

APD DECISION ON IAB EUROPE AND TCF - FEBRUARY 2022

The Belgian Data Protection Authority (APD) handed down on 2 February 2022 a decision on IAB Europe and the Transparency & Consent Framework (TCF). What does this decision *actually* say, and what does it mean for the TCF itself, for IAB Europe, for vendors, publishers and consent management platforms (CMPs)?

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GENERAL

What is in the Belgian DPA (APDs) decision and where can I find it?

The Belgian Data Protection Authority (APD) handed down on 2 February 2022 a decision on IAB Europe and the Transparency & Consent Framework (TCF). The decision identifies IAB Europe as a data controller for the registration of TC Strings (digital signals containing user preferences) and a joint controller for the dissemination of TC Strings as well as for subsequent processing of personal data in the context of the TCF. You can read the full decision [here](#).

Did IAB Europe file an appeal against the decision to the Market Court?

On 4 March 2022, IAB Europe will submit to the Market Court (Court of Appeal of Brussels) an appeal against the Belgian Data Protection Authority (APD) ruling, which claimed that IAB Europe acted in breach of the General Data Protection Regulation (GDPR). IAB Europe also requested a suspension of enforcement until the end of the appeal process (in other words, a request to ensure that the APD decision is put on hold entirely until a decision on appeal is handed down).

Are TCF CMP consent pop-ups illegal?

No. There is nothing in the APD's decision that even remotely suggests that consent prompts are illegal or that they should not be employed by the digital advertising ecosystem to comply with legal requirements under the EU's data protection framework.

If anything, the APD ruling appears to require the disclosure of *additional* information in consent pop-ups to request additional consent for personal data collection and processing to store user preference signals.

The APD considers user preference signals (such as TC Strings under TCF) to be personal data that requires a legal basis (consent or legitimate interest) under GDPR, and that users cannot reasonably expect that their preferences are saved. As a result, disclosing information about this data collection and processing in consent prompts could be the only way to establish transparency about and user control over the creation, storage and processing of TC Strings.

See the question "What are TC Strings?" for additional background information.

Should all data collected via the TCF be deleted?

No.

First, there is the question of whether the TCF truly involves the processing of "personal data". *See the question "Why are TC Strings considered personal data by the APD?"*

Next, the APD says explicitly in its decision that it cannot mandate the removal of all TC Strings generated until now on IAB Europe. The APD only requires IAB Europe to ensure the deletion of personal data collected through TC Strings in the context of a specific mechanism called the “global scope”. See *the question “**What is the global scope?**”*.

The APD’s decision only concerns IAB Europe, not any vendor, publishers or CMPs, but it does hint at the possibility of an order for a given publisher or CMP to delete TC Strings if they contain “personal data that has been collected in breach of Articles 5 and 6 GDPR”. This is nothing new: if personal data is collected in breach of the GDPR it cannot be processed. Yet no GDPR breach has been established for any vendor, publisher or CMP.

For more input on what the APD’s decision means for you as a TCF participant, see *the question “**Are TCF participants at risk now towards their local Data Protection Authority?**”*.

EFFECTS OF THE DECISION ON THE TCF

What are the findings that relate to the TCF?

Several findings in the decision relate to the TCF:

- First, the APD considers that the current version of the TCF is incompatible with the GDPR because it offers legitimate interests as a legal basis for targeting and profiling¹.
- Second, the APD considers that the information provided to users needs to be made even more precise and granular (e.g. by standardising disclosures about the categories of data collected), though also more concise and easy to understand, with the result that consent under the current version of the Framework may not meet the GDPR standard for “informed” and “specific”.
- Third, the TCF does not *guarantee* that vendors implementing it comply with *all* obligations laid down in the GDPR.
- Fourth, according to the APD, the TCF does not sufficiently prevent tampering with the TC String, the signal that captures users’ choices in relation to data processing (even though such tampering is a clear violation of TCF Policies and can be subject to contractual enforcement by IAB Europe).
- Finally, users are not informed about the processing of the TC String by IAB Europe, which according to the APD is a data controller in relation to the TC String.

