DATATILSYNET

8 September 2022

Chromebooks: The Danish Data Protection Agency suspends a ban and issues an order to bring use into compliance

In the case concerning the use of Google Workspace in Helsingør Municipality, the Danish Data Protection Agency has now suspended the existing ban, whilst at the same time issuing an order to bring the use into compliance with the law. A similar order has been issued to Aarhus Municipality.

Summary

In July, the Danish Data Protection Agency imposed a ban on the use of Google Workspace in Helsingør Municipality, and in August the Agency upheld the ban. In the subsequent dialogue with the Danish Data Protection Agency, Helsingør Municipality has now identified a number of circumstances where the use of Google Workspace etc. has either not been lawful, or where the risk to school pupils has not been sufficiently identified and mitigated. In light of this acknowledgement – and the finding of similar issues in the data processing practices of several other local authorities – the Danish Data Protection Agency has decided to suspend the ban for a short period and has issued the local authority with a number of orders to bring the use into compliance with the law.

In practice, this means that pupils in Helsingør – during this period – may resume using Google Workspace, but that the continued use of the products is conditional upon the local authority addressing a number of significant outstanding issues relating to contracts, technology and documentation.

“Our decision to suspend the ban is based on the fact that the local authority has now acknowledged and outlined the issues that need to be resolved to ensure compliance with the law. There is now reasonable clarity regarding what remains to be addressed – and we are therefore giving the municipality two months to sort this out together with its suppliers,” explains Allan Frank, a lawyer and IT security specialist at the Danish Data Protection Agency.

The same process in Aarhus Municipality

In addition to the order issued to Helsingør Municipality, the Danish Data Protection Agency has also issued a similar order to Aarhus Municipality. This is because Aarhus Municipality (like Helsingør Municipality) has established that some of the processing of schoolchildren’s personal data it has carried out to date has not been lawful, and that it has not, to the necessary extent, identified and mitigated the risks to those pupils. Consequently, a similar process to

bring the processing into compliance with the law has now also been initiated in Aarhus Municipality.

Local Government Denmark has informed the Danish Data Protection Agency that, on behalf of a further number of local authorities, it expects to submit similar requests regarding the legalisation of the use of Google Workspace and similar services. The Danish Data Protection Agency expects to impose the same requirements on other local authorities carrying out similar processing activities.

Legal background

The Danish Data Protection Agency expects all controllers – before commencing new processing of personal data, or when existing processing operations result in a change to the risk profile – to assess whether the programmes, services and suppliers used to process personal data can in fact be used lawfully. In addition, the GDPR requires that no processing of personal data involving high, unmitigated risks may be carried out without the Authority being informed of such processing and having had the opportunity to exercise the powers conferred by the GDPR.

The assessment and recognition that certain services or supplier agreements lead to unlawful processing of personal data or high risks that cannot be mitigated is a necessary prerequisite for being able to get the supplier to amend the relevant terms and services, to amend the processing activities or, ultimately, to discontinue use of the supplier if the latter is unwilling or unable to provide a service that can be used lawfully.

On the basis of the material provided by Helsingør Municipality and Aarhus Municipality, the Danish Data Protection Agency has established that the municipalities have carried out processing operations that were not lawful and that they have not, to the necessary extent, identified and mitigated the risks to pupils and teachers. The Danish Data Protection Agency has issued an order to Aarhus Municipality and Helsingør Municipality requiring that the contract entered into with the processor and the technology provider be amended and clarified on a number of points. The local authorities have also been ordered to identify further risks relating to data points and data containing personal data that are disclosed to the technology provider for the provider's own purposes. This order also requires the disabling of functionality in the technology used that results in the unauthorised disclosure of personal data.

These orders are subject to a two-month deadline, and the local authorities have been informed that the Danish Data Protection Agency intends to prohibit the manner in which the processing activities in question are carried out if the local authorities are unable to get the supplier to rectify the relevant issues.

Decision

1. Decision

The Danish Data Protection Agency's prohibition issued to Helsingør Municipality on 18 August 2022 is suspended until 5 November 2022.

