



**+++ Proposal on EU Data Act +++ EUR 100 million fine against Google confirmed +++ Google Analytics unlawful +++
Google Fonts only with consent +++ TCF consent mechanism insufficient +++
Managing director personally liable for GDPR infringements +++**

1. Changes in Legislation

+++ EU COMMISSION PRESENTS DRAFT DATA ACT +++

The EU Commission has presented the first draft of the Data Act. Once it enters into force, the Data Act will apply directly in the EU Member States and will form the basic legal framework for the exchange of and access to data. It also applies to non-personal data. The Act provides a right of access to and use of data by the respective user and public bodies in specific circumstances. It also prohibits the use of certain clauses in (civil law) data sharing contracts. Some providers (including cloud services providers) must fulfil new interoperability requirements and protect data against access from third countries. The Data Act will also make it easier for customers to change between providers, including through new rules on notice periods. Fines of up to EUR 20 million or 4 % of the worldwide group turnover can be imposed for infringements. The Data Act will have a significant impact on the business models of data-driven companies.

[To the draft bill of the Data Act \(dated 23 February 2022\).](#)

2. Case Law

+++ GERMAN FEDERAL SUPREME COURT: NO OBLIGATION TO PROVIDE REAL NAME ON FACEBOOK +++

The Federal Supreme Court held that the obligation to use the real name, as foreseen in Facebook's general terms and conditions, constitutes unreasonable discrimination and is thus invalid. This applies at least to those who accepted the terms before the GDPR came into force on 25 May 2018, as was the case for the plaintiffs. As part of a balancing of interests, the court ruled that Facebook can make access to the platform dependent on the provision of a real name (e.g., when registering). However, if users subsequently want to use the platform under an alias to protect their real name from the public, it is reasonable for Facebook to allow them to do so. The legal situation may differ after GDPR came into force, since the EU legislators decided during the legislative procedure not to include a right to use an alias in the GDPR. This decision is likely to be relevant for the assessment of Facebook's current terms and conditions.

[To the press release of the Federal Supreme Court \(dated 27 January 2022 in Cases III ZR 3/21 und III ZR 4/21, German\)](#)

+++ CONSEIL D'ÉTAT CONFIRMS FINES OF EUR 100 MILLION AGAINST GOOGLE +++

The highest French administrative court (*Conseil d'État*) held that the imposition of fines amounting to EUR 100 million against Google LLC and Google Ireland Limited for inadequate cookie banners in December 2020 was lawful (see [BB Privacy Ticker, January 2021](#)). According to the court, the French data protection authority (CNIL) and not the Irish authority was competent to impose the fines. The "one-stop shop" principle anchored in the GDPR (Article 56) did not apply as a violation of a national data protection law implementing the ePrivacy Directive, and not a violation of the GDPR, was sanctioned. Following this view, cookie violations are subject to the jurisdiction of national data protection authorities, even if a lead supervisory authority is otherwise competent for a company in the EU. As a result, various Member States may impose fines in parallel for cookie infringements. In Germany, the ePrivacy Directive was most recently implemented by the Telecommunications Telemedia Data Protection Act (TTDSG) (see [AB Privacy Ticker, December 2021](#)).

[To the press release of the court \(dated 28 January 2022, French\)](#)

+++ HIGHER ADMINISTRATIVE COURT IN KASSEL OVERRULES COOKIEBOT JUDGMENT +++

The Higher Administrative Court in Kassel overturned the controversial judgment of the Administrative Court of Wiesbaden, by which a university was prohibited from using the widespread cookie banner service "Cookiebot". The Wiesbaden court decided in summary proceedings that the transfer of IP addresses to a company registered in the USA was unlawful considering the *Schrems-II* Judgment (see [AB Privacy Ticker, December 2021](#)). The Higher Administrative Court in Kassel held that complex legal issues related to data transfer could not properly be answered in summary judgment. In addition, there was no urgency. The court did not make any statements about the legality of the transfer of IP addresses to the USA.

[To the judgment of the Higher Administrative Court of Kassel \(dated 17 January 2022, 10 B 2486/21, German\)](#)

+++ HIGHER REGIONAL COURT IN DRESDEN: MANAGING DIRECTOR PERSONALLY LIABLE FOR GDPR INFRINGEMENTS +++

In a controversial judgment, the Higher Regional Court of Dresden held that the managing director of a limited liability company (GmbH) was personally liable for a GDPR infringement, together with the data processing firm (joint debtors). The data subject was awarded damages under the GDPR amounting to EUR 5,000, which he can now claim directly from the managing director. In the view of the court, the managing director ordered the unlawful data processing (here the hiring of an investigator) and is a separate controller within the meaning of the GDPR. In contrast to other employees and staff, the director is not required to follow directions. The court's reasoning seems tenuous. Whether it will be followed remains to be seen.

[To the judgment of the Higher Regional Court in Dresden \(dated 30 November 2021, 4 U 1158/21, German\)](#)

+++ REGIONAL COURT OF WIESBADEN: NO INJUNCTIVE RELIEF FOR INFRINGEMENT OF GDPR +++

The Regional Court in Wiesbaden ruled that a data subject does not have a right to injunctive relief against the company responsible for (alleged) unlawful data processing. The plaintiff ordered from an online store on the website, on which various services (e.g., Google Analytics, Google Fonts, YouTube and Facebook) were allegedly unlawfully integrated. The plaintiff sought injunctive relief against the use of these services.

The Court dismissed the claim. The GDPR did not foresee such injunctive relief. The civil law norms (in particular Section 1004 of the German Civil Code, *BGB*) did not apply analogously because the GDPR provides a conclusive system of sanctions and, in this respect, has a “blocking effect”. This judgment is not in line with other court decisions (see for example Regional Court of Munich I, below).

