

## FAQ: APD DECISION ON IAB EUROPE AND TCF - SEPTEMBER 2022

On 7th September, the Belgian Market Court issued an “interim ruling” on the Belgian Data Protection Authority’s February 2022 decision on IAB Europe and the Transparency & Consent (TCF). The interim ruling refers preliminary questions to the Court of Justice of the European Union (CJEU). It contains the Market Court’s findings on the procedural arguments made by IAB Europe but is silent on the substantive arguments, pending the CJEU’s judgement on the preliminary questions. What does the Market Court’s judgement *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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## **ABOUT THE APPEAL BEFORE THE BELGIAN MARKET COURT AND REFERRAL TO THE CJEU**

### **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 with respect to how 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.

### **What did the Belgian Market Court do in the ruling issued on 7th September?**

The ruling issued on 7th September is an "interim ruling". In it, the Belgian Market Court provided its findings on the procedural arguments raised by IAB Europe in its appeal but suspended its reflection on the substantive arguments (i.e. arguments regarding the alleged GDPR infringements) pending answers from the Court of Justice of the European Union (CJEU) on two questions it referred to that Court. The questions concern, respectively, (i) whether the TC String – the digital signal containing user choices about the processing of their personal data for the TCF purposes – constitutes personal data under the GDPR and (ii) whether IAB Europe should be considered to be a controller for personal data processed under the TCF (both in relation to the TC String and even in relation to further processing, for instance targeted online advertising by publishers and vendors).

The Market Court has ruled on the procedural part of the appeal, i.e. the points challenging the way the APD handled the enforcement procedure against IAB Europe. The Market Court confirmed positively that the APD's decision was insufficiently substantiated in relation to the issue of whether the TC String is personal data and that the decision failed to meet the relevant standard for proper investigation and fact-finding - which will have a bearing on the ultimate outcome of the case irrespective of the Court of Justice's answers.

## Why has the Belgian Market Court referred to the CJEU?

In its interim ruling, the Market Court explained that it is not self-evident that IAB Europe should be considered as a data controller for the processing of personal data within the TCF or that TC Strings should be considered personal data. The Court noted that the CJEU has not yet had the opportunity to rule on the “new and far-reaching technology” at issue in the contested decision.

IAB Europe had (i) rejected the finding that the TC String is personal data for IAB Europe, arguing that the Internet user whose choices go into a TC String is not identified or identifiable for IAB Europe, and (ii) rejected the APD’s finding that it is a controller, arguing that this reflected an incorrect interpretation of the GDPR and would have grave negative implications for standard-setting organisations everywhere. In its final written submission to the Market Court, the APD itself suggested a referral to the European Court on the second issue, while the complainants in the case themselves suggested a referral on both issues. The broad implications of the APD’s sweeping interpretation of the concepts of personal data and controllership make a referral to the European Court a logical next step.

## How long will it take for the European Court of Justice to rule on the preliminary questions?

We expect the European Court to take between twelve and eighteen months to issue its judgement. Once the judgement has been issued, the Belgian Market Court will be able to conclude its deliberations on the substantive issues raised in IAB Europe’s appeal of the APD decision.

## Are TCF participants at risk 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 the question “**Did IAB Europe file an appeal against the decision to the Market Court?**”); The appeal procedure is still ongoing, as the Belgian Market Court issued an interim ruling on 7 September 2022. In its judgement, the Market Court confirmed positively that the APD’s decision was insufficiently substantiated in relation to the issue of whether the TC String is personal data and that the decision failed to meet the relevant standard for proper investigation and fact-finding. As a result, it may be difficult for the APD or any other data protection authority to rely solely on the decision of February, irrespective of the outcome of the questions referred to the Court of Justice of the European Union, and they would have to carry out a proper (complete, objective) investigation in order to avoid easy criticism on that point, even if the Court did not explicitly confirm that the APD’s decision is now suspended.

Moreover, given how central the question of whether a TC String contains personal data will be to any other investigation into the TCF, it is possible that data protection authorities will be

cautious, to avoid the risk of being contradicted later on by the Court of Justice, should it agree with IAB Europe's arguments and reject those of the APD.

(ii) the Belgian DPA decision includes a grace period. IAB Europe first had a period of two months to present a plan to the APD to take into account the APD's conclusions (*see the question "Did IAB Europe submit the action plan required by the APD's decision?"*), 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 "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 pending the appeal proceedings before the Belgian Market Court?**

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 until a final ruling on the merits is rendered by the Belgian Market Court, 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.

### **Did IAB Europe request the suspension of the execution?**

IAB Europe had initially asked that enforcement of the decision be put on hold until after an appeal decision is handed down by the Market Court. Following confirmation from the APD that the validation of the action plan required by the decision will take place after September 2022, at a date by which the Market Court was expected to have issued a ruling on the appeal, IAB Europe had withdrawn its request for suspension. Now that the Market Court has rendered an interim ruling to refer questions to the European Court of Justice, IAB Europe is currently examining whether the APD could require the execution of the remaining elements of the formal orders in the February 2022 decision, pending the outcome of the referral to the CJEU and the issuing of the Market Court's final ruling.

## GENERAL

### **What is in the decision of the Belgian DPA (APD) 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](#).

On 4 March 2022, IAB Europe submitted 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) (see “about the appeal before the Belgian Market Court and referral to the European Court of Justice”)

### **Did IAB Europe submit the action plan required by the APD’s decision?**

On 1 April 2022, IAB Europe submitted the action plan required by the decision to the APD. Each of the steps described in the action plan is the result of a careful assessment of which measures appear best suited to meet the APD’s interpretation of the GDPR and the obligations the decision creates for IAB Europe. Once the action plan has been reviewed and validated by the APD and concerned supervisory authorities, IAB Europe will have six months to implement it.

Now that the Market Court has rendered an interim ruling on IAB Europe’s appeal to refer questions to the European Court of Justice, IAB Europe is currently examining whether the APD could require the execution of the action plan pending the outcome of the referral to the CJEU and the issuing of the Market Court’s final ruling.

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

In accordance with Article 60 (10) GDPR, as further interpreted by the EDPB in para. 249 of its Guidelines 02/2022, the APD should share IAB Europe’s action plan with the concerned authorities the APD consulted under the cooperation procedure prior to finalising its decision, notably to ensure the consistent application of the GDPR across the EU. Once the action plan is validated by the APD, the other 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).

### **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 “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 profiling.
- 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.

### **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.

### **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 are 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 are 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-scoped* 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.

## **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.

### **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 (network-wise). 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.