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Represented by: ██████████

Registration
number:
NAIH-3561-4/2022
Previous Case
Numbers:
NAIH-2020/7603
NAIH-697/2021

Dear ██████████ .,

The National Authority for Data Protection and Freedom of Information (hereinafter: **Authority**) received a complaint from ██████████, represented by ██████████, ██████████; hereinafter referred to as: the **Complainant**) regarding the fact that ██████████ (hereinafter referred to as: **Data Controller**) unlawfully transfers personal data to a third country, specifically to the United States of America. According to the complaint, on 12 August 2020 at 11:31:00 the Complainant visited the ██████████ website operated by the Data Controller (hereinafter: **Website**), while she was logged in her Google account associated with her Gmail email address. The complaint claims that the Data Controller uses Google Services codes, including Google Analytics, embedded in the Website. The Complainant noticed when visiting the Website that the Data Controller processed her personal data (at least the IP address and cookie data). In her experience, at least some of those data were transferred to Google, which, in accordance with its contractual terms, transferred them to the United States of America.

According to the Complainant, the transfer of personal data to the United States of America is unlawful, is in breach of Article 28 of the GDPR¹ and the rules of Chapter V, taking into account that the Court of Justice of the European Union, in its judgment C-311/18 (hereinafter: **Schrems-II**) on 16 July 2020 annulled Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 on the adequacy of the protection provided by the EU-US Privacy Shield. According to the Complainant, the Data Controller has a legal obligation to stop the transfer of personal data, and can no longer base the transfer to Google in the United States of America on Articles 45-46 of the GDPR. The complaint claims that the Data Controller is unable to adequately guarantee the protection of personal data transmitted to Google. It is also contrary to Schrems-II if the Data Controller and Google wish to base the transfer on standard data protection clauses. After the Schrems-II judgment, the Data Controller has not yet taken action to stop the data transfer according to the Complainant.

The complaint also referred to documents called Google Analytics Terms of Service and Google Ads Data Processing Terms and, in the latter case, including an updated version.

The Complainant requested the Authority to investigate the complaint in accordance with Article 58(1) GDPR and to establish

- (i) which personal data are transferred to Google LLC by the Data Controller to the USA, another third country or to an international organisation;
- (ii) which transfer mechanism under Article 44 et seqq. GDPR the Data Controller based this data transfer on;

¹ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

- (iii) whether the applicable Google Analytics Terms of Service and (new) Google Ads Data Processing Terms comply with the requirements of Article 28 of the GDPR with regard to the transfer of personal data to a third country.

The Notifier also requested that the Authority, pursuant to Article 58(2)(d), (f) and (j) of the GDPR, bans or suspends the transfer of data from the Data Controller to Google LLC to the USA without delay and order the return of such data to the EU/EEA or a country that ensures an adequate level of protection.

The notification also includes a request for an effective, proportionate and dissuasive fine under Article 83(5)(c) of the GDPR on the Data Controller and Google, taking into account the fact that the Data Controller has not taken any steps to bring its data processing in line with the GDPR even if more than one month passed since the Schrems-II judgment and that the Complainant is most likely only one of thousands of users.

The Authority initiated an investigation pursuant to Article 77(1) of the GDPR and Articles 52(1) and 54(1)(c) and (d) of Act CXII of 2011 on the right to informational self-determination and on the freedom of information (hereinafter: Infotv.).

1. Facts identified by the Authority

- 1.1. At the request of the Authority, the Data Controller stated in a letter dated 7 January 2021 that it no longer uses the HTML codes or cookies of the Google Analytics service when operating the Website. The Codes were removed from the Website by the Data Controller on 24 August 2020 after becoming aware of the possible consequences of the Schrems-II judgment. According to the Data Controller's statement, due to the uncertainty surrounding the Schrems-II judgment, it has decided to set the codes used on the Website so that they do not transfer personal data to third countries outside the EEA, including the United States of America. The Data Controller plans to maintain this decision as long as practical guidance on the use of online advertising tools will have been published that will allow data transfers to the United States of America to resume without concern.
- 1.2. The Data Controller has attached as Annex 1 to its reply a list of external organisations to which personal data have been or are transmitted directly or indirectly due to the codes used on the Website, indicating the legal basis, the duration and the location of data processing. According to the Data Controller's statement, they use the Google advertising tools with settings which do not allow the transfer of the collected visitors' data to a third country outside the EEA when serving advertisements. The Data Controller also referred to point 6.3 of the data transfer agreement between Google Ireland Limited and the Data Controller attached as Annex 2 to its reply.
- 1.3. According to the Data Controller's presentation, based on the visitor's consent and settings, cookies on the Website may collect the visitor's personal data, in particular the IP address from which the user visited the Website. The Data Controller stated that no data falling in the special categories of personal data is collected.
- 1.4. According to the Data Controller's statement, with regard to the data collected through the advertising cookie used on the Website, its principal partner is Google Ireland Limited, which defines itself as an independent data controller for the Google products used by the Data Controller. The Data Controller has not been able to carry out an independent assessment of that classification; Google's own product classification is mandatory for all business partners to accept. The classification and the text of the data transfer contract between the Data Controller and Google Ireland Limited are attached as Annex 2 to the

Data Controller's reply. According to the declaration of the Data Controller, with the external organisations to which it directly or indirectly transfers personal data, it has a contractual relationship and has no controller-processor relationship.

