

The Danish Data Protection Authority expresses serious criticism of Den Blå Avis' consent solution

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Decision

Private companies

The Danish Data Protection Authority has made a decision in an independent case concerning Den Blå Avis' processing of personal data about website visitors. The Danish Data Protection Authority expresses serious criticism that DBA's consent solution www.dba.dk does not meet the rules in the data protection regulation.

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Summary

At the end of June 2020, the Danish Data Protection Authority launched an independent action against Den Blå Avis' (DBA) processing of personal data about website visitors. After the Danish Data Protection Authority started the investigation, DBA chose to change its consent solution at www.dba.dk. The Danish Data Protection Authority has therefore decided on two different consent solutions in the decision.

As part of the investigation, the Norwegian Data Protection Authority has, among other things, assessed whether the conditions set for a data protection legal consent have been, and are, met in connection with the DBA's processing of personal data.

DBA stated in connection with the processing of the case that the processing of information about website visitors for analytical and statistical purposes can be based on the company's legitimate interests. In this connection, DBA uses the statistics and analysis tool Google Analytics.

The Danish Data Protection Authority found - after the case had been dealt with at a meeting of the Data Council - reason to express serious criticism that neither DBA's previous nor current consent solution for processing personal data about visitors to www.dba.dk meets the data protection regulation's requirements for consent.

The Norwegian Data Protection Authority also found that DBA's current consent solution for processing personal data does not meet the basic principle of legality, reasonableness and transparency in the data protection regulation.

The Norwegian Data Protection Authority also found that DBA's processing of personal data for statistical purposes is not in accordance with the data protection regulation.

1. Decision

The Danish Data Protection Authority hereby returns to the case which the Danish Data Protection Authority has initiated on its own initiative regarding Den Blå Avis A/S' (DBA) processing of personal data about website visitors. The Danish Data Protection Authority's decision concerns in particular whether DBA's consent solution at <https://www.dba.dk/> before 25 June 2020 and the website's current consent solution are in accordance with the data protection legal rules.

The Danish Data Protection Authority finds - after the case has been submitted to the Data Council - that neither DBA's previous nor current consent solution for the processing of personal data about the visitors to <https://www.dba.dk/> fulfills the data protection regulation's^[1] requirement for consent in article 4, no. 11 .

Furthermore, the Danish Data Protection Authority finds that the DBA's current consent solution for processing personal data does not meet the basic principle of legality, reasonableness and transparency in the Data Protection Regulation, Article 5, subsection 1, letter a.

In addition, the Danish Data Protection Authority finds that DBA's processing of personal data for statistical purposes is not in accordance with the Data Protection Regulation, Article 6, subsection 1, letter f.

Based on the above, the Danish Data Protection Authority finds that there are grounds for expressing serious criticism that DBA's processing of personal data about the visitors to <https://www.dba.dk/> does not take place in accordance with the data protection regulation.

Below follows a closer review of the case and a rationale for the Data Protection Authority's decision.

2. Case presentation

As a follow-up to the issuance of the authority's guidance from February 2020 on the processing of personal data about website visitors, the Danish Data Protection Authority has chosen to focus on whether the rules in this area are being complied with.

On this occasion, the Danish Data Protection Authority has decided to investigate, among other things, website <https://www.dba.dk/> of its own accord, and the supervisory authority has, by letters of 18 June 2020, 30 July 2020 and 18 June 2021, respectively, asked DBA a number of questions with a view to the Danish Data Protection Authority's handling of the case.

In connection with the processing of the case, the Danish Data Protection Authority has examined two different consent

solutions on the website <https://www.dba.dk/>, as DBA changed its original consent solution on 25 June 2020.

Before 25 June 2020, the consent solution at DBA was formulated as follows:

"By clicking "Accept" or by clicking on a link or image on the page so that you use our page, you consent to the use of cookies and other technologies, such as cookie identifiers that process behavioral data and personal data, with the aim of improve and personalize your experience across brands and sites powered by eBay, including third-party advertising tailored to you on and off this site. In addition, you also agree that third-party companies with whom we collaborate may use cookies and similar technologies on your device from which you visit the site, to collect and use information for tailored targeted marketing/banners on third-party sites, measurement and analysis. You can revoke your consent at any time."

