

# Reports

This part of the EDPL hosts reports in which our correspondents keep readers abreast of various national data protection developments in Europe, as well as on the most recent questions in different privacy policy areas. The Reports are organised in cooperation with the Institute of European Media Law (EMR) in Saarbrücken ([www.emr-sb.de](http://www.emr-sb.de)) of which the Reports Editor Mark D. Cole is Director for Academic Affairs. If you are interested in contributing or would like to comment, please contact him at [mark.cole@uni.lu](mailto:mark.cole@uni.lu).

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## Recent Developments and Overview of the Country and Practitioner's Reports

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When the final issue of a periodical publication such as the EDPL is published at the end of a year, one is inclined to delve into a review of the past year. However, given the wide range of topics in the field of data protection and data security law covered by the EDPL and specifically in the Reports Section, this is hardly feasible. Even more so when we are talking about a year that has been as curious as this one and no one could foresee at the beginning the developments we would all witness. Although the Corona pandemic forced many areas of life to come to a temporary standstill or – currently ongoing in most areas – slow down, in data protection terms a large amount of notable developments occurred in 2020. Apart from the obvious data protection implications of the pandemic, which raised questions about the use of information technology systems in the home office, the design of trac(k)ing apps or, more generally, the flow of (personal/non-personal) data to com-

bat the effects of the pandemic, there were a number of other ‘milestones’ that will have an impact beyond the moment when they occurred.

An example for the latter is the first **assessment of the GDPR** by the Commission, which took place as foreseen by the Regulation two years after its date of applicability<sup>1</sup>: it rates the development since as a success, but identifies areas for further improvement. Although the Commission underlined that it is still too early to give any final conclusion about how the GDPR has been applied in Member States, its positive assessment does not come as surprise and the reports we have been able to share with you in this section over the last years do nothing but confirm the significant impact GDPR has had on the development of data protection not only on the territory of the EU's Member States, but also further afield. But it is not only the GDPR. In the European Commission's current work programme which is aimed at making ‘Europe fit for the digital age’, data play a crucial role. They do so now and they will in the future, both in economic but also regulatory terms. This concerns especially the development of artificial intelligence with a European perspective and a new ‘**European Data Strategy**’. The latter is now progressively taking on a more substantial shape, with the presentation of the Commission's **Data Governance Act**<sup>2</sup> at the end of November being a major milestone. That proposal – as a side note: again in form of a Regulation – aims to foster the availability of data for use by increasing trust in data intermediaries and by strengthening data-sharing mechanisms across the

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1 Communication from the Commission to the European Parliament and the Council: Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation, COM(2020) 264 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0264>>.

2 Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), 2020/0340 (COD) [25 November 2020], <<https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-european-data-governance-data-governance-act>>.

EU addressing issues such as making public sector data available for re-use, sharing of data among businesses against remuneration in any form, allowing personal data to be used with the help of a ‘personal data-sharing intermediary’ and on altruistic grounds and many more points. It is still ‘fresh on the table’ and will certainly be another important topic for EDPL to cover in the coming year(s).

New developments in the fields of **cyber security**<sup>3</sup> and **artificial intelligence**<sup>4</sup> have also recently been presented by the Council of the European Union under the German Presidency which had been announced in its Presidency programme – covering the period of 1 July to 31 December 2020<sup>5</sup> – to advance the discussion which was initiated by the ‘European Data Strategy’ on the appropriate use of **high-quality datasets for digital services** and on a transparent **European healthcare data space**.

But it is not only the Commission and Council – as well as the Parliament eg. by taking a very proactive stance towards the announced **Digital Services Act** proposal of the Commission, by presenting reports which strongly focus on data-related aspects of a possible future platform regulatory framework.<sup>6</sup> It is also the CJEU that is continuing to have a prime role in the shaping of data protection law, which once again can be observed by following the case notes section of this Journal. The CJEU has taken a number of important decisions in 2020 which have a lasting impact on data processing in both the digital but also the more analogue field. Probably most significant is the **Schrems III** – strictly counting, although mostly referred to as Schrems II because of its close connection to the first Safe harbour Decision-related case – judgment. This has enormous implications (again) for cross-border data processing especially by US companies, and has therefore attracted a great deal of attention and has now also prompted the Commission to conclude the year with a draft implementing decision on **standard contractual clauses** for the transfer of personal data to third countries pursuant to the GDPR which was open to feedback until 10 December 2020.<sup>7</sup> Given the extent of the legal uncertainty created by the Schrems II judgment and the number of data processors affected by it, the urgency with which the update of the standard contractual clauses is being pursued is to be welcomed. This is all the more true given that a ‘Schrems IV/III’-case may already be on the horizon following complaints by noyb against Apple’s Identifier for Adver-

