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Deficiencies on all levels: Berlin DPA confronts website operators with unlawful tracking

Given the ongoing deficiencies in the use of tracking tools and third-party services on websites, the Berlin Commissioner for Data Protection and Freedom of Information has launched a large-scale campaign. In the following days, about 50 Berlin-based organisations will receive a written request to bring tracking processes on their websites in line with the applicable data protection law. Otherwise, the supervisory authority will initiate formal investigation procedures, which can lead to an order or a fine.

"There is no ambiguity in the law: if website operators want to track the behaviour of their users with the help of cookies and other technologies, they need a legal basis to do so," says Maja Smoltczyk, Berlin's Commissioner for Data Protection and Freedom of Information. Even though many websites now feature multi-level cookie banners, they frequently fail to obtain effective consent.

The use of tracking tools and third-party services involves the processing of personal data, at least the IP address of the user. Typically, this not only serves to analyse user behaviour, but also to create and enrich profiles about their overall internet use. In most cases, the data is transmitted to a large number of advertising networks around the world.

"It follows from data protection law that it must be just as easy to refuse tracking as to consent to it. Refusal may not be more elaborate or even hidden," says the Commissioner for Data Protection. "In addition, consent requests are often embedded in incomplete or misleading information and labelling. How the website operators want to prove that the users have given their voluntary and informed consent with such a design is a mystery to me."

In addition to individual complaints, the Berlin Commissioner for Data Protection and Freedom of Information is also receiving an increasing number of tips concerning website tracking. The large number of tips not only shows the concerns of citizens, but is also an indicator of how many website operators are still struggling to comply with the legal framework.

For their campaign, the supervisory authority documented the design features and precise data flows on the selected websites and confronted the operators with the specific deficits in data protection law. In its letters, the supervisory authority puts the documented facts in relation to the legal provisions and points out critical points in individual cases. Another significant challenge is the extent of tracking, which is based on legal grounds other than consent, despite the fact that the legal requirements for this are not fulfilled.

The notices were sent to companies whose cookie banners were found to be especially deficient, which have a comparatively large number of users or who may be processing sensitive data. Companies from various sectors are affected, in particular e-commerce, real estate, finance, social networks, legal services, software, health, education and comparison sites.

The controllers were requested to immediately bring the data processing into compliance with data protection law. In each case, a follow-up documentation of the websites will take place, which may result in further action by the authority depending on whether past and/or ongoing violations are determined.

"Our campaign complements the already ongoing investigations based on individual complaints and is a signal to Berlin website operators," says Maja Smolczyk, Berlin Commissioner for Data Protection and Freedom of Information.