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Zürich, 13. Mai 2022 STG/GRF

fusedeck / «Cookieless Tracking» without Consent¹

Dear Sir or Madam,

- 1 With fusedeck, you enable your customers to measure the performance and reach of websites *without* cookies («cookieless tracking»).
- 2 Now the question has arisen whether consent in accordance with the European «Cookie Directive» and its national implementations² («cookie banner») must also be obtained for this type of tracking, i.e., for «cookieless tracking» with fusedeck.

1. Legal Basis in Europe, in particular in Germany

1.1 European ePrivacy Directive («EU Cookie Directive»)

- 3 To answer this question, the relevant requirements of the European ePrivacy Directive, which was supplemented in 2009 with the following Art. 5 para. 3 and is in this respect therefore referred to as the «EU Cookie Directive», must be examined (**emphasis added**):

*«Member States shall ensure that the use of electronic communications networks **to store information or to gain access to information stored in the terminal equipment of a [...] user** is only allowed on condition that the [...] user concerned is provided with clear and comprehensive information [...], inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. [...]»*

¹ English translation from the original text in German.

² Germany: § 25 TTDSG (effective since 1 December 2021); Austria: § 165 TKG (effective since 1 November 2021).

- 4 Accordingly, the active, explicit, voluntary, informed, and prior consent of the respective user is required for the storage of information in the terminal equipment of a user or for gaining access to information stored in the terminal equipment of a user without there being a technical necessity for such storage or access. Individual users must have an equivalent opportunity to consent to storage and / or access or to refuse such consent according to the practice of European data protection authorities.
- 5 In the context of users' devices or browsers, cookies were originally used to store such information or to gain access to such stored information, which is why the term «cookies» is still used today. However, nowadays, there are other options for storing such information, which are often collectively referred to as «web storage».
- 6 With fusedeck's «cookieless tracking», no «cookies» are set, i.e., no cookies or other information are stored on the users' devices or browsers.
- 7 Moreover, «cookieless tracking» with fusedeck does not gain access to stored cookies or other stored information on the users' devices or browsers.
- 8 In contrast, «cookieless tracking» with fusedeck uses information that devices or browsers transmit by default and independently of fusedeck to each web server in order to be able to retrieve individual content or pages to create session IDs («cookieless session tracking») or session IDs and client IDs («cookieless client tracking»). Such information includes in particular the accessed Internet address (URL), the shortened or pseudonymized IP address and the user agent (see **Appendix 1** for details).
- 9 From the point of view of Capture Media and / or fusedeck, and from the point of view of the individual customers who use fusedeck, the IDs explicitly have no personal reference, in particular through hashing and salting of the IDs.³
- 10 **Since «cookieless tracking» with fusedeck does not actively access stored information of users, but only uses information that is transmitted by default, the «EU Cookie Directive» is not applicable.**
- 11 **As a result, no consent according to the «EU Cookie Directive» is required for «cookieless tracking» with fusedeck.**

1.2 Implementation of the «EU Cookie Directive» in German and Austrian law

- 12 The same conclusion results from the national and thus directly applicable implementation in Germany (Art. 25 para. 1 of the Telecommunications Telemedia Data Protection Act, TTDSG, for all data

³ In the case of a possible reference to natural persons, the European General Data Protection Regulation (GDPR) would be applicable.

or information, i.e., without restriction to personal data, **emphasis** added, unofficial English translation):⁴

«*The storage of information in the end user's terminal equipment or the access to information already stored in the terminal equipment shall only be permitted if the end user has consented on the basis of clear and comprehensive information. [...]*»

- 13 The same conclusion also follows from the national and thus directly applicable implementation in Austria (Art. 165 para. 3 of the Telecommunications Act 2021, TKG, explicitly limited to personal data and their gathering, **emphasis** added, unofficial English translation):⁵

«[...] Providers of an information society service [...] are obliged to inform the user of the **personal data** they will process, on what legal basis and for what purposes, and for how long the data will be stored. A **gathering** of this data is only permitted if the user has given his or her consent to this actively and on the basis of clear and comprehensive information. [...].»

- 14 «**Cookieless tracking**» with fusedeck is accordingly not covered by the scope of application of TTDSG and TKG.