- 1.5. According to a statement by Google LLC dated 23 May 2022 at the request of the Irish Data Protection Commission, the contracting Google partners in the case of Google Analytics are as follows. Between August 12, 2020 and the end of April 2021, when using the paid version of Google Analytics, the contractual partner of a website operator is Google Ireland Limited, and in the case of the free version, Google LLC. During that period, the data exporter was the operator of the website, while the data was imported into the USA by Google LLC. Between May 2021 and 27 September 2021, the operators of a website contracted with Google Ireland Limited for the both free and paid services, and the data exporter remained the operator of the website while the importer was still Google LLC. Since 27 September 2021, website operators continue to contract with Google Ireland Limited for both the free and paid versions of Google Analytics, but under the new contractual clauses, Google Ireland Limited is the data exporter and Google LLC is the data importer regarding the transfer of personal data to the USA.
- 1.6. Google LLC is a U.S.-registered company², while Google Ireland Limited (or Google Ireland Ltd) is a company incorporated in Ireland³ and thus resident in the EU. Neither company's activity is limited to services exclusively related to Hungarian stakeholders.
- 1.7. The Authority tested the cookies used by the Website on 27 May 2022. During the test, it was confirmed that the Data Controller has suspended the use of Google Analytics, but continues to use the Google Doubleclick service. On the basis of the documents submitted by the Data Controller, the Google Doubleclick for Publishers service is part of the Google Ads service package, and in respect of this service, the recipient of the data transfer is Google Ireland Ltd, which is an independent data controller. General information on Google's data processing is available under the heading 'data protection' on the Internet interface that allows you to order the Google Doubleclick for Publishers service. Neither the information notice nor the publicly available general terms and conditions refer to any circumstance that would refute the Data Controller's claim that the Data Controller and Google Ireland Ltd are independent data controllers.
- 1.8. According to some test results, the Website uses three cookies linked to Google Ads that transmit data to the USA.
- 1.9. However, according to Google's privacy policy published on the Internet, there is a data controller - data processor - sub-processor relationship between the actors with regard to the Google Analytics service, where Google companies are data processors and the operator of the website using the service is the data controller.

2. Legal assessment of the data processing activity under consideration

- 2.1. According to Article 4(1) of the GDPR, "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. According to Article 2(1) of the GDPR, that Regulation

² <https://sec.report/CIK/0001824723>

³ <https://www.bloomberg.com/profile/company/0202877D:ID>

applies to the processing of personal data wholly or partly by automated means and to the processing, other than by automated means, of personal data which form part of a filing system or are intended to form part of a filing system.

- 2.2. In the course of the data processing under consideration, the Data Controller itself has acknowledged that it collects personal data about the users visiting the Website using cookies. Among other types of data, the IP address was also listed. According to established European Union interpretation, supported by the case law of the Court of Justice of the European Union, the latter is personal data.
- 2.3. According to Article 3(1) GDPR, that Regulation applies to the processing of personal data in the context of the activities of controllers or processors established in the Union, whether or not the processing takes place in the territory of the Union. [REDACTED] is an independent data controller with regard to the processing of data with the examined cookies, because it has independently decided on the use of services that require the application of cookies (namely: the use of Google Services, including Google Analytics and Google Doubleclick for Publishers), as well as the suspension and possible termination of the use of such services. No fact contrary to that conclusion emerged in the course of the investigation.
- 2.4. Pursuant to Article 44 of the GDPR, transfers of personal data which, following their transfer to a third country or to an international organisation, are subject to processing or are intended to be processed, may only take place, subject to other provisions of the GDPR, provided that the controller and the processor fulfil the conditions laid down in Chapter V of the GDPR.
- 2.5. In accordance with Article 55(1) of the GDPR, the supervisory authority is competent to carry out the tasks and exercise the powers conferred on it under the GDPR in the territory of its own Member State. Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall have the right to act as lead supervisory authority for cross-border processing by that controller or processor in accordance with the procedure laid down in Article 60, without prejudice to Article 55. In the present investigation procedure, the Authority has established its competence with regard to the processing of personal data concerning the Data Controller.
- 2.6. The Website is available in Hungarian, and even if another language is chosen in the mobile application, most of the content is displayed in Hungarian (e.g. articles and text forecasts, only the meaning of headers and pictograms are translated), and the Data Controller does not have a registered establishment, subsidiary or parent company abroad, therefore it can be concluded that it does not carry out cross-border data processing in accordance with Article 4(23) of the General Data Protection Regulation, and the Authority is the only competent supervisory authority for the data processing under consideration.
- 2.7. However, the Authority is not competent to assess the compliance of Google Analytics Terms of Service and (new) Google Ads Data Processing Terms with the General Data Protection Regulation, given that the main establishment of Google LLC and Google Ireland Limited, i.e. the data controllers concerned, are not located in Hungary and they do not only target data subjects in Hungary with their services.
- 2.8. The General Data Protection Regulation (GDPR) was incorporated into the EEA Agreement by the EEA Joint Committee by Decision No 154/2018, so that EEA Member States are not third countries for the purposes of Article 44 GDPR. Thus, the Data