DBA subsequently changed its consent solution for the processing of personal data on 25 June 2020. From the consent solution, a text appears in which, among other things, the following is stated:

"By clicking "OK" you consent to the use of cookies and similar technologies (collectively referred to as 'cookies'), which we use for the purpose of creating targeted advertising, including on third-party sites, using segmentation, market research/target group analysis and statistics generated in connection with your behavior on our websites (DBA and BilBasen) and improvement of advertising services.

In addition, you agree that certain third-party companies with which we work may use cookies for the above-mentioned purposes here on the website.

In connection with our use of cookies, we and the above-mentioned third parties process the following personal data: IP address and other cookie ID, Facebook ID (in certain cases) as well as information about your browser, your device, your operating system and your behavior in in connection with the use of our services."

DBA's current consent solution allows visitors to press "OK" or "Do not accept" for the website's processing of personal data. In addition, the option to press "Settings" is presented, where visitors can access more information about the purposes for which the information is processed. Under "Settings" there is a section on advertising, which is divided into IAB Partners and Non-IAB Partners (IAB is a trade association).

As part of the processing of the case, the Danish Data Protection Authority has examined which cookies DBA uses for analytical and statistical purposes at <https://www.dba.dk/>.

In its statement of 11 September 2020, the DBA has stated that the DBA has adapted its consent solution in continuation of

the DBA's response of 14 July 2020, and is continuously working on improvements in light of current practices and standards to improve transparency.

Under the section on statistical cookies in dba.dk's consent solution, the following appeared, among other things, about one of the cookies used for statistics:

"This is one of the four main cookies set by the Google Analytics service, which enables website owners to track visitor behavior and measure website performance. This cookie lasts for 2 years by default and distinguishes between users and sessions. It is used to calculate new and returning visitor statistics. The cookie is updated every time data is sent to Google Analytics. Cookie lifetime can be customized by website owners"

Another example of a cookie that is used to perform statistics on dba.dk is described as follows:

"This is a pattern type cookie set by Google Analytics, where the pattern element on the name contains the unique identity number of the account or website it relates to. It appears to be a variation of the `_gat` cookie which is used to limit the amount of data recorded by Google on high traffic volume websites."

DBA has also described the use of the analysis tool Google Analytics in its personal data policy. The personal data policy states, among other things, following:

"WE use Google Analytics, an analysis tool from Google LLC and Google Ireland Ltd. ("Google") to continuously improve our services. The use makes it possible to assign data, sessions and interactions to a pseudonymous user ID and thus to analyze a user's activities on our website. Google Analytics uses cookies that are stored on your device and which enable us to analyze your use of our services. The data collected by cookies about the use of our services (including your IP address) is usually transferred to a Google server in the USA and stored there (see further information for users in the European Economic Area below in this section).

On our behalf, Google processes this data to evaluate the use of our services, to prepare reports on usage activities and to provide us with additional services associated with the use of our services. Your IP address sent in connection with Google Analytics is not combined with other data from Google.

[...]

We would like to point out that Google Analytics on our website has been extended with the code `"gat._anonymizeIp ();"` to guarantee an anonymized collection of IP addresses (so-called IP masking). This means that before your IP address is

transferred to Google's servers in the USA, it is sent to a Google server in the EU (or in another EEA state), where it is shortened so that it cannot be traced to a specific person. Only after the IP address has become anonymous is the short IP address sent to a Google server in the USA and stored there.

If personal data is transferred to the United States, this is done on the basis of the European Commission's adequacy decision under the EU-US privacy protection.”

On 26 June, 14 July, 11 September 2020 and 9 July 2021, DBA submitted statements to the Danish Data Protection Authority, and section 2.1. below deals with the DBA's remarks.

