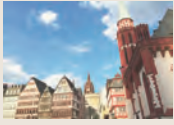




► Newsletter from our FRANKFURT AFFILIATE OFFICE (Tokyo - Frankfurt): *Atsumi Sakai Janssen Rechtsanwalts- und Steuerberatungsgesellschaft mbH*

Atsumi & Sakai is a multi-award-winning, independent Tokyo law firm with offices in London and Frankfurt. Through our local presence, we respond to various cultures and mindsets in those regions. Furthermore, our local presence facilitates building cooperative relationships with local law firms. We continue to meet the diverse needs of our clients from both a legal and tax perspective, which is essential for business development in Europe.



More legal risks for online tracking in the EU

I. Understanding online tracking

Don't be surprised, companies are tracking your cyber footprints. Many businesses are relying on online tracking as a tool to understand their online customers' behaviours and preferences, improve browsing experience, generate statistics, tailor their products to customers' expectations, profile them, and facilitate direct marketing. Various online tracking tools are being widely used such as:

- Internet Protocol (IP) address that reveals the users' rough location; HTTP referrers that tell the webpage address where the users were previously;
- Cookies that save the users' log-in data for a certain period, including browsing history (this is the most common and well-known online tracking tool);
- Tracking Pixels that can track web traffic, site conversions, user behaviour and more (e.g. if a webpage is clicked on or an email is opened);
- User agents that can identify the browsers and operating systems being used;
- Browser fingerprinting that can let websites know e.g. the users' operating system, screen resolution, installed fonts, time zone, language, and other information without the users' explicit permission.^[1]

Online tracking tools can derive an extensive amount of personal data from Internet users and have a certain impact on their privacy rights. However, they are quite well hidden from the Internet users. It is often rather vague to Internet users by whom, when, and how they are being tracked and for what purpose their data is being collected and used. For that, the use of online tracking tools must be regulated by law.

2. Obtaining users' consent before tracking them online

In the EU, the use of cookies, as the most common form of online tracking, is governed under the General Data Protection Regulation (GDPR)^[2] and the ePrivacy Directive.^[3] Accordingly, a cookie tracker must comply with the following requirements when using cookies to track its users online.

- Explaining to users in plain language about the data to be tracked by cookies, its purpose of tracking, the cookie providers, types, functions and storage duration;
- Obtaining users' consent before using any cookies regardless of whether personal data are processed using the cookies or not, except those that are strictly necessary for the website to function such as cookies used for shopping cart, login status, language selection, consent storage;
- Storing users' consent;
- Allowing regular use of the website even when users refuse to give consent (i.e. the website should be functional even without the unconsented cookies);
- Making it easy for users to withdraw their given consent.

In the consent request, it is not admissible to have a pre-ticked box for users to give their consent.

Instead, the users must be allowed to actively tick the box to opt-in to agree with the use of cookies.

For a long time, it was controversial whether such an opt-in consent requirement for using cookies is applicable under German law or not. It can be argued that this requirement has never been transposed from the ePrivacy Directive into German law. Although a consent requirement can be found in the German Telemedia Act (TMG), this Act does not actually deal with the use of cookies. However, finally, in May 2020, the German Federal Court (BGH) has confirmed in its case between the Federation of German Consumer Organizations and Planet49 GmbH, that the opt-in consent requirement also applies in Germany.^[4] Exceptions are given to pure content websites, smaller web stores or websites that only use technical cookies. These websites may continue to inform their users about the cookies being used without taking any further action for obtaining consent.



3. More attention drawn on online trackers

Despite the explicit rules and guidance from courts and data protection authorities (DPA), not all cookie trackers are strictly complying with them.

From August to December 2019, the Irish Data Protection Commission (Irish DPC) ran a “sweep” survey, sending a questionnaire to 40 organizations across various sectors to examine their use of cookies or other similar online tracking tools on their websites. The survey’s result reveals some common non-compliances of organizations regarding their cookie usages, for example:

- Use of unnecessary cookies when users first land on the websites;
- Pre-ticked boxes in consent requests;
- Implied consent;
- Bundled consent for all purposes;
- Misclassification of cookies as necessary;
- Poorly designed cookie banners, insufficient explanation regarding the use of cookies;
- Difficulty in changing cookie settings.

It is likely that these are non-compliant issues of many other organizations out there, not only the 40 selected ones in the survey. These issues have caught the attention of not only data protection authorities but also data protection activists. The number of complaints on the use of cookies and other tracking technologies filed to supervisory authorities has increased rapidly over the last two years. For example, the UK’s Information Commissioner’s Office alone received from April 2019 to March 2020, 1473 cases relating to cookies, four times more than the number of complaints received from April 2018 to March 2019.^[5]

In receiving these complaints, DPAs are obliged under GDPR to take action. The DPA will first ask the organization under concern to answer a questionnaire to examine its actual use of cookies and confirm whether the complaint is correct. If the organization does not respond to such a request, the DPA can require the processed data to be handed over.

