

Data Law: five things you need to know in 2023

In 2023, we believe that you, as in-house counsel, will have to deal with five main developments in the area of data. By anticipating these changes, you can use them to your advantage and prepare for their impact. The five main developments we have identified are:

- #1 New EU-US data privacy framework & international data transfers
- #2 Procedural evolutions: settlements and class actions
- #3 Higher fines
- #4 Update on European data strategy: the open data movement
- #5 E-archiving harmonisation and the eID wallet

#1 New EU-US data privacy framework & international data transfers

In July 2020 the Court of Justice of the European Union (CJEU) invalidated the Privacy Shield which was a basis for legitimate transfers of personal data from the EU to self-certified commercial organisations (for example, in the context of intra-group transfers and/or in the course of deployment of cloud services provided by US groups). For more than two years, this left EU data controllers without a general legal framework to enable EU-US personal data transfers. It caused an increased burden of organising data transfer impact assessments (DTIAs), organising adequacy otherwise than via the signature of standard contractual clauses (SCCs) and, in nearly all cases, supplementary measures to avoid US government access.

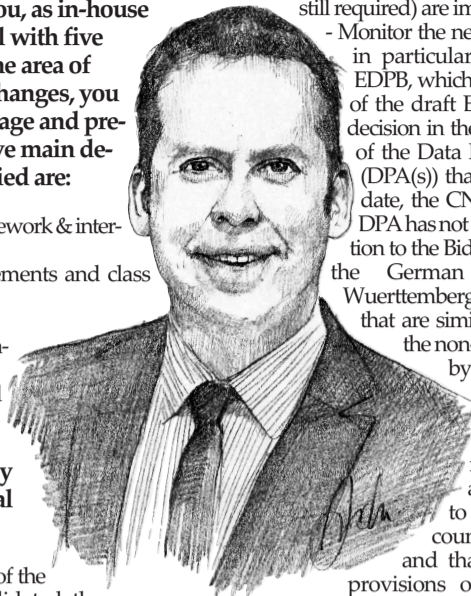
However, a new framework under the name "EU-US Data Privacy Framework" (EU-US DPF) is expected to be finally adopted this spring. On 7 October 2022 President Biden signed an Executive Order setting out the measures the U.S. will take to implement its commitments under the EU-US data privacy framework (Biden EO) announced by President Biden and European Commission President von der Leyen in March 2022. Such measures are targeted at reducing the risk of unjustifiable government data access and improving the means of judicial redress in this context. Once adopted, the EU-US DPF will allow personal data to flow freely between the EU and US companies certified under the new EU-US DPF. US companies will be able to join the framework by committing to comply with a detailed set of privacy obligations that are yet to be released by the US Department of Commerce. On 13 December 2022, in any event, the European Commission published its draft adequacy decision in relation to the EU-US DPF, which should give interested US companies a good grasp of what will be expected in order to be self-certified.

Although not yet final, we recommend already taking the Biden EO and the draft EU-US DPF adequacy decision into account by means of the following three actions:

- Update all EU-US DTIAs to reflect the reduced risk of unjustifiable government data access following the Biden EO. Such updates may lead to a reduced need for supplementary measures.
- Check whether the most important US suppliers and personal data recipients plan to obtain certification by the US Department of Commerce under the new EU-US data privacy framework. If not, ensure that (1) the most recent set of the standard contractual clauses (version June 2021; implementation deadline was 27 December 2022) are in place, (2) the DTIA is up to date and (3) any supplementary measures (if

still required) are implemented.

- Monitor the next adoption steps and, in particular, the position of the EDPB, which has to give its opinion of the draft EU-US DPF adequacy decision in the coming months, and of the Data Protection Authorities (DPA(s)) that have jurisdiction. To date, the CNPD, the Luxembourg DPA has not taken a position in relation to the Biden EO, but the DPA of the German state of Baden-Wuerttemberg has voiced criticisms that are similar to those of NYOB, the non-profit organisation led by Max Schrems.



On a more general note, do not forget that multiple processing activities entail transfers to other non-EU/EEA countries besides the US and that the specific GDPR provisions on international data transfers must also be complied with for transfers to those countries as well.

#2 Procedural evolutions: settlements, class actions and actions from competitors

In 2022 some interesting procedural evolutions were announced in the EU, which will be sure to materialise in 2023 and are likely to have a direct impact on data protection proceedings in Luxembourg.