[To the judgment of the Regional Court of Wiesbaden \(dated 22 January 2022, 10 O 14/21, German\)](#)

+++ REGIONAL COURT OF MUNICH I: INTEGRATING GOOGLE FONTS IS UNLAWFUL WITHOUT CONSENT +++

The Regional Court of Munich held that the use of Google Fonts on a website is not compliant with the GDPR if the IP address is automatically passed on to Google without consent. In the case in question, Google Fonts was not hosted on the website operator’s server, but on the Google servers. As a result, when a user accessed the website, the IP address was automatically shared with Google. IP addresses are considered personal data under the GDPR. The court stated that there were no legitimate interests for the transfer of this information to Google (Article 6 (1) (f) GDPR). The court found this to be an infringement of the plaintiff’s general right of privacy and ordered the defendant to cease the transfer of data.

[To the judgment of the Regional Court of Munich I \(dated 20 January 2022, 3 O 17493/20, German\)](#)

+++ REGIONAL COURT OF HANNOVER: CREDIT AGENCY MUST PAY EUR 5,000 IN DAMAGES FOR FALSE NEGATIVE ENTRY +++

The Regional Court of Hannover ordered a credit agency to pay EUR 5,000 in compensation under Article 82 GDPR for an unauthorised negative entry. The credit agency could not prove that the plaintiff had been sent two written reminder notices (Section 31 (2) No. 4a of the Federal Data Protection Act, BDSG), so the overdue payment of a telephone invoice should not have been taken into account for their credit rating. When setting the amount of the compensation, the court stated that the creditworthiness was sensitive data that could affect the plaintiff’s professional activities and their creditworthiness in their private life, too. The defendant should also have had doubts about the legality of its actions after it received information from the plaintiff about the unlawful conditions.

[To the judgment of the Regional Court of Hannover \(dated 14 February 2022, 13 O 129/21, German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ CENTRAL MECHANISM FOR CONSENT IN COOKIE BANNER (TCF) DOES NOT COMPLY WITH THE GDPR +++

According to a decision of the Belgian data protection authority, *Autorité de protection des données* (APD), in its current form, the widely used consent mechanism Transparency & Consent Framework (TCF) from the Interactive Advertising Bureau Europe (IAB Europe) infringes the GDPR in various respects. A fine of EUR 250,000 was imposed on the company. The TCF manages consent signals and is a central switch point behind cookie banners and the playing of personalised online adverts. According to the APD, IAB Europe was the data controller for the TCF mechanism. The IAB had failed to establish a legal basis for processing within the meaning of the GDPR and there was insufficient transparency for consent. The decision applies for the whole EU as the APD was the lead authority in this case and is responsible for IAB Europe throughout the EU. IAB Europe intends to appeal this decision in court.

[To the press release of the APD \(of 2 February 2022\)](#)

[To the decision of the APD \(of 2 February 2022\)](#)

+++ FRENCH DATA PROTECTION AUTHORITY: USE OF GOOGLE ANALYTICS IS UNLAWFUL +++

The French data protection authority, *Commission Nationale de l'Informatique et des Libertés* (CNIL) stated in a press release that the use of Google Analytics was unlawful in light of the transfer of data to the USA. Google was taking additional measures to secure its data in the USA. However, these measures couldn't effectively prevent the US authorities from accessing the data. The transfer of data infringed Article 44 GDPR. Recently, the Austrian data protection authority also took this position (see [AB Privacy Ticker, January 2022](#)). In the period relevant for the decision, Google Analytics was still operated by the US Google LLC. In the meantime, the analytics tool is offered by a European Google subsidiary in the EU (Google Ireland Limited). The issue of the transfer of data to the USA, therefore, needs to be reassessed.

[To the press release of the CNIL \(dated 10 February 2022, French\)](#)

+++ ITALIAN DATA PROTECTION AUTHORITY: ADVERTISERS LIABLE FOR INFRINGEMENTS OF GDPR BY ADVERTISING AGENCIES +++

The Italian data protection authority, Garante per la Protezione dei Dati Personali (GPDP) is taking a stronger stance against advertisers (clients of advertising agencies) that infringe GDPR provisions. In the cases in question, unchecked lists of contact details, among others, were used for direct marketing measures (to send SMS), while the GDPR responsibilities between the principal and the marketing agency were not clearly established in a contract. The advertisers argued that they were not the controller within the meaning of the GDPR. The GPDP took a different view. In this context, the GPDP stated that principals who involve third parties for the sending of (direct) marketing campaigns must generally check whether the data processing in question is legally permissible and whether the data subjects have been sufficiently informed about the data processing. In this respect, the advertisers were liable for any data protection infringements of their advertising agency.

[To the decision of the GPDP \(dated 25 November 2021, Italian\)](#)

4. Opinions

+++ EDPB PUBLISHES GUIDELINES ON GDPR RIGHT OF ACCESS +++

The European Data Protection Board (EDPB) published draft of guidelines on the right of access under the GDPR. These guidelines interpret the right of access (Art. 15 GDPR) quite broadly. The grounds for refusing access to information should only exist in limited cases; the large amount of time needed for the controller to process the request, or the irrelevant motives of the data subject are insufficient. Regarding the right to obtain a copy (Art. 15 (3) of the GDPR), controllers may first ask for a specification of the request where the request covers a large mass of data. The EDPB also provides examples to demonstrate the intervals at which data subjects can use their right to request access to data from companies. The guidelines are now available for comment.

[To the Guidelines of the EDPB \(dated 18 January 2022\)](#)

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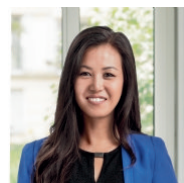
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