



POSITION of the IVW e.V.

on Draft 2017/0003 (COD) of the EU Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC

1) The IVW as an organisation

The German Audit Bureau of Circulation (IVW) has neutrally and objectively recorded and audited the distribution of advertising media since 1949. With the establishment of the IVW, media providers (publishers), advertisers and advertising agencies created an effective controlling system which is under their joint supervision.

Almost all relevant advertising media categories are covered under the umbrella of the IVW: newspapers, magazines and other periodically appearing press products, broadcast media (radio and TV), cinema advertising and digital media.

The underlying idea is simple and obvious. In order to function, the advertising market requires performance data regarding the advertising media that are offered on the market. However, if these data were collected by each provider of an advertising medium for its own advertising media with its own individual methods, on the one hand, no comparability with the data of other providers would be guaranteed, and on the other hand, there would also be no independent assurance of data quality. The advertising market players transferred these tasks to a common parent institution: the IVW.

The results of the IVW's work provide reliable data for the market, for professional advertisers and performance-based competition between the media. As an independent, non-commercial, and neutral auditing organisation, the IVW provides the media and advertising industry, and interested public, with basic data for the marketing of media as advertising.

Behind the measurement and control procedures are complex rules and regulations which are negotiated and decided by the delegates of advertisers, agencies and media providers at the IVW "round table". The bodies are committed to the consensus principle and to the IVW's duty to ensure transparency, i.e. a common denominator is reached in the IVW between the opposing interests of the provider and the customer. The resulting definitions and conventions form market standards and the data provided by the IVW have become the accepted currency for quantitative advertising media performance.¹ The consensus principle ensures the general acceptance of these currencies, and in this sense, the IVW is a classic Joint Industry Committee (JIC).

¹ In the area of determining and monitoring the circulation figures of print titles (regional and national daily newspapers, weekly newspapers, general interest magazines, journals, digital replicas etc.), the IVW is therefore also known as the "Circulation TÜV", in which the "TÜV" (Technical Supervisory Association) is an equivalent to the MOT test that has to be passed in UK for example.



2) Currency for the German digital advertising market

For the digital advertising business, the central prerequisite for a stable currency accepted by all market partners is also neutral collecting and auditing of the traffic data. The IVW provides the German-speaking online advertising market with this component of the currency in the form of the audited metrics "PageImpression" and "Visit".

The IVW procedures ensure that the use of digital advertising media is measured according to consistent criteria, and that basic comparable data on the effectiveness, evaluation and planning of advertising media use are thus available to the advertising market.

In the area of digital media, the advertising market relevant to Germany has almost completely joined this IVW controlling procedure, with approximately 1800 digital offerings. Websites, mobile enabled websites and apps have become member of the IVW as digital advertising media. The only relevant players missing in that system of the advertising market are the US companies Facebook and Google.

3) Measuring system

The measuring system uses a tracking pixel that is inserted on every page of the monitored website (scalable centralised measuring system "SZM", operated by INFOline GmbH in Bonn). The number of user actions ("PageImpressions") on a website is recorded by this tracking pixel. This individual user actions are each attributed to a specific, related usage event ("Visit"). The IVW auditors ensure that this is carried out according to the detailed IVW guidelines.

The "SZM tag 2.0" used for measuring consists of two code parts, namely an external JavaScript file and other JavaScript variables. The SZM tag, which is integrated on the measured website, transmits the measuring impulse (i.e. the measuring pixel request) to the measuring system. If the SZM tag activates such a request to the measuring system, the system also checks whether or not a cookie is present. If no cookie is present, the system attempts to drop a cookie. This cookie is a small text file and contains a random unique identifier which is transmitted by the browser every time the website is accessed. Here the cookie text file is not sent as such, but rather the browser sends the contents of the cookie (browser function) upon request.

To identify computer systems, the SZM reach measurement uses either a cookie with the identifier "ioam.de", a LocalStorage object or a signature that is created from different information automatically transmitted by the browser. IP addresses are only processed in anonymous (shortened) form.

