# 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**

The pace of developments in data protection law seems to neither know a summer break nor allow interested followers a relaxing time-out. Our particularly packed Reports Section in the last issue of the EDPL – one of the most voluminous since launching the journal in 2015 – demonstrated this very clearly. Even in the few weeks since then, a lot has been happening and an exciting autumn in data protection terms is here. After the European Parliament and the Council reached an agreement on the Data Act[1] at the end of June[2], which in future will lay down the rules on who can derive added value from which data (personal and non-personal) under which conditions, its 'sister act' has already arrived in practice: the Data Governance Act. This Regulation, which creates structures and processes for the traffic of and access to data and thus corresponds with the Data Act, is directly applicable in all Member States since 24 September 2023.[3] On 9 August 2023, the European Commission, in preparation for the date of applicability, passed an Implementing Regulation. This lays down the design of common logos to identify data intermediation services providers and data altruism organisations recognised in the Union.[4] These logos are worth taking a closer look as they shall serve as trust marks differentiating recognised services that are subject to the special requirements and obligations imposed by the Data Governance Act, from other services. This distinction will hopefully contribute to trust in voluntary data sharing, to transparency in the market and continuing the idea of certification as developed in the GDPR.

While the Data Act and the Data Governance Act are obviously elements of data law, scholars and practitioners in the field also need to keep developments on the Digital Markets Act (DMA) and Digital Services Act (DSA) on their radar. While neither of these are considered to be data protection law as such, and in particular are 'without prejudice' to GDPR rules, they actually have strong intersections and contain specific restrictions on data processing.[5] This is especially true for the rules on profiling of users based

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1 Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), COM(2022)0068 final.

2 See Council of the EU, press release of 27 June 2023 <https://www.consilium.europa.eu/en/press/press-releases/2023/06/27/data-act-council-and-parliament-strike-a-deal-on-fair-access-to-and-use-of-data/>. The final text has not yet been published in the Official Journal but the text of the provisional agreement can be accessed under <https://www.europarl.europa.eu/RegData/commissions/itre/inag/2023/07-14/ITRE_AG(2023)751822_EN.pdf>.

3 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ 2 152/01.

4 Commission Implementing Regulation of 9 August 2023 on the design of common logos to identify data intermediation services providers and data altruism organisations recognised in the Union available (including Annex) <https://digital-strategy.ec.europa.eu/en/library/data-governance-act-implementing-regulation>.

5 See for the DMA Christina Etteldorf, 'DMA – Digital Markets Act or Data Markets Act?' (2022) 8(2) EDPL 255-261.

on their personal data, which can be found in both of these Acts. In addition, enforcement of the rules will probably necessitate the involvement of data protection authorities, and in the case of the DMA the involvement of the European Data Protection Board (EDPB) is even explicitly mandated.

With regard to the DMA, we know since the beginning of September who the first gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft) offering which core platform services[6] are. These will have to comply with the new rules of the DMA after a transition period of six months. With regard to the DSA, the first very large online platforms (Alibaba, AliExpress, Amazon Store, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube and Zalando) and online search engines (Bing and Google Seach)[7] were already designated at the end of April and therefore – after a transition period of four months – already had to achieve compliance with the relevant DSA rules by the end of August. This requirement did not only lead to the first investigations by the European Commission as the competent supervisory authority,[8] but also resulted in the establishment of the transparency database concerning content moderation decisions[9]. The very large providers have to fill this database with detailed information on their practices in individual cases and already do so to a considerable extent – less than two weeks after its launch more than 60 million entries could already be found in the database. From the perspective of data protection law, this could be interesting because the platforms must also document the justification and basis for the restrictive measures, including for instance infringements of privacy, and indicate the extent to which the decision was based on automated means. Furthermore, it will be interesting to see how the transparency obligations of the DMA on profiling, according to which gatekeepers should at least provide an independently audited description of the basis upon which profiling is performed, and the restrictions resulting from the DSA, according to which online platforms are prohibited from engaging in advertising profiling based on special categories of personal data and targeting minors, play out in practice.

