

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 Reports

*Mark D Cole and Christina Etteldorf**

Although it is difficult to find appropriate words in reaction to the act of aggression and the war brought to Ukraine by the Russian leadership, it is evident that it questions many certainties we have relied on in the past. And certainly, the gift of living in a value-based Union of Member States in which fundamental rights are one of the main pillars, is suddenly dramatically underscored. In finding joint responses to the Russian Federation's aggression, EU Member States as well as their partners within and beyond Europe are moving closer together. Especially the transatlantic ties with the US have been reinforced. Although it is not connected to recent developments and was a topic (of relevance in the context of our journal) that had to be resolved some time ago, it may not come as a complete surprise that the negotiations on a future framework for data transfer between the EU and the US reached a breakthrough at one of the high-level meetings in March. Although the legal text has not been prepared yet, a public announcement was made by both sides that the cornerstones of the future framework – which had become necessary after the Schrems II-judgment of the Court of Justice

of the EU halted the Privacy Shield – have finally been found.¹

Before we move on to present the reports of the current issue, I would like to make an announcement concerning this section of our journal: as our regular readers will know, since the very first issue of the EDPL, the Institute of European Media Law (EMR) and myself (Mark Cole) as its Director for Academic Affairs, have been organising and reviewing the Reports section. It has been a pleasure to work with so many different experts from across Europe and beyond, which help with their excellent contributions to enlighten our readers on important developments in data protection and privacy matters. Since several years, I have been supported by Christina Etteldorf, the senior research scientist at EMR, in this task and am very grateful for all her help in deciding on topics, reaching out to the authors, collecting the reports, reviewing their content, following up with the publisher in preparing the proofs and giving an introductory overview. As of now, “we” means the two of us are jointly sharing all these tasks and bring this section to you together and, consequently, the introduction is authored jointly.

From our perspective, one topic in privacy and data protection is currently the focus of attention: the question of personalised online advertising, or rather: the future of (personalised?) online advertising. This discussion is not only ongoing from a competition law angle, notable recent examples of which are the complaint of the European Publishers Council against Google's practices in the operation of its Double Click

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1 Cf. Joint Statement on Trans-Atlantic Data Privacy Framework (25 March 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2087.

advertising network² or the investigation launched by the Commission in June 2021 in the case "Google - Adtech and Data-related practices"³. Beyond that it is especially a controversy concerning data protection issues. Google's announcement at the beginning of 2020 that it intends to abandon third-party cookies in its Chrome browser in the near future stirred up the advertising industry, as such a move would also have considerable consequences for tracking user behaviour and displaying personalised advertising by third parties and thus for the financing of such online services. Two years later we are witnessing an increasing pressure in this matter from different sides. The concerns of the industry that fears negative consequences by such a change of the browser setup are reflected in a complaint recently submitted to the European Commission: a broad alliance of leading associations from the German media, internet and advertising industry is demanding that the use of third-party cookies must remain permitted, provided that users give their informed and valid consent.⁴

That such valid consent is, indeed, not that easy to achieve is illustrated (yet again) by recent decisions of data protection authorities. At the beginning of the year, the French CNIL (yet again) imposed severe penalties on Google (150 mio. Euro) and Facebook (60 mio. Euro) for the unlawful use of cookies⁵, while a former decision against Google – this fact is reflected in the level of the penalty aspect of the fine handed down in January – was confirmed by the competent court.⁶

Two other important decisions in the context of cookies and consent are illustrative examples of this current controversy around online advertising and tracking tools and therefore presented in this edition's Reports Section:

In her contribution '**Belgian Data Protection Authority Ruling – Online Advertising on the Brink of Extinction?**' *Kristin Benedikt* reports on the decision of the Belgian DPA declaring the so-called 'Transparency and Consent Framework' (TCF) – at the moment an essential and widely used tool for the online advertising industry for the purpose of consent management when it comes to real time bidding for online advertising space – in its current design to be incompatible with the GDPR. She gives an overview of the functioning and significance of the TCF in the field of online advertising, as well as the key aspects of the decision and what impact it has for the industry. *Benedikt* takes partly a critical view of the deci-

sion, especially with regard to the capacity of IAB Europe, which is the developer of the TCF, as (joint) data controller in the DPA's opinion. She closes with a conclusion for practitioners applying such solutions and the advice to critically review their own consent banners on websites.