Continuous measurement allows the central collecting of the traffic data on the websites and apps which have joined the IVW-system. Anonymous measurement data are thereby formed. The recording of usage events enabled by a cookie is always processed as a merely intermediate step towards generating overall statistics. The statistical data on the intensity of use of an advertising medium are transferred and aggregated in a complex interaction of multiple system levels. The reference to individual usage events permanently disappears, including complete anonymisation, due to the ongoing aggregation of the recorded usage data.²

² Example: The news portal www.FAZ.net, a website version of the national daily newspaper F.A.Z., participates in the technical usage measurement, auditing and reporting carried out by the IVW. If the homepage of www.FAZ.net is



The specific characteristic of the system established in Germany³ is the complete technical survey (census measurement): The total traffic generated by all users to the participating websites can be collected by the measuring system. In the case of this survey, it must be noted that *the use* of a website is recorded for the overall statistics, but not *the users* of the website. That is because the metrics of the IVW refer to the advertising medium and its frequency of use (Visits), not to the visitor accessing the site. Accordingly, no retroactive accounting can be done or conclusions can be drawn as to the number of users, groups of users, or individual users based on the metrics "PageImpression" and "Visit". For the performance values of the advertising media in the IVW system, this connection is neither required nor desired.

The statistical data on the intensity of use of an advertising medium are respectively reported publicly on the IVW website for a whole month measured. The monthly statistical results of all 1800 IVW-affiliated digital advertising media are available at <http://ausweisung.ivw-online.de/>

4) Measuring system in compliance with data protection

In 2011 various modifications were made to the measurement and auditing procedure in consultation with the regional supervisory authorities for data protection in order to meet the additional data protection requirements set by the supervisory authorities. In particular, IP addresses have shortened since been recorded at the start of the measuring process before any processing in order to make any inference regarding a natural person impossible. In addition, all Internet users are granted the option of objecting to the traffic measurement by the SZM. This is an opt-out indicated by the websites to their visitors.

INFOnline GmbH acts as a data processor for the affiliated digital advertising media (within the meaning of Article 28 of EU Regulation 2016/679/EU and the BDSG, German Federal Data Protection Act). All measurement services meet the high standards of German data protection. This quality is also proven by regular TÜV (Technical Supervisory Association) certification. Most recently, the SZMnG was attested with the "certified data protection" certificate in December 2016 by TÜV Saarland.

5) Basic data

In addition to their function as a currency and their task of ensuring competition in the market, the IVW-tested measurement results are an important component in the reach studies published by other organisations. In this manner, the AGOF (Association for Online Research) uses the basic data from the technical survey for its market media study "digital facts"; the agma (Association for Media Analysis) has published the AGOF study "Internet facts" as "ma online" as part of its study portfolio since 2009. In this way, the quality assurance of the basic data by the IVW continues to have an effect under the umbrella of other organisations.

accessed on January 22, this activates a counting impulse which is centrally recorded and stored as 1 PageImpression for www.FAZ.net. If, within the same usage event (Visit), an article (content) on the homepage is then opened and the user subsequently clicks to switch to the business section and goes to the feuilleton section, this gives three further PageImpressions. This is recorded in the usage statistics as a total of 4 PageImpressions and 1 Visit for the website www.FAZ.net. This value is combined with all other PageImpressions and Visits recorded on the www.FAZ.net portal in January to obtain the monthly overall result: 141,091,280 PageImpressions and 31,050,093 Visits.

³ Similar census measurements are also used in other EU countries, for example in Austria and Romania.



6) Impact of Articles 8-10 of the EU Privacy Regulation

At most, just a few fragments of this proven and balanced system of the IVW will remain when the provisions of the Privacy Regulation comes to operation.

Although the privacy regulation provides no legal definitions for "3rd party cookies", we assume that the SZMnG should be classified as a 3rd party system in the context of the Regulation's provisions. the interplay of Articles 8, 9 and 10 has the following impact on the system for measuring the web traffic:

6.1) So that the system can, as previously, collect the usage of the websites to form the metrics "PageImpression" and "Visit", every Internet user, during the selection of privacy settings prescribed as mandatory by Article 10 paragraph 2, would have to consent to a default setting which technically enables the setting of 3rd party cookies. However, depending on the nature of the information on the settings and the presentation of the different settings (default setting?, order of selectable settings?) it should be assumed, from a realistic perspective, that a variety or even the vast majority of users chooses the "strict" browser setting offered to them – whether simply out of convenience and the desire to be able to complete the browser installation as quickly as possible and without further intermediate steps and dealing with the possible settings, or whether it is also because the user assesses them as having a possible adverse effect based on the information given to him/her on 3rd party cookies.⁴ The measuring system would consequently be confronted with a variety of browsers that automatically and generally prevent important functionalities of the measurement system for all websites.