2.1. DBA's remarks

2.1.1. DBA's consent solution before 25 June 2020

DBA has stated that in its previous consent solution, the company processed information about website visitors covered by the data protection regulation. DBA chose, in continuation of the Danish Data Protection Authority's new guidelines on the processing of personal data about website visitors, to change the consent solution, as the website implemented a new solution on 25 June 2020 in order to meet the Danish Data Protection Authority's assessment of the legal situation and to increase transparency towards website visitors.

DBA's previous consent solution was designed so that website visitors were presented with a consent solution on their first visit to the website. The user then had the option to give consent by either clicking on a link on the website, a feature or by pressing the "Accept" box in the consent solution. On that basis, the DBA has stated that consent required an active action from the user and that the user was informed of this when visiting the website.

2.1.2. DBA's current consent solution

DBA has generally stated that the company with its current consent solution processes information about website visitors, including information about IP address, information about the visitor's browser and operating system and information about the visitor's behavior in connection with use of the website.

DBA has also stated that the company processes personal data about website visitors for the purpose of targeting marketing and advertising as well as for purely analytical purposes. The information collected about visitors to dba.dk is used to create statistics that can give DBA a better understanding of how the website is used by users. The information is crucial for the company's ability to improve their services and products, including analysis of whether visitors show interest in new functions.

The information also gives the DBA an understanding of whether the website delivers value to the advertisers who have paid for them.

2.1.2.1. Processing authority

On the balancing of interests rule

With reference to the nature of the processing and the reasonable expectations of the data subjects, the DBA has stated that the information the website processes for analytical purposes can be done on the basis of the balancing of interests rule in the Data Protection Regulation, Article 6, subsection 1, letter f.

In this connection, the DBA has emphasized that no sensitive information is processed, that the processing is for analytical purposes, and that the scope of the processing is of a modest nature, which will not affect the data subject. The processing has the sole aim of optimizing the website on the basis of analyzes of anonymous aggregated data that can show how the website is used and facilitates the delivery of data to DBA's advertisers, so that the value of dba.dk as an advertising platform is made visible and user fees are kept to a minimum.

In support of this, DBA has referred to the data protection regulation's preamble consideration no. 47, where it appears that processing of personal data for direct marketing can be considered to have been carried out in a legitimate interest. With reference to this, the DBA has stated that processing that is solely aimed at generating anonymous aggregated data for use in the operation and development of the website can be based on a legitimate interest. Processing for purely analytical purposes must be considered to be less intrusive towards the data subject than processing information about a named person for direct marketing, which is why the processing of the visitor's information must be considered to be in accordance with the latter's reasonable expectations.

The DBA has also referred to the Norwegian Data Protection Authority's guidance on the processing of personal data about website visitors and a previous statement by the Norwegian Data Protection Authority on Nuuday A/S[2]' processing of personal data for analytical purposes, where the Norwegian Data Protection Authority found that the processing could be done in relation to the preparation of predictive models with a view to targeting any subsequent marketing on the basis of the data protection regulation, article 6, subsection 1, letter f.

DBA has claimed that the company's legitimate interest in processing the information for analytical purposes by using cookies, so that a better understanding of the visitors' needs and behavior on the website is achieved, is reinforced by the fact that DBA

is in intensive competition with several large online platforms among other in the form of Facebook and Marketplace.

These companies are able to obtain a very detailed understanding of their users' behavior without the use of cookies. On that basis, DBA has stated that if DBA is prevented from processing information about website visitors for analytical purposes on the basis of a legitimate interest, the resulting lack of knowledge about the visitors will weaken DBA's competitiveness and distort competition on the market.

It appears from the DBA's current consent solution that the website uses the tool Google Analytics to collect personal data for statistical purposes. DBA has also explained that Google LLC, in connection with Google Analytics, processes data on behalf of DBA, and is therefore considered a data processor for DBA. Only data originating from DBA's own services (website and app) is processed and it is not combined with data from other sources. Google LLC does not use the data collected from the DBA for its own purposes or those of third parties.