Another essential tool for services in the online environment is covered by the report of *Stephan Winklbauer* and *Robert Horner* concerning the possibility of transatlantic data flows in connection with the tool: '**Austrian DPA Decides EU-U.S. Data Transfer Through the Use of Google Analytics to be Unlawful**'. The authors analyse the decision of the Austrian DPA of December 2021, which turned down the incorporation of the popular tool Google Analytics on websites against the backdrop of the CJEU's Schrems II-ruling and thus made the first of a total of 101 model complaints filed by the NGO noyb successful. They also include a comparative view at a similar decision of the French CNIL which was handed down in January. Like *Benedikt*, *Winklbauer* and *Horner* also have a critical view of the DPA's decision with regard to the qualification of the parties involved in their roles within the GDPR (in this case the capacity of a website provider as data processor because of the use of Google Analytics). Although it is a decision by the Austrian DPA this aspect of the decision impacts practitioners all across the world. Even if a new data transfer framework between the EU and the US is agreed upon (as mentioned above), this will not

- 2 EPC, 'European Publishers Council files EU Complaint against Google for Anti-Competitive Ad Tech practices' (11 February 2022), <<https://www.epceurope.eu/post/european-publishers-council-files-eu-complaint-against-google-for-anti-competitive-ad-tech-practices>>. The EPC criticises the anti-competitive exploitation of Google's monopolised ad tech value chain, which in its view is causing significant harm to European press publishers, advertisers and consumers in the form of higher prices, lower quality of service and few opportunities for innovation.
- 3 AT.40670 Google - Adtech and Data-related practices, <https://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=1_AT_40670>.
- 4 Cf. eg. ZAW, 'Medien- und Werbewirtschaft kritisiert Wettbewerbsverzerrungen durch Google und wendet sich an die Europäische Kommission', <<https://zaw.de/medien-und-werbewirtschaft-kritisiert-wettbewerbsverzerrungen-durch-google-und-wendet-sich-an-die-europaeische-kommission/>>.
- 5 CNIL, 'Cookies : la CNIL sanctionne GOOGLE à hauteur de 150 millions d'euros et FACEBOOK à hauteur de 60 millions d'euros pour non-respect de la loi' (6 January 2022), <<https://www.cnil.fr/fr/cookies-la-cnil-sanctionne-google-hauteur-de-150-millions-deuros-et-facebook-hauteur-de-60-millions>>.
- 6 Conseil d'État, N° 449209, ECLI:FR:CECHR:2022:449209.20220128, <<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-01-28/449209>>.

help website providers in the view of the authors, because the illegality of the implementation of Google Analytics is based in the DPA decision mainly on the lack of technical supplementary measures and not because of too weak contractual safeguards (which would be improved in a new framework).

These two reports show that there is still much need for discussion on the use of cookies and the shape of online advertising and it will therefore continue to occupy us intensively. There is an obvious wish for clarification from the perspective of practitioners relying on such tools and there are attempts at such clarification: at the EU level for example by the EDPB⁷ and at national level with guidelines from authorities⁸. It has, however, become clear that this is by far not yet sufficient. Meanwhile, the European Parliament is tackling the issue from a different angle and by relying on a different legal basis. In its position on the Digital Services Act proposal, which is currently being negotiated in the trilogue between Parliament and Council under moderation of the Commission, the EP intends to add to the provisions concerning transparency of online advertising a further detailing of the GDPR conditions concerning such advertising.⁹ The EDPS has also recently spoken out in favour of addressing this issue in the DSA, in a contribution entitled “It is time to target online advertising”.¹⁰