The wheels in the personalised advertising industry, which for many of the big players is in fact the engine of their business models, have been in motion for some time and developments are leading to a faster turn recently. Google, for example, is trying to 'depersonalise' profiling by technical means. Since an update of June 2023 the so-called 'topics' model can be selected in the Chrome browser, which is intended to enable the collection of user data and the subsequent personalised advertising through the use of AI without creating profiles to a comparable extent.[10] Meta, on the other hand, apparently wants to take a different route. After the clear decision of the Irish supervisory authority about a violation of GDPR standards concerning this practice by Meta[11] and the clear criticism to be found in between the lines of a Court of Justice of the European Union (CJEU) judgment which concerned competition law[12], the company had initially announced that in future it wanted to rely on a model based on clear consent.[13] Now, however, a payment model seems to be also on the cards, which would keep services like Facebook and Instagram free of advertising and tracking, but would require user to pay for that version of the service.[14]

Against the backdrop of a decision from Norway, this highly relevant development prompted us to

6 TikTok, Facebook, Instagram and LinkedIn as social networks; Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store and Meta Marketplace as intermediation services; Google, Amazon and Meta as Ad services; WhatsApp and Messenger as N-IICS (number-independent interpersonal communications services); YouTube as video-sharing-platform; Google search as search engine; Chrome and Safari as browsers; Android, iOS and Windows PC OS as operating systems.

7 See European Commission, 'DSA: Very large online platforms and search engines' (25 April 2023) https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops. Amazon (Amazon Store) and Zalando applied at the General Court against the Commission's decision (Cases T-367/23 and T-348/23), Amazon being interim successful according to the provisional judgement.

8 See the information request against X (formerly Twitter) in light of the platforms handling of illegal content: European Commission, 'The Commission sends request for information to X under the Digital Services Act' (12 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4953>.

9 Available at <https://transparency.dsa.ec.europa.eu/>.

10 See Sam Dutton, 'Topics API overview' (29 August 2023) <https://developer.chrome.com/docs/privacy-sandbox/topics/overview/>.

11 Data Protection Commission, 'Data Protection Commission announces conclusion of two inquiries into Meta Ireland' (January 2023) <https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland>.

12 Case C-252/21 *Meta Platforms and Others* [2023] ECLI:EU:C:2023:537.

13 Meta, 'How Meta Uses Legal Bases for Processing Ads in the EU' (Updated 1 August 2023) <https://about.fb.com/news/2023/01/how-meta-uses-legal-bases-for-processing-ads-in-the-eu/>.

14 See on this critical and with further references noyb, 'Meta (Facebook / Instagram) to move to a "Pay for your Rights" approach' (3 October 2023) <https://noyb.eu/en/meta-facebook-instagram-move-pay-your-rights-approach>.

write an 'in house' contribution at EMR in this issue of the Reports Section: together with *Katharina Kollmann* the undersigning associate editor of EDPL reports on the Norwegian Data Protection Authority's ban on advertising addressed to Meta and the urgent proceedings brought to the EDPB in this context. The decision is interesting not only from a procedural perspective, but also in its significance for cross-border enforcement – after all, Norway is not the lead jurisdiction for Meta and a clear penalty ruling by the Irish supervisory authority on the facts of the case (for a certain period in the past) had been taken. The authors shed light on the background and the decision itself in their article 'Norwegian Data Protection Authority Blocking personalized Advertising on Facebook and Instagram in Urgency Procedure – Another Step towards a Departure from Meta's Business Model?' in this context. After the Reports Section was already finalised, the EDPB adopted its Urgent Binding Decision on 27 Octobre 2023 following the request from Norway. Although the full text of the decision is not yet published, the outcome is remarkable: The Board instructed the Irish lead supervisory authority to take, within two weeks, final measures regarding Meta Ireland Limited and to impose a ban on the processing of personal data for behavioural advertising on the legal bases of contract and legitimate interest across the entire European Economic Area. The Irish DPC has notified Meta on 31 Octobre about the EDPB decision. The ban itself will become effective one week after the notification of the final measures by the Irish authority to Meta, ie still this Novembre according to the EDPB's instructions.[15]