DBA has also elaborated on the use of Google Analytics and stated that DBA uses the Universal Google Analytics version. The configuration of the analysis tool works in such a way that it is possible to opt out of certain Google Analytics functions (so-called features) when implemented on the website. DBA has actively made use of that option and configured Google Analytics so that the processing of personal data about website visitors is limited as much as possible.

DBA has deactivated the "Data sharing for Google Products" option, which means that DBA does not collect or otherwise process information about the visitor that may be available via their Google account. DBA has also deactivated Google's so-called "Cross device tracking via User ID" function, which is why DBA does not combine data about visitors across their various devices (computer, iPhone, tablets, etc.) when a visitor is not logged in to their DBA account. The DBA has also deactivated Google's "Anonymize IP" function, so that the IP address is only stored at an aggregated level without the last three digits. This means that the IP address cannot be attributed to a specific person or household.

To the question of whether the DBA, when using Google Analytics, exchanges information about visitors with Google LLC and, if applicable, which ones, the DBA has stated that Google LLC, on behalf of the DBA, collects information about the visitor's IP address, cookie ID as well as information about the visitor's browser, operating system and behavior on dba.dk. If the visitor is logged in to his DBA account, his user ID (in encrypted form) and email address will also be transferred by the DBA to Google Analytics. The IP address is only processed on an aggregate level, as the last three digits of the IP address are deleted immediately after Google receives it. The IP address cannot then be traced to a specific person or household, but can only be

used to derive the geographical area from which the page is accessed.

By consent

With regard to DBA's processing of information about website visitors for marketing and advertising purposes, DBA has stated that the company obtains consent from its users, cf. the data protection regulation, article 6, subsection 1, letter a.

The DBA has argued that the website visitor is presented with a consent solution when the page is accessed for the first time and each time changes are made to the consent solution. The visitor has the option of both giving consent to the treatment and refraining from giving consent.

The consent solution also states who the data controller is, which of the data controller's pages information is collected on, for what purpose the processing takes place, and that consent can be revoked at any time. By clicking on the "Settings" button, the visitor has the opportunity to adapt the consent. Furthermore, the consent solution contains a link to DBA's cookie policy. Against this background, it is DBA's opinion that the consent solution gives the website visitor the opportunity to give consent that is voluntary, specific, informed and an expression of an unequivocal expression of intent, cf. Article 4, No. 11 of the Data Protection Regulation.

The current system is set up in such a way that technically cookies cannot be stored in relation to targeted marketing on the website visitor's device, unless the website visitor has given active consent by clicking "OK" in the consent solution. If the visitor chooses this solution, a text string is sent back to dba.dk indicating whether consent has been given or not. In this way, it is ensured that no personal data is processed, unless the visitor has previously given consent to the processing. A cookie is also placed on the visitor's device, which aims to remember whether consent has been given or not.

As a result, it can be documented that it is not possible for DBA to process personal data about website visitors for targeted marketing without the users' consent. Since the DBA also informs the visitor that the consent can be revoked or changed at any time in accordance with the data protection regulation, Article 7, paragraph 3, it is the DBA's assessment that the consent is in accordance with Article 7 of the Data Protection Regulation.

DBA has stated that the website targets its advertising using statistics generated by the visitor's behavior on the website in order to be able to select relevant content for the advertisements. The targeted advertising and the relevant processing in relation to statistics are therefore linked, which is why both the main purpose (targeted advertising) and the underlying processing (statistics for advertising purposes) are highlighted in the consent solution for reasons of transparency towards

users.

On this basis, the DBA has stated that a visitor's click on "OK" alone triggers consent for one purpose but two connected treatments. If the visitor presses the "Do not accept" button, the website can still be used without restrictions. It is therefore DBA's opinion that the consent solution fulfills the condition of voluntariness according to the data protection regulation, article 4, no. 11.

2.1.2.2. Treatment principles

By legality, fairness and transparency

DBA has stated that if a visitor to dba.dk only wishes to give consent to certain treatments, the visitor can click on "Settings" in the consent solution and then make an adjustment of his consent as far as targeted advertising is concerned. The information is given in an easily accessible and easy-to-understand language.

