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CURRENT DEVELOPMENTS ON DATA PROTECTION REGARDING THE USE OF GOOGLE ANALYTICS

Information on data protection I February 2022

Introduction

In Germany, many companies make extensive use of the technical possibilities for evaluating the behavior of users on their own online sites. Alphabet/Google has the largest share in the market for analysis tools of this type with its Google Analytics service. With the help of Google Analytics, website operators can create detailed reports on the user behavior of their visitors; at the same time, however, the corresponding information is also available to Google as the operator of the service.

In the course of a complaint procedure, the Austrian data protection authority has now determined that website operators cannot use Google Analytics, at least in its version of August 14, 2020, and remain compliant with the General Data Protection Regulation (GDPR). The background and consequences of this decision are presented below, particularly with regard to transferability for the situation in Germany.

Facts of the case

The Austrian authority's decision is based on a complaint filed by the data protection organization noyb, which was founded by Austrian lawyer and data protection activist Max Schrems. The complaint was directed against an Austrian publisher that had integrated Google Analytics on its website in 2020 and against Google LLC as the operator of Google Analytics.

Since the end of April 2021, Google Ireland Limited has been offering both the free and paid versions of Google Analytics. In the case in question, the website operator used the free version, which at the time was still provided by Google LLC based in the USA. The evaluations made possible by Google Analytics were used by the publisher to present the content of its website in accordance with general interest in such a way that the topics attracting the greatest interest were placed in the foreground and the presentation was adjusted depending on the currency of a specific topic.

As a safeguard, the publisher had concluded with Google LLC its „Order Processing Terms and Conditions for Google Advertising Products" in the version of August 12, 2020, as well as standard data protection clauses in the version of the implementing decision of the European Commission 2010/87/EU of February 5, 2010. In addition, further contractual, organizational and technical measures were taken. However, the „IP anonymization function" of Google Analytics was not correctly implemented on the publisher's website, at least not on August 14, 2020, the date when the complainant accessed the website. Consents to the transfer of data to a third country pursuant to Article 49 of the GDPR were not obtained by the publisher.

The complainant submitted that during his visit to the publisher's website on August 14, 2020, the publisher transmitted his personal data to Google LLC and thus to the USA. During the visit, the complainant had been logged into his Google account. However, in the opinion of the complainant, the requirements for the data transfer pursuant to Articles 44 et seq. of the GDPR had not been met for the data transfer, since the publisher, as responsible body, had not been able to ensure adequate protection of the personal data during the transfer. In the opinion of the complainant, the data transfer to the USA was therefore unlawful.

The Austrian data protection authority confirmed the facts of the case, determining that the publisher, by implementing Google Analytics, did indeed transmit personal data of the complainant, including at least unique user identification numbers, the IP address and browser parameters, to Google LLC on August 14, 2020. When calling up a website that uses Google Analytics, an identification number is assigned to the browser of the visitor. Visitors could be individualized and treated differently based on this identification number. In addition, it is possible to combine this identification number with further information, such as the IP address or certain browser data. This combination creates a unique digital footprint that can be assigned to the browser user. If a visitor is logged into his Google account while visiting a website on which Google Analytics is implemented, Google has the technical possibility to assign the information about the website visit to the corresponding Google account.

Decision of the Austrian data protection authority

In its decision, the Austrian data protection authority determined that the website operator in question cannot use the Google Analytics tool in compliance with the GDPR, at least on the basis of the facts established in the decision (decision of December 22, 2021 – Ref. D155.027: 2021-0.586.257). The publisher was found to be in violation of Article 44 of the GDPR. In general, the authority stated that, in its opinion, the Google Analytics tool, at least in the version of August 14, 2020, cannot be used in accordance with the requirements of Chapter V of the GDPR.

The Austrian data protection authority bases its argumentation primarily on the „Schrems II" judgment of the European Court of Jus-

tice (ECJ, judgment of July 16, 2020 – Ref. C-311/18), which we reported on in our data protection newsletter in August 2020. In the ruling, the ECJ declared the EU-US Privacy Shield to be invalid and specified the requirements for the use of standard data protection clauses to the effect that data controllers must check on a case-by-case basis whether an adequate level of protection actually exists for data transfers to third countries and, if necessary, take additional protective measures. According to the GDPR, a transfer of personal data to third countries is only permissible if it can be ensured prior to the transfer that a level of data protection comparable to the level of data protection in the EU is guaranteed in the destination country. In its ruling, the ECJ criticized the level of data protection in the U.S., among other things due to national legislation that provides opportunities to U.S. authorities for far-reaching access to American companies' data.

Following the case law of the ECJ, the authority found that the mere inclusion of standard data protection clauses in the agreement was not sufficient in the case at hand, as Google LLC was subject to surveillance by the U.S. intelligence services, in particular under Section 702 of the U.S. Foreign Intelligence Surveillance Act (FISA). The standard data protection clauses could not provide guarantees that go beyond the contractual obligation to ensure the level of protection required by EU law. Additional safeguards were therefore necessary to close precisely those legal protection gaps that result from a case-by-case examination of the level of data protection. The measures implemented in the specific case, in addition to the standard data protection clauses, were not effective in the view of the authority, as they did not eliminate the possibilities for monitoring and access by U.S. intelligence services identified by the ECJ. Nor could any other instrument from Chapter V of the GDPR be used for the specific data transfer.

