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GOOGLE ANALYTICS: IS THERE REALLY UNIFORMITY IN THE CRITERIA OF EU DPAs?

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Google Analytics (GA) has become the most widely used website analysis and tracking tool in the world to analyse and collect statistical information on user interactions on websites by assigning each user a unique identifier, all using so-called "cookies". This tool allows information to be collected on how the visitor interacts with the website, the time of the visit, browser, operating system, etc.

This tool has been in the sights of the Data Protection Authorities of the European Economic Area (EEA) since the pronouncement of the Court of Justice of the European Union in case C-311/18, better known as the "Schrems II" judgment, which represented a new setback for data movements between the EEA and the US insofar as it again implied the annulment of the adequacy mechanism, the "Privacy Shield", suffering the same fate as its predecessor, the "Safe Harbor Agreement". The main stumbling blocks observed by the CJEU to rule out compliance with the GDPR security standards are constituted by the Foreign Intelligence Surveillance Act (FISA) and US Executive Order 12.333.

In this regard, since January 2022 there has been a constant trickle of pronouncements from different Data Protection Agencies following the complaints filed by the NGO NOYB, analysing the case of GA and warning of the risks involved.

One of the first authorities to speak out was the Bavarian DPA, which ruled in January 2022 that the use of Google Fonts involved the transmission of the user's dynamic IP address to the US. In similar terms, the French DPA (CNIL) ruled in February 2022 that the use of Google's tool involves the transmission of IP addresses, online identifiers and browser data without implementing additional measures.

The Liechtenstein and Austrian authorities in March and April respectively insisted that with Schrems II the legal basis for transferring data to the USA disappears and warned that the IP address anonymisation process was carried out after Google had received the IP address and could therefore not be considered effective .

In June 2022 the French DPA published a Q&A document in which it stated, inter alia:

- That the use of GA always presupposes the realisation of an international transfer to the US which lacks a legitimate basis, the use of SCC's not being sufficient either, a conclusion also reached in July by the German DPA Baden-Württemberg.
- That, as already mentioned by other authorities, the anonymisation process was not carried out prior to the transfer and that the encryption mechanisms were not sufficiently acceptable.

In addition, the CNIL proposes as alternative measures the use of a "reverse proxy" to avoid direct contact between the user and Google's servers or the carrying out of the corresponding evaluations, while warning that explicit consent is only possible in the case of non-systematic transfers.

In September 2022, the Danish DPA stated that GA could not be used without implementing some additional measures and resolving some issues. Among others, it understood that it was not possible to configure GA in a way that would not result in a transfer to the US, that even the minimum configuration collected identifiers, interactions and time-location that can be considered personal data and, like its counterparts, insisted on the insufficiency of encryption and pseudonymisation methods, proposing in the latter case the use of the "reverse proxy" as recommended by the CNIL. In addition, and unlike the Italian DPA, which in June banned the use of GA, it acknowledged that its use is not prohibited, but compliance with data protection regulations must be verified, and ruled out explicit consent as a legitimate basis.

More recently, in December last year, the Spanish Data Protection Agency (AEPD) finally ruled on the use of GA, and, to everyone's surprise, it did not do so in the same sense as the rest of the European authorities. The Spanish authority agreed to close the proceedings as it considered the following facts:

- The defendant used the free version of GA from September 2019 until December 2020, without using any advanced functionality.
- As a public body, the defendant did not use GA to obtain any commercial benefit.
- The only information transferred was the random identifier that GA assigns to each user, so it was not possible to identify them.
- It did not process any IP addresses.

The AEPD concluded that there is no indication of an infringement of the GDPR and decided not to further investigate or sanction the respondent or Google.

In its decision, the AEPD argued that the defendant did not process data for the purpose of identifying users of the website and that it stopped using GA shortly after becoming aware of the Schrems II judgment.

With this decision, the AEPD loses, in a way, a valuable opportunity to analyse GA's case in greater detail in order to reach similar conclusions to those of the other authorities, bearing in mind that, in the present case, it has not addressed the merits of the case, but has limited itself to a more superficial review.

To conclude, it is worth mentioning that in October 2022, US President Joe Biden signed Executive Order 14.086 on Enhancing Safeguards for US Signals Intelligence Activities and Fact Sheet, National Security Memorandum on Partial Repeal of Presidential Policy Directive 28, the European Commission has been working on a new adequacy mechanism to re-enable data transfers between the EEA and the US. In this regard, in December 2022, the Commission published the first draft of the Draft Adequacy Decision for the EU-EEA data privacy framework. The US is awaiting the opinions of the ECDC and the European Parliament which are expected to be published in spring of this year.

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