

November 14th 2019

### Google Analytics and similar services can only be used with consent

Website operators require the consent of the website visitors if they wish to integrate third-party services by providers that also use the personal data collected for their own purposes. This includes the product Google Analytics.

In spring this year, the data protection supervisory authorities published Guidelines for Telemedia Providers " ([https://www.datenschutzkonferenz-online.de/media/oh/20190405\\_oh\\_tmng.pdf](https://www.datenschutzkonferenz-online.de/media/oh/20190405_oh_tmng.pdf); German only) and worked out in detail under which conditions tracking of website visitors is permitted. Nevertheless, the Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) continues to receive a large number of complaints about websites that do not comply with the requirements of the Guidelines. Analytics tools that transfer data on user behaviour to third parties may only be used with the consent of the user if these third parties also use the data for their own purposes. In principle, the same applies if the behaviour of website visitors can be traced in detail, for example when keyboard inputs, mouse or swipe movements are recorded. In contrast, it might be permitted if website operators monitor website use by collecting the number of visitors per page, the devices and the language settings, including where a processor is involved. If applicable, the requirements of Art. 28 of the General Data Protection Regulation (GDPR) where appropriate observed. However, a processor may not use the data for own purposes, as Google, the provider of Google Analytics, reserves itself the right to do so.

When integrating Google Analytics, many website operators often refer to old, outdated and withdrawn publications. The product Google Analytics changed over the past years so it no longer qualifies as a controller processor situation. Rather, the provider grants itself the right to use the data for its own purposes. The integration of Google Analytics therefore requires a consent that meets the requirements of the GDPR. Most of the so-called "cookie banners" currently do not meet the legal requirements.

Website operators in Hamburg should now check their websites for third-party content and tracking mechanisms. Those who use services that require consent must obtain such consent from their users or remove the services. Consent is only valid if the user is sufficiently informed and agrees to the data processing. Data processing requiring consent may only be started after consent has been given. Merely continuing to use the website, e.g. in the context of a cookie banner, does not represent an effective consent. The same applies to pre-checked boxes for declarations of consent. The GDPR is clear in that respect as was recently confirmed by the European Court of Justice in its judgment of 1 October 2019 (ECJ, judgment of 1 October 2019 - C-673/17 - "Planet49").

Article 4 (11) of the GDPR defines consent. It states that "'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's 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". Recital 32 of the GDPR states: "Silence, pre-ticked boxes or inactivity should not therefore constitute consent".

Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information, comments: "We have received a large number of complaints and notices about the unlawful integration of third-party content on websites in Hamburg. We are reviewing these and have already initiated proceedings against those responsible. Website operators who illegally integrate third-party content must not only anticipate orders to comply with the GDPR, but should also consider that fines can be imposed for such infringements.

**Press contact:**

Martin Schemm

Phone: +49 40 428 54-4044

Mail: [presse@datenschutz.hamburg.de](mailto:presse@datenschutz.hamburg.de)