In the opinion of the authority, Google LLC is not in violation of Article 44 of the GDPR, since the requirements of Chapter V of the GDPR must be complied with by the data exporter, but not by the data importer. The partial decision has not yet ruled on Google LLC's alleged violations of Articles 5 et seq. in conjunction with Article 28(3)(a) and Article 29 of the GDPR; in the opinion of the authority, further investigative steps are first necessary in this regard.

The decision of the authority is not yet legally binding.

Statements of other organizations

Since the ECJ ruling „Schrems II", there have been a large number of opinions on the transfer of data to third countries, some of which explicitly refer to the use of tracking tools or specifically to Google Analytics. Selected statements by various organizations that are currently regularly cited in connection with the decision of the Austrian data protection authority are briefly described below.

On December 20, 2021, the German Conference of the Independent Federal and State Data Protection Authorities (Datenschutzkonferenz, DSK) published an update of its guidance for telemedia providers in response to the entry into force of the German Telecommunications Telemedia Data Protection Act (TTDSG). The DSK's guidance also describes how the adequacy of the level of data protection in the case of a third-party transfer must be reviewed on a case-by-case basis, and that additional protective measures must be taken if necessary. The DSK comments that, in its opinion, it is often not possible to take sufficient supplementary measures, particularly in connection with the integration of third-party content and the use of tracking services. In this case, the services in question may not be used, i.e., they may not be integrated into the website. Furthermore, personal data processed in connection with the regular tracking of user behavior on websites or in apps could not on principle be transferred to a third country on the basis of consent pursuant to Article 49(1)(a) of the GDPR. The scope and regularity of such transfers would regularly contradict the character of Article 49 of the GDPR as an exceptional provision and the requirements of Article 44 p. 2 of the GDPR. In this regard, the Commission refers to the Guidelines 2/2018 published by the European Data Protection Authority (EDSA) on derogations of Article 49 of Regulation 2016/679. However, the Commission's guidance does not explicitly assume that the use of Google Analytics is generally contrary to data protection.

In a recent decision, the European Data Protection Supervisor has found that the European Parliament is in breach of the GDPR for using Google Analytics on one of its websites, among other reasons (decision of January 5, 2022 - Case 2020-1013). Specifically, the case concerns a website of the Parliament on which Covid-19 tests can be ordered. In his reasoning, the European Data Protection Supervisor also points out that the integration of Google Analytics on the website transfers personal data to the USA, whereby the mere conclusion of standard data protection clauses cannot replace an individual case-by-case examination. If necessary, additional contractual, technical and organizational measures must be taken to ensure an appropriate level of protection. In the specific case, however, no such level of protection had been guaranteed.

Conclusion and recommendations for action

In its decision, the Austrian data protection authority determined that the website operator concerned in the specific case cannot use the Google Analytics tool in compliance with the GDPR, at least on the basis of the facts established in the decision. In general, the authority comes to the conclusion that, in its opinion, the Google Analytics tool, at least in the version of August 14, 2020, cannot be used in compliance with the provisions of Chapter V of the GDPR.

It should be noted that the German data protection supervisory authorities have so far at least not expressly issued a general ban on Google Analytics. Nevertheless, the fundamental concerns regarding data transfers to the USA naturally also exist in Germany. The provision of Google Analytics by Google Ireland Limited cannot fully address these concerns, as data transfer to the USA still cannot be ruled out.

In general, it is therefore recommended that German companies transferring data to third countries take into account the requirements of the ECJ in the „Schrems II" ruling and, if necessary, take additional protective measures to ensure an adequate level of protection for the data transfer. It is important to conduct a case-by-case review in order to identify gaps in legal protection in the specific recipient country and to close precisely these gaps through additional measures. In addition to concluding the standard data protection clauses, which have now been updated by the European Commission, additional measures can include, for example, encryption and anonymization techniques that exclude data access by the non-European data importer and thus also by the authorities in third countries. If even additional protective measures cannot guarantee an adequate level of data protection, any third-country transfer should be avoided if possible, for example by using alternative European providers.

However, the transfer of data to third countries when using Google Analytics and similar tracking tools is also an issue that affects not only website operators and users, but also major providers such as Google. It is therefore advisable for companies to carefully observe

further developments on this topic. It remains to be seen whether the authority's decision will become legally binding or whether this will be followed by legal proceedings. It is also possible that Google will react by making changes to the data processing in the context of the use of Google Analytics, thus possibly addressing the problems of the third-country transfer. The reactions of the German supervisory authorities should also be observed.

When evaluating the decision from Austria, it is important to note above all that the decision does not specifically affect the processes at Google Analytics, but that the decisive factor was solely the US reference due to the assignment of the service to Google LLC. Therefore, no statement has been made as to how analytics services can be used in a data protection-compliant manner, if at all.

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