However, if the browser is firstly technically configured so that 3rd party cookies be indistinctively excluded, it is possible for consent to be given later individually by the user for a particular cookie (pursuant to Article 8 1 (b), Article 9), but de facto meaningless. That is because this consent additionally requires technical implementation in order to be effective. In particular, it only leads to the consequence of cookie use chosen by the consenting party if the consenting party also individually superimposes or resets the general settings of the browser for the cookie in question. However, whether the user will even take that path (which is ultimately a step backwards for him/her) after giving his/her consent is more than questionable: Users do not want to individually configure and update their browser at short intervals. Users want to surf, i.e. to access the website they have chosen. Any other notion overestimates the willingness of the average user to customise "privacy by design" through frequent changes in the technical settings.

Consequence for the currency system: The technical survey, which forms the basis of the quality of the currency system in the German market, would be heavily undermined. Any statements regarding the frequency of use of websites would be massively distorted, and comparisons of the figured performance data would therefore be no longer meaningful. A consistent, objective currency would thus ultimately become illusory.

⁴ Reference is also made at this point to the unsatisfactory and worrying fact that, in practice, only the provider of the respective browser can formulate the manner of the information of the user and the modalities of the privacy settings. However, this provider is in no way part of the concerned parties whose interests and needs are to be appropriately balanced by the Privacy Regulation. Rather, it must be assumed that a browser provider has primarily commercial interests which are detached from the aims and purposes of the Regulation and which are not committed to an appropriate balance.



6.2) The legal permission formulated in Article 8 1(d) for a "web audience" does not help to maintain the measuring system because it is narrowed down - in an incomprehensible manner - to 1st party cookies. This narrowing is possibly based on the erroneous simplification that the intensity of interference when using a cookie can be defined by the distinction between 1st party and 3rd party. However, 3rd party cookies are neither per se intensive in terms of interference, nor are 1st party cookies always neutral in terms of interference for the user.

6.3) Article 9 para. 2 states, that *"for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet."* However, even this provision cannot bridge the gap between the technical default setting of the browser and individual consent of the user conflicting this setting. A distinction can be made between two combinations here: Either the user has already chosen a restrictive "privacy setting" in his/her browser. The concerns described in 6.1) then remain. Or the user has not selected a restrictive setting in the browser. However, it is then totally unclear how the consent option *"in the technical settings"* can act as consent with regard to the information requirements which are extensive and focused on a specific purpose. The text of the Regulation (Article 9 paragraph 1) states that these diverse information requirements remain unaffected, and that the information would initially have to be given in relation to a specific cookie and its purpose in connection with the browser setting. In the current version of Article 9 paragraph 2, there is therefore no simplification or effort to address the factual circumstances, neither for the user nor the operator of the website accessed by the user.

Overall, the Regulation has an unnecessary regulatory excess in the area of traffic measurement. The objectives of the Regulation could be implemented even without knowingly accepting collateral damage to the traffic measurement system in the German market.

7) Required amendments

The following aspects are required in particular to ensure a balance of interests in the provisions of the Regulation:

- the deletion of the obligation to consent to a privacy setting offered by the browser,
- assurance that the user can give consent through continuing using his browser after having proved with clear and comprehensive information that this action signifies consent,
- removal of the restriction that permits audience measurement only with 1st party cookies,
- assurance of the possibility of data processing in the context of audience measurement without this leading to categorisation as a 3rd party driven system,
- legal certainty and practicality for the currency system in the German market and the tasks of the IVW.

The recitals of the draft Regulation rightly emphasise that a corridor of permission must be kept clear in the bans of the Regulation where interference with the privacy of the user is only minor. We regard the procedures that the IVW currently uses to fulfil its tasks as being in this range of very limited and acceptable intrusion. However, in the present Regulation, Articles 8, 9 and 10 do not implement that approach which differs according to the intensity of the interference.



The consequences for the currency system in Germany's digital advertising market would be enormous.

Please therefore consider these concerns of the market in the forthcoming consultations in Berlin and Brussels.

IVW e.V. contact person:

Dr. Kai Kuhlmann
(Deputy Managing Director, Legal Department Head)

Contact:

Email:kuhlmann@ivw.de
Office:+49 (0) 30-590099758
Mobile:+49 (0) 162-4110499
Am Weidendamm 1 A, 10117 Berlin
www.ivw.de