

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.

Introduction

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

*Mark D Cole**

The Reports section of the last issue opened with the remark that, three years after the GDPR came into force, it seems that the parties involved in enforcement have settled in and that hardly a week goes by without some interesting news about decisions by data protection authorities. Now, in this edition, we can back this up with some interesting figures published by the European Data Protection Board (EDPB) in an overview on resources made available for and enforcement actions of data protection authorities.¹

The analysis covers this period of about three years and provides concrete numbers that shed light on the performance of the GDPR. It is interesting to note the considerable differences in the financial and personnel resources of the national authorities displayed

here, which are due not only to their size, but also to their structural set-up (federal structures, accumulation of tasks in one authority, etc.). While the German data protection authorities, for example, have a combined budget of €94.8 million for 2021 and employ over 1000 staff, the Maltese authority works with a budget of €620,000 and the Lithuanian authority with 7 staff members. In this context, the vast majority of the authorities state that the human and financial resources are not sufficient to fulfil their tasks effectively. This attitude becomes more comprehensible to the reader of the report when one looks at the statistics on enforcement measures, which include complaints and initiations of proceedings regardless of the outcome, which show 165,641 cases taken by German authorities, followed by the Dutch authority with 68,827 cases. It can be observed in all states that the number of cases has increased from year to year, as have the budgets of the authorities. For statistical analysis purposes these data will be of continued interest, especially when it comes to analysing cross-border cooperation (which can be relevant and burdensome for small and large authorities alike). The trend clearly points to an increase of such cross-border cases and shows personnel shifts to this area.

The EDPB's overview further shows that the highest individual fines since the entry into force of the GDPR were imposed by the French (€50 million against Google)², German (€35.5 million against H&M)³ and Italian (€27.8 million against the telecom-

DOI: 10.21552/edpl/2021/3/9

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1 EDPB, Overview on resources made available by Member States to the Data Protection Authorities and on enforcement actions by the Data Protection Authorities, (2021) <https://edpb.europa.eu/system/files/2021-08/edpb_report_2021_overviewsaressourcesandenforcement_v3_en_0.pdf>.

2 Deliberation No SAN - 2019-001 of 21 January 2019 imposing a financial penalty on company X, <<https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000038032552/>>.

3 Cf. the English version of the press release on the website of the EDPB: Hamburg Commissioner Fines H&M 35.3 Million Euro for Data Protection Violations in Service Centre, 2.10.2020, <https://edpb.europa.eu/news/national-news/2020/hamburg-commissioner-fines-hm-353-million-euro-data-protection-violations_en>.

munications company TIM S.p.A.)⁴ authorities. However, this does not include the most recent high fine from the Luxembourgish DPA CNPD (€746 million against Amazon) which has already raised a lot of attention, not only because of the size of the fine. However, it will raise even more attention once the actual decision is published, because as of now the authority has only confirmed in a press release⁵ that the sanction indeed was imposed but will not publish the decision until the conclusion of an appeal brought against the decision by Amazon.

While the EDPB's overview further does not include the most recent fine of the Irish authority, our Reports Section does: *Lisette Mustert* discusses in her contribution 'The EDPB's second Article 65 Decision – Is the Board Stepping up its Game?' the EDPB's recent binding decision on the issue of data protection breaches, in particular in the area of information obligations, by WhatsApp, as well as the subsequent final decision by the Irish Data Protection Commissioner (DPC) imposing a €225 million fine on the messaging service provider. In particular, the author emphasises the importance of consistent application of the law and expresses concerns about the judicial tenability of the decision from Ireland, which follows the guideline and reasoning of the EDPB but obviously with little conviction of its own. The consequence of this will be observed with interest - WhatsApp has already announced legal action against the decision - especially as many eyes are increasingly turning to the DPC because of its role as lead supervisory authority for many of the European headquarters of US tech companies such as Facebook and Twitter. However, according to the EDPB's report, with a budget of €19 million and 175 staff, 145 of whom are involved in enforcement and cooperation tasks, it is only positioned in the upper midfield of the statistics. With a total of 875,000 euros in fines imposed, the authority has so far rather restrained itself compared to other Member State authorities, despite the financial strength of the companies partly falling under its jurisdiction.

