

# 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).

## Recent Developments and Overview of the Country and Practitioners Reports

*Mark D Cole and Christina Etteldorf\**

In data protection terms, the past few months were dominated by news around proceedings in reaction to data protection violations by various social networks.

TikTok, which is still sharply rising in popularity in Europe and is operated by the Chinese company ByteDance, announced in July 2022 that it intends to change its terms of service. While the social network had recently shown its goodwill in terms of compliance with the EU legal framework concerning consumer protection and advertising,<sup>1</sup> alarm bells have been ringing in terms of data protection law as the announcement included the plan that targeted advertising would no longer be carried out based on consent, but on the grounds of legitimate interests. This ‘creeping’ change of significant conditions that users would have had to accept if they wanted to continue using the service is inevitably reminiscent of the announcement of the change of WhatsApp’s terms of service in May 2021 with which users would have automatically agreed to a merging of their data in the Meta Group. At that time, this not only alerted (for Meta non-leading) data protection authorities in the EU, but also was a crucial factor in the proceedings before the EDPB and ultimately in the final fine imposed by the Irish (lead) supervisory authority (the Data Protection Commission, DPC).<sup>2</sup>

Now, just over a year later, we can once again observe quick reactions of non-lead supervisory authorities. After clear warnings from inter alia the Italian<sup>3</sup> and Spanish<sup>4</sup> supervisory authorities, TikTok decided to ‘pause’ its plans.<sup>5</sup> However, this does not apply to other behaviour that is considered critical under

data protection law and for which TikTok has been under scrutiny of EU data protection authorities for a long time, namely the (unlawful) processing of personal data of minors and data transfers to China, for which the EDPB has even set up a dedicated investigative task force.<sup>6</sup> For the specific aspect of the protection of minors’ data, the Irish DPC has most recently in September submitted its Article 60 GDPR draft decision to other concerned supervisory authorities in the EU.<sup>7</sup> The Inquiry focuses on basic settings

DOI: 10.21552/edpl/2022/3/8

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- 1 European Commission, ‘EU Consumer protection: TikTok commits to align with EU rules to better protect consumers’ (21 June 2022), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3823](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3823).
- 2 Lisette Mustert ‘The EDPB’s second Article 65 Decision – Is the Board Stepping up its Game?’ (2021) 7(3) EDPL 416-422.
- 3 GPD (12 July 2022), <https://www.garantepriavacy.it/home/docweb/-/docweb-display/docweb/9789143>.
- 4 AEPD (12 July 2022), [https://twitter.com/AEPD\\_es/status/1546818248301330432?ref\\_src=twsrc%5Etfw](https://twitter.com/AEPD_es/status/1546818248301330432?ref_src=twsrc%5Etfw).
- 5 Accessnow, ‘TikTok forced to pause plans for privacy-intrusive ads’ (12 July 2022), <https://www.accessnow.org/tiktok-pauses-plans-for-privacy-intrusive-ads/>.
- 6 Cf. on this in detail Christina Etteldorf, ‘The Clock is ticking for TikTok – How to protect underage EU citizens?’, DPOblog (6 November 2021), <https://dpoblog.eu/the-clock-is-ticking-for-tiktok-how-to-protect-underage-eu-citizens/>.
- 7 DPC, ‘Irish DPC submits Article 60 draft decision on inquiry into TikTok’ (13 September 2022), <https://www.dataprotection.ie/en/news-media/irish-dpc-submits-article-60-draft-decision-inquiry-tiktok-0>.

of the TikTok platform, in particular the setting that puts processing public-by-default in relation to accounts of users under the age of 18 as well as age verification measures for persons under 13. In addition, the compliance with transparency obligations vis-à-vis this vulnerable category of users is one of the main topics of the draft decision.

In another procedure involving the cooperation mechanism in cross-border matters and concerning the question of data transfers there is important news: the DPC has sent its draft decision on the Facebook/Meta case to its colleagues in Europe. According to media reports, the authority wants to block the transfer of data from Meta to the United States of America. However, there is no mention of a penalty for the consequently illegal data transfer of the past years.<sup>8</sup> While these proceedings will still go through the cross-border mechanism of the GDPR, the case against Instagram has finally reached an outcome. Following the EDPB's binding decision in late July, the DPC in mid-September has announced a fine of €405 million and a range of corrective measures.<sup>9</sup> The decision concerns, in particular, the public disclosure of email addresses and/or phone numbers of children using the Instagram business account feature and a public-by-default setting for personal Instagram accounts of children.