In its Guidelines 06/2022 on the practical implementation of amicable settlements the European Data Protection Board (EDPB) put the spotlight on alternative dispute resolution in the field of GDPR enforcement. Currently and even when this is not widely known, the CNPD already has an interesting scheme to settle complaints at an early stage of the procedure, but such settlement will not take place after the official opening of a sanction procedure. The CNPD can, in case of an admissible and (partially) founded complaint, invite the allegedly infringing data controller or processor to take certain indicated measures to ensure compliance within a fixed time limit, whereby the CNPD will then in case of acceptance and timely execution not proceed with the opening of a formal investigation procedure. Contrary to the settlement schemes covered by the EDPB guidelines, the CNPD settlement procedure in the context of complaints does, in principle, not directly involve the complaining data subject. Now that the topic is also on the EDPB agenda and also finding resonance in other Member States (such as Belgium), we can expect that the CNPD will continue to intensively use this procedural avenue as well in order to deal with the continuous rise of data protection complaints.

2022 saw the rise of class actions in the EU and this in line with and as a result of the increased recognition at EU and Member State level of avenues to bring class actions for data protection infringements. In the Meta judgment dated 28 April 2022, the CJEU for instance ruled that consumer protection associations may bring representative actions against personal data protection infringements. The CJEU specifically considered that the GDPR does not preclude national legislation that grants consumer protection associations the right to pursue data protection claims on a representative basis, without a mandate from the data subjects they claim to represent, where those associations believe there is a link between data processing practices and alleged non-compliance with consumer protection laws. Against this backdrop, the currently pen-

ding Luxembourg bill of law n°7650 which seeks to introduce so-called "collective recourse procedures" in consumer law could mean an important step forward for data protection class actions as well given the natural link between infringing data processing practices and non-compliance with consumer protection laws.

Also watch out for new case law of the CJEU on procedural issues, such as the question raised by the German supreme court in January 2023 as to whether undertakings are entitled to sue their competitors for GDPR infringements. In April 2022 a Paris court already had indicated that a GDPR violation could amount to an act of unfair competition.

#3 Higher fines

Last year the EDPB issued the Guidelines 04/2022 on the calculation of administrative fines under the GDPR. The Guidelines are intended for use by the supervisory authorities and seek to establish harmonised "starting points" for the calculation of a fine by means of a detailed five-step methodology. Thereby, the EDPB also clarifies how to determine the turnover of an undertaking, given that fines under the GDPR can be up to 4% of the worldwide turnover of the preceding financial year. The Guidelines reconfirm the discretionary power of supervising authorities to apply the full range of fines, from the minimum amount up to the legal maximum set out in the GDPR, and that they are even allowed to use predetermined fixed amount fines for certain infringements. Overall and taking into account the EDPB's harmonised "starting points", these Guidelines are expected to further accelerate the trend of supervising authorities to impose higher penalties against larger organisations, as the Luxembourg DPA did by fining Amazon for a record amount of EUR 746 million.

#4 Update on European data strategy: the open data movement

The European data strategy that was announced by the European Commission in 2020 aims to create a single market for data, in which data will flow freely across sectors benefiting various stakeholders, boosting Europe's global competitiveness and data sovereignty. The European Commission published the Data Governance Act (DGA) and the Data Act (DA) as legislative initiatives in connection with this strategy. 'Data' in this context should be interpreted broadly and includes both personal data and non-personal data. The DA is still in the proposal phase, while the DGA will apply from 24 September 2023 (but will necessarily have to be complemented by a national law which, amongst others, will appoint the competent authorities). The DGA includes conditions for the re-use of certain categories of data held by public sector bodies, sets rules for the provision of data intermediation services, and introduces a framework that facilitates data altruism for objectives of general interest. Entities that already provided data intermediation services on 23 June 2022 have an extended deadline – 24 September 2025 – to ensure compliance with the specific provisions in the DGA on data intermediation services.

The DA aims to ensure fairness in the digital environment, stimulate a competitive data market, open opportunities for data-driven innovation and make data more accessible for all. It includes harmonised rules on (i) making data generated by the use of a product or related service available to the user of that product or service, (ii) making data available by data holders to data recipients, public sector bodies and EU institutions, agencies or bodies, (iii) facilitating switching between data processing services, (iv) introdu-

cing safeguards against unlawful third party access to non-personal data, and (v) the development of interoperability standards for data to be accessed, transferred and used. The European data strategy and the related legislative proposals show that the open data movement is a priority of the European Commission. On the one hand, these initiatives should increase the movement of open data, leading to benefits such as data-driven innovations and a competitive data market. On the other, these initiatives introduce obligations for non-personal data similar to those under the GDPR. Personal data remain subject to the GDPR.