¹ The formal order contained in the ruling suggests that legitimate interests should not be available for *any* of the TCF purposes, but wording elsewhere in the Decision suggests the APD may only aim to forbid it for profiling.

Will the legitimate interest legal basis be removed from TCF?

The APD solely assessed and concluded that reliance on legitimate interest was inadequate for purposes that entail targeted advertising or profiling of users (excluding non-marketing related purposes, such as audience and performance measurement). Legitimate interest means that user data can be collected and processed if it is a reasonable need for the operation of the business and as long as the user receives adequate information and has the ability to object or opt-out of any related personal data processing.

It is therefore unclear if the requirement for IAB Europe to prohibit the reliance on legitimate interests as a legal ground for the processing of personal data by TCF participants is intended to apply to *all* TCF purposes or solely to purposes related to personalised advertising and profiling.

Because of the lack of clarity of the APD's position on this point, IAB Europe has addressed this point in its appeal.

Are TCF participants at risk now regarding their local Data Protection Authority?

In principle, no, for two reasons: first, for timing and procedural reasons; and second, for technical and legal reasons.

Following the publication of the decision of the Belgian data protection authority of 2 February 2022 on the Transparency & Consent Framework (TCF), many sources have published partial or incorrect information about the scope of that decision. Notably, IAB Europe is alarmed to see European data protection authorities (DPAs) advising publishers and others to switch from using the TCF, despite the fact that :

(i) the decision is subject to appeal, and IAB Europe has indeed filed an appeal against it (see question "**Did IAB Europe appeal to the Market Court?**") ;

(ii) the Belgian DPA decision includes a grace period. IAB Europe first has a period of two months to present a plan to the APD to take into account the APD's conclusions, and in total, six months to implement them after approval of the plan.

Any investigation or complaint before the end of these follow-up procedures (for example, an appeal) could be challenged as preventing the proper course of the justice system. This notably stems from the fact that many other local Data Protection Authorities have given input to the APD before it handed down its decision, as well as from general principles regarding the rights of defence.

From a technical and legal perspective, the APD decision itself does not conclude that the use of TC Strings or the TCF more broadly is illegal. It does hint in its decision that it may

order a publisher or CMP to delete TC Strings if they contain “personal data that has been collected in breach of Articles 5 and 6 GDPR”. Yet, it never concludes that vendors, publishers or CMPs that collect personal data are automatically in breach of the GDPR. In other words, the APD decision does not make it much easier for local Data Protection Authorities to attack specific vendors, publishers or CMPs.

What can TCF stakeholders do to better align their practices with the APD’s interpretation of the law between now and the end of the remediation period?

IAB Europe wishes to reiterate that the TCF is a minimum standard on how publishers can document the legal basis chosen for the processing of users’ personal data by third parties who deliver and measure digital advertising on their sites. The APD has not rejected the TCF, but has instead asked IAB Europe to propose corrective measures, showing that the alleged infringements can in its view be remedied to make the TCF even stronger.

If publishers, vendors and CMPs wish to adapt their use of the TCF in the meantime, they remain free to do so, and they can in this context take into account the APD’s suggestions of additional information disclosures as well as its considerations regarding the use of legitimate interests as a legal ground for profiling.

EFFECTS OF THE DECISION ON IAB EUROPE

What are the findings that relate to IAB Europe?

Several findings in the decision relate to IAB Europe. According to the APD:

- IAB Europe is a data controller for the recording of TC Strings, which are personal data that is processed in the context of the TCF;
- IAB Europe is a joint controller with CMPs, publishers and vendors for the collection and dissemination of TC Strings, which are personal data that is processed in the context of the TCF;
- IAB Europe is a joint controller with CMPs, publishers and vendors for the subsequent processing of personal data;
- IAB Europe must establish a legal basis for the processing of TC Strings;
- IAB Europe must ensure the deletion of *global scope* TC Strings;
- IAB Europe must carry out a data protection impact assessment, name a DPO and list TCF processing in its record of processing activities.