However, the 'social media giants' do not only have to fear severe sanctions by data protection authorities, but also might run into trouble in other context. This is documented by the opinion of the Court of Justice of the EU's Advocate General Rantos which he delivered on 20 September 2022 in the case of Meta Platforms.<sup>10</sup> In essence, this case is about the decision of the German Federal Cartel Office prohibiting Meta Platforms from processing data as provided for in Facebook's terms of service and from implementing those terms, relying on the reasoning

that this (unlawful) processing constitutes an abuse of the company's dominant position in the social media market for private users in Germany.<sup>11</sup> Questions arising in this context on the relationship between competition law and data protection law as well as on intersectoral (data protection authorities or competition authorities) and territorial jurisdiction (Germany or Ireland) are answered by the AG in the sense that, yes, a competition authority, within the framework of its powers under the competition rules, may examine, as an incidental question, the compliance of the practices under investigation with the GDPR rules. However, it then has to take into account any decision or investigation of the competent (lead) supervisory authority in the framework of the GDPR, informing and, where appropriate, consulting the national supervisory authority. The AG bases this obligation on the duty to cooperate in good faith enshrined in Article 4(3) TEU due to a lack of cross-sectoral cooperation rules. In conclusion, the AG's opinion means that if the Irish DPC had already assessed the processing activity of Meta subject to the proceedings as lawful, the German Federal Cartel Office in principle would not have been allowed to base its competition law decision on unlawful processing to justify an abuse of market power. The CJEU's ruling in this case will be eagerly awaited, especially in view of its interconnections with the newly agreed regulation, the Digital Markets Act.

Less of a surprise or novelty were the rulings on French and German data retention, in which the CJEU once again assessed variants of obligations (created by national law) to retain traffic and location data by providers of electronic communication services without specific reasons. These were – unsurprisingly – declared to be in breach of the ePrivacy Directive, as has been the case with data retention schemes of the Member States previously.

Another ruling, or rather a referral to the CJEU in a different matter, which concerns the interpretation of the notion of legitimate interests in a commercial environment and which many in the data protection community, especially in the Netherlands, had hoped for, will have to wait a while longer for its final outcome. The Dutch State Council has delivered its long-awaited decision in 'Voetbal TV' which concerns a penalty (€575,000) imposed by the Dutch DPA on the video platform Voetbal TV due to recording amateur football matches on behalf of football clubs and making them available online without consent of the

8 Vincent Manancourt, 'Europe faces Facebook blackout' <<https://www.politico.eu/article/europe-faces-facebook-blackout-instagram-meta-data-protection/amp/>> (7 July 2022).

9 DPC 'Data Protection Commission announces decision in Instagram Inquiry' (15 September 2022), <<https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-instagram-inquiry>>.

10 AG Rantos, Opinion delivered on 20 September 2022, C-252/21, Meta Platforms a.o., ECLI:EU:C:2022:704.

11 See in detail Christina Etteldorf 'Data 'Protection' from a Different Perspective: German Competition Authority Targets Facebook's Data Usage' (2019) 5(2) EDPL 238-245.

(mostly underage) players.<sup>12</sup> Beyond this specific fine, however, this case is about the Dutch DPA's interpretation that data processing for purely commercial purposes cannot, in general, be justified relying on legitimate interests, which the authority has also pointed out in a standard declaration.<sup>13</sup> This standard declaration had alerted the European Commission 2020, which in a letter to the Dutch DPA – only recently uncovered in the context of a request for information by the Dutch newspaper NRC – expressed its 'concern' about a (too) strict interpretation of the GDPR in its view.<sup>14</sup> The Commission stated that it was not compatible with the case law of the CJEU, recitals 4 and 47 of the GDPR and the different interpretations by the Article 29 Working Party and therefore very clearly requested the Dutch DPA to amend the wording of its standard declaration to make clear that commercial interests can be considered as 'legitimate' interests if they are not overridden by fundamental rights and freedoms of the data subject which always needs to be checked in a specific balancing exercise. However, the Dutch DPA did not change its supervisory practice in response to this; rather, a number of further proceedings based on the strict interpretation are pending before the domestic courts. This will not change with the decision of the State Council, because although it indeed overturned the specific decision of the DPA, it based this on the fact that the DPA had already erroneously carried out the first step of the three-step examination required under Art. 6 para. 1 lit. f) without taking into account all functions of the platform (eg. game analysis, exchange of players, players who want to be presented, etc.) in its examination, ie. by already incorrectly identifying the interest as being purely of a commercial nature. Therefore, in the opinion of the State Council, comments on the second and third steps of the test (necessity and weighing of interests) were no longer necessary in the present case and thus it also rejected the need for a referral to the CJEU, which had been requested in the proceedings.

