



1. Changes in legislation

+++ GERMAN PARLIAMENT PASSES TELECOMMUNICATIONS AND TELEMEDIA DATA PROTECTION ACT: CONSENT FOR TRACKING COOKIES REQUIRED BY LAW +++

The German Parliament has adopted a draft law for the Telecommunications and Telemedia Data Protection Act (TTDSG) (see our [BB Privacy Ticker of February 2021](#)). Among other things, the new law intends to implement the European requirements for privacy protection in the use of telemedia. For example, the new legislation now expressly stipulates that the setting of cookies that are not technically or functionally necessary requires the informed consent of the user (section 25 TTDSG). In the future, however, services that provide legally compliant procedures for managing consent are to be recognized (section 26 TTDSG). This could increase legal certainty in handling cookies which might be important for website operators, for example.

[The draft TTDSG in its version as adopted on 20 May 2021](#)

2. Case Law

+++ ECJ CALLED IN ON REQUIREMENTS FOR GDPR DAMAGES +++

The Austrian Supreme Court has referred to the European Court of Justice (ECJ) various extremely practice-relevant questions on the interpretation and application of the claim for damages regulated in Article 82 GDPR. Among other things, the ECJ will have to decide whether a GDPR damage claim only arises if the claimant has suffered

specific damage or whether a simple breach of the GDPR already includes such damage. The ECJ was further presented with the question of the materiality threshold for non-material damage, with which German courts had also recently rejected GDPR claims for so-called "non-material damages". The Federal Constitutional Court had only recently stated that this was an unresolved legal issue that had to be submitted to the ECJ (see [BB Privacy Ticker of February 2021](#)).

[The decision of the Austrian Supreme Court \(of 15 April 2021, case 6Ob35/21x\)](#)

+++ FEDERAL LABOUR COURT: GLOBAL DEMAND FOR DATA COPIES NOT SPECIFIC ENOUGH +++

The Federal Labour Court has ruled that a request for the surrender of all e-mails that "mention the employee bringing action by name" is too vague and therefore inadmissible. In the case, a former employee had tried to obtain a copy of all e-mails concerning him from his previous employer. However, the eagerly awaited ruling of the Federal Labour Court left the legal question unresolved as to whether employees are entitled to such a far-reaching right to data copies (Article 15 (3) GDPR) at all.

[The press release of the Federal Labour Court \(of 27 April 2021, case 2 AZR 342/20\)](#)

[The blog post](#)

+++ HIGHER REGIONAL COURT OF NAUMBURG: SCHUFA REPORTS BY PARTICIPATING COMPANIES LAWFUL +++

The Higher Regional Court of the German State of Saxony-Anhalt found that the transmission of data relevant to creditworthiness to an economic information file, in this case Schufa Holding AG, is lawful on the basis of legitimate interests (Article 6 (1) lit. f) GDPR) if the transmitting entity participates in the corresponding (Schufa) alert system of the credit industry. The court stated that the provision of accurate creditworthiness information was of considerable importance for the functioning of the economy and that the provision of the necessary data by data subjects was therefore generally to be accepted. Ultimately, credit agencies not only serve the economy but also the protection of consumers from over-indebtedness.

[The decision of the Higher Regional Court of Naumburg \(of 10 March 2021, case 5 U 182/20\)](#)

+++ HIGHER LABOUR COURT OF COLOGNE: EMPLOYER'S LIABILITY FOR GDPR DAMAGES IN CASE OF UNDELETED PROFILE OF FORMER EMPLOYEE +++

The Higher Labour Court of Cologne has ruled in a recently published judgment that an employer violates Article 17 of the GDPR and is liable for damages if the employer

does not properly delete the employee profiles of former employees. In the case in question, the employer deleted the link to the employee profile from its own website and intranet when the plaintiff left, but overlooked an isolated pdf containing the plaintiff's profile, which had been posted on an earlier version of the website and could still be accessed via a Google search. With regard to the amount of the damages for pain and suffering, the Higher Labour Court of Cologne found that it did not exceed EUR 300.00.

