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Your

referenceOur reference
20/01801-23

Your date

28.10.2024

Decision on reprimand - processing of personal data without legal basis - Disqus Inc.

1. Introduction

We refer to previous correspondence in the case from 2021 and 2022, including our notice of decision on an infringement fee dated 2 May 2021.

We apologise for the long processing time.

2. Decision on reprimand

The Norwegian Data Protection Authority has today made the following decision:

Pursuant to Article 58(2)(b) of the GDPR, we issue a reprimand to Disqus Inc. for disclosing personal data about data subjects in Norway in real time to its parent company Zeta Global without a legal basis, cf. Article 6(1) of the GDPR, and in breach of the principle of lawfulness, cf. Article 5(1)(a).

3. The geographic scope of the General Data Protection Regulation and the Data Protection Authority's competence and authority

Disqus Inc. (hereinafter "Disqus" or "the company") has reserved the right to contest both the geographic scope of the General Data Protection Regulation and the competence of the Norwegian Data Protection Authority in the matter.

This argument is rejected by the Norwegian Data Protection Authority, and we maintain that the processing of personal data that this case concerns and for which Disqus is the controller, is covered by Article 3(2) of the General Data Protection Regulation, and that it thus falls within the geographical scope of the Regulation. Furthermore, we maintain that the Norwegian Data Protection Authority has competence and authority in this case pursuant to Articles 55, 57 and 58 of the GDPR. We also refer to sections 5.3 and 5.4 of our notice of decision, where we have provided a more detailed account of both the geographical scope of the General Data Protection Regulation and the Norwegian Data Protection Authority's competence and duties under the Regulation.

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4. Briefly about the procedure

Through media reports in 2019, the Norwegian Data Protection Authority became aware that Disqus had incorrectly assumed that the General Data Protection Regulation did not apply in Norway. As a result, between 20 July 2018 and 12 December 2019, the company delivered a version of the Disqus widget to Norwegian websites intended for countries outside the EEA where the GDPR does not apply. The Norwegian Data Protection Authority opened a supervisory case based on the information that emerged in the media.

In May 2020, we sent a request for an explanation to Disqus, to obtain information in the case. We received a response from Disqus's parent company Zeta Global in July 2020. Based on the statement from Zeta Global and the information that emerged in the media, the Norwegian Data Protection Authority announced in May 2021 that we would impose an infringement fee of NOK 25 million on Disqus.

In July 2021, the Norwegian Data Protection Authority received Disqus' comments on the notified decision, through the law firm Schjødt. Disqus had a number of objections to both the factual basis for the Data Protection Authority's notification and to the Data Protection Authority's legal assessments. We will return to the comments from Disqus in more detail below.

In May 2022, the Norwegian Data Protection Authority sent a new request for an explanation to Disqus to clarify matters concerning the corporate structure of the Group. Schjødt responded on behalf of Disqus in June 2022.

5. Facts of the case

5.1 Introduction

As previously mentioned, it appears from Disqus' comments on the notified decision that the company disagrees in several areas with the facts on which the Norwegian Data Protection Authority based its notification. In the following, we will account for both the parts of the facts on which there is agreement in our opinion, and the disputed parts of the facts.

5.2 Time period and affected websites

In the period from 20 July 2018 to 12 December 2019, Disqus delivered a version of the company's comment field service (Disqus widget) intended for countries outside the EEA on the following Norwegian websites: p3.no, tv2.no/broom, khrono.no, adressa.no, rights.no and document.no.

The comment field service provided to the Norwegian websites was thus not adapted to the rules of the General Data Protection Regulation, and had tracking and data sharing with Disqus as the default setting. This meant that data was collected via cookies (Disqus Cookies) about all visitors to the websites in question who had not activated settings in their browser to disallow cookies.

In the notified decision, the Norwegian Data Protection Authority assumed that the NRK.no/ytring website was also covered. In its response to the notification, Disqus stated that it did not collect personal data from NRK.no/ytring, as it was the ad-free paid version of the service that was used on the website. The Norwegian Data Protection Authority sees no reason to dispute this information.

5.3 Data controller

Disqus has confirmed that it considers itself to be the data controller for personal data collected via Disqus Cookies. The actual placement of the cookies and retrieval of data from them is not covered by this case. The Norwegian Data Protection Authority's supervision relates exclusively to the subsequent processing of personal data. This is explained in more detail in section 6.1 below.

5.4 More about the subsequent treatment

In the notification, the Norwegian Data Protection Authority found that Disqus collected, tracked and analysed large amounts of personal data, including information about the activity of visitors across the internet. Furthermore, the Norwegian Data Protection Authority found that Disqus used the information to create aggregated interest groups, in addition to individual profiling.

Disqus denies that it has profiled visitors to the Norwegian websites to the extent assumed by the Norwegian Data Protection Authority in its notification.

