Taking on Goliath

The Facebook ruling and how clever legal initiatives can trigger political change

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Last week's ruling against Facebook from the European Court of Justice (ECJ) justifiably caused a great stir. The ECJ declared the Safe Harbour agreement to be obsolete. European politicians can no longer hide behind the myth that data protection is safeguarded by the US data centers that store and process our information. It remains unclear, however, what the consequences of this decision will be for Facebook and thousands of other internet companies.

This post will leave aside any further discussion of the substance of the judgment and will look instead at the methods and the process that brought about the decision. Max Schrems, the 28 year old lawyer who initiated the case, is being likened to David, landing a great blow to the billion dollar Goliath that is Facebook. While this captures something of the spirit of the case, it doesn't quite go far enough to describe the extent of what happened.

Schrems made use of strategic litigation, an approach that has been pursued for decades by many civil and human rights organizations working in the Anglo-American legal system.

Preparing the legal instruments – complaints, lawsuits, criminal proceedings – takes sometimes years of work by lawyers, activists and organizations. Other legal experts and official bodies may then join the action before it is finally submitted.

The cases often pertain to questions of great public importance, and so the legal action goes hand in hand with communications and public awareness work. For the claimants and the groups that support them, these proceedings are part of a politico-legal battle, and their significance extends far beyond securing a win in the individual cases. The goal is often to reveal systematic problems and structural injustice. This is also how we work at my organization, the European Center for Constitutional and Human Rights in Berlin.

For over four years, Schrems and his allies tried out various legal instruments. In 2011 they submitted a complaint to the Data Protection Commissioner in Ireland, where Facebook's European headquarters is based. This was followed by a class action lawsuit at a court in Vienna. Ultimately their action made it to the ECJ. That court's spectacular ruling was not the overnight result of *one* genius idea. Instead it was the product of careful legal analysis paired with a willingness to try many different methods.

In the end, the right forum materialized, and the requisite momentum had built, thanks to the debate around the Snowden revelations. And the ECJ, keen to further its role in human rights, had already proven itself in the area of data security on questions of data retention and the "right to be forgotten".

Little has changed since Edward Snowden risked everything with his revelations. Particularly disappointing is the lack of efforts by politicians and ministry staff, those whose job it is to protect public interests and thus civil and human rights. Schrems and his network, including OpenDataCity and LobbyPlag.eu, exposed this failure – and tried to fill the gap.

That’s why the Facebook case serves as a model and inspiration: when used cleverly, legal initiatives can bring about real political movement.