2. Statements by Data Protection Authorities

2.1 Guidance issued by the German Data Protection Conference (DSK)

- 15 The same conclusion follows from the guidance of the united German data protection authorities (Datenschutzkonferenz, DSK) on the TTDSG.⁶ The decisive factor in this regard is what is meant by «access to information» according to the «EU Cookie Directive» or TTDSG.
- 16 In its guidance, the DSK states, among other things, that the exclusive processing of «**information, such as browser or header information [...], which is transmitted inevitably or due to (browser) settings [...] when accessing a website [...]**» is «not to be regarded as <access to information that is already [...] stored>» (**emphasis** added, unofficial English translation). The DSK explicitly mentions as examples the «address of the website (URL) accessed» or individual Internet addresses accessed, the «user agent

4 Cf. e.g. KLAUS MEFFERT: Browser Fingerprinting und das TTDSG: Erlaubt oder nicht?, 15 / 16 November 2021, available online at <https://dr-dsgvo.de/browser-fingerprinting-und-das-ttdsg/>; MIKE KUKETZ: Meinung – Auch das TTDSG ermöglicht einwilligungsfreies Tracking, 18 November 2021, available online at <https://www.kuketz-blog.de/?p=495439> (According to information available at <https://www.kuketz-blog.de/ueber-mich/>, Mike Kuketz is an employee of the State Commissioner for Data Protection and Freedom of Information Baden-Württemberg, LfDI BW, i.e., an employee of a German data protection authority).

5 Cf. e.g. CHRISTOPH OBERMAYR: Die Umsetzung der Cookie-Regelung in Österreich, Linz 2017, available online as PDF file at <https://epub.jku.at/obvulihs/download/pdf/1706717>.

6 DSK: Orientierungshilfe der Aufsichtsbehörden für Anbieter:innen von Telemedien ab dem 1. Dezember 2021 (OH Telemedien 2021), available online at https://datenschutzkonferenz-online.de/media/oh/20211220_oh_telemedien.pdf.

string with browser and operating system version» and the «language set» (sec. III / 1 lit. c, unofficial English translation).

- 17 Immediately following these explanations – still under section III / 1 lit. c – the DSK states what kind of digital fingerprints or fingerprinting should only be permissible with consent: *«In contrast, it is already to be considered access to information [...] of the end user if [...] **properties of a terminal device are actively read and transmitted to a server for the creation of a fingerprint**»*. And: *«[...] browser fingerprinting [...] refers to the process of **server-side creation of a (hash) value or image that is as unique and long-lasting as possible** as the result of a mathematical calculation of browser information [...]*» **(emphasis added, unofficial English translation)**.
- 18 Conversely, there is no «access to information» if information is *not* actively read to create a digital fingerprint that is as long-lasting as possible. For «cookieless tracking» with fusedeck, information is only passively read, there is no active access, and there is no longevity.
- 19 «Cookieless tracking» with fusedeck is therefore not within the scope of application of the TTDSG. This is already accounted for by the protective purpose of Art. 25 TTDSG, which the German Data Protection Conference describes in its guidance as follows: *«End users are thus protected from third parties storing or reading out information on their terminal equipment without authorization and thereby violating their privacy»* (sec. III / Introduction, unofficial English translation). Cookieless tracking with fusedeck does not involve any such readout.

2.2 Assessment of the French CNIL

- 20 The same conclusion also results from the assessment of the French data protection authority CNIL⁷ with regard to the potential use of analytics and tracking software for performance and reach measurement without consent, incidentally also explicitly in the context of data processing (hosting).
- 21 In the context of this assessment, the does not even absolutely exclude the use of cookies without consent **(emphasis added, unofficial English translation)**:⁸
*«La gestion d'un site web ou d'une application mobile requiert généralement l'utilisation de **statistiques de fréquentation ou de performance**, souvent indispensables à la fourniture du service. Les **cookies** déposés dans cet objectif **peuvent être exemptés de consentement sous certaines conditions**.»*
- 22 CNIL thus considers, subject to compliance with certain requirements, even tracking that uses cookies without consent to be possible and thus goes beyond the «cookieless tracking» with fusedeck.

⁷ CNIL is the abbreviation of Commission nationale de l'informatique et des libertés; the French data protection authority is considered particularly strict in comparison to other European data protection authorities.

⁸ CNIL: Cookies – solutions pour les outils de mesure d'audience, 23 September 2021, available online in French at <https://www.cnil.fr/fr/cookies-solutions-pour-les-outils-de-mesure-dauidience>.

