

## 1. CASE LAW

### **+++ ECJ MUST DECIDE ON THE ASSESSMENT OF DAMAGES UNDER THE GDPR +++**

The Federal Labour Court has referred highly relevant questions on damages under Article 82 GDPR to the European Court of Justice. The ECJ must now decide, among other things, whether the claim for damages under the GDPR should have a "specific or general preventive effect". In this case, a deterrent effect - exceeding the actual compensation of the damage - would have to be factored into the amount of damages. This should generally lead to significantly higher GDPR damages claims, although such a construction is fundamentally unknown to German law. Moreover, the ECJ is to decide whether minor fault on the part of the controller can have a mitigating effect on the amount of damages.

[To the questions referred by the Federal Labour Court \(Decision of 28 August 2021, 8 AZR 253/20 \(A\), German\)](#)

### **+++ HIGHER REGIONAL COURT OF BRANDENBURG: GDPR COMPENSATION ONLY IN THE EVENT OF ACTUAL DAMAGE +++**

The Higher Regional Court of Brandenburg ruled that a claim for damages under the GDPR (Article 82 GDPR) requires the occurrence of a concrete damage on the part of the data subject. Accordingly, not every violation of the GDPR automatically leads to a claim for damages. The Higher Regional Court Bremen (see [BB Privacy Ticker August 2021](#)) had recently ruled similarly. The Higher Regional Court of Brandenburg rejected the plaintiff's claim for damages, as the plaintiff had only submitted evidence of a GDPR violation, but not of causal damage.

[To the decision of the Higher Regional Court Brandenburg \(Decision of 11 August 2021, 1 U 69/20, German\)](#)

### **+++ HIGHER REGIONAL COURT OF HAMM: STATING OF EMPLOYEE'S FAMILY NAME ON RATING PLATFORM PERMISSIBLE +++**

The Higher Regional Court of Hamm ruled that Google does not have to delete a publicly viewable online rating that contained the family name of a female bakery employee. The employee who lodged the complaint had tried to have the review, in which she was called "unfriendly" by a reviewer, deleted pursuant to Article 17 of the GDPR. The court did indeed assume that Google was processing a personal data of the plaintiff with the family name. However, this processing was lawful as it was necessary for the exercise of the right to freedom of expression (Article 17 (3) lit. a) GDPR). The court's assessment was based on a comprehensive weighing of interests.

[To the decision of the Higher Regional Court Hamm \(Ruling of 29 June 2021, I-4 U 189/20, juris, German\)](#)

### **+++ REGIONAL COURT OF WUPPERTAL: NO RIGHT TO INFORMATION UNDER THE GDPR IN THE PURSUIT OF PURPOSES OTHER THAN THOSE INTENDED +++**

The Regional Court of Wuppertal rejected a claim for information under the GDPR filed by a policyholder against his former insurance company. The claim for information had been exercised in abuse of rights. (Sec. 242 German Civil Code (BGB)), as the plaintiff only wanted to verify whether further monetary claims against the insurance company existed on the basis of the information. "Not even as a reflex" did this correspond to the interests protected by Article 15 GDPR. The right to

information is intended to enable data subjects to verify the lawfulness of data processing and to assert further data subject rights (e.g. claims for rectification or erasure).

[To the decision of the Regional Court Wuppertal \(Ruling of 29 July 2021, 4 O 409/20, German\)](#)

## **2. REGULATORY INVESTIGATIONS AND ENFORCEMENT ACTIONS**

### **+++ FINE OF EUR 225 MILLION AGAINST WHATSAPP +++**

The Irish Data Protection Commission (DPC) has imposed a fine of EUR 225 million on Facebook subsidiary WhatsApp. The service violated the GDPR transparency obligations by not sufficiently informing users about the transfer of data within the Facebook group. The DPC is the lead authority for WhatsApp in the so-called "one-stop shop" procedure, as Facebook maintains its European headquarters in Ireland. Originally, the DPC estimated a fine range of between EUR 30 and 50 million. This was opposed by supervisory authorities of several other member states, including Germany. Following a binding decision by the European Data Protection Board (Article 65 GDPR), which aims to ensure the uniform application of the GDPR within the EU, the DPC increased the fine accordingly.

[To the press article on Zeit.de \(of 2 September 2021, German\)](#)

[To the binding decision of the European Data Protection Board \(of 28 July 2021\)](#)

### **+++ CONSUMER ORGANISATIONS WARN SOME 100 COMPANIES ABOUT COOKIE BANNERS +++**

In a coordinated action, various consumer centres and associations have examined the cookie banners of 949 websites and found "clear" violations of the GDPR and the German Telemedia Act (TMG) in about 10% of these sites. The consumer protection agencies considered preticked or missing cookie banners as well as banners where consent was obtained "by surfing on" to be a clear violation. The consumer

protection agencies issued warnings to a total of 98 website operators and obtained 66 cease-and-desist declarations. According to the consumer centres, many more websites were operating in a "legal grey area".