tisers to German and Spanish data protection authorities, which will also have to address the core issue of the limits to the lawfulness of the processing of personal data of European citizens, yet again by a big US corporation, here via tracking cookies activated without users of these services giving explicit consent.<sup>8</sup> In that context one should highlight that CNIL has issued on 10 December decisions imposing significant fines on Google (total of 100 million Euro) and Amazon (35 million Euro) for breach of national transposition provisions of the ePrivacy Directive by using cookies without sufficient consent by users.<sup>9</sup>

As we have already pointed out in previous editions, the case-filing activity of **noyb** is not its only contribution to data protection work ‘on the ground’, but their regular **newsletter** offers a wealth of up-to-date information on smaller and bigger cases across Europe and an additional possibility of receiving the latest news in between editions of EDPL and more broadly than what can be covered in the Reports section.<sup>10</sup> In order to fill the ‘time gap’ between editions, EPDL itself launched the bi-weekly newsletter ‘**Data Protection Insider**’, in which *Dara Hallinan* and

- 3 Council Conclusions on the cybersecurity of connected devices, 13629/20 [2 December 2020], <<https://data.consilium.europa.eu/doc/document/ST-13629-2020-INIT/en/pdf>>.
- 4 Presidency conclusions - The Charter of Fundamental Rights in the context of Artificial Intelligence and Digital Change, 11481/20 [21 October 2020], <<https://www.consilium.europa.eu/media/46496/st11481-en20.pdf>>.
- 5 Programme for Germany’s Presidency of the Council of the European Union 1 July to 31 December 2020, >  
<https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/06-30-pdf-programm-en-data.pdf>>.
- 6 European Parliament resolution of 20 October 2020, ‘Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL))’, P9\_TA(2020)0272, <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272_EN.html)>.
- 7 Draft implementing decision on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council Ref. Ares(2020)6654686 [12 November 2020], <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12741-Commission-Implementing-Decision-on-standard-contractual-clauses-for-the-transfer-of-personal-data-to-third-countries>>.
- 8 Noyb, press release of 16 November 2020, ‘noyb files complaints against Apple’s tracking code “IDFA”’, <<https://noyb.eu/en/noyb-files-complaints-against-apples-tracking-code-idfa>>.
- 9 See for further details, CNIL, press releases of 10 December 2020, <<https://www.cnil.fr/fr/cookies-sanction-de-60-millions-deuros-lencontre-de-google-llc-et-de-40-millions-deuros-lencontre-de>> and <<https://www.cnil.fr/fr/cookies-sanction-de-35-millions-deuros-lencontre-damazon-europe-core>>.
- 10 More information at <<https://gdprhub.eu/index.php?title=GDPRtoday>>.

*Diana Dimitrova* comprehensively give an overview of all relevant developments and cases also from the European Court of Human Rights.<sup>11</sup>

What all the mentioned developments have in common is that they deal with global issues. Digital interconnectivity and the associated cross-border processing of data, as 2020 has shown more than ever, call for a supranational approach, coherence, cooperation and European, if not global, responses. It is therefore not surprising that the **EDPB**, which as a body composed of representatives of national data protection authorities was set up precisely to provide coherence and consistency and to serve as a forum for supranational cooperation, is particularly active. In recent months in particular, the EDPB focused on cross-border issues, for example by adopting recommendations on supplementary measures following the Schrems II(I) judgment<sup>12</sup> and by setting up a Coordinated Enforcement Framework<sup>13</sup> to facilitate and flexibly coordinate joint actions by the EDPB Supervisory Authorities.