In contrast, another significant matter from the point of view of companies operating online, with a European-wide significance for the marketing industry, will have to be decided by the CJEU due to a pending referral. The Court of Appeal Antwerp forwarded the decision of the Belgian supervisory authority on the Transparency and Consent Framework of IAB Europe<sup>15</sup> to the CJEU and asked in the preliminary reference in particular whether the consent string

alone or in combination with the IP address constitutes personal data and whether IAB Europe can be qualified as a (joint) controller in collecting this.<sup>16</sup> The EDPB has continued its high pace of activity in the previous months, publishing inter alia another Art. 65 binding decision concerning Accor SA, a statement on the European Police Cooperation Code<sup>17</sup>, an EDPB-EDPS Joint Opinion on the child sexual abuse regulation proposal<sup>18</sup> and an opinion on certification criteria<sup>19</sup>. Noteworthy is the open letter on the EDPB budget proposal for 2023 in which the Board expresses its deep concerns that the 2023 budget, if not substantially increased, will be far too small to allow the EDPB and the EDPS to fulfil their tasks appropriately.<sup>20</sup> Receiving continued new tasks from the legislator, the EDPB 'strongly urges support' for its budget request which includes eight additional staff members each for the EDPB and EDPS Secretariat. This would still be a small contribution in view of the pillars that the EDPB wants to support with such additional staff: credibility of enforcement (as national DPAs are intensifying their enforcement activities leading to more disputes requiring the EDPB's inter-

12 Uitspraak 202100045/1/A3, ECLI:NL:RVS:2022:2173, <<https://www.raad-vanstate.nl/actueel/nieuws/@132243/202100045-1-a3/>>, (27 July 2022).

13 APG, 'Normuitleg grondslag 'gerechtvaardigd belang'', <[https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/normuitleg\\_gerechtvaardigd\\_belang.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/normuitleg_gerechtvaardigd_belang.pdf)>.

14 European Commission, Ref. Ares(2020)1417369, <<https://static.nrc.nl/2022/pdf/letter-dutch-dpa-legitimate-interest.pdf>> (6 March 2020).

15 Cf. Kristin Benedikt 'Belgian Data Protection Authority Ruling - Online Advertising on the Brink of Extinction?' (2022) 8(1) EDPL 85-89.

16 Hof van beroep, decision of 7 September 2022, 2022/AR7292, <<https://www.gegevensbeschermingsautoriteit.be/publications/tussenarrest-van-7-september-2022-van-het-marktenhof-ar-292.pdf>>.

17 EDPB 'Statement 03/2022 on the European Police Cooperation Code', <[https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-032022-european-police-cooperation-code\\_de](https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-032022-european-police-cooperation-code_de)> (12 September 2022).

18 EDPB/EDPS, 'Joint Opinion 04/2022 on the Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse', <[https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion-042022-proposal\\_en](https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion-042022-proposal_en)> (27 July 2022).

19 EDPB, 'Opinion 25/2022 regarding the European Privacy Seal (EuroPriSe) certification criteria for the certification of processing operations by processors', <[https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-252022-regarding-european-privacy-seal\\_de](https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-252022-regarding-european-privacy-seal_de)> (19 September 2022).

20 EDPB, 'Open letter on EDPB budget proposal for 2023', <[https://edpb.europa.eu/system/files/2022-09/letteronbudget\\_out2022-0068.pdf](https://edpb.europa.eu/system/files/2022-09/letteronbudget_out2022-0068.pdf)> (12 September 2022).

vention), robustness of enforcement (higher fines lead to more litigation requiring robust and well-reasoned decisions) and predictability of the legal framework.

In the Reports Section of this edition of EDPL two other published texts of the EDPB are taken up.

*Carl Vander Maelen* deals with the EDPB's new guidelines on codes of conducts for international data transfers in his contribution '**EDPB Releases Final Version of 'Guidelines 04/2021 on Codes of Conduct as Tools for Transfers' – An Important Step with some Rough Edges**'. He examines the formal and substantive requirements set by the EDPB for the development of such codes of conduct, the role of the supervisory bodies in this process and the significance of these codes for practitioners, who are thus provided with another means for ensuring compliance with an adequate level of data protection when transferring data outside the EU. Besides some potential for clarifications and improvement, the author assesses Guidelines 04/2021 in their final version as an important step for more legal certainty.