The company has stated in the note that Disqus Cookies collects the following data: impression ID, unique ID, URL, referrer URL, timestamp, IP address, user ID (for logged-in users), website ID, user agent, language and no-track banner. Disqus has also stated that it collects personal data when visiting other websites that also run the service, but they deny that the company has logged visits to websites that do not use the service.

Disqus has also stated that it never profiles natural persons based on assumed political affiliation, religion, sexual orientation, trade union membership or specific health conditions, and that the company does not analyse content in comment fields or the specific content of an article or on a website where the registered person comments.

Furthermore, Disqus has stated that it initially only categorises English-language websites, and that it then uses broad categories such as "golf", "food" and "travel". For websites that are not in English, Disqus allows the websites to categorise themselves. This is, as we understand the notes from Disqus, an active action that the site administrator must take. The website administrator can choose between ten predefined categories (business, celebrity, culture, entertainment, games, living, news, tech, style and sports). As we understand the feedback, it is only the website's main category that is used in connection with profiling. However, it is unclear whether any of the Norwegian websites were categorised.

Disqus calls this processing "segmentation" of the data subjects, and we understand that Disqus does not consider this to be profiling. For the sake of clarity, we would like to point out that the processing of personal data that Disqus calls "segmentation", in our judgement, falls under the definition of profiling in Article 4(4) of the General Data Protection Regulation. The Norwegian Data Protection Authority therefore uses the term profiling when referring to this processing.

We understand the remarks from Disqus to mean that the company can neither confirm nor exclude that one or more of the Norwegian websites in question had been categorised. According to Disqus, the company had already deleted the personal data of the Norwegian data subjects when the Norwegian Data Protection Authority opened

the supervisory case, with the consequence that they cannot check exactly what information was registered. The companies behind the websites in question are not parties to the supervisory case, and the Norwegian Data Protection Authority considers it unlikely that any of them will be able to document the settings they used in the period 2018/2019 at this time.

For the sake of the evidence, the Norwegian Data Protection Authority has decided to base its decision on Disqus' explanation of the extent of the profiling.

In light of the overall evidence, the Data Protection Authority cannot assume that there is a preponderance of probability that one or more of the Norwegian websites were categorised. As an extension of this, the Data Protection Authority cannot assume that there is a preponderance of probability that the data subjects covered by this case have been profiled by Disqus.

5.5 About behavioural marketing

In the notification, the Norwegian Data Protection Authority found that Disqus used the collected personal data to display behavioural marketing on p3.no, tv2.no/broom, khrono.no, adressa.no, rights.no and document.no. We also assumed that Norwegian users may have been shown behavioural marketing when they visited foreign websites where Disqus has a presence.

In its comments, Disqus has pointed out that in the ad-supported version of the service, it displays contextual adverts in the comments section, based solely on the content of the website where the adverts are displayed. The Norwegian Data Protection Authority sees no basis in the evidence in the case to dispute this claim, and we therefore assume that Disqus has not used the collected personal data to display behavioural marketing in the comment field module (Disqus widget) on the Norwegian websites.

With regard to other use of personal data for marketing purposes, we understand Disqus' comments on the notification to mean that the company cannot rule out having used the personal data of data subjects in Norway for purposes related to behaviour-based marketing. However, this presupposes that the data subjects have been profiled, which, based on the evidence in the case, the Data Protection Authority cannot establish with a preponderance of probability, cf. section 5.4 above. On this basis, the Norwegian Data Protection Authority cannot assume that there is a preponderance of probability that Disqus has provided behavioural marketing to the data subjects on the basis of the personal data collected from the Norwegian websites.

5.6 Sharing of data with third parties

Disqus has confirmed that it has shared all the personal data collected in real time with its parent company Zeta Global. However, the company has denied that the data was also shared with Viglink and LiveRamp, as the Norwegian Data Protection Authority assumed in the notification.

It was information in Disqus's privacy policy and information that emerged in the media that formed the basis for the Norwegian Data Protection Authority's assumption that personal data was also shared with Viglink and LiveRamp.

However, NRK Beta's journalist has drawn the attention of the Norwegian Data Protection Authority to the fact that the tests carried out by the consultancy company Conzentio showed that no data was shared with LiveRamp after all.

The Norwegian Data Protection Authority does not have access to the report from Conzentio that might have substantiated the sharing of data with Viglink.

Against this background, we base this case on the information provided by Disqus that they have only shared personal data from the Norwegian websites with Zeta Global.