Moreover, on 9 November 2020, the EDPB adopted its **first dispute settlement decision** based on Article 65 GDPR.<sup>14</sup> This is the first binding decision in a cross-border procedure taken by EDPB. It concerns the proceedings against the social media platform Twitter, which are conducted by the (lead DPA) Irish data protection authority, but which also affect a large number of Twitter users in other EU Member States and therefore led to the triggering of the coherence procedure of the GDPR. Some Member State supervisory authorities had concerns about the draft decision of the Irish authority. The EDBP decision itself as well as the statement of reasons have not yet been published. It will be formally notified to the Irish

DPA shortly. Whatever the outcome of the decision, the fact that such a binding decision has been taken by an overarching body at EU level composed of national regulators is of (increased) interest. Regardless of the outcome of EDPB's decision, the Irish DPC will have to take its decision vis-à-vis Twitter 'without delay and at the latest one month after EDPB has notified its decision' and 'on the basis' of the said EDPB decision (Art. 60(6) GDPR). This mechanism allows authorities in other Member States whose citizens are also affected by data protection breaches to exert influence, even though platform operators have chosen a different location of establishment. This is particularly interesting because coherence mechanisms for regulators in the area of platform regulation are also being discussed in connection with the Digital Services Act Package. A similar procedure is also underway against Facebook with regard to the operation of WhatsApp. We will be reporting on those in future editions of the Reports Section of EDPL once final decisions are taken.

With that stocktaking and outlook we can now turn to the overview of reports of this section, which offers again a broad overview of relevant developments. One of them concerns one of the major contributions of the EDPB in 2020: *Giorgia Bincoletto* reports on 'EDPB Guidelines 4/2019 on Data Protection by Design and by Default' which provide a step by step guidance for data controllers to comply with Article 25 GDPR by interpreting its requirements, by investigating how data protection principles and rights can be implemented effectively, and by listing key design and default elements with several concrete examples on data processing operations. She analyses the proposed rules in detail and concludes in particular that the guidelines on one hand remain technologically neutral in the explanation of the requirements and mention privacy enhancing technologies, but on the other hand there are also shortcomings in terms of the detail of analysis and exploration of interdisciplinary methodologies, thus are less practical for the 'average' processor.

In a further contribution, *Christina Etteldorf* of the EMR looks at the new compromise text on the proposal for the ePrivacy Regulation, presented on 4 November 2020 under the German Presidency of the Council of the EU and raises the question if this 'A New Wind in the Sails of the EU ePrivacy-Regulation or Hot Air Only?'. She briefly presents the current state of the legislative procedure, highlights the

11 Available for signing up at <<https://www.lexxion.eu/en/newsletter/?list=19>>.

12 Cf on this EDPB, press release of 11 November 2020, <[https://edpb.europa.eu/news/news/2020/european-data-protection-board-41st-plenary-session-edpb-adopts-recommendations\\_en](https://edpb.europa.eu/news/news/2020/european-data-protection-board-41st-plenary-session-edpb-adopts-recommendations_en)>, in addition the EDPB provides answers on 'Frequently Asked Questions on the judgment of the Court of Justice of the European Union in Case C-311/18 - Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems', <[https://edpb.europa.eu/our-work-tools/our-documents/ohrajn/frequently-asked-questions-judgment-court-justice-european-union\\_en](https://edpb.europa.eu/our-work-tools/our-documents/ohrajn/frequently-asked-questions-judgment-court-justice-european-union_en)>.

13 EDPB Document on Coordinated Enforcement Framework under Regulation 2016/679 adopted on 20 October 2020, <[https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_documents\\_20201020\\_coordinatedenforcementframework\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_documents_20201020_coordinatedenforcementframework_en.pdf)>.

14 EDPB, press release of 10 November 2020, <[https://edpb.europa.eu/news/news/2020/edpb-adopts-first-art-65-decision\\_en](https://edpb.europa.eu/news/news/2020/edpb-adopts-first-art-65-decision_en)>.

amendments recently proposed in the Council discussions and, finally, highlights the gaps which arise at executive, legislative and judicial level from the current situation of failure to reach a final agreement. In particular, the report refers to the EDPB's opinions on the subject and to the implications of the Interim Regulation recently proposed by the Commission in the field of combating child abuse online. In this light it is crucial that the negotiations on the proposal for an ePrivacy Regulation stay on track. In that context it is noteworthy that while writing this Introduction news surfaced that after a lengthy negotiation period political agreement was reached between Council and Parliament on the Proposal of the Commission for a Regulation preventing dissemination of terrorist content online, which had not only been discussed through the lens of freedom of expression but also more generally the increased responsibility that platform operators will have and which includes potential implications for data processing.<sup>15</sup>

