

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) 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.

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

*Mark D Cole**

The new year has started no less interesting in terms of data protection law than the last one ended.

At the beginning of February, the Council, under the current Portuguese Presidency, agreed – some would say: finally – on a **common approach on the proposal for an ePrivacy Regulation** after discussions and presentations and withdrawals of earlier drafts had been ongoing since 2017.¹ With that, trilogue negotiations with the European Parliament can commence. It will be interesting to see the outcome of these negotiations as the positions of Parliament and Council are by no means aligned. Already last year, under German Council Presidency, a new draft had been introduced for deliberation in the Council as we reported on in the last edition.² Compared to that draft, the changes in the final position mainly concern the extension of the scope of the proposed Regulation to the processing of electronic communications data by companies outside the European Economic Area, the introduction of a definition of loca-

tion data, provisions on the change of purpose and data protection impact assessments in certain areas, and – probably most notably – the admissibility of placing ‘necessary’ cookies and of so-called ‘cookie walls’. Just as is the case with the rules of the GDPR, the ePrivacy Regulation is intended to follow the market location principle and therefore applies to all providers who process personal data of EU citizens via the services directed at them. With regard to the closely related issue of supervision, the ePrivacy proposal provides for more concrete provisions in comparison to the currently applicable ePrivacy Directive and was inspired again by the GDPR. Although there is no coherence mechanism as in the GDPR, at least a close cooperation of several competent supervisory authorities is foreseen and the EDPB shall also be involved.

In the field of electronic communications networks and services, which regularly involve cross-border offers, many of which are dominated by US companies with only subsidiaries in the EU, clear rules and cooperation mechanisms between authorities of the different Member States concerned seem more important here than ever. It can be observed that on multiple levels the pressure on these providers is increasing, as can be witnessed, for example, by the targeted investigations of the French data protection authority (CNIL) against **US tech companies and their use of cookies**. This began at the end of last year with fines in the millions against Amazon and Google³ and continues this year with an investigation of the – currently hyped – social network app Club-

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* Mark D Cole, Professor at the University of Luxembourg, Director for Academic Affairs, EMR, and EDPL Associate Editor. For correspondence: mark.cole@uni.lu.

1 Council of the EU, 6087/21, [10 February 2021] <<https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf>>.

2 Cf. Christina Etteldorf, ‘A New Wind in the Sails of the EU ePrivacy-Regulation or Hot Air Only? On an Updated Input from the Council of the EU under German Presidency’ [2020] EDPL 567 – 573.

3 Cf. Introduction of last issue: Mark D. Cole, ‘Recent Developments and Overview of the Country and Practitioner's Reports’ [2020] EDPL 549, 550.

house⁴. The CNIL bases its jurisdiction in the Clubhouse proceedings on the grounds that the ‘one-stop-shop’-mechanism does not apply, as Alpha Exploration Co. Inc. – being the provider of the app – lacks an establishment within the territory of the European Union, so that CNIL regards itself to be competent to take action as any other data protection authority in other Member States would be. In the case of Google, on the other hand, CNIL argued that the use of cookies takes place within the framework of the ‘activities’ of the company Google France and that this assignment therefore constitutes the ‘establishment’ on French territory. All of this becomes even more significant when one looks across the Channel: the group of ‘EU foreign countries’ has recently become larger by the expansion to a very relevant third country. In the near future, **EU and UK** companies will be dependent on an **adequacy decision for data transfers** between each other if they want to have legal certainty and an easily applicable framework. The procedure for creating such a decision has just been initiated by the European Commission.⁵

However, tech companies will not only be held more accountable by the future rules of the ePrivacy Regulation, but also by the provisions of the **Digital Services Act (DSA)** and the **Digital Markets Act (DMA)**. The proposals for these two new Regulations were tabled by the Commission mid-December 2020.⁶ These cannot go unmentioned in terms of data protection law either, as on the one hand they will in future provide the decisive horizontal legal framework for online platforms whose business models are essentially based on the processing of personal data, and on the other hand they themselves contain provisions on the processing of data (for example, in relation to the playing out of personalised content and in the area of advertising). The new framework for digital services will add new supervisory structures and cooperation mechanisms based on the market location principle, too. The DSA and DMA are already intensively debated in the regular legislative procedure as well as in numerous academic contributions and events and it is more than justified to pay very careful attention to the further shaping of these acts in light of their significance which will reach well beyond what the e-Commerce Directive did with information society services in 2000.⁷

But even outside of legally prescribed cooperation mechanisms, the intertwining of different legal matters in the online sector is significant, and **coopera-**

tion between competent authorities is and will continue to be key. This always includes – pragmatically – a good atmosphere and a certain level of trust between institutions and persons concerned. This is not always a given, especially where authorities between different Member States take diverging approaches, as could be recently seen on the occasion of a hearing in the European Parliament on the question of adequate enforcement measures under GDPR against ‘Big Tech’.⁸

