

Data Privacy and Cybersecurity

US Tech Companies Under Increased Scrutiny from EU Data Protection Authorities

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By the close of 2021, EU data protection authorities (“DPA”) had initiated investigations into a number of US tech companies operating in Europe and further investigations are set to continue. In a recent case concerning Google and Facebook, the French DPA found that existing cookie consent mechanisms violated GDPR and significant fines were issued as a result. In another recent notable decision, the Austrian DPA scrutinised the legality of data transfers from an EU website to Google in the US, through the use of Google Analytics; depending on the reaction of other member states, this may have wide-ranging consequences for organisations using Google Analytics across the EU.

Cookie Consent Forms

On 31 December 2021, the French DPA (the CNIL) fined Google LLC and Google Ireland Limited €150 million, and Facebook Ireland Limited €60 million (approximately \$170 million and \$68 million) for failing to comply with cookie consent requirements set out in Article 82 of the French Data Protection Act. The CNIL has stated that there was no easy way to refuse the deposit of cookies without requiring several clicks with respect to Google and that the button to reject cookies on Facebook’s site was at the bottom of the second page that a user had to click through, and was entitled ‘Accept Cookies’. On the other hand, users could click a single button to easily and immediately accept all cookies on both sites. As a result, the CNIL [found](#) “the sites do not implement an equivalent solution (button or other) enabling the user to refuse the deposit of cookies equally easily.”^[1]

Whilst Google and Facebook did provide mechanisms for users to refuse cookies, the CNIL considered that freedom of consent rights are not automatically satisfied simply because the user is technically able to consent. Rather, the CNIL stated that the options should be equally accessible and making one more difficult than the other impedes free consent.

The CNIL claimed that the large fines were justified on the basis of the number of people affected and the size of profits indirectly generated from those cookies. In addition to the substantial fines, Google and Facebook each face an additional daily fine of €100,000 if they do not implement what the CNIL determines is a compliant consent system within three months. The scale at which US tech companies operate and the levels of profit made by their use of EU residents’ personal data make them particularly vulnerable to scrutiny by European DPAs.

This is not the first time the CNIL has demonstrated interest in this topic. In 2020, France implemented a requirement for websites operating in France to keep a register of users who refuse to accept cookies for at least six months.^[2] It would be prudent for prominent platforms, even those operating outside of France, to revisit their cookie consent practices to ensure easy opt-out mechanisms are available.

Data Transfers using Google Analytics

The Austrian decision regarding Google Analytics’ international transfers of personal data is the first in what may become a series of investigations initiated by the NGO ‘None of Your Business’ (“*noyb*”). The honorary chairman of *noyb* is Max Schrems, the individual who instigated the complaint that ultimately

resulted in the *Schrems II* judgment in which the Court of Justice of the European Union (“CJEU”) held that personal data can only be transferred from the EU to the US where an adequate level of protection can be ensured. For a summary of the *Schrems II* judgment please see our earlier article [here](#).

In August 2020, *noyb* filed 101 complaints against a number of organisations in the EU that use Google and Facebook functions on their websites. Each complaint considers compliance with international data transfer requirements and the application of the *Schrems II* judgment.

Google Analytics is widely used by websites all around the world to track and report website traffic through the data collected with cookies. However, on 22 December 2021 the Austrian DPA found that the use of Google Analytics by a medical news company, NetDoktor, violated the GDPR. The complaint against Google LLC was rejected as Google had not been involved in the disclosure or transfer of such data. However, the Austrian DPA reserved its right to initiate an investigation into Google’s further data processing activities, *ex officio*.

The Austrian DPA found that the information transferred to Google Analytics in the US – unique identifiers stored within `_ga` and `_gid` cookies – is not anonymous because, taken together, the information is enough to distinguish individual users. Google’s anonymisation and encryption processes were also found to be insufficient to protect EU users; as per EDPB Recommendations 01/2020, encryption was considered irrelevant because Google held the key and could de-encrypt the data in the US.

To protect EU personal data, the parties had implemented Standard Contractual Clauses (“SCC”) (based on legacy EU Standard Contractual Clauses (v.2010/87/EU)) and supplementary measures (based on the EDPB Recommendations 01/2020). Nevertheless, these were found to provide inadequate levels of protection. Supplementary measures should address any specific deficiencies identified in the recipient country regarding the protection of personal data but it was held that the measures in the parties’ agreements did not prevent US authorities from accessing personal data received by Google or from conducting surveillance.

Separately and in response to another complaint filed by *noyb*, the European Data Protection Supervisor (“EDPS”) sanctioned the European Parliament for a violation of data protection laws on its COVID testing website. As was the case above, the European Parliament was found to have transferred personal data from the EU to the US using Google Analytics and Stripe, in contravention of the *Schrems II* ruling. The EDPS also found failures in the European Parliament’s data protection notice, which referred to a wrong legal basis in breach of transparency requirements. No fine was issued but the European Parliament was reprimanded and ordered to update its data protection notice within one month of the decision.

These decisions are the first in a series of complaints initiated by *noyb* and provide an insight into how the outstanding complaints might be decided.

Review of Data Protection Practices

Following the *Schrems II* decision, it was expected that US providers and EU data exporters would revisit their international transfer mechanisms to ensure adequate protection of EU personal data. Absent a formal replacement of the Privacy Shield, EU regulators appear to be intent on enforcing this ruling and strict compliance will be necessary to avoid substantial fines.

Organisations that transfer EU personal data abroad to countries not deemed adequate by the European Commission should consider whether their existing policies and data processing agreements comply with local data protection laws. If a new data sharing deal is not reached between EU and US negotiators, reviewing existing privacy policies will not be enough; a practical and critical review of existing practices will be necessary to understand whether an organisation could withstand EU regulatory scrutiny and sophisticated safeguards may be needed to ensure protection of EU personal data. As part of this exercise, organisations should refer to the EDPB Recommendations,^[3] which were cited by the Austrian DPA.

Organisations should also be mindful of their extant obligations, including the requirement to implement the new SCCs adopted by the European Commission by 27 December 2022, including for existing contracts executed prior to 27 September 2021. Depending on the number and complexity of the contracts that will need updating, this could be a time-consuming exercise. Organisations will need to start taking steps soon, if they haven't already, to identify which contracts will need updating.

[1] Press Release, *Cookies: GOOGLE fined 150 million euros*, CNIL.fr, 6 Jan. 2022, cnil.fr/en/cookies-google-fined-150-million-euros.

[2] legifrance.gouv.fr/download/pdf?id=e6bxMYSEEHfqF4oOYmAHPYpCcGT-rcdb8-ILZuCsKkM= (in the original French language).

[3] edpb.europa.eu/system/files/202106/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf

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