Against this background, the DBA has stated that the company uses a consent solution with several "layers" with the aim of ensuring voluntariness and transparency and to prevent too much information being included in the consent solution, so that the website visitor finds it difficult to understand what consent is given to. The consent solution must also be suitable for display on devices with different screen sizes, and that on certain devices there are limits to the amount of information that can be provided.

By giving the visitor the opportunity to either give or reject consent in the solution's first "layer" and the possibility of a customized consent in the second "layer", DBA is of the opinion that the solution is in accordance with the data protection legal regulations. In support of this, the DBA has referred to the European Data Protection Board's (EDPB) guidelines on consent from May 2020 and the Irish Data Protection Authority's guidelines from April 2020.

Overall, it is the DBA's assessment that a multi-layered consent solution that is immediately available to the website visitor (one click away) and which gives them the opportunity to adapt their consent is in accordance with the data protection regulation's principle of transparency, cf. the data protection regulation's article 5, subsection 1, letter a.

3. Reason for the Data Protection Authority's decision

In the following, the DBA's processing of personal data about the company's website visitors is reviewed both before and after 25 June 2020, when the website's consent solution was changed.

3.1. DBA's processing of personal data before 25 June 2020

The conditions for a valid consent

It appears that before 25 June 2020, DBA processed personal data about website visitors by obtaining consent via a consent solution, which presented website visitors to either press "Settings" or "Accept".

Of the data protection regulation, article 6, subsection 1, letter a, it follows that the processing of personal data is lawful if the data subject has given consent to the processing of his personal data for one or more specific purposes.

It follows from Article 4, No. 11 of the Data Protection Regulation that consent must be an expression of a voluntary, specific, informed and unequivocal expression of will from the data subject.

All four conditions must be met for a consent to be valid according to the data protection regulation.

In addition, Article 7 of the Data Protection Regulation contains additional conditions, including the condition in subsection 3, on revocation of consent.

Voluntarily

A consent must therefore, among other things, be voluntary in order to be valid according to the data protection legal rules.

The EDPB has adopted guidelines on consent[3], where the understanding of the definition of consent is described.

According to the EDPB's guidelines, the requirement of voluntariness implies that the data subject has a real free choice.

There is a voluntary declaration of intent if the following four criteria are met: i) the data subject must be able to freely choose the purposes for which consent is given (granularity), ii) the data subject must be able to refuse to give or revoke his consent without it being to the detriment of the person concerned, iii) fulfillment of a contract must not be made conditional on a consent to the processing of personal data that is not necessary for the fulfillment of the contract, and iv) there must not be a clear bias (an unequal relationship) between the registered and the data controller

It also follows from preamble consideration no. 32 to the data protection regulation that:

"Consent should cover all processing activities carried out for the same purpose(s). When the processing serves several purposes, consent should be given for all of them."

In preamble consideration no. 43, the following is also stated:

"Consent is not presumed to have been given voluntarily if it is not possible to give separate consent to different processing activities regarding personal data, even if it is appropriate in the individual case [...]."

Specifically

Consent must also be specific. It must therefore not be drafted in general terms or without a precise statement of the purposes for the processing of personal data and which personal data will be processed. In other words, a consent must be specified in such a way that it is clear and distinct what consent is given for.

The requirement for specific consent is connected to the principle of purpose limitation, which means that personal data must always be collected for explicitly stated and legitimate purposes, and must not be further processed in a way that is incompatible with these purposes. The data subject's consent must therefore, in accordance with this principle, always be obtained for specifically stated purposes.

According to the EDPB's guidelines[4], a data controller who obtains consent for the processing of personal data for several different purposes must ensure that the data subject is given the opportunity to opt in or out of the various processing purposes.

The Danish Data Protection Authority assesses that the various treatments to which a visitor consented by choosing "Accept" constituted several different treatment purposes, including marketing, collection of information with a view to improving and personalizing the user's experience on the website, and passing on information to third-party companies with for the purposes of these companies' processing of the information. The objectives were therefore not divided and precisely stated.