*Giorgia Bincoletto* reports on the EDPB-EDPS Joint Opinion on the Commission Proposal for a Regulation on the European Health Data Space published in July. Based on a summary of the main rules of the Commission's proposal of May 2022, which includes not only provisions on the use of electronic health data and the development of corresponding systems and applications, but also on monitoring by a new European Health Data Space Board, she addresses the remarks and also criticisms that the EDPB and EDPS raise regarding the proposal. Her contribution '**The EDPB-EDPS Joint Opinion on the Commission Proposal for a Regulation on the European Health Data Space: key issues to be considered in the legislative process**' highlights in particular the need for cross-border sharing, access, and further use of these categories of data both for the provision of healthcare and for other following purposes and public interests. However, given the highly sensitive nature of personal health data, the risks of unlawful access to it should be carefully addressed in the Regulation, which will therefore be the task for the legislative

bodies in the upcoming process. This is especially true in light of the fact that the EHDS could serve as a blueprint for the future regulation of other sectors such as the others that were announced in the Commission's data strategy.<sup>21</sup>

Picking up on the topics described in our introductory remark, *Marcelo Corrales Compagnucci* reports on a case from Denmark also evolving around protection of minors and transatlantic data transfers but in a completely different scenario. As the title '**Danish DPA Banned the Use of Google Chromebooks and Google Workspace in Schools in Helsingør Municipality**' already suggests, the contribution discusses the proceedings of the Danish DPA on the implementation of certain Google applications used in classrooms of Danish primary schools and their (un)lawfulness. Despite some safeguards put in place, the inclusion of EMEA cloud services and restrictions in Google Chromebooks and Workspace applications, the authority has found the use of that hardware and software to be incompatible with the requirements of the GDPR, especially because of the lack of adequate safeguards for data transfers to the US and the special protection for underage students. The author not only shows the details of the decision, but also its background in the Schrems II case and the status of currently available options to solve this problem for Danish municipalities.

Also highly topical against the background of the aforementioned news from the CJEU, *Adrien Bottacci* takes up the issue of data retention regimes and reports on recent developments in Portugal. His contribution '**Judgment n.º 268/2022 of the Portuguese Tribunal Constitucional and its Contribution to the European Dialogue on Metadata Retention and Access Regimes**' analyses the decision of the Constitutional Court in light of the Portuguese regime of metadata retention, which integrates the standards set by the CJEU but also extends them by applying the right to informational self-determination to legal persons and by further developing its concept of communicational self-determination. This in particular alludes to the rights of data subjects in the digital environment.

*Gaurav Pathak* deals in his report '**Manifestly Made Public: Clearview and GDPR**' in the Practitioner's Corner with the latest developments around the facial recognition software Clearview AI and its compliance with data protection law which was questioned by several data protection authorities in Eu-

21 Cf. On this already Andrés Chomczyk Penedo 'Can a Data Breach be Caused by Poor Quality Data? An Analysis of a Decision by the Irish Data Protection Commission and its Potential Influence on Future Financial Data Sharing', (2022) 8(1) EDPL, 278, 283.

rope and beyond in the recent past. The author gives a brief overview of decisions from Australia, Canada, France, Italy, Greece and the UK and reflects the main points of criticism under data protection law, thereby showing the high practical relevance of limits to such facial recognition databases and their use. This essentially revolves around the question to what extent it is relevant in terms of data protection law that the data Clearview AI uses (the software scrapes the internet for photos of people, saves them in a database and allows customers (mainly police authorities) to search with and for images and, in the end, people) were freely accessible on the open internet anyway and the search results therefore only refer to freely accessible sources as well. This question and its answer by authorities also has considerable relevance for millions of data subjects and will certainly be subject for further litigation.<sup>22</sup>

Finally, we are pleased to once again have a piece dealing with developments in data protection law in the Council of Europe. *Rowin Jansen* and *Minke Reijneveld* report on '**Convention 108+, the GDPR, and Data Processing in the National Security Domain**' and analysing how the legal order of the Council of Europe is more and more influencing national activities in the security sector. The authors in particular highlight areas in which Convention 108+ can have an impact also on the EU legal order by pointing to

differences in the scope of application between the GDPR (which in principle excludes the national security and intelligence domain) and Convention 108+ (explicitly including the national security domain). The report demonstrates the legal consequence this might have, especially with regard to oversight mechanisms, and concludes that it is not unlikely that Member States might have to strengthen the legal safeguards for the privacy protection of citizens in this context.

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>.

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22 Cf. on a comparable issue with the PimEyes-Website Ruth Fulterer, Das Ende der Anonymität: Wie eine Suchmaschine für Gesichter unser Leben verändern könnte, NZZ of 10 September 2022, available at <<https://www.nzz.ch/technologie/das-ende-der-anonymitaet-wie-pimeyes-wie-gesichtserkennung-unser-leben-veraendern-wird-gesichtserkennung-unsere-gesellschaft-fuer-immer-veraendern-koennte-ld.1698397>>.