[The decision of the Higher Labour Court of Cologne \(of 14 September 2020, case 2 SA 358/20\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ HAMBURG DATA PROTECTION OFFICER PROHIBITS FACEBOOK FROM PROCESSING WHATSAPP USER DATA +++

The Hamburg Officer for Data Protection and Freedom of Information has issued an order against Facebook Ireland Ltd. prohibiting Facebook from processing personal data of WhatsApp users for own purposes. In the view of the Data Protection Officer of Hamburg, WhatsApp requests "far-reaching powers to pass on data to Facebook" through new usage and privacy provisions. Moreover, these are not transparent. The order was issued within the framework of an urgent procedure, has a limited period of validity of only three months and is geographically restricted to its own territory. In principle, the Irish data protection authority is responsible for Facebook Ireland Ltd. The Hamburg data protection authority has announced that it will request a referral to the European Data Protection Board (EDPB) in order to bring about a decision at European level.

[The press release of the Data Protection Officer of Hamburg \(of 11 May 2021\)](#)

+++ PORTUGUESE DATA PROTECTION AUTHORITY PROHIBITS DATA TRANSFER TO THE USA +++

The Portuguese data protection authority Comissão Nacional de Proteção de Dados (CNPd) has ordered the National Institute of Statistics (NIS) to stop the transfer of data to the US and other third countries without an adequate level of protection within 12 hours. At that time, the NIS had already transferred data on 6.5 million residents from an ongoing online census to Cloudflare servers operating around the world (including in the USA). The authority could not determine to which server locations the data had been transferred in detail. The CNPD criticised that the standard data protection clauses concluded with Cloudflare (Article 46 (2) lit. c) GDPR) alone do not provide sufficient

guarantees for the security of data transmitted to certain third countries (including the USA). This occurred in view of the "Schrems II" decision (ECJ, judgment of 16 July 2020, C-311/18, see [BB Privacy Ticker of July 2020](#)), in which the ECJ found that data controllers may have to take additional measures to protect personal data before the data is transferred to the USA.

[The CNPD decision of 27 April 2021 \(Portuguese\)](#)

[The press release of the European Data Protection Board of 28 April 2021 \(English\)](#)

4. Opinions

+++ DATA PROTECTION OFFICER OF THE STATE OF BREMEN: TELEFAX IS NOT DATA PROTECTION COMPLIANT +++

The Officer for Data Protection and Freedom of Information of the German State of Bremen has stated that the security level of data transmissions by fax is to be compared with an openly visible postcard or an unencrypted e-mail. The sender can never be sure which technology is used on the recipient's side. However, whether a fax message is encrypted or whether a (non-)European cloud is used for the transmission depends on the recipient's technology. At least for the transmission of special categories of personal data in terms of Article 9 GDPR, "the use of fax is not permissible".

[Opinion of the Data Protection Officer of the city of Bremen \(as of May 2021\)](#)

+++ MICROSOFT REACTS TO "SCHREMS II": SWITCH TO EUROPEAN-ONLY SERVICES PLANNED +++

Microsoft has announced that it will operate its own "core cloud services" exclusively from within the EU, at the request of corporate or public sector customers. An "EU data boundary" is to be established so that all processing of personal data, including the provision of technical support, will take place within the EU. Data transfer to the United States or other third countries will then no longer take place. The offer is intended for customers in the EU, Norway and Switzerland and is a reaction to the "Schrems II" decision (ECJ, judgment of 16 July 2020, C311/18, see [BB Privacy Ticker of July 2020](#)), which set high standards for data transfers to the USA. Most recently, data protection authorities warned against the use of "Microsoft products" because of data transfers to the USA (see for example [BB Privacy Ticker of March 2021](#)). Microsoft is planning the changes for 2022.

[The blog post by Microsoft](#)

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