The Danish Data Protection Agency issues an order to Helsingør Municipality to amend the existing agreement with the processor in such a way that the circumstances mentioned in the Agency's decisions of 14 July and 18 August 2022, as well as the material Helsingør Municipality submitted on 1 September 2022, and which stem from the overall contractual framework

with the supplier, are brought into compliance with the General Data Protection Regulation. This includes, as a minimum, a clarification of the instances in which the 'processor' acts as an independent controller, as well as the purposes for which it does so; the support scenarios which the municipality no longer utilises; and ambiguities in the contract text that create uncertainty regarding the processor's actions beyond the provisions of Article 28(3)(a) of the General Data Protection Regulation. Furthermore, all intended transfers to third countries without an adequate level of protection must demonstrably comply with the General Data Protection Regulation.

The Danish Data Protection Agency further issues an order to Helsingør Municipality to describe the data flows taking place and to identify the personal data disclosed to the supplier, and to clarify when the supplier acts as an independent or joint controller. The documentation must cover the entire technology stack used by Helsingør Municipality for the processing.

The Danish Data Protection Agency further orders Helsingør Municipality to draw up an updated data protection impact assessment based on all the risks identified by the municipality during the documentation process, should it transpire that – in addition to those for which an Article 36 procedure has now been requested – there are further high, non-mitigable risks, the order also includes consultation with the Danish Data Protection Agency pursuant to Article 36.

Finally, the Danish Data Protection Agency orders Helsingør Municipality to submit a final, time-bound plan for bringing any processing operations into compliance with the law that could not be brought into compliance by the deadline for the orders, which is set at 3 November 2022. The Danish Data Protection Agency expects to receive documentation of compliance with the orders by the specified date.

The orders have been issued pursuant to Article 58(2)(d) of the General Data Protection Regulation.

Failure to comply with an order may – unless a more severe penalty is applicable – be punishable by a fine or imprisonment for up to six months, cf. Section 41(2), no. 4 of the Data Protection Act.

If Helsingør Municipality complies with the conditions set out in the prohibition of 18 August 2022 by 5 November 2022, the Danish Data Protection Agency may, following a review of the relevant documentation, lift the prohibition.

2. Statement of the case

On 18 August, the Danish Data Protection Agency ruled, amongst other things, that Helsingør Municipality's processing of personal data through the use of Google Chromebooks and Workspace for Education was not in compliance with the General Data Protection Regulation.

On that basis, the Danish Data Protection Agency upheld its prohibition of 14 July 2022.

However, the ban was amended such that the Danish Data Protection Agency prohibited Helsingør Municipality from processing personal data through the use of Google Chromebooks and Workspace for Education. The prohibition remains in force until Helsingør Municipality has brought the processing activity into compliance with the General Data Protection Regulation as set out in the Danish Data Protection Agency's decision of 14 July 2022, and until the municipality has carried out a data protection impact assessment that meets the requirements

regarding content and procedure for its implementation, as set out in Articles 35 and 36 of the Regulation. For processing operations where prior consultation with the Danish Data Protection Agency is required under Article 36 of the General Data Protection Regulation, the prohibition applies until the Agency has issued an opinion pursuant to Article 36(2), and Helsingør Municipality has taken the necessary measures on the basis of the Danish Data Protection Agency's opinion, or until the Agency authorises the processing at a time prior to the opinion being issued.

The prohibition came into force immediately.

3. Comments from Helsingør Municipality

Helsingør Municipality submitted a request for consultation with the Danish Data Protection Agency by email on 1 September 2022. The request reads as follows:

"Basis for the consultation

In the Danish Data Protection Agency's decision of 14 July 2022 concerning Helsingør Municipality, the Danish Data Protection Agency imposed a general ban on Helsingør Municipality's processing of personal data via Google Chromebooks and Google Workspace for Education Standard ("the Services") until Helsingør Municipality had prepared a data protection impact assessment for the processing of personal data as prescribed and defined in sections 4.2 and 4.3 of the Danish Data Protection Agency's decision. Against this background, Helsingør Municipality submitted the requested data protection impact assessment.

