

Privacy Ticker

August & September 2022



**+++ ECJ OVERTURNS GERMAN DATA RETENTION +++
EMPLOYERS MUST RECORD WORKING HOURS +++ EUR 405
MILLION FINE AGAINST INSTAGRAM +++ ULTIMATUM TO USE
WEBEX +++**

1. Changes in Legislation

+++ GERMAN FEDERAL COUNCIL CRITICISES PLANNED CHAT CONTROL +++

The German Federal Council has expressed clear concerns about the so-called "chat control" planned by the EU Commission. The draft regulation published in May provides, among other things, that operators of platforms and encrypted messenger services (e.g., WhatsApp, Signal, iMessage) must scan private communication content and search for conspicuous patterns (see [AB Privacy Ticker June 2022](#)). The Federal Council now raised serious fundamental rights concerns and pointed out, for instance, that the draft regulation does not include any provision for the protection of particularly confidential communication (e.g., communications with persons subject to professional secrecy or from the most personal sphere of life). The European Data Protection Board and the European Data Protection Supervisor also criticised the draft regulation in a joint opinion.

[To the decision of the German Federal Council \(dated 16 September 2022, German\)](#)

[To the statements of EDPB and EDPS \(dated 28 July 2022\)](#)

2. Case Law

+++ ECJ: GERMAN DATA RETENTION IS UNLAWFUL +++

The European Court of Justice has ruled that the German regulations on data retention without prior notice are unlawful under European law. Union law is fundamentally opposed to the general and indiscriminate retention of traffic and location data. The ECJ thus confirms its previous case law on the corresponding regulations of other EU states. However, the ECJ nevertheless grants member states a certain leeway for data retention under tight conditions, for instance if there is a serious threat to national security.

[To the ECJ ruling \(dated 20 September 2022, C-793/19 and C-794/19\)](#)

+++ GERMAN FEDERAL LABOUR COURT: COMPANIES MUST RECORD EMPLOYEES' WORKING HOURS +++

The Federal Labour Court has ruled that employers must introduce or operate a system for recording the working hours of their employees. The works council does, however, not have the right to initiate the introduction of such a system, as this obligation already arises from section 3 (2) no. 1 of the German Occupational Health and Safety Act. Thus, the obligation to record employees' working hours applies in principle to all companies and establishments, regardless of their size or the existence of a works council (see [AB blog post dated 14 September 2022](#)).

[To the press release of the Federal Labour Court dated 13 September 2022, German\)](#)

+++ GERMAN FEDERAL LABOUR COURT: EUR 1,000 COMPENSATION FOR GDPR-DAMAGES AFTER INCOMPLETE INFORMATION BY THE EMPLOYER NOT TOO LOW +++

In proceedings in which the employer and the employee disputed the amount of damages (Art. 82 GDPR) as a result of incomplete information provided by the employer, the Federal Labour Court ruled that an assessment of damages in the amount of EUR 1,000 is at least not too low. According to the claimant employee, the sum of the claim for damages for the incorrect information amounted to at least EUR 6,000.

After she was only awarded EUR 1,000 in the first instance, she appealed to the Federal Labour Court. The Court now ruled that the assessment of damages was free of legal errors. For comparable cases in the future, this means that the claim for damages under the GDPR as a result of erroneous information does not necessarily have to be higher.

[To the ruling of the Federal Labour Court \(dated 5 May 2022, 2 AZR 363/21, German\)](#)

+++ KARLSRUHE HIGHER REGIONAL COURT: NO EXCLUSION OF HOSTING PROVIDER WITH US PARENT FROM AWARD PROCEDURE +++

The Karlsruhe Higher Regional Court has ruled that a software service provider is not to be excluded from an award procedure of two municipal hospitals solely because it integrates a Luxembourg hosting provider that is part of a US group. Although the software service provider promised to transfer the processed data exclusively to the Luxembourg company and to process it in Germany, it had been excluded in the lower instance by the Baden-Wuerttemberg Procurement Chamber on the grounds that the use of the hosting provider would lead to an inadmissible transfer of data to the USA. For this, the latent risk of access by state or private US agencies was sufficient. The Karlsruhe Higher Regional Court disagreed. Based solely on the connection to a US group, it could not be assumed that instructions from the US parent company regarding the transfer of data to the USA that were contrary to law or to the contract would be followed.