Another interesting news came from Norway these days: in its decision of 27 September 2023, the Norwegian Privacy Protection Board (*Personvernnemnda*), as an appeal body for decisions of the Norwegian data protection authority, upheld the fine of 65 million Norwegian crowns (about €5.7 million) that the authority had imposed on the LGBTQ dating app Grindr at the end of 2021 — we had a detailed report on that decision by *Lara Marie Nicole Eguia* in a previous EDPL edition[16]. The main issue was that Grindr had processed and disclosed special categories of personal data (on sexual orientation and being part of a minority) without the required consent. The Board now confirmed the particular gravity of the infringement and upheld the level of the fine. The disclosure of location data in combination with the disclosure of sexual orientation data was considered particularly invasive and therefore particularly dangerous in light of the protection of fundamental rights.[17]

Developments also continue in the area of transatlantic data transfers. After the Commission adopted its Data Privacy Framework (DPF) concerning EU-US data transfers on 10 July 2023 – despite concerns in the legal community and on the part of the European Parliament – the corresponding framework was adopted by the Parliament in the United Kingdom[18], too, and extended to the UK GDPR by means of corresponding agreements. It remains to be seen how long both will last – in the UK because of the envisaged Data Protection and Digital Information Bill[19] and in the EU because the first lawsuit against the DPF is already pending before the CJEU's General Court[20]. The initiator, albeit in his capacity as a private individual, is Philippe Latombe, member of the French National Assembly and commissioner at the French Data Protection Authority. He is suing for suspension of the Framework in interim proceedings and requests annulment of the Commission's decision under Article 263 TFEU in the main proceedings. He relies on the DPF violating his (fundamental) rights as the measures provided for are in his view neither in line with the GDPR nor with the Charter of Fundamental Rights of the EU. Specifically, he criticises the lack of guarantees for effective remedies and access to independent courts, the lack of a framework for automated decisions and the security of personal data.[21] It will be interesting to see whether the action passes the high hurdle of admis-

15 EDPB, 'EDPB Urgent Binding Decision on processing of personal data for behavioural advertising by Meta' (1 November 2023) <https://edpb.europa.eu/news/news/2023/edpb-urgent-binding-decision-processing-personal-data-behavioural-advertising-meta_en>.

16 Lara Marie and Nicole Eguia, 'Snatched up by Advertising Partners: Norwegian DPA Fines Grindr for Lack of Consent over Third-Party Data Sharing' (2022) 8(2) EDPL 289-294.

17 See Personvernnemnda, PVN-2022-22 (27 September 2023) <https://www.datatilsynet.no/contentassets/1d47020af8cb4af0984818f291d902f0/pvn-2022-22-endelig-vedtak_offentlig.pdf> (in Norwegian only).

18 'UK-US data bridge: Data Privacy Framework Principles and List' (21 September 2023) <https://www.gov.uk/government/publications/uk-us-data-bridge-data-privacy-framework-principles-and-list>.

19 See on this in our last issue Luben Roussev, 'United Kingdom · The DPDI No.2 Bill - GDPR Revamp or Rule Tinkering?' (2023) 9(2) EDPL 231-238.

20 Case T-553/23.

21 Philippe Latomba, communiqué des presse (4 July 2023) <https://www.politico.eu/wp-content/uploads/2023/09/07/4_6039685923346583457.pdf>.

sibility under Article 263 TFEU. The requirement for proving individual standing before the Court is that there is a direct personal impact on the individual by the contested decision which is at least questionable in this case in light of the DPF's specific legal nature. In the preliminary proceedings, Latombe's request for deciding in an urgency procedure was unsuccessful as the particular urgency of a judgment was not demonstrated by the plaintiff in the view of the Court.[22] While a decision in the main proceedings will still take a while, the decisions on the 101 noyb complaints against website operators regarding their use of cookies, which were raised in 2020 and are still partially pending, continue to trickle in steadily. Recently, for example, the Estonian DPA, like many authorities before it across the EU, ruled that the use of Google Analytics was unlawful because of the associated US data transfers and therefore had to be stopped.[23] However, these refer to processing situations that took place between the invalidation of the Privacy Shield and the introduction of the DPF, ie without a valid adequacy decision by the Commission.