However, the DPC has now also announced proceedings against another potential cross-border candidate: In particular, the protection of data of minors and the transfer of data outside the EEA by the social network and video portal TikTok, which is operated by the Chinese company ByteDance, will be investigated in detail.⁶ Meanwhile, the Dutch supervisory authority has already taken action against this

company, as *Eva Lievens* reports in her contribution, 'Dutch DPA fines TikTok for not offering understandable information to children'. In this context, she not only presents the decision against the background of special transparency obligations towards minors as well as interconnections with the (now)⁷ lead jurisdiction of the DPC in Ireland, but also comments on it from the perspective of the protection of children in the digital environment in general. In doing so, *Lievens* makes a point of following an approach that involves children themselves in a more active way in the development of policies aimed at protecting this vulnerable group.

Giorgia Bincoletto also reports on the imposition of a fine by a data protection authority, but in a completely different thematic context. Her contribution 'Whistleblowing Application: Italian DPA sanctions non-compliance with GDPR principles' deals with the data protection-compliant design and integration of applications on the part of data controllers and data processors, which are intended to serve employees for reporting possible misconduct. It also deals with how the requirements of the GDPR for technical and organisational protection measures relate to the special protection of whistleblowers, specifically by Directive (EU) 2019/1937.

Not only the range of topics dealt with by data protection authorities is very broad, but also the range of types of activity, as is shown by *Thomas Dubuisson's* contribution, 'Data Protection Authority provides new policies on GDPR infringements and litigation proceedings aspects'. The report concerns the Belgium data protection authority detailing some of its powers in several policies that will be useful in

4 Provvedimento correttivo e sanzionatorio nei confronti di TIM S.p.A. - 15 gennaio 2020 [9256486], <<https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9256486>>; English press release available at <https://edpb.europa.eu/news/national-news/2020/marketing-italian-sa-fines-tim-eur-278-million_en>.

5 CNPD, 'Decision Regarding Amazon Europe Core S. À R.L.' (2021) <<https://cnpd.public.lu/en/actualites/international/2021/08/decision-amazon-2.html>>.

6 Data Protection Commission, 'DPC launches two inquiries into TikTok concerning compliance with GDPR requirements relating to the processing of childrens' personal data and transfers of data to China' (2021) <<https://www.dataprotection.ie/en/news-media/latest-news/dpc-launches-two-inquiries-tiktok-concerning-compliance-gdpr-requirements-relating-processing>>.

7 Due to the rapid growth of TikTok in the EU, which has also led to the establishment of numerous branches of the company in various Member States, the lead jurisdiction was long under discussion, although the company had always referred to an alleged EU headquarter in Dublin.

clarifying future practices inter alia in the areas of linguistic aspects and on admissibility requirements for complaints and thereby give useful guidance for companies that wish to have a proper privacy and data protection strategy in place. *Dubuisson* in this regard also highlights the status of the Litigation Chamber of the authority and its powers and includes some recent decisions to document these so far under-discussed policies. The report is very detailed and longer than our usual reports, but we wanted to illustrate how manifold the policies are and allow their comparison in one report instead of making it a series of reports on the different Belgian DPA's new policies.

A look beyond the EU borders is provided by *Ashit Kumar Srivastava* in his contribution about India: '**Reading Regulation as a Prohibition: A Critical Review of the new IT Rules 2021 in relation to Social Media Networks and Messaging Applications**'. He reports on the reformed rules for intermediaries, which focus on the treatment of illegal online content and related user data, and their relevance to fundamental rights to privacy and freedom of expression in the context of Indian constitutional jurisprudence. Although developments outside the EU are not the focus of the EDPL's country reports, as in the past we will continue to provide an occasional look at developments in the rest of the world whenever they concern states that are especially relevant for the EU and companies active here or where comparisons with regulatory developments by the EU and its Member States allow interesting insights, such as

in this case of increased regulatory scrutiny of social media providers.

This issues' Reports Section closes with the Practitioner's Corner report '**Appropriateness under Article 32 GDPR**' of *Annika Selzer, Daniel Woods* and *Rainer Böhme*. One of the authors already reported in a previous issue on the obligations privacy laws put on organisations to protect the fundamental rights of individuals which in particular involves the need for balancing the risk to individuals against the costs of privacy measures from the perspective of practitioners.⁸ Now the authors, based on their research project presented in this contribution, want to shed some light on uncertainties looming over how much preventative measures cost directly and indirectly, what the likelihood and impact of a violation of rights of individuals is (and how this factors into the calculation of costs), and which privacy measures should be selected to be in line with the requirements stemming from Article 32 GDPR.

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. In that context, we would like to thank *Christina Etteldorf*, Research Associate at the EMR, who as always was instrumental in putting together EDPL's reports section and managing the reviews together with me. 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>.

⁸ Annika Selzer, 'The Appropriateness of Technical and Organizational Measures under Article 32 GDPR' (2021) 7 EDPL 1, 124.