet
  - Complexity of the internet
  - Opacity of the internet
  
- Intrinsic to the economy:
  - Market dominance
  - Open market

# But first: who does GDPR apply to?

## 1. Material scope:

*“processing\* of **personal data**\*\* wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.”*

Article 2 GDPR

*“personal data” means any information relating to an identified or identifiable natural person*

*“processing” means any operation or set of operations which is performed on personal data or on sets of personal data”*

Article 4 GDPR

# GDPR

## 2. Territorial scope

*“processing of personal data in the context of the activities of an establishment of a [organization] **in the Union**, regardless of whether the processing takes place in the Union or not.”*

*“processing of personal data of [individuals] **who are in the Union** by a [organization] not established in the Union, where the processing activities are related to:*

*(a) the offering of goods or services*

*(b) the monitoring of their behaviour within the Union.”*

Article 3 GDPR

# Who does PIPEDA apply to?

- Federally regulated business across Canada
- Provincially regulated business except
  - In Alberta, British Columbia and Quebec
  - In the health care sector
- In the course of commercial activities

Section 4 PIPEDA

# Re-balancing power: Strengthening consent

## 1. Article 7 of GDPR on conditions of consent:

1. Demonstrable
2. Clearly distinguishable from other consent requests
3. In intelligible and accessible form
4. Using clear and plain language
5. As easy to withdraw as to give
6. Freely given

## 2. Article 6.1 of PIPEDA on valid consent

1. Freely given
2. Clear as to the consequences of providing consent

# Re-balancing power: Requiring transparency

## 1. Articles 12, 13 and 14 of GDPR

1. Privacy policies in concise, transparent, intelligible and easily accessible form, using clear and plain language
2. Adapted to a child, as applicable
3. In writing
4. Supported by the right of the individual to access one's data, have it corrected or deleted
5. Including all information material to the processing of the personal data ( types of data, uses, with whom it is shared...) and who is in charge

## 2. Clause 4.8 of Schedule 1 of PIPEDA

1. Readily available information about privacy policies and practices
2. Generally understandable
3. Including all information: The information made available shall include who is in charge, the means of gaining access to personal information held by the organization. The type of personal information held by the organization and its use, what personal information is made available to related organizations (e.g. subsidiaries).

# Re-balancing power: Mandatory breach notification

## 1. Article 33 GDPR

1. Report to data protection authority within 72 hours if likely to result in risk to individuals
2. Notify individuals without undue delay

## 2. Section 10.1 PIPEDA (in force November 1, 2018)

1. Report to Privacy Commissioner any breach that creates a real risk of significant harm\* to an individual
2. Notify all individuals affected as soon as feasible

\* “harm” includes non-pecuniary loss

# Rebalancing power: Imposing penalties

## 1. Article 83 GDPR:

- Depending on the nature, gravity and duration of the infringement, the intentional or negligent character of the infringement, any mitigation action, the degree of responsibility of the organization, the safeguards implemented, any relevant previous infringements, the degree of cooperation with the supervisory authority, the categories of personal data and the manner in which the infringement became known,
  1. Up to 10,000,000 EUR, or up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher: or
  2. Up to 20,000,000 EUR, or up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

# Penalties...

2. Under section 28 PIPEDA,

- For violation of mandatory breach notification:
  - an indictable offence and liable to a fine not exceeding \$100,000
  - per individual that was not notified and that should have been on the basis of a “real risk of significant harm”

# Rebalancing power: Accountability

## 1. Under GDPR

1. Enhanced transparency
2. Designation of a Data Protection Officer
3. Recording data processing and making records available upon request
4. Data portability: the right to have one's personal data transmitted directly from one organization to another
5. Right to access, correction and erasure
6. Audits of processors
7. Monitoring by Supervisory authorities
8. Mandatory due diligence in processor contracting for compliance with GDPR

## 2. Under PIPEDA

1. Designation of a responsible official
2. Transfer of data with comparable level of protection
3. Transparency
4. Staff training
5. Right to access and correction
6. Right to challenge compliance

# The economic impact

- Should Canada change PIPEDA to correspond to GDPR and keep adequacy or keep flexibility of PIPEDA and forgo adequacy?
- Should a company balance GDPR compliance costs with EU business loss?
- Are users going for GDPR as the gold standard to entrust their personal data?
- How is data monetization/commercialization impacted?

# The cross-walk between privacy and competition law

## Protection of choice

- User welfare as human right:
  - EU Charter of Fundamental Rights (2012) recognizes consumer protection as a fundamental right
- Genuine character of choice
  - Addressing dominance for a well functioning market and for privacy

# Protecting choice

- Data portability from one company to another of structured data executed directly
  - As a matter of competition and as a matter of control over one's personal data
  - Providing control and forbidding lock-in
- Data portability as an absolute right – not subject to claims of abuse of dominance
  - Creating a by-pass for portability in relation to competition law
- Restricting data analytics to avoid a competition tool
  - Addressing data mining of personal insights for competitiveness

# Privacy as a benchmark

- Validity of consent requirements to establish anti-competitive exploitation of consumers
- Limitation of data processing as a test for exploitative abuse
- Mandatory segregation of personal data in mergers to prevent anti-competitive effects

## In short,

- Privacy law developments are driven by a concern to rebalance power between users and organizations
- The measures to rebalance impact competition law application

# Thank you

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