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Data Protection Commissioner: Google Analytics and Similar Services Only to Be Used With Consent of Website Visitors

Website operators require the consent of their website visitors if third party services are integrated into those websites whenever the provider of those services also uses the personal data obtained this way for its own purposes. One of those providers is Google Analytics, as the Berlin Commissioner for Data Protection and Freedom of Information, Maja Smoltczyk, emphasises.

This spring, the German supervisory authorities published a Guideline for Providers of Tele-Media (“Orientierungshilfe für Anbieter von Telemedien”¹) and laid out in detail the conditions under which tracking of website visitors is permitted. Nevertheless, the Berlin Commissioner for Data Protection continues to receive a large number of complaints about websites that disregard the guidance given.

Website analytics tools that pass on data on user’s behaviour to third parties may only be used on the basis of user consent whenever those third parties also use the data for their own purposes. The same applies if the behaviour of website visitors can be traced and recorded in detail, e.g. if keystrokes, mouse or swiping movements are recorded. On the other hand, it may be considered permissible for a website operator to measure the number of visitors that reach a given website, or page, and to collect data about the type of device they use and their language settings for this purpose, even if this is done by a processor. However, a processor may not use the data for his own purposes, as the provider of Google Analytics now reserves the right to do.

Maja Smoltczyk:

"When integrating Google Analytics, many website operators refer to old publications that have been obsolete for a long time and were withdrawn due to continuous product changes, such as the old “Information for Website Operators in Berlin who use Google Analytics”. In recent years, the Google Analytics product has been changed in a way that, in its current form, it can no longer be considered exclusively as a processing operation on behalf of a controller. Rather, Google grants itself the right to use the data about website visitors for its own purposes. The integration of Google Analytics therefore requires consent in a way that meets the requirements of the General Data Protection Regulation (GDPR). Most of the so-called cookie banners that we see in practice do not meet these legal requirements.

¹ https://www.datenschutzkonferenz-online.de/media/oh/20190405_oh_tmq.pdf.

Website operators in Berlin should immediately check their website for third-party content and tracking mechanisms. Anyone using features that require consent must either obtain consent or remove the feature. Consent is only effective, if the user gives his or her unambiguous and informed consent to the specific data processing. A so-called cookie banner, which assumes that mere further surfing on the website or something similar means consent, is insufficient. The same applies to ticked boxes that need to be unchecked to withhold consent. This assessment of the GDPR is definite, and the European Court of Justice expressly confirmed it in its judgement of 1st October 2019.²"

What constitutes an effective consent is defined in Article 4(11) of the GDPR. According to this definition, "consent" of the data subject means "any freely given, specific, informed and unambiguous indication of the data subjects wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her". According to recital 32 of the GDPR, silence, ticked boxes or inactivity on the part of the data subject are therefore not to be regarded as consent.

Maja Smolczyk:

"We have already received numerous complaints and indications about the inadmissible integration of third-party content. We are investigating these entries and have already initiated many proceedings against companies. This number will increase considerably in the future. Website operators who illegally integrate third-party content must not only expect to be given orders by the supervisory authority, but should also take into account that the GDPR threatens to impose large fines for such violations."

² ECJ, October 1st 2019, C-673/17 – „Planet49“:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=218462&pageIndex=0&doclang=DE&mode=lst&dire=&occ=first&part=1&cid=497860>