However, in its decision of 18 August 2022, the Danish Data Protection Agency concludes that, in connection with the preparation of this impact assessment, Helsingør Municipality should have conducted a prior consultation with the Danish Data Protection Agency, cf. Article 36(1) of the General Data Protection Regulation. In its decision, the Danish Data Protection Agency bases this assessment on the fact that the measures taken by Helsingør Municipality regarding the disclosure of personal data to Google, as well as a number of other identified risks relating to the processing of personal data via the Services, are not suitable for addressing these issues.

Helsingør Municipality acknowledges that, at present, there are insufficient technical, contractual or organisational measures in place to mitigate these residual high risks relating to pupils' rights and freedoms. Helsingør Municipality therefore wishes, by means of this letter, to consult the Danish Data Protection Agency as prescribed in Article 36(1) of the General Data Protection Regulation, with a view to receiving the Agency's written advice in accordance with Article 36(2) of the General Data Protection Regulation.

Compliance with the formal requirements

With regard to the formal requirements set out in Article 36(3) of the General Data Protection Regulation, Helsingør Municipality notes the following:

Helsingør Municipality is the controller for the processing of personal data carried out via the Services, and Google Ireland Limited is the processor. However, Google Ireland Limited may act as controller for 'service data', and this issue is, amongst other things, the subject of this consultation, as the disclosure relates to school pupils' personal data.

The aim is to use a digital learning platform based on Google Chromebooks with Workspace for Education Standard. The platform enables the sharing of documents between pupils and teachers and generally facilitates collaboration within the class and across classes. Local authorities are obliged to make digital learning resources and learning platforms available to pupils in schools. Access to digital learning resources is necessary to meet the learning objectives for subjects in primary and lower secondary school. Some of the primary and lower secondary school leaving examinations, as well as national tests, are conducted digitally. Local authorities are obliged to make digital assistive technology available to pupils with special needs, including those with dyslexia.

With regard to measures and safeguards to protect the rights and freedoms of data subjects, Helsingør Municipality refers to (i) the attached Annex 1 and the safeguards and measures implemented as described therein, as well as (ii) the previously submitted impact assessment relating to the Services and the associated annexes.

The data protection officer is Bech-Bruun Advokatpartnerselskab, Langelinie Allé 35, 2100 Copenhagen Ø.

The data protection impact assessment, which was prepared in collaboration with the municipality's data protection officer, has already been submitted to the Danish Data Protection Agency.

Helsingør Municipality will, of course, provide any further information and documents that the Danish Data Protection Agency may request.

Advice from the Danish Data Protection Agency

For the purposes of the Danish Data Protection Agency's advice, as specified in Article 36(2) of the General Data Protection Regulation, Helsingør Municipality encloses, as Annex 1 to this prior consultation letter, a list of all data protection risks identified by Google in relation to the Services.

The Danish Data Protection Agency has previously received this list; however, it has been both updated in accordance with the Danish Data Protection Agency's email of 18 August 2022 and generally updated and adapted to Danish circumstances. The list also sets out the residual data protection risks relating to the Services which are currently too high and which are therefore the subject of this consultation.

The Danish Data Protection Agency has further requested that the following matters be included as an addendum to the Article 36 process:

What Service Data the local authority will disclose to Google, for which Google will continue to be the controller in relation to 'Planned future', and for what purposes this Service Data will be used. Yesterday, the municipality requested that Google assist in clarifying these issues. However, this could not be achieved before this letter was sent, and the municipality can therefore instead state the following regarding the next steps: Within the next 14 days, the municipality will clarify with Google whether the above questions can be answered immediately. If this is not the case, the municipality will ensure that the question can be answered no later than 14 days before the completion of an updated impact assessment for the use of the Services, as further detailed below.

The risk outlined above and the risks listed in Annex 1 hereby constitute the total data protection risks covered by this consultation.

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Helsingør Municipality requests that, on the basis of this consultation letter, the Danish Data Protection Agency lift the ban on the use of the Services, provided that Helsingør Municipality complies with the conditions for lifting the ban as specified in detail by the Danish Data Protection Agency, including the preparation and submission of an updated data protection impact assessment for the use of the Services, with an expected completion date of 2–3 months from today."

The submitted request for consultation was also accompanied by a table setting out the high, unmitigated risks, which essentially correspond to the impact assessment carried out in the Netherlands.