What are the consequences for IAB Europe to be a Data controller of the TC String?

IAB Europe has not considered itself to be a data controller in the context of the TCF. This is based on previous guidance from other DPAs and the fact that IAB Europe does not in any way process, own, or decide on the use of specific TC Strings (nor is it involved in any “coordination” of the use of TC Strings), as well as relevant case law and its own interpretation of the GDPR.

However, in its decision, the APD takes a different position and says that IAB Europe is a controller regarding the processing of personal data in the form of TC Strings.

Controllers are under additional obligations according to the GDPR, so the APD decision requires IAB Europe to work with the APD to ensure that these obligations are met going forward. This includes: establishing a legal basis for the TC String, ensuring effective technical and organisational monitoring measures in order to guarantee the integrity and confidentiality of the TC String, carrying out a data protection impact assessment (DPIA) with regard to the processing activities under the TCF and appointing a Data Protection Officer.

Will the action plan and its execution be supervised only by the APD or by other concerned authorities as well?

The APD expects IAB Europe to submit an action plan to the APD within two months after the decision. We assume that the APD will also share this action plan with the other supervisory authorities concerned, notably to ensure the consistent application of the GDPR across the EU but also in accordance with the cooperation mechanism used in prior phases of the APD proceedings. Once the action plan is validated by the APD, the compliance measures should be completed within a maximum period of six months. This process will involve proposed changes to the TCF that would need to be agreed by the existing TCF instances (the Steering Group, the Policy working group as well as the Framework Signals Working Group).

ABOUT THE APPEAL TO THE MARKET COURT

Why is IAB Europe appealing the Decision?

IAB Europe is appealing the decision, because it considers it to be wrong both in its assessment of the facts and in its legal analysis. The APD fails to justify its position on two fundamental issues, namely its claims that the TC Strings involve the processing of personal data and that IAB Europe acts as controller in relation to the TC Strings, despite the fact that IAB Europe is merely managing the framework, not the technologies implementing the framework or the actual processing based on the framework.

On what points is IAB Europe appealing?

IAB Europe disputes notably the controversial and novel allegation that it acts as a controller for the recording of TC Strings (the digital signals created to capture data subjects' choices on how their with respect to their personal data can be processed), and as a joint controller for the dissemination of TC Strings and other data processing done by TCF vendors under the OpenRTB protocol. IAB Europe also challenges the APD's assessments on the validity of legal bases established by the TCF, which were done in the abstract, without reference to the particular circumstances surrounding any discrete act of data processing.

Why does IAB Europe need the suspension of execution?

The Market Court has previously held that the pressure to pay a fine or to implement corrective measures can rob an appeal of its effectiveness, notably if the consequences of implementation are difficult to reverse, and IAB Europe considers that this element of pressure is present in this particular case. Immediate enforcement before the appeal has run its course could have irreversible and serious consequences for IAB Europe. IAB Europe has therefore asked that enforcement of the decision be put on hold until after an appeal decision is handed down by the Market Court.

Wouldn't a suspension of the execution be a bad outcome for consumers?

No. The TCF lays down minimum requirements to help companies comply with a narrow range of requirements in the GDPR, notably to do with establishing a valid legal basis for data processing for advertising and content personalisation. Participants are free to go beyond these minimum requirements to ensure they are complying with the law in other respects that are not in-scope of the current Framework. Some of the changes that the APD wants IAB Europe to add to the TCF go beyond the current scope of the TCF or are problematic for other reasons. The APD's approach has the merit of having helped IAB Europe resume a conversation about where to take the TCF in the future, which could lead to some suggestions being taken into account even if the APD's reasoning is legally and factually incorrect. Similarly, TCF participants can already take a cue from the Decision and proactively decide not to rely on legitimate interests as a legal basis for profiling, or provide supplementary wording to inform users about the data processing purposes for which user agreement is being sought.