[To the press release of the Federation of German Consumer Organisations \(of 17 September 2021, German\)](#)

### **+++ ITALIAN DATA PROTECTION AUTHORITY IMPOSES FINE FOR UNLAWFUL DATA PROCESSING IN WHISTLEBLOWING SYSTEM +++**

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has fined a company EUR 40,000 for unlawful processing of employees' personal data in a whistleblowing system. The system allegedly did not sufficiently encrypt data and documents entered. In addition, the identity of the users could be traced by means of log data. The design of whistleblowing systems in conformity with data protection requirements is also being discussed in Germany in the light of the so-called Whistleblower Directive (EU Directive 2019/1937), which must be implemented by 17 December 2021. Among other things, the directive provides for whistleblowers to be able to report grievances anonymously. However, this confidentiality requirement may lead to conflicts with the GDPR, for instance with regard to the right to information of the data subjects or the information obligations of the company.

[To the GPDP press release \(of 10 June 2021, Italian\)](#)

[To the EU Directive 2019/1937 of 23 October 2019\)](#)

### **+++ HAMBURG COMMISSIONER FOR DATA PROTECTION: FINE FOR INTRANSPARANCY ON MATCHING OF BONUS-RELEVANT CUSTOMER DATA +++**

The Hamburg Commissioner for Data Protection and Freedom of Information has imposed a fine of around EUR 900,000 on Vattenfall Europe Sales GmbH. The energy company had cross-checked the data of potential new customers who wanted to conclude bonus-relevant contracts with the existing customer data in order to detect any fraudulent behavior and to prevent "abusive use" of the bonus scheme. According to Vattenfall, the Hamburg Commissioner for Data Protection confirmed that the actual data processing (i.e. the data matching) was lawful. The fine was imposed because Vattenfall did not sufficiently

inform potential new customers about the cross-check and thus violated the transparency requirements of the GDPR.

[To the report on Heise Online \(German\)](#)

[To the press release of Vattenfall \(of 24 September 2021, German\)](#)

## 3. OPINIONS

### **+++ HESSIAN COMMISSIONER FOR DATA PROTECTION AND FREEDOM OF INFORMATION: FAX IS NOT IN CONFORMITY WITH THE GDPR +++**

The Hessian Commissioner for Data Protection and Freedom of Information warns controllers against sending personal data by fax. Especially if the data require a high level of protection, sending them by unencrypted fax is a violation of the principle of integrity and confidentiality (Article 5 lit. f GDPR). According to this, the controller must take appropriate technical and organisational measures to secure the transmission of data (Article 32 GDPR). At most, such fax transmission is still permissible in exceptional cases (e.g. special urgency) or with the consent of the data subject. Controllers are being asked to switch to alternative means of communication. As early as May, the Bremen data protection authority had declared that it considered the use of faxes to be inadmissible (see [BB Privacy Ticker May 2021](#)).

[To the HBDI's communication \(of 14 September 2021, German\)](#)

### **+++ BAVARIAN STATE COMMISSIONER FOR DATA PROTECTION: NEW ORIENTATION GUIDE ON CONSENT +++**

The Bavarian State Commissioner for Data Protection has published a detailed orientation guide on consent in the public sector. It explains how consent works and provides interpretation and application guidance, illustrated by exemplary cases. Although the orientation guide is tailored to Bavarian public authorities, it can also be useful for companies in and outside Bavaria.

[To the BayLfd's orientation guide \(of 1 September 2021, German\)](#)

# Your contacts

If you have any questions, please address the ADVANT Beiten lawyer of your choice or contact the ADVANT Beiten Privacy Team directly:

## Office Frankfurt

Mainzer Landstrasse 36 | 60325 Frankfurt am Main

### Dr Andreas Lober

+49 69 756095-582

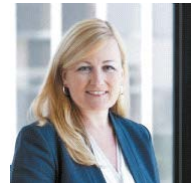
[Email](#)



### Susanne Klein, LL.M.

+49 69 756095-582

[Email](#)



### Lennart Kriebel

+49 69 756095-582

[Email](#)



## Office Munich

Ganghoferstrasse 33 | 80339 Munich

### Laureen Lee, LL.M.

+49 89 35065-1380

[Email](#)



## Office Dusseldorf

Cecilienallee 7 | 40474 Dusseldorf

### Mathias Zimmer-Goertz

+49 211 518989-144

[Email](#)



### Christian Frederik Döpke, LL.M.

+49 211 518989-144

[Email](#)



## EDITOR IN CHARGE

Dr Andreas Lober | Rechtsanwalt

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Rechtsanwaltsgesellschaft mbH

[Datenschutz-Ticker@advant-beiten.com](mailto:Datenschutz-Ticker@advant-beiten.com)

[www.advant-beiten.com](http://www.advant-beiten.com)



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