2.3 Opinion of the European Article 29 Data Protection Working Party

- 23 The same conclusion finally results from Opinion 9/2014 on the application of Directive 2002/58/EC to device fingerprinting of 25 November 2014 of the then Article 29 Data Protection Working Party.⁹
- 24 In this opinion, the Working Party states that according to RFC 6973, a fingerprint is «*a set of information elements that identifies a device or application instance*», while for its Opinion, «*the term is used in a broad sense*» and includes «*a set of information that can be used to single out, link or infer a user, user agent or device over time*».
- 25 In the case of «cookieless tracking» with fusedeck, there is in particular no «over time» element, and the main data protection risk that the Article 29 Data Protection Working Party focuses on, i.e., that «*an individual may be associated, and therefore identified, or made identifiable, by [a] device fingerprint*» does not apply.

3. «Cookieless Tracking» with fusedeck without Consent

- 26 **As a result, customers who use fusedeck can justify waiving the requirement to obtain consent according to the «EU Cookie Directive for «cookieless tracking» with fusedeck.**
- 27 This justification is possible irrespective of whether «cookieless session tracking» or «cookieless client tracking» is used, because with regard to the scope of application of the «EU Cookie Directive», the decisive factor is that information is not actively accessed, but only passively read out or transmitted by the users by default.
- 28 With regard to both available «cookieless tracking» variants, «cookieless session tracking» has the advantage that, compared to «cookieless client tracking», it is somewhat easier to argue that no personal data are processed.
- 29 In addition, I refer to the explanations on «Using fusedeck without Consent (without «Opt-in»）」 of 26 November 2019, especially with regard to a *possible* processing of personal data and its justification under the EU General Data Protection Regulation (GDPR).¹⁰

⁹ Available online at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp224_en.pdf; the Article 29 Data protection Working Party was the predecessor of today's European Data Protection Board under the then current EU Data Protection Directive, the predecessor of today's European General Data Protection Regulation (GDPR).

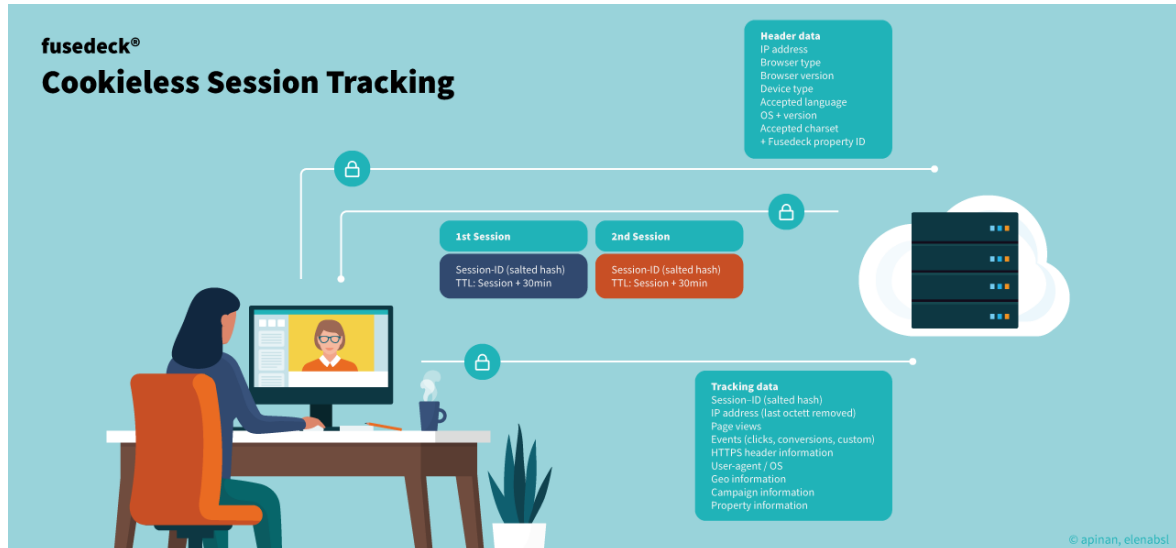
¹⁰ Available online as PDF file at https://fusedeck.com/wp-content/uploads/2021/05/Steiger-Legal_fusedeck-ohne-Einwilligung.pdf.

Yours sincerely,



Martin Steiger

Appendix 1 – «Cookieless Tracking» with fusedeck



«Cookieless Session Tracking» with fusedeck as presented by Capture Media (4 November 2021)



«Cookieless Client Tracking» with fusedeck as presented by Capture Media (4 November 2021)