#5 E-archiving harmonisation and the eID wallet

The 2014 eIDAS Regulation (EU) introduced common rules on e-identification and e-signatures, and furthermore introduced several other so-called "trust services", such as the electronic seal and time stamp. The eIDAS Regulation, however, falls short in a twofold way: (1) the eID part of the eIDAS Regulation is inherently limited to the public sector, and furthermore only led to 14 Member States giving notification of at least one eID scheme (for Luxembourg: the Luxembourg eID card); and (2) the Regulation fails to harmonise the rules on e-archiving (for Luxembourg those rules are contained in the Luxembourg E-Archiving Act of 25 July 2015 and its executing Grand Ducal Regulations).

To remedy such shortcomings and more generally increase cross-border reliance, a proposal to update the eIDAS Regulation was published in mid-June 2021 which:

- Creates a European Digital Identity Wallet that allows users to store identity data, credentials and attributes linked to their identity and to the extent necessary to use these for purposes of interaction with both public sector and private sector players (e.g. for authentication (online and offline) for a service; to sign via qualified electronic signature, etc.).
- Now obliges Member States to notify of at least one Electronic Identification Scheme which can be used both online and offline.
- Introduces three new qualified trust services: qualified electronic archiving services, electronic ledgers and the management of remote qualified signature and seal creation devices. The qualified electronic archiving service legal framework will facilitate cross border recognition of qualified electronic archiving services and thus remedy the uncertainty resulting from the different sets of Member State requirement regarding e-archiving.

The creation of the European Digital Identity Wallet is the topic that is currently slowing down the legislative process, given that it raises a number of data protection concerns regrouped around the fact that such a European Digital Identity Wallet stores a large number of personal data, including sensitive personal data, which would be used for a large variety of use cases across different sectors and Member States. This obviously entails an important risk of identity theft and data oversharing. Once a compromise is reached on this topic, we expect the further adoption process to go quickly, so that the updated eIDAS Regulation may well be adopted in 2023.

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Inauguration du nouveau site de production de pointe d'Artec 3D

Le Premier ministre, ministre d'État, Xavier Bettel, et le ministre de l'Économie, Franz Fayot, ont visité, en date du 31 janvier 2023, les locaux de la société Artec 3D au Senningerberg afin d'inaugurer le nouveau site de production optoélectronique de l'entreprise au sein duquel ses scanners 3D, primés et ayant contribué à sa renommée dans le monde entier, seront assemblés et fabriqués.

La nouvelle ligne de production comprend une clean room de 300 m² qui bénéficie d'une classification de propreté ISO7 et d'un contrôle personnalisé de la température, de la pression et de l'humidité. La salle blanche est également équipée d'un logiciel d'intelligence des données de pointe qui permet de connaître, à tout moment et en temps réel, l'état de la salle blanche.



(de g. à dr.) Art YUKHIN, président-directeur général, Artec 3D; Xavier BETTEL, Premier ministre, ministre d'État © SIP / Jean-Christophe Verhaegen © SIP / J.-C. Verhaegen

Cette technologie est unique au Luxembourg et assure le plus haut niveau de production ainsi que les plus hauts niveaux de sécurité et de précision. Avec cette nouvelle ligne de production, Artec 3D ambitionne de continuer à monter la voie en matière de matériel et de logiciels de numérisation 3D.

Créée en 2007 à Paolo Alto en Californie, la société a décidé de s'établir au Luxembourg en 2010, en y transférant son siège social. Développant et produisant des scanners 3D innovants qui sont utilisés dans de nombreux domaines tels que l'ingénierie inverse, l'inspection de la qualité, le design, l'industrie 4.0, la santé, et la médecine légale, Artec 3D est aujourd'hui active dans 150 pays avec plus de 220 employés dans 4 pays.

Pour rappel, en novembre dernier, la Direction de la défense luxembourgeoise avait fourni un ensemble complet de solutions Artec 3D innovantes à l'Ukraine

pour la numérisation 3D de preuves médico-légales afin de documenter d'éventuels crimes de guerre. Artec 3D s'est également associée à l'organisation locale de collecte de fonds, L'Ukraine, depuis le début de la guerre l'année dernière. Après une courte présentation des activités de la société, la délégation a pu visiter la salle blanche. Xavier Bettel et Franz Fayot se sont ensuite eux-mêmes prêtés à un scanning complet.

Lors de l'inauguration, le Premier ministre, ministre d'État, Xavier Bettel, a commenté: «Grâce à cet investissement d'Artec 3D, le Luxembourg dispose d'une des salles blanches les plus sophistiquées en Europe. En tant que gouvernement, nous sommes fiers d'avoir facilité cet investissement. L'histoire d'Artec 3D est une véritable success story et aussi l'exemple d'un partenariat public privé qui a très bien fonctionné.»

Source: ministère d'État / ministère de l'Économie