

Summary Final Decision Art 60

Complaint

Violation identified, No sanction,

EDPBI:AT:OSS:D:2022:357

Background information

Date of final decision:	22 April 2022
Date of broadcast:	22 April 2022
LSA:	AT
CSAs:	DEBW, DEBE, DEHE, DERP, DENI, ES
Legal Reference(s):	Article 44 (General principle for transfers), Article 45 (Transfers with an adequacy decision), Article 46 (Transfers by way of appropriate safeguards), Article 49 (Derogations for specific situations)
Decision:	Violation identified, No sanction
Key words:	International transfer, Profiling, Social media, Advertising, Cookies.

Summary of the Decision

Origin of the case

The controller provides an online comparison portal for consumer products in several Member States and is registered in Austria. On 18 August 2020, the LSA received a complaint against both the controller and the processor (Google LLC) concerning the transfer of the complainant's personal data to the United States of America (US). The personal data were collected during the complainant's visit to the controller's website incorporating the free version of the Google Analytics tool. Such data were collected through the user's HTTP request, browser information and first party cookies. After collection, these data were transferred to Google LLC to generate behavioural analyses.

As safeguards for this data transfer, the controller and Google LLC had implemented several measures. The contractual safeguards included the conclusion of standard contractual clauses whereas the implemented organisational and technical safeguards consisted of, among other things, the publication of transparency reports by Google LLC and the use of an IP anonymisation function.

Findings

Firstly, the LSA noted that it was competent to deal with the complaint at issue in so far as the ePrivacy Directive, which acts as the *lex specialis* of the GDPR according to Article 95 GDPR, does not contain any obligation regarding transfers within the meaning of Chapter V GDPR.

Contrary to the controller's contention, the LSA held, in line with the case law of the CJEU and the wording of Article 77(1) GDPR, that the obligation under Chapter V and, in particular, the one to ensure that the level of protection of individuals guaranteed by the GDPR is not undermined by transfers of personal data, can also be asserted as a subjective right before the competent control authority. Following this, the LSA found that the controller had transferred personal data of the complainant to the US, through Google LLC, by implementing the Google Analytics tool on its website. Considering that the IP addresses of data subjects were anonymised only after the transfer to Google LLC, and Google LLC was subject to the relevant laws of the US granting national intelligence services access to the transferred data regardless of where it stored its data, the LSA concluded that the transfer was an international transfer of personal data within the meaning of **Chapter V GDPR**.

In this respect, the AT SA first found that the transfer could not be covered by **Article 45 GDPR** due to the invalidation of the EU-US adequacy decision by the CJEU (Case C-311/18). The LSA then looked at the safeguards implemented by the controller in accordance with **Article 46 GDPR**. In that respect, the LSA found that the standard contractual clauses adopted between the controller and Google LLC did not provide by themselves an adequate level of protection as required under Article 46 GDPR considering that Google LLC, as an electronic communication supplier, was subject to surveillance law by USA intelligence services. In addition, the LSA found that the supplementary measures implemented to safeguard the transfer were not adequate, since they do not close the legal protection gaps identified in the judgment of the CJEU C-311/18, i.e. the access and monitoring possibilities of US intelligence services. Further, the AT SA noted that no other instrument under Chapter V GDPR was used to ensure an adequate level of protection of the transferred personal data. In the absence of any other tools of transfer, the AT SA found that the controller had not ensured an adequate level of protection as referred to in Article 44 GDPR.

Finally, the LSA pointed out that this finding is not altered by the fact that the controller had ceased from using the Google Analytics tool. Finally, as regard Google LLC's argument that a risk-based approach should be taken when assessing the adequacy of the transfer to the USA, the AT SA recalled that the GDPR includes no such mechanism or principle regarding data transfers.

Decision

In relation to the first complaint against the controller, the LSA found that the controller had breached the general principles of Article 44 GDPR. However, as the controller had stopped transferring data to the US by removing the Google Analytics tool from its website before the conclusion of this case, no suspension order was made by the LSA. In addition, the LSA dismissed the second complaint against Google LLC.