[To the decision of the Karlsruhe Higher Regional Court \(dated 7 September 2022, file ref. 15 Verg 8/22, German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ IRISH DATA PROTECTION AUTHORITY: EUR 405 MILLION FINE AGAINST INSTAGRAM +++

According to media reports, the Irish Data Protection Commission (DPC) has imposed a fine of EUR 405 million on Instagram. The platform, which belongs to the Meta Group, had not sufficiently protected the data of minors. For instance, users aged 13-17 were allowed to open a business account where telephone numbers and e-mail addresses could be

accessed. In addition, the accounts of minors were not set to "private" by default. This was probably a violation of the "Privacy by Default" principle of the GDPR. Details on the decision of the data protection authority are expected soon.

[To the article on spiegel.de \(dated 5 September 2022, German\)](#)

+++ BERLIN DATA PROTECTION AUTHORITY ISSUES ULTIMATUM ON USE OF CISCO WEBEX +++

By the deadline of 30 September, the Berlin Commissioner for Data Protection and Freedom of Information has requested the Freie Universität Berlin (FU) to stop using Cisco Webex or provide "complete" proof of its legality. According to the authority, the use of the videoconferencing system is unlawful, among other things because of the alleged transfer of data to the USA. In a statement, the FU announced its intention to maintain the use of the conference system and referred to a series of measures to ensure compliance with the GDPR in the "best possible way". Among other things, only European servers are used. The proceedings are receiving special attention because Cisco Webex is also used by the Berlin Senate and House of Representatives.

[To the article on golem.de \(dated 5 September 2022, German\)](#)

[To the article on tagesspiegel.de \(dated 9 September 2022, German\)](#)

+++ VOLKSWAGEN FINED IN MILLIONS FOR MISSING PRIVACY STATEMENT ON TEST VEHICLES +++

The Data Protection Commissioner of Lower Saxony has imposed a fine of EUR 1.1 million on Volkswagen AG. Volkswagen Group had had research drives carried out for a driving assistance system to avoid traffic accidents. The test vehicles, which were equipped with cameras, were not marked with a camera symbol and the other prescribed information for the data subjects (in this case, other road users). In doing so, VW Group had violated the information obligations under Art. 13 GDPR. Furthermore, Volkswagen had failed to conclude a contract on commissioned processing with the service provider used (Art. 28 GDPR), to document the technical and organisational measures in the processing directory (Art. 30 GDPR) and to conduct a data protection impact assessment (Art. 35 GDPR). According to the authority, all four penalised violations had a "low degree of severity" and Volkswagen had cooperated comprehensively.

[To the press release of the authority \(dated 26 July 2022, German\)](#)

+++ FRENCH DATA PROTECTION AUTHORITY: FINE AGAINST CAR SHARING COMPANY FOR COLLECTION OF LOCATION DATA +++

The French data protection authority Commission Nationale de l'Informatique et des Libertés (CNIL) has imposed a fine of EUR 175,000 on a car-sharing company that had regularly collected (every 500 metres) location data of vehicles on the move. Other data recorded the switching on/off of the engine and the closing of the doors. CNIL considered that such detailed data was not necessary to fulfil the purposes pursued - locating stolen vehicles or providing assistance in the event of accidents. In addition, the data was stored for 3 years after the return of the vehicle, in some cases even for up to 8 years, which was assessed as a violation of the GDPR principle of storage limitation. After all, customers had not been adequately informed about the data processing when registering in the app.