[Part of the documentation has been omitted here]

4. Reasons for the Danish Data Protection Agency's decision

The Danish Data Protection Agency notes, in accordance with Helsingør Municipality's own comments in the request of 1 September 2022, that the processing operations in question pose a high risk to the rights of data subjects which cannot be mitigated, cf. Article 36(1) of the General Data Protection Regulation.

The Danish Data Protection Agency finds that several of the processing operations are, in themselves, not in compliance with the General Data Protection Regulation, whilst others have not been sufficiently identified or have not had the risk mitigated to the necessary extent. The Danish Data Protection Agency therefore finds that the conditions for the Agency to provide advice under Article 36(2) are met.

The Danish Data Protection Agency further notes that, for those processing operations that have not been sufficiently identified or for which the risk has not been mitigated to the necessary extent, prompt compliance must be ensured. The Danish Data Protection Agency considers it necessary to ensure the required progress in achieving such compliance. The Authority has therefore decided, in relation to the outstanding issues, to issue a number of orders with a shorter deadline pursuant to Article 58(2)(d) of the General Data Protection Regulation.

In addition, the Danish Data Protection Agency has attached importance to ensuring that Helsingør Municipality, together with other municipalities acting as controllers and carrying out processing of personal data similar to that of Helsingør Municipality, can collectively approach the processor and the supplier to obtain a definitive lawful solution that covers all parties.

Against this background, the Danish Data Protection Agency states:

The Danish Data Protection Agency's prohibition imposed on Helsingør Municipality on 18 August 2022 is suspended until 5 November 2022.

The Danish Data Protection Agency issues an order to Helsingør Municipality to amend the existing agreement with the processor in such a way that the matters referred to in the Agency's decisions of 14 July and 18 August 2022, as well as the material Helsingør Municipality submitted on 1 September 2022, and which stem from the overall contractual framework

with the supplier, are brought into compliance with the General Data Protection Regulation. This includes, as a minimum, a clarification of the instances in which the 'processor' acts as an independent controller, as well as the purposes for which it does so; the support scenarios which the municipality no longer utilises; and ambiguities in the contract text that create uncertainty regarding the processor's actions beyond the provisions of Article 28(3)(a) of the General Data Protection Regulation. Furthermore, all intended transfers to third countries without an adequate level of protection must demonstrably comply with the General Data Protection Regulation.

The Danish Data Protection Agency further issues an order to Helsingør Municipality to describe the data flows taking place and to identify the personal data disclosed to the supplier, and to clarify when the supplier acts as an independent or joint controller. The documentation must cover the entire technology stack used by Helsingør Municipality for the processing.

The Danish Data Protection Agency further orders Helsingør Municipality to draw up an updated data protection impact assessment based on all the risks identified by the municipality during the documentation process, should it transpire that – in addition to those for which an Article 36 procedure has now been requested – there are further high, non-mitigable risks, the order also includes consultation with the Danish Data Protection Agency pursuant to Article 36.

Finally, the Danish Data Protection Agency orders Helsingør Municipality to submit a final, time-bound plan for bringing any processing operations into compliance with the law that could not be brought into compliance by the deadline for the orders, which is set at 3 November 2022. The Danish Data Protection Agency expects to receive documentation of compliance with the orders by the specified date.

The orders have been issued pursuant to Article 58(2)(d) of the General Data Protection Regulation.

Failure to comply with an order may – unless a more severe penalty is applicable – be punishable by a fine or imprisonment for up to six months, cf. Section 41(2), no. 4 of the Data Protection Act.

If Helsingør Municipality complies with the conditions set out in the prohibition of 18 August 2022 by 5 November 2022, the Danish Data Protection Agency may, following a review of the relevant documentation, lift the prohibition.

The Danish Data Protection Agency further reserves the right to exercise additional powers under Article 58(2) of the General Data Protection Regulation, in relation to matters described in the previous decisions, once Helsingør Municipality has submitted final documentation that fully clarifies the lawfulness of the processing operations and the risks to the rights and freedoms of data subjects. In addition, the above-mentioned matters may also be subject to sanctions under Section 41 of the Data Protection Act.