And with that we are in the midst of our reports section of this edition of EDPL: the first report demonstrates how cooperation and coherence has to take place within the legal framework set by the the GDPR. The first Art. 65 coherence decision was recently issued by the European Data Protection Board (EDPB) and subsequently integrated in the final decision by the competent Irish data protection authority DPC. *Lisette Mustert* questions in her contribution: **‘The First Article 65 Decision – Correct and Consistent Application of the GDPR Ensured?’**. She takes into account the decision of the EDPB and shows how its assessments (and thus also the criticisms made by other Member State authorities) were reflected in the Irish Data Protection Authority’s final decision as lead supervisory authority against Twitter. *Mustert* concludes that although the consistency mechanism gives the EDPB the opportunity to clarify certain matters, it faces some serious drawbacks relying on the willingness of the lead supervisory authority to coop-

4 CNIL, ‘La CNIL ouvre une enquête sur l’application Clubhouse’ [17.3.2021] <<https://www.cnil.fr/fr/la-cnil-ouvre-une-enquete-sur-lapplication-clubhouse>>

5 Draft decision on the adequate protection of personal data by the United Kingdom - General Data Protection Regulation [19.2.2021] <https://ec.europa.eu/info/files/draft-decision-adequate-protection-personal-data-united-kingdom-general-data-protection-regulation_en>.

6 Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>>; Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>>.

7 We are contributing to the debate with a first assessment of the DSA: Mark D. Cole, Christina Etteldorf, Carsten Ullrich, Updating the Rules for Online Content Dissemination Legislative Options of the European Union and the Digital Services Act Proposal, 2021 (forthcoming), in print ISBN 978-3-8487-8184-3, available shortly as open access.

8 Cf. noyb.eu, ‘DPC cancels Parliamentary Hearing on EU-US transfers’, [18.3.2021] <<https://noyb.eu/en/dpc-cancels-parliamentary-hearing-eu-us-transfers>>, reporting on the short notice cancellation of the Irish DPC for a Parliament hearing in the LIBE Committee due to a controversy with other DPAs.

erate effectively with the other competent supervisory authorities. In particular she questions whether the EDPB, when it objected to the DPCs initial proposal, had such a low fine against Twitter as finally imposed by the DPC in mind if looked at in relation to the company's annual turnover.

The other EU report is not about cooperation between authorities but about overlaps that have been created in two intertwined legal frameworks. *Sandra Schmitz-Berndt* and *Fabian Anheier* discuss in their report '**Synergies in Cybersecurity Incident Reporting – The NIS Cooperation Group Publication 04/20 in Context**'. They outline the different reporting schemes for security breaches under the Directive on security of network and information systems (NIS Directive) and the GDPR and present the recently published key findings of the NIS Cooperation Group on this matter. These are put into context of the recent review of the NIS Directive and the proposal for a revised 'NIS 2.0'. The subject of coherence and cooperation, which runs through the Report Section of this issue like a red thread, thus plays a decisive role here as well, even if not mandated currently under the law. The NIS Cooperation Group clearly calls for a substantive alignment and harmonising of reporting obligations under the different EU legislative acts.

Cooperation between supervisory authorities in cross-border cases (here on the basis of Art. 60 GDPR between the Lithuanian and Latvian authorities) is also addressed in *Natalija Bitiukova's* contribution. She presents **Lithuania** in our **GDPR Implementation Series** and shows the challenges of the still 'young' national data protection legislation and its remarkable and rapid development, having taken place without attracting much attention. She observes two trends in particular: increased activity of the Lithuanian supervisory authority and a growing tension between conflicting fundamental rights of privacy on the one hand and freedom of expression and information on the other. *Bitiukova* concludes that Lithuania may need to reconsider its current approach to balancing of the right to data protection with the right to information, set out in the national data protection law and other applicable laws.

Mentioning the balancing of these two rights leads to the next report: The subject of *Giorgia Bincoletto's* contribution is not the interaction of different supervisory authorities, but the interplay of different legal *materiae*. It deals with a decision of the Italian data protection authority in connection with data process-

ing for journalistic purposes as an expression of freedom of the press and information on the one hand and the protection of privacy on the other. Her report '**Italian DPA Balancing Data Protection and Freedom of Expression: Essentiality and Fairness as key principles**' shows that although the GDPR requires special rules for the journalistic sector based on the media privilege of Art. 85 GDPR, the general principles of GDPR nonetheless play a crucial role also in these special circumstances. Even investigative journalism is not allowed to process data without limitations and must provide sufficient safeguards for data subjects, especially in light of the principle of fairness. The decision involving one of the major Italian TV channels is interesting from a media law perspective – concerning the use of hidden cameras and recording in investigative work as well as the relevance of deontological codes – as well as from data protection law which integrated the deontological code and makes the respect of it a condition for lawfulness of fairness of processing in journalistic work.

Data security is the focus of the contribution in the Practitioners' Corner, which concludes this edition's reports section. *Annika Selzer* gives an insight on '**The Appropriateness of Technical and Organizational Measures under Article 32 GDPR**' taking into account both sides of the coin: the rights and freedoms of data subjects, but also the financial interests of the controller or processor as elements of the selection criteria for establishing what constitutes 'appropriate' technical and organisational measures. She sheds light on questions that practitioners need to ask themselves and puts them in the context of requirements of the GDPR and the relevance of the criterion of economically feasible. In that regard she highlights the importance of the documentation of considerations made by the controller or processor before deciding for a measure as well as the steps taken in the implementation process.

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 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>.