5.7 Number of affected registrants

Disqus has informed the Norwegian Data Protection Authority that it immediately deleted the personal data of Norwegian data subjects when it became aware that the General Data Protection Regulation applies in Norway. Since the data had been deleted when the Norwegian Data Protection Authority opened the supervisory case, it has not been possible for Disqus to state exactly how many Norwegian data subjects had their personal data processed by the company. However, Disqus has stated that there were 10,377 people who had registered with a user in the comment field service on one of the Norwegian websites during the period. Furthermore, they have confirmed that they also collected data on visitors to the websites in question who did not register with a user, with the exception of visitors who had activated settings in their browser to disallow cookies.

The Norwegian Data Protection Authority has not conducted its own investigations into the number of visitors to the websites in question during the period. However, based on the information from Disqus, we assume that they have shared with their parent company, Zeta Global, personal data about 10,377 registered users in addition to an unknown number of unregistered visitors to the websites in question who used the ad-supported version of the Disqus widget.

6. The Norwegian Data Protection Authority's legal assessment

6.1 Relationship to section 2-7 b of the Electronic Communications Act

The use of cookies is specifically regulated in section 2-7 b of the Electronic Communications Act, which implements Article 5(3) of the EU Communications Privacy ^{Directive}¹.

Section 2-7 b first sentence of the Electronic Communications Act states that:

"[t]he storage of information in the user's communication equipment, or the gaining of access to such information, is not permitted without the user being informed of what information is being processed, the purpose of the processing, who is processing the information, and having consented to this."

As the wording shows, the provision firstly regulates the storage of information on the data subject's device, for example via a web browser. Furthermore, the provision regulates access to the information stored on the device. In the note to the provision, it is stated that it is

¹ DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

"designed so that it is the act itself - storing or retrieving information - that is covered".²

The actual collection of personal data via Disqus Cookies, and the company's retrieval of the personal data in question from the data subjects' devices, is thus covered by the scope of Section 2-7 b of the Norwegian Electronic Communications Act. However, the further processing that takes place with the personal data that Disqus has gained access to via Disqus Cookies falls outside the scope of Section 2-7 b of the Norwegian Electronic Communications Act, and is thus regulated by the general rules in the General Data Protection Regulation. This interpretation is also supported by the EDPB's statement on the relationship between the General Data Protection Regulation and the Communications Protection Directive.³

The Norwegian Data Protection Authority has limited the audit to Disqus' subsequent processing of personal data.

6.2 Assessment of the legal basis for the subsequent processing of personal data

Article 6(1) of the General Data Protection Regulation requires that all processing of personal data has a legal basis. In its response to the notification, Disqus stated that it had obtained valid consent for the subsequent processing of personal data that this case concerns.

It follows from Article 6(1)(a) that a processing operation is lawful if "the data subject has given consent to the processing of his or her personal data for one or more specific purposes".

The term "consent" is defined in Article 4(11) of the GDPR as:

"any freely given specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

Article 7(1) of the General Data Protection Regulation also states:

"If the processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to the processing of personal data relating to them."

In the comments to the notification, Disqus has stated that the company "obtained consent to the use of cookies and subsequent processing of personal data obtained in accordance with NKOM's guidelines that were applicable until 27 November 2019". (Our emphasis.) Disqus has further stated that the Norwegian Data Protection Authority must refer to Nkom's guidelines when assessing whether Disqus has obtained sufficient consent for the subsequent processing.

The requirements for a valid consent under the Electronic Communications Act, as the legal situation was in the relevant period when the processing of personal data took place, did not correspond to the requirements for a consent under the General Data Protection Regulation. This is also highlighted by the legislator in the explanatory memorandum to Section 2-7 b of the Electronic Communications Act, which states:

² Prop. 69 L (2012-2013) on p. 102.

³ [Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities](#), see in particular section 41.

"For practical reasons, the requirement for consent does not coincide with the requirement for consent under the Personal Data Act."⁴

For the sake of clarity, we would like to point out that the Norwegian Data Protection Authority has not taken a position on whether Disqus obtained valid consent under the Norwegian Electronic Communications Act for the placement of cookies and the retrieval of information from these, as this falls outside the scope of the Norwegian Data Protection Authority's investigations in this case.

However, the subsequent processing to which this supervisory case relates is not regulated by the Electronic Communications Act, but by the General Data Protection Regulation, cf. the discussion in section 6.1 above. The General Data Protection Regulation is fully harmonised, and the requirement for consent must be interpreted in the same way across the regulation's geographical area of application. This means that each member state is not free to define what constitutes valid consent under the regulation, and it is therefore not relevant to refer to Nkom's interpretation of the consent requirement under the Electronic Communications Act.

Disqus has pointed out that the legal basis for the subsequent processing was consent based on presettings in the data subjects' browsers.

It follows from the regulations cited above that there are several conditions that must be met for consent to be considered valid under the GDPR. In the opinion of the Norwegian Data Protection Authority, it is clear that a general presetting in the data subject's browser does not fulfil the conditions for valid consent under Article 6(1)(a) of the GDPR, cf. Article 4(11).