Controller's statement that the codes used on the Website do not transfer data to a third country outside in the EEA (in the understanding of the Authority: the European Economic Area), indicates that the recipients of data transfers are obliged to apply the GDPR.

- 2.9. In the course of the investigation, it was established that the Data Controller suspended the data processing activities affected by the complaint. The Data Controller stated that no data is transferred to a third country outside the EEA. According to the list in Annex 1 of the reply sent to the Authority, in addition to data controllers established in Hungary, personal data are transferred to data controllers registered in Ireland (Google Ireland Ltd.) and Denmark (██████████). According to the statements, the Data Controller has an (independent) controller-controller contractual relationship with the partners involved in the data transfer.
- 2.10. According to the statement of Google LLC dated 23 May 2022, that the Authority obtained through mutual assistance pursuant to Article 61 of the GDPR, Google Analytics services have been provided by Google Ireland Ltd. since May 2021; and the data exporter is also Google Ireland Ltd. in the case of transfers to the USA. In the case of Google Analytics, it can be established therefore that the Data Controller is the controller, Google Ireland Ltd. is the processor of personal data, while Google LLC qualifies as sub-processor.
- 2.11. Pursuant to Article 28(1) of the GDPR, the controller may only use processors who provide adequate guarantees for the implementation of appropriate technical and organisational measures to ensure compliance with the requirements of the GDPR and the protection of the rights of data subjects. Therefore, the Data Controller may not lawfully use Google Analytics to the extent that it involves the transfer of personal data to the USA, irrespective of whether Google Ireland Ltd or Google LLC is its contractual partner.
- 2.12. In its investigation, the Authority concluded that cookies used on the Website may continue to transfer personal data to the USA in some cases, despite the fact that the Data Controller has suspended the use of Google Analytics.
- 2.13. Pursuant to Article 58(2)(j) GDPR, the supervisory authority, acting within its corrective powers, has the power to order the suspension of data flows to a recipient in a third country or to an international organisation.
- 2.14. Based on Article 56 of Infotv. if, as a result of its investigation, the Authority determines the existence of an infringement or imminent threat of a right related to the processing of personal data or to the exercise of the rights of access to data of public interest or data made public for reasons of public interest, the Authority shall request the controller to remedy or eliminate the imminent threat of the violation of the right. If the data controller agrees, the controller shall immediately take the necessary measures specified in the request and inform the Authority in writing of the measures taken or, in the event of disagreement, its position within thirty days of receipt of the request.
- 2.15. The right of the Complainant to request an administrative fine cannot be inferred from the right to lodge a complaint pursuant to Article 77(1) of the GDPR nor is it possible to impose a fine as a result of an examination pursuant to Article 52 of Infotv.
- 3. On the basis of the above, the Authority concludes that the Data Controller unlawfully transferred personal data to the United States of America on the day of the complaint, 12 August 2020, thereby infringing Article 28(1) of the GDPR. The unlawful transfer of data has been discontinued in the meantime, however,**

according to the Authority's investigation, some codes used on the Website may continue to transfer data to the USA. That's why pursuant to Article 56(1) of the Infotv., the Authority shall

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the Data Controller to permanently remove the possibility of transferring personal data to third countries, in particular to permanently remove Google Analytics codes from the Website. In addition, the Data Controller shall permanently cease and in the future not transfer personal data to a controller or processor that transfers personal data to a third country without the safeguards required by the General Data Protection Regulation and remove from the Website the possibility of consenting to the use of such codes.

- 3.1. **The Authority invites the Data Controller to confirm the fulfilment of the definitive termination of the above-mentioned data transfers by means of a statement sent to the Authority within 30 days of receipt of this decision in accordance with Section 56(2) of the Infotv.** Pursuant to Article 58(1) of the Infotv, if, the infringement has not been rectified or the immediate risk of infringement has not been eliminated in accordance with the present request, the Authority shall decide within thirty days of the expiry of the period for providing information on taking the necessary additional measures, among others the Authority may decide to initiate an administrative authority procedure, in which it may impose a fine.

Budapest, by electronic signature


President