In the Reports Section, we also welcome the next contribution to our **GDPR implementation series**, which is now almost complete (for the first round) with a report from **Malta**. *David Ciliberti* looks at the specificities of the implementation of the GDPR into the national law of the smallest EU Member State, highlighting in particular weaknesses relating to the establishment and allocation of tasks in the context of supervision. The author acknowledges the creation of a clear legal framework as well as the way some specific requirements of the GDPR were implemented (eg. Art. 85 GDPR), but he also sees a need for retrospective analysis and checking whether earlier Maltese legislation in important sectors is still in line with the new provisions of the GDPR. This to a certain extent confirms the Commission's assessment mentioned above that there is still room for improvement and further alignment in the application of the GDPR.

Two regular country reports present data protection perspectives from Italy and Greece. *Niki Georgiadou* and *George Kakarelidis* report on '**Flight 9525 Crash: Balance Between the Rights of Medical Confidentiality and the General Right of Public Safety under Greek Law**'. The tragic plane crash, which occurred in 2015 and was deliberately caused by the co-pilot at the time, has data protection implications. In particular, the investigation into the course of events also revealed particularly sensitive data, especially health data, of the co-pilot. The question of the law-

fulness of the processing (notably disclosure and transfer) of health data covered by the authors becomes particularly timely in the light of issues around collection and disclosing of health data that have arisen during in the Corona pandemic.

The contribution from Italy, on the other hand, deals with a completely different area of data processing, namely the use of contact details for marketing purposes – on a large scale. In her second contribution in this issue on '**Italian DPA Against Vodafone: History of a €12 million Fine**', *Giorgia Bincolletto* deals with a substantial fine very recently imposed on that telecommunications operator by the Italian DPA. In particular, she points out the decisive factors in determining the amount of the fine: not only the large number of data subjects concerned (and with it the large number of complaints filed), but also the significant instances of infringements of GDPR rules and Italian data protection law were relevant in this case. In light of the significant and structural problem of the 'undergrowth of abusive tele-marketing operators', the decision could set an example in the telecommunications sector reaching beyond Italy.

Finally, I would like to specially mention two contributions in our Practitioners Corner: *Amanda Antonely A. Bispo* reports on '**Open Banking and the Decentralization of Payments in the EU: Untwining the PSD2**' and deals with the changes, the revised Payment Services Directive has brought to the new phenomenon of open banking and a further digitalization of financial services. She raises the question whether the payment market with its trend to personalization and detailed analysis of customer data is ready for the changes that come with the revised Directive. Another report by *Maria Mitjans Serveto* gives an interesting insight into '**Exercising GDPR Data Subjects' Rights: Empirical Research on the Right to Explanation of News Recommender Systems**'. She presents a study conducted last year in order to find out more about how data protection rights that stem from GDPR can actually be applied in practice and where there are shortcomings. With the area of news recommender systems she chooses a highly relevant example which raises not only data protec-

15 European Commission, press release of 10 December 2020, 'Security Union: Commission welcomes political agreement on removing terrorist content online', <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2372](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2372)>.

tion questions but beyond it questions of understanding why what type of news is highlighted to some users in comparison to others – a question which will be come ever more important, the more ‘personalized’ the online experience will become in the future.

This overview of our reports once again demonstrates the diversity of topics and developments that we can cover thanks to our Country Experts. We, the Editors together with the Institute of European Media Law (EMR), hope to have made a worthwhile selection in sharing with you these reports for this edition and are sure that they will prove useful to you.

We invite you to continue to suggest reports on future national and European developments to us. To submit a report or to share a comment please reach out to me at <mark.cole@uni.lu>. At the end of this indeed significantly different year than any in the past five years of existence of the EDPL, we would like to wish all our readers a safe and healthy end of year and new year 2021 which will certainly continue to bring relevant developments in privacy law but hopefully will also allow us to leave our private surroundings again more easily for discussing and debating with each other ‘in real’!