Even if an active action is required to activate the setting, the consent will not be:

- voluntary, in that consent cannot be given for every purpose
- specific, as the consent is not linked to the specific processing purpose
- informed, because you cannot understand what you are consenting to in such a general consent
- unambiguous, in that the controller cannot be certain that the data subject intended to consent to their subsequent use of data from cookies, nor can it prove this under Article 7(1) of the GDPR
- consent cannot be withdrawn as easily as it is given

With regard to the 10,377 people who registered with a user at Disqus, the company has stated that as part of the registration process it was mandatory to tick the box for consent to marketing. In the statement, which came from Disqus's parent company Zeta Global, the parent company itself stated that these "consents" did not comply with the requirements for consent under the GDPR. The Norwegian Data Protection Authority agrees with this assessment.

⁴ Prop.69 L (2012-2013) on page 102.

Based on the above, we conclude that Disqus had not obtained valid consent under Article 6(1)(a) of the General Data Protection Regulation (GDPR), cf. Article 4(11), to disclose personal data in real time to its parent company Zeta Global. Disqus has not cited other legal grounds for the disclosure of personal data to Zeta Global, nor can the Norwegian Data Protection Authority see that there are other relevant legal grounds in Article 6.

6.3 The principle of legality

Article 5 of the General Data Protection Regulation sets out some basic principles for the processing of personal data. It follows from Article 5(1)(a) that personal data shall "processed in a lawful, fair and transparent manner with regard to the data subject".

The legal basis requirement in Article 6(1) is an expression of the principle that personal data must be processed lawfully (the lawfulness principle). The processing of personal data without a valid legal basis is unlawful, and thus also a breach of the principle of lawfulness in Article 5(1)(a).

6.4 Summary of the Norwegian Data Protection Authority's conclusions

In summary, the Norwegian Data Protection Authority concludes that the special rule in Section 2-7 b of the Electronic Communications Act does not regulate the subsequent processing activities that are the subject of this case. It is thus the general rules of the General Data Protection Regulation that apply to the processing.

The Norwegian Data Protection Authority further concludes that Disqus did not have a legal basis in Article 6(1) to disclose personal data in real time to its parent company Zeta Global.

The processing of the data subjects' personal data was thus also in breach of the principle of lawfulness set out in Article 5(1)(a) of the General Data Protection Regulation.

Due to the state of the evidence in the case, we have not considered it appropriate to proceed with the other points included in the notification.

7. Reprimand

A reprimand is an administrative reaction aimed at criticising the violations of the rules in question. The imposition of a reprimand may be emphasised in any subsequent assessment of the imposition of an infringement fee if there are similar breaches of the regulations, cf. GDPR Art. 83 no. 2 letter i.

The processing of personal data without a valid legal basis, as in this case, generally indicates that the offence is serious, and that the authority will respond with an infringement fine. In some cases, however, there are circumstances that indicate that a reprimand is an appropriate response.

In this case, an infringement fee was originally notified for violation of the privacy policy. As explained in section 5, Disqus disagrees in a number of areas with the factual basis for the Norwegian Data Protection Authority's notification.

As mentioned, the Norwegian Data Protection Authority does not have access to the report from Conzentio, which could have further documented some of the allegations that Disqus disputes in its comments on the notification. For evidentiary reasons, the Norwegian Data Protection Authority has therefore based its decision on several points on Disqus's assertions about the facts in its comments on the notification. The data protection breach that the Norwegian Data Protection Authority has found to be substantiated in this decision is thus of a far lesser scope and seriousness than the alleged breaches that originally formed the basis for the notification.

Furthermore, this case has regrettably been subject to a long case processing time at the Norwegian Data Protection Authority. In accordance with the Privacy Board's practice, we have emphasised the passage of time in our assessment of the final determination of sanctions. We refer to the Data Protection Board's decisions in cases PVN-2022-3, PVN-2021-20, PVN-2021-16, PVN-2021-13 and PVN-2021-3.

On the basis of the above, and after an overall assessment, we have concluded that a reprimand is the most appropriate form of reaction in this case.

8. Access to justice

Disqus Inc. may appeal the decision to reprimand. Any appeal must be sent to the Norwegian Data Protection Authority **within three weeks of receipt of this letter**, cf. the Public Administration Act §§ 28 and

29. if we uphold our decision, we will forward the case to the Data Protection Board for complaint handling

9. Openness and transparency

We would like to inform you that all documents are public in principle, cf. section 3 of the Freedom of Information Act. If you believe there are grounds for exempting all or part of the document from public access, we ask you to justify this.

Yours sincerely

Line Coll
Director

Miriam Karlsen Senior
Legal Adviser

The document is electronically approved and therefore has no handwritten signatures