Furthermore, the third-party companies were not specifically indicated in the consent solution, nor was there a link or drop-down menu in close connection with the purpose for which the information was disclosed[5].

It is also the Danish Data Protection Authority's assessment that a consent cannot be assumed to have been given voluntarily if the procedure for obtaining consent does not give the data subject the opportunity to give separate consent to various processing activities relating to personal data and the data subject is thus forced to consent for all purposes. By being presented with the "Accept" function in the consent solution, users were not given the opportunity to opt in and out of the various processing purposes.

On that basis, the Danish Data Protection Authority finds that the consent that DBA collected from the company's users before 25 June 2020 did not meet the conditions of being voluntary and specific.

Informed

That a consent must be informed means that the data subject must be aware of what consent is being given. The data controller must provide the data subject with a range of information to ensure that the data subject can make his decision on

an informed basis.

The information must at least consist of information on:

the identity of the data controller,

the purpose of the intended treatment,

which information is processed, and

the right to withdraw consent.

The Danish Data Protection Authority finds that the consent that the DBA obtained in its previous consent solution was not sufficiently informed.

The Danish Data Protection Authority has emphasized that there was not sufficiently clear information about the third-party companies in collaboration with whom personal data was collected and to whom personal data was passed on, and that it was not sufficiently clear to the data subjects which personal data was collected and passed on to these third party companies.

In this connection, the Danish Data Protection Authority must note that it is the opinion of the Danish Data Protection Authority that - as far as consent to the processing of personal data is concerned - it is necessary that a consent solution or statement in an easily understandable and easily accessible form and in clear and simple language it appears which data controllers, for example, personal data is passed on to. It is added in this connection that it is the identity of the data controller's organization that must appear, and not the data controller's possible websites, nicknames or product names that the data controller uses, as it is not easily understandable and easily accessible to the data subject.

Unequivocal expression of will

The data subject's consent must be given in the form of an unequivocal declaration of intent. This means that the consent given must not give rise to doubt.

Such an indication may consist of the registered person, by means of a statement or by an active action, clearly indicating an acceptance that personal data about him/her is processed.

The Danish Data Protection Authority notes that a website visitor's passivity, silence or continued use of a website is not considered an active option, and that such a solution therefore cannot constitute valid consent according to the data protection legal rules. The Norwegian Data Protection Authority hereby refers to section 75 and 79 of the EDPB's guidelines on consent[6] on page 18.

The Danish Data Protection Authority finds that the consent that the DBA collected from the company's users before 25 June 2020 was not an expression of an unequivocal expression of intent.

The Danish Data Protection Authority has hereby emphasized that a consent which the user can give both by actually accepting the processing of personal data but also by clicking on a link or image on the page, is not an unequivocal expression of intent from the data subject.

Against this background, the Danish Data Protection Authority collectively finds that DBA, through the previous consent solution, did not obtain consent from visitors to dba.dk in accordance with Article 4, No. 11 of the Data Protection Regulation, and therefore processed personal data in violation of Article 6, Paragraph 1 of the Data Protection Regulation. 1, letter a.

3.2. DBA's processing of personal data with its current consent solution

Consent

It appears that DBA processes information about website visitors for targeted marketing and advertising on the basis of the users' consent, cf. the data protection regulation, article 6, subsection 1, letter a, and that DBA processes information about website visitors for targeted marketing by using statistics generated in connection with the website visitor's behavior on the website. The information is also passed on to other companies for the purposes of these companies' processing of information. Regardless of the fact that DBA's commercial aim with these processing activities is marketing, the Danish Data Protection Authority is of the opinion that DBA, in the context of data protection law, processes website visitors' personal data for multiple and other purposes than this one purpose.

The purpose must also be well defined and delimited, so that sufficient clarity and openness is created about the processing and the indication of marketing as the only purpose implies, in the Data Protection Authority's opinion, an imprecise description of the purposes linked to the processing that DBA carries out using the website visitor information.