The EDPS is not the body to finally answer this question, as it will likely be settled, at least in principle, by the legislating bodies of the EU. He is, how-

ever, the body taking final decisions when it comes to oversight of data processing by the EU institutions, bodies and agencies. On 3 January 2022, the EDPS used his corrective powers and in a remarkable decision ordered Europol to delete all personal data held on individuals with no established link to criminal activity. This order received much attention also in the media as it puts in very clear words how and to what extent law enforcement-related activities of an EU agency constitute a serious data protection violation. *Teresa Quintel* offers in her contribution ‘**The EDPS on Europol’s Big Data Challenge Under its Revised Regulation – The Question of Legitimizing Unlawful Practices**’ a detailed analysis of the order and places it in a broader context. *Quintel* points out some major concerns that have arisen with regard to Europol’s handling of personal data, notably data which had been transferred to Europol by national law enforcement agencies and combined by Europol. She also addresses the question of what Europol’s new data protection framework will mean in practice and highlights that it will most likely become more challenging for the EDPS in the future to sanction processing activities of Europol in view of the provisions in the new framework, even though the EDPS has enhanced powers for oversight according to the new rules.

Further important developments at EU level are also covered in this issue: *Pier Giorgio Chiara* reports on ‘**Commission Delegated Regulation (EU) 2022/30 Supplementing Directive 2014/53/EU on Radio Equipment: Strengthening Cybersecurity, Privacy and Personal Data Protection of Wireless Devices**’. He highlights how the Delegated Regulation (EU) 2022/30 building on the essential requirements of Article 3(3)(d), (e) and (f) of the Radio Equipment Directive will enhance and complement existing cybersecurity, privacy and data protection frameworks at EU level. He points out that this will lead to the strengthening of the (cyber)security of wireless devices. *Chiara* also takes a look at other initiatives and regulations that will accompany the Delegated Act now and in the future in the field of cybersecurity, leading to an overall strengthening of an ecosystem of trust.

More broadly speaking, this environment of trust in data processing is also an aim of the planned future Data Act, further complementing the existing EU rules on data protection and free flow of data. The European Commission published its Proposal

7 Cf. eg. the taskforce on cookie banners (announcement of 27 September 2021, <https://edpb.europa.eu/news/news/2021/edpb-establishes-cookie-banner-taskforce_en>) and EDPB response to French associations on the cookie consent requirement (19th January 2022, <https://edpb.europa.eu/our-work-tools/our-documents/letters/edpb-response-french-associations-cookie-consent-requirement_en>).

8 For Germany cf. eg. the guidance of the DSK, ‘Orientierungshilfe der Aufsichtsbehörden zur Verarbeitung von personenbezogenen Daten für Zwecke der Direktwerbung unter Geltung der Datenschutz-Grundverordnung (DS-GVO)’, <https://www.datenschutzkonferenz-online.de/media/oh/OH-Werbung_Februar%202022_final.pdf>; for France eg. CNIL, ‘Alternatives to third-party cookies: what consequences regarding consent?’ (23 November 2021), <<https://www.cnil.fr/en/alternatives-third-party-cookies-what-consequences-regarding-consent>>.

9 Art. 24(1a) of the amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html>.

10 Wojciech Wiewiórowski ‘It is time to target online advertising’ (14th March 2022), <https://edps.europa.eu/press-publications/press-news/blog/it-time-target-online-advertising_de>.

for a 'Regulation on harmonised rules on fair access to and use of data' on 23 February 2022 as part of the European data strategy. *Angelica Fernandez* provides an overview of the main provisions in the proposed Data Act while giving a first orientation concerning the relevance of these elements. She also briefly highlights some of the potential contentious issues when the legislative process moves forward. Her contribution '**The Data Act: The Next Step in Moving Forward to a European Data Space**' concludes with the remark that the proposal is meant to boost a sustainable data economy in the EU by improving efficiency in data sharing across sectors and enhancing trust. However, *Fernandez* highlights several points that could trigger discussions and therefore it may not be a straight-forward road to a final agreement on the Data Act by the co-legislators.