While IAB Europe has grave reservations on the substance of the decision and the data controller designation, the ruling makes clear that what the APD wants is more TCF, not less - they want the TCF to deliver a broader range of compliance functionality and further standardisation of information disclosures to users. The TCF can and will continue to improve in ways that better align with the APD's vision and other DPA guidance. It has always been IAB Europe's intention to submit the Framework for approval as a GDPR transnational Code of Conduct, which necessarily implies to have an appropriate structure and procedures to carry out audits and take appropriate enforcement measures against participants in case of non-compliance. The obtention of the suspension will not change this aspiration.

What are the next steps?

IAB Europe expects a decision on the suspension of enforcement within the next few weeks. However, the full appeal before the Market Court will take several months. At this time, it is not possible to provide a more precise timeline. IAB Europe will regularly communicate on the different stages of the appeal process.

ADDITIONAL BACKGROUND

What is the TCF?

Launched in April 2018, the TCF is an open-source, voluntary standard to assist companies from the digital advertising ecosystem in their efforts to comply with EU privacy and data protection law.

It contains a minimal set of best practices that seek to ensure that when personal data is processed, users are provided with adequate transparency and choice, and that participants in the ecosystem are informed - through a digital signal - about what preferences users have expressed so that they know what they are permitted to do with personal data collected on sites.

Transparency and choice are provided to people visiting a site by publishers (websites) and their Consent Management Platforms (CMPs). They generate the digital signal and make it available to ad vendors that need to know whether the user has given them the necessary permissions under GDPR for their data to be collected and processed.

What are TC Strings?

TC Strings are the digital signals created by Consent Management Platforms (CMPs) that work for Publishers (owners of websites and/or apps) to capture data subjects' choices about the processing of their personal data for digital advertising, content and measurement. Vendors can receive such signals directly from CMPs or from other TCF participants to verify if they have obtained consent or legitimate interest for a purpose.

Why are TC Strings considered personal data by the APD?

The APD does not consider the TC String itself to be personal data, as the TC string does not allow for direct identification of the user due to the limited metadata and values it contains.

However, the APD holds that the possibility of CMPs being able to combine TC Strings and the IP address means it is ultimately information about an *identifiable* user and therefore personal data. This is based on the idea that CMPs could, via an Internet Service Provider, link an IP address to an individual. This reasoning is based on legal decisions from a very different context. The APD also suggests that identification is possible by linking the TC String to other data that can be used by TCF participants.

What legal basis could be used for the processing of TC Strings?

The APD appears to not consider consent or performance of a contract as an appropriate legal basis for the processing of TC Strings by IAB Europe.

However, it seems the APD would consider legitimate interest to be an adequate legal basis: the APD considers that capturing users' approval and preferences to ensure and demonstrate valid consent to advertising purposes may be considered a legitimate interest. This is, in part, based on the fact that the APD explicitly states that, in its view, the information processed in a TC String is strictly limited to data strictly necessary to achieve the intended purpose. However, it notes that users must be informed about their preferences being stored in the form of a TC String and provided with a way to exercise the right to object to such storage/processing. This would, as indicated above, result in additional user disclosures and controls in consent prompts.

What is the global scope?

The TCF Policy previously allowed legal bases in the Framework to be established with "global scope", which means a legal basis is not only applicable on the website or group of websites (service-specific and group-specific scopes) where it is obtained and managed, but all services implementing global scope preferences. Deprecation of global scope support was announced by IAB Europe on June 22nd 2021. This was due to the overall negligible use of global scope by publishers and indication by several DPAs that users should be clearly informed of the digital properties where their choices apply, for example by being provided with a list of domains.