On the basis of what was disclosed in the case, the Danish Data Protection Authority finds that the consent that the DBA obtains from the company's users with its current consent solution is not granular, and therefore does not meet the condition of voluntariness, as the users are not given the opportunity to be presented with the "OK" function in the consent solution to opt in and out of the various treatment purposes.

The Danish Data Protection Authority has hereby emphasized the previously stated that a consent cannot be assumed to have been given voluntarily if the procedure for obtaining consent does not give the registered person the opportunity to give

separate consent to various processing activities regarding personal data, and is thus forced to consent for all purposes.

The Danish Data Protection Authority assesses that DBA with its current consent solution processes information for different purposes, which are not divided and precisely stated.

On this basis, it is also the Danish Data Protection Authority's assessment that the consent that DBA collects with its current consent solution is in breach of the principle of purpose limitation and the condition that a consent must be specific.

Furthermore, it does not appear that the information is passed on to third-party companies for the purpose of their marketing on DBA's website, including which companies and for what purpose. The user only gets certain information about this by reading DBA's personal data and cookie policy. Correspondingly, it does not appear to which third-party companies disclosure takes place, and the visitor must also go deep into the text of the personal data and cookie policy to find an overview of the third parties.

In addition, the preparation of statistics/analyses of visitor behavior on the website should have been covered by the consent solution, cf. below on the application of the data protection regulation, article 6, subsection 1, letter f.

Overall, the Danish Data Protection Authority finds that DBA's processing of personal data with its current consent solution for targeted marketing is in breach of Article 6, subsection 1 of the Data Protection Regulation. 1, letter a, since a valid consent is not obtained from the registered, cf. Article 4, No. 11.

Processing of personal data for statistical and analytical purposes

The DBA has stated that the processing of personal data for purely analytical and statistical purposes takes place on the basis of Article 6, paragraph 1 of the Data Protection Regulation. 1, letter f, and that DBA in this connection uses Google Analytics to collect personal data for statistical purposes.

It follows from the regulation's article 6, subsection 1, letter f, that the processing of personal data is lawful if the processing is necessary for the data controller or a third party to pursue a legitimate interest, unless the data subject's interests or fundamental rights and freedoms take precedence.

Preamble consideration no. 47 of the Data Protection Regulation supplements the provision, where the following appears, among other things:

"The legitimate interests of a data controller, including a data controller to whom personal data may be disclosed, or the legitimate interests of a third party may constitute a legal basis for processing, unless the data subject's interests or

fundamental rights and freedoms take precedence, taking into account the data subject's reasonable expectations based on their relationship with the data controller.

[...]

In all cases, the presence of a legitimate interest requires a careful assessment, including whether a data subject at the time of and in connection with the collection of personal data can reasonably expect that processing for this purpose can take place.”

Furthermore, it appears from DBA's privacy policy that the data collected by cookies about the use of DBA's services is normally transferred to a Google server in the USA and stored there. It is stated in the privacy policy that if personal data is transferred to the USA, this is done on the basis of the European Commission's adequacy decision under the EU-USA's privacy protection.

On this basis, the Danish Data Protection Authority assumes that the DBA's use of Google Analytics for statistical purposes will result in the transfer of personal data to Google LLC in the USA.

The Danish Data Protection Authority then finds that the DBA's processing of personal data for statistical purposes cannot take place on the basis of the balancing of interests rule in the Data Protection Regulation, Article 6, subsection 1, letter f.

The Danish Data Protection Authority has emphasized that DBA, by integrating content from Google in the form of the web analysis tool Google Analytics, gives Google the opportunity to collect personal data about website visitors, as this opportunity arises from the time the website is used.

The Danish Data Protection Authority has also emphasized that the European Commission's adequacy decision under the EU-US privacy protection, which DBA has pointed to as the basis for the transfer, was declared invalid by the EU judgment of 16 July 2020, in case C-311/18 (Schrems II) . The Danish Data Protection Authority is aware that transfers to Google LLC in the USA after this date take place on the basis of the EU Commission's Standard Contract (SCC).