This Reports edition takes stock of different developments at the national level, too. We offer a wide variety of insights both in terms of the topics and actors as well as the geographical diversity.

Already in 2018, the Luxembourgish data protection authority CNPD launched 25 audit procedures investigating the role of data protection officers in the public and private sector in light of the minimum requirements set out in Articles 37 to 39 of the then newly applicable GDPR. In her contribution '**Luxembourg DPA Raises the Bar for Data Protection Officers**' *Florence D'Ath* reports on the outcome of these investigations. In light of the 25 decisions adopted by the CNPD, *D'Ath* focuses on the most relevant clarifications provided in three decisions adopted in October 2021 in which the CNPD found GDPR violations by companies active in the insurance sector as well as a public authority. In particular, she takes a look at the authority's interpretation of the GDPR's minimum rules and how this raises the bar of what data processors are expected to consider when appointing data protection officers as well as on the conduct of these DPOs when they carry out their duties in practice.

In her contribution, *Alina J. Wolski* reports on '**German Angst and the Immunisation Registry**' and addresses the question of the compatibility of immunisation registries and the GDPR against the background of a possible introduction of compulsory vaccination as a reaction to the Covid pandemic. This issue is being hotly debated in Germany due to a vaccination obligation concerning certain facilities, especially in the health care sector, applying since 15

March 2022. There is a continued discussion on expanding this obligation, possibly even to a general mandatory vaccination. *Wolski* looks into it from a data protection perspective by analysing the functionalities of digital immunisation registries and challenges arising from different provisions of the GDPR. She also takes a comparative look at existing systems in other countries such as Sweden and Norway. The report shows that there are many issues that need to be addressed in order to make such registries GDPR compliant while maintaining their functionality and purpose.

In the report '**Lithuanian Supreme Administrative Court Undertakes a Legitimate Interests Assessment in a Seminal Case on Journalistic Expression**' *Natalija Bitiukova* takes us on the long journey of the case of the news platform 'Atvira Klaipėda' which was accused of violating the GDPR when reporting on corrupt public procurement practices. This case is placed at the intersection of media law and data protection law and generated a debate on the values attributed to data protection and transparency in Lithuania. It ultimately led the Lithuanian Parliament to adopt changes to the national media law to limit privacy rights of 'public persons' and strengthen media freedom. *Bitiukova* presents the legal framework and analyses the key elements of the decision of the Lithuanian court by highlighting a number of significant questions in particular on the application of legitimate interests as a legal basis for data processing in the context of journalistic expression, and the interplay between data protection and media law.

Even after and irrespective of Brexit, the United Kingdom is still closely connected to the EU in terms of data protection rules and relevance for interpretation of key legal concepts in that regard. We are therefore pleased to have again a flash news contribution by *Lorna Woods*, who offers us an insight into judicial developments in the UK, which would remain interesting even if the Government's announcement of possibly departing from the close connection to the EU in data protection terms would be realized. For the moment – and also relevant in this case that was launched while still an EU Member State – Brexit has not significantly affected the outcome of the case, because the GDPR has been turned into the UK GDPR. *Woods* reports on '**The Court of Appeals Judgment Concerning the Legality of the 'Immigration Exception' for Data Processing**'. The case *Open*

Rights Group and the 3million v Secretary of State for the Home Department and Others concerns the lawfulness of the ‘immigration exception’ which disallows certain data protection rights in relation to the processing of personal data for the maintenance of effective immigration control or the investigation or detection of activities that would undermine the maintenance of effective immigration control. This matter is of great relevance and the increasing migration movements will certainly lead to a further importance of settling how and which data of migrants and refugees can be processed. Because the requirements of Article 23 GDPR and the immigration exception under applicable national law were unaf-

ected by Brexit, as a consequence the Government had to amend the immigration exception which recently entered into force.

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 us at <mark.cole@uni.lu> or <c.etteldorf@emr-sb.de>.