Once the DPA could confirm that the organization does not comply with data protection rules for using cookies, it can impose a fine, which might be higher in case of non-cooperation. However, a high fine is not the only risk that non-compliant online trackers may have to face.

4. Non-material damages

As to private enforcement by means of damages claims, Article 82(1) GDPR provides that “any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered”.

A large data protection activist in Austria – has recently successfully claimed a non-material damages amount of 500 Euro for a data protection violation at the Vienna Regional Court. However, the decision is not legally binding, and the plaintiff is still fighting for an even higher compensation for the breach.

In a similar case, the Düsseldorf Labour Court recently awarded the plaintiff an amount of 5,000 Euro as non-material damages for what he has suffered due to an alleged data protection breach. This decision is not legally binding either, and an appeal is pending before the Düsseldorf Labour Court as the plaintiff would like actually to claim damages of more than 140,000 Euro.

It can be more serious for online trackers, as claims for non-material damages can be claimed in mass actions. A data protection violation in online tracking can have similar impact on a large number of different users. For that, it is not a problem for the plaintiffs to together file the violating organization in one case and for the court to bundle up the lawsuits. The amount of damages will then be way larger than in lawsuits with individual plaintiffs. Therefore, it is better to avoid any online tracking violation, especially at the moment when the courts’ opinion regarding non-material damages is still unclear.

5. Getting prepared for investigations and lawsuits

Mistakes might take place in the most unexpected situation. So, besides making sure to comply with all the afore-mentioned rules for using cookies, organizations should also get themselves ready in case a complaint comes up one day. Following are some of our suggestions to reduce the risks and be prepared for any complaint or investigation from the DPA:

- Reviewing data flows and processes regularly when using cookies;
- Being ready for any necessary technical changes of the website or other data processing activities;
- Having all information, which is normally requested by the DPAs, in place for fast reaction;
- Defining in advance a defence strategy (What risks does the company accept regarding e.g. fines and claims for damages? Is the company prepared to challenge its legal position before court?).

On top of these general suggestions, ASJ is always ready and happy to give our clients advice tailored to their specific situations, supporting them in reviewing their data processing activities, preparing documents required for GDPR-compliance, as well as reacting in case of breaches, complaints, or DPA’s investigations. For further inquiries, do contact our team.

[1] Koofr Blog, What is online tracking and how do websites track you?, <https://koofr.eu/blog/posts/what-is-online-tracking-and-how-do-websites-track-you>

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (General Data Protection Regulation)

[3] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

[4] Bundesgerichtshof zur Einwilligung in telefonische Werbung und Cookie Speicherung; <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2020&nr=106314&pos=1&anz=68>

[5] ICO, Action we’ve taken: Cookies; <https://ico.org.uk/action-weve-taken/cookies/>, retrieved 07/09/2020

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LEGAL NOTICES

1. About Atsumi & Sakai

Atsumi & Sakai is a group of Atsumi & Sakai Legal Professional Corporation, a corporation organized under the Attorney Act of Japan, which forms foreign law joint ventures under the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers with certain registered foreign lawyers at our firm, and lawyers of a Japanese Civil Code partnership (represented by Yutaka Sakai, a lawyer admitted in Japan). We also form a foreign law joint venture with Markus Janssen, a foreign lawyer registered in Japan to advise on the law of the Federal Republic of Germany, heading Janssen Foreign Law Office. In addition to lawyers admitted in Japan (including Japanese lawyers also admitted in England and Wales and the Republic of the Marshall Islands), our firm includes foreign lawyers registered in Japan to advise on the laws of the US States of New York and California, the People's Republic of China, Taiwan, India, and the State of Queensland, Australia. Foreign lawyers registered in Japan to advise on state laws are also qualified to advise on federal laws of their respective countries.

Atsumi & Sakai Legal Professional Corporation also wholly-owns a subsidiary, Atsumi & Sakai Europe Limited (a company incorporated in England and Wales (No: 09389892); sole director Naoki Kanehisa, a lawyer admitted in Japan), as its London Office. It also has an affiliate office in Frankfurt, Atsumi Sakai Janssen Rechtsanwalts- und Steuerberatungsgesellschaft mbH, a German legal and tax advisory professional corporation (local managing director: Frank Becker, a lawyer admitted in the Federal Republic of Germany).

2. Legal Advice

Unless stated otherwise by A&S, any legal advice given by A&S is given under the supervision and authority of (i) in respect of Japanese law or any laws other than foreign laws on which our foreign lawyers are registered in Japan to advise, a specified lawyer admitted in Japan at A&S, or (ii) in respect of any foreign law on which our foreign lawyer is registered in Japan to advise, such registered foreign lawyer.