DBA has not proven, on the present basis, that measures should have been implemented, in addition to what was agreed in the SCCs in question, which overall provide the data subjects with a protection of their rights that is at a level that is essentially equal to protection in the EU.

The Danish Data Protection Authority considers that this in itself means that DBA's legitimate interests in gaining a better understanding of the visitors' behavior on the website and in order to be able to form a basis for product and service improvements on dba.dk do not exceed consideration for the website's users, since the website visitors cannot reasonably

expect that their information, in addition to being made the subject of analyzes and statistics on dba.dk, will also be passed on to Google LLC's servers in the USA.

The Danish Data Protection Authority therefore considers that consideration of the website visitors' interests and rights exceeds consideration of the DBA's legitimate interests in processing the information for statistical purposes, and that the DBA's processing of information about website visitors for this purpose cannot therefore take place on the basis of Article 6, subsection of the Data Protection Regulation. 1, letter f.

The Danish Data Protection Authority also adds, with reference to the DBA's remark about the Danish Authority's opinion in a case about Nuuday A/S, that the Danish Data Protection Authority did not state in the decision in question that Article 6, subsection 1, letter f, could apply in relation to the use of predictive models.

With this decision, the Data Protection Authority has not taken a position on what DBA stated that Google LLC, in connection with Google Analytics, processes information about website visitors on behalf of DBA, and that Google LLC is therefore to be considered a data processor for DBA.

Regarding the structure of the consent solution

Of the data protection regulation, article 5, subsection 1, letter a, it appears that personal data must be processed legally, fairly and in a transparent manner in relation to the data subject.

The conditions in Article 4, No. 11 of the Data Protection Regulation, that a consent must be voluntary, specific, informed and an expression of an unequivocal expression of will from the data subject, means, among other things, that it must be clear for what purposes information is processed that is covered by the consent.

This means that to the extent that processing is carried out on the basis of Article 6, subsection 1, letter f, on balancing of interests, this processing should not appear as part of what the consent deals with. In the opinion of the Danish Data Protection Authority, the consent text should only cover the processing(s) that the consent must cover. The data controller should therefore make it clear which basis for the processing of personal data is relevant when drafting the consent text.

As stated in the presentation of the case, the following appears from the DBA's current consent solution:

"By clicking OK" you consent to the use of cookies and similar technologies (collectively referred to as 'cookies'), which we use for the purpose of creating targeted advertising, including on third-party sites, using segmentation, market research/target group analyzes and statistics generated in in connection with your behavior on our websites (DBA and BilBasen) and

improvement of advertising services.

In addition, you agree that certain third-party companies with whom we work may use cookies for the above-mentioned purposes here on the website.”

It is the Danish Data Protection Authority's assessment that the wording makes it unclear for the website visitors which (t) basis of processing is actually the basis for the DBA's processing of personal data in relation to statistics, since the processing purpose is mentioned here in connection with what the users give consent to.

Correspondingly, it is the Danish Data Protection Authority's assessment that information about withdrawal of consent does not appear sufficiently clearly in the DBA's current consent solution, as the information about this is neither highlighted nor draws the visitor's attention to this option in any other way.

Against this background, the Danish Data Protection Authority finds that the DBA's current consent solution for the processing of personal data does not meet the basic principle of legality, fairness and transparency in the Data Protection Regulation, Article 5, subsection 1, letter a.

Based on the above, the Danish Data Protection Authority finds that there are grounds for expressing serious criticism that DBA's processing of personal data about visitors to the website dba.dk does not take place in accordance with the data protection regulation.

On the basis of the above comments on the new consent solution, the Danish Data Protection Authority must invite the DBA to reconsider the design of the DBA's current consent solution.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).

[2] The decision was published on the Danish Data Protection Authority's website on 2 June 2020 (2019-31-1713)

[3] EDPB, Guidelines on 05/2020 on consent, Version 1.1., adopted on 4 May 2020.

[4] Ibid. para. 60.

[5] Ibid. para. 45, example 7.

[6] Ibid. para. 75 and 79