Speaking of Google and cookies, in a decision of 13 July 2023, the French Data Protection Authority (CNIL) acknowledged that Google had complied with earlier injunctions the CNIL had imposed on the company concerning the conditions for obtaining consent to deposit cookies on end-user devices. This is the (for now) final step in a long and for Google costly series of rulings by the French Authority (Google LLC and Google Ireland Limited were fined €90 and €60 million, accompanied by a fine of €100,000 per day of delay in 2021). In his contribution 'CNIL Confirms Google's Compliance with Earlier Injunctions on Cookie Banners' *Hugo Lami* gives us an overview of this decision noting, however, that it will not prejudice further investigations in the future. In contrast to the mostly negative outcome of decisions from the perspective of data processing companies that are usually reported on in our section, the efforts of a data processor of this size establishing compliance – and being confirmed by the supervisory authority – can be regarded as 'good news' for a change.

What can be seen as rather 'bad news' due to their recurrent nature, are the German attempts to introduce data retention obligations. *Sven Braun* gives us an insight into this never-ending (?) story[24] in his report 'German Data Retention Law Nullified, Again'. Once again a legislative measure in this regard did not pass judicial scrutiny. The second attempt by Germany to introduce and regulate data retention in the telecommunications sector, aiming at addressing requirements established by the German Federal Constitutional Court and the CJEU in earlier decisions, has once again been struck down by the German Federal Administrative Court. The court found that the attempt falls short of adequately justifying the interference with fundamental rights by failing to clarify the intended purpose and not sufficiently limiting it. As this was hardly surprising after the previous decision of the CJEU[25], there are already considerations about a third attempt, which mainly revolve around the so-called 'quick-freeze' method. Depending on the outcome there might be another report on this in the future. The same applies for the in view of individuals in Lithuania in light of the data retention judgment of the CJEU from 7 September 2023.[26]

Besides data retention, the issue of health data seems to be very present before the CJEU nowadays. For example, this concerns questions of the lawfulness of and necessity for online publication of personal data of a person who has acted in breach of anti-doping rules and whether anti-doping rules concern data concerning health (according to the Advocate General unlawful processing of, indeed, health data under Article 9 GDPR)[27] or questions related to EU digital Covid certificates in mobile applications[28]. The latter documents that although the Covid containment measures are now hardly noticeable in our lives, their review from a data protection perspective is still ongoing. How the lessons learned from the Corona pandemic continue to be relevant, regardless of the disease, is illustrated by *Giorgia Bincoletta's* contribution. While in the last issue she already re-

22 Order of the President of the Court of Justice of 12 October 2023, T-553/23 <https://rb.gy/7s53yz>.

23 The decision and a summary is available at <https://rb.gy/w7pyeh >.

24 See already Sebastian Schweda, 'Parliament Adopts New Data Retention Law' (2015) 1(3) EDPL 223-226; Christina Etteldorf, 'Higher Administrative Court of North Rhine Westphalia Declares German Data Retention Law Violates EU Law' (2017) 3(3) EDPL 394-398.

25 Joined Cases C-793/19 and C-794/19 *SpaceNet and Telekom* [2022] ECLI:EU:C:2022:854.

26 Case C-162/22 *Lietuvos Respublikos generalinė prokuratūra* [2023] ECLI:EU:C:2023:631.

27 Case C-115/22 *NADA and Others* [2023] ECLI:EU:C:2023:676.

28 Case C-659/22 *Ministerstvo zdravotnictví (Application mobile Covid-19)* [2023] ECLI:EU:C:2023:745.

ported on a decision by the Italian supervisory authority in the context of disclosure of Covid health data, it is now about the Italian vaccination strategy on monkeypox. In the course of vaccination campaigns, citizens seeking to be inocculated were asked partly very intimate questions, for example about their sexual practices (in the context of infection risks). The Italian DPA issued a reprimand to the National Institute for Infectious Diseases finding their approach to be incompliant with Articles 5 and 13 of the GDPR. Bincoletta's report 'Italian DPA on the vaccine booking procedure: Intimate Questions Possible, but Information Obligations still Key' discusses the decision in light of the balancing of public health interest on the one hand and individuals' data protection rights on the other.

This overview of our Reports Section hopefully demonstrates not only the relevance of the topics covered, but also their timeliness – both of which we can provide thanks to our Country and topical Experts. We, the Editors together with the Institute of European Media Law (EMR), hope to meet your interest with these reports and are looking forward to receiving suggestions for reports on national and European developments in the future that you would like to see in this section: 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>.