[To the CNIL press release \(dated 21 Juli 2022\)](#)

[To the administrative fine notice of CNIL \(dated 7 July 2022, French\)](#)

+++ NONE OF YOUR BUSINESS ACTIVIST GROUP FILES 226 COMPLAINTS WITH 18 DATA PROTECTION AUTHORITIES AGAINST THE COOKIE BANNERS OF ONE TRUST+++

The Austrian data protection activists of None of Your Business (noyb) have filed another 226 complaints with a total of 18 data protection authorities against websites with allegedly misleading cookie banners of the provider One Trust. According to the activists, the cookie banners in question do not offer a "*fair yes/no decision*", but try to mislead users into consenting to the use of cookies with the help of so-called "dark patterns" (e.g., by allowing the "reject" button to be pressed only after several clicks). According to noyb, the website operators concerned were asked in advance to adapt their cookie banners to comply with the law. Only if the companies had not fully complied with the request had noyb filed a complaint with the competent authority.

[To the press release of noyb \(dated 9 August 2022, German\)](#)

4. Opinions

+++ DATA PROTECTION AUTHORITY OF NORTH RHINE-WESTPHALIA PUBLISHES HANDOUT ON ONLINE EXAMINATIONS AT UNIVERSITIES +++

The State Commissioner for Data Protection and Freedom of Information of North Rhine-Westphalia has published a handout on the GDPR-compliant implementation of online examinations and video-based examination supervision at universities. It provides information on suitable legal bases and the admissibility of individual supervisory measures. For instance, the comparison of the identity card and the face of the examinee for authentication purposes may be permissible, but not the recording of the identity card or the use of facial recognition software. The permanent storage of image and sound files of the recorded examination is also only permissible in individual cases. The handout should also be helpful for higher education institutions outside of North Rhine-Westphalia.

[To the handout \(dated 26 July 2022, German\)](#)

+++ SCHLESWIG-HOLSTEIN DATA PROTECTION AUTHORITY: SENDING E-PRESCRIPTION BY E-MAIL OR SMS ILLEGAL +++

According to the assessment of the Independent Centre for Data Protection Schleswig-Holstein, the transmission of the planned electronic prescription ("e-prescription") to patients or pharmacies by e-mail and SMS is not in compliance with the GDPR, as there are no sufficient technical and organizational measures (TOMs) according to Art. 32 GDPR. The code transmitted as part of the e-prescription would allow access to the name of the insured person, their date of birth, the doctor's contact details, the date of issue of the prescription and the prescription medicines, and thus to sensitive health data. Medical practices should therefore not resort to "insecure procedures" for the transmission but must ensure adequate encryption. This applies even if the patient concerned has consented to this transmission, as the TOMs are not at the disposal of the parties involved. However, the transmission via e-prescription app or the sending via e-mail remains possible under the condition that the code is also sufficiently encrypted. In response to the authority's assessment, the Association of Statutory Health Insurance Physicians of Schleswig-Holstein (KVSH) announced that it would withdraw from the rollout phase of the e-prescription.

[To the press release of the authority \(dated 6 September 2022, German\)](#)

[To the press release of KVSH dated 22 August 2022, German\)](#)

+++ THURINGIA'S DATA PROTECTION COMMISSIONER WARNS OF WAVE OF WARNING NOTICES DUE TO INTEGRATION OF GOOGLE FONTS +++

The Thuringian State Commissioner for Data Protection and Freedom of Information informs in a press release about a threatening wave of warnings against "thousands" of operators of websites on which Google Fonts are integrated. This was triggered by a ruling of the Regional Court of Munich in January 2022, according to which the integration of Google Fonts on websites without consent is illegal if the IP addresses of the users are transmitted to the USA (see [AB Privacy Ticker February 2022](#)). The authority recommends that website operators check whether Google Fonts are used and, if so, only store the fonts used locally and integrate them into their own websites from there (so-called "on premise" solution).

[To the press release of the authority \(dated 18 August 2022, German\)](#)

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