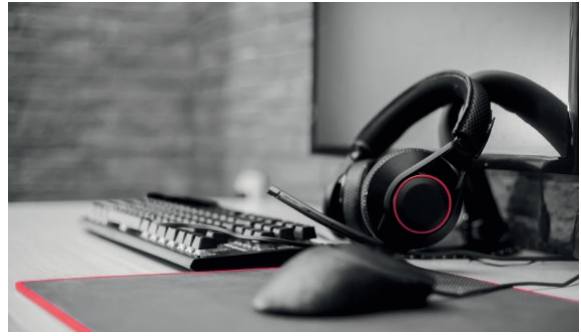


# Privacy Ticker

August 2023



**+++ AMENDMENT OF THE FEDERAL DATA PROTECTION ACT +++  
FEDERAL LABOUR COURT: EXTRAORDINARY DISMISSAL DUE TO  
INSULTS IN WHATSAPP GROUP +++ HIGHER LABOUR COURT OF  
BADEN-WURTTENBERG: INADMISSIBILITY OF EVIDENCE IF  
PRIVATE USE OF E-MAIL ACCOUNT IS PERMITTED +++**

## 1. Changes in Legislation

### **+++ AMENDMENT OF THE FEDERAL DATA PROTECTION ACT +++**

The German Federal Ministry of the Interior has presented a draft bill to amend the Federal Data Protection Act. Among other things, it provides for an exception to the right of access according to Article 15 of the GDPR for the protection of trade and business secrets. Furthermore, the German Data Protection Conference is to be institutionalised. The position of the Federal Commissioner for Data Protection and Freedom of Information is also to be strengthened by granting the Commissioner the power to represent the state data protection authorities in the European Data Protection Board. Another relevant change is a new regulation on joint controllership in scientific or historical research. In the case of jointly operating companies from different federal states, the supervisory authority in whose federal state the company with the larger annual turnover is located will be solely responsible in the future. Associations and stakeholders currently still have the opportunity to comment on the draft bill.

[To the report on heise.de \(dated 11 August 2023, in German\)](#)

## 2. Case Law

### **+++ FEDERAL LABOUR COURT: EXTRAORDINARY DISMISSAL DUE TO INSULTS IN WHATSAPP GROUP +++**

The Federal Labour Court has ruled that employees cannot invoke the confidentiality of a chat group if they make comments about staff in this group that are strongly insulting, racist, sexist and inciting violence. The employee who brought the action was a member of a WhatsApp chat group with five other employees. Here he made insulting and inhuman comments about, among others, superiors and work colleagues. After the employer learned of this by chance, the employer dismissed the employee without notice. The first two instances ruled in favour of the employee who had brought the action, as he had the right to rely on the confidentiality of the chat. The Federal Labour Court, however, is of the opinion that the content of the exchanged messages as well as the size and composition of the chat group are decisive for the protection of the confidentiality. In the case of insulting and inhuman comments about staff, protection of confidentiality is regularly excluded, which is why a justified expectation of confidentiality would have to be specifically demonstrated. The Federal Labour Court therefore overturned the appeal ruling and referred the matter back.

[To the press release of the Federal Labour Court \(dated 24 August 2023, 2 AZR 17/23, in German\)](#)

### **+++ HIGHER LABOUR COURT OF BADEN-WURTTENBERG: INADMISSIBILITY OF EVIDENCE IF PRIVATE USE OF E-MAIL ACCOUNT IS PERMITTED +++**

The Higher Labour Court of Baden-Wurttemberg has dealt with very practical questions regarding the use of e-mails and WhatsApp accounts. The employer had allowed the employees to use the company email account and messenger services privately. After issuing a notice of termination, the employer evaluated the e-mail and WhatsApp messages on the employee's company smartphone and submitted them in the court proceedings to justify the termination. These messages included a large number of private messages from the plaintiff to friends and acquaintances. The Court considered the use of the data to be a data protection breach, which leads to an inadmissibility of evidence with regard to this content. If private use of official means of communication is permitted, a stricter proportionality check must be carried out when evaluating the data. Generally, the employer may not covertly carry out a suspicion-independent check, and the employee must have the opportunity to eliminate private messages. The Court ruled that the termination was invalid and ordered the employer to pay non-material damages of EUR 3,000 for the breach of data protection.

[To the judgment of the Higher Labour Court of Baden-Wurttemberg \(dated 27 January 2023, 12 Sa 56/21, in German\)](#)

**+++ LEIPZIG REGIONAL COURT: UNLAWFUL PRINTING OF USER PHOTOS ON REMINDERS BY DATING PORTAL +++**

The Leipzig Regional Court has declared certain data processing by an online dating portal to be unlawful. The operator of the portal sent reminders to defaulting customers, including their profile photo. Besides, the company reserved the right in its privacy policy to pass on customers' personal data to third parties for advertising purposes. The Court considered the printing of the user photos on the reminders to be a breach of data protection, as there was no legal basis for this. Neither had the customers consented to the use of their photos, nor was the printing of the photos on the reminders permissible for the performance of the contract or for legitimate interests. The provision on data transfer was also invalid as it was not definite enough. It remained unclear to customers to which third parties their personal data would be transferred, and for what type of advertising it would be used.

[To the judgement of the Leipzig Regional Court \(dated 31 May 2023, 05 O 666/22, in German\)](#)

**+++ BERLIN ADMINISTRATIVE COURT: SECRET PHOTOS OF TEACHERS JUSTIFY WRITTEN REPRIMAND +++**

The Berlin Administrative Court has dismissed the complaint of a student against a written reprimand issued to him. The eighth-grader had secretly photographed his class teacher in class and sent the picture to an unknown person. The photos then circulated among students at the school via messenger services. The class teachers' panel decided to give the student a written reprimand for his action. After the student's objection remained unsuccessful, he filed a lawsuit. The Berlin Administrative Court confirmed the lawfulness of the reprimand as a school and pedagogical disciplinary measure. By taking the photos, the student had violated the school's house rules and the teacher's personal rights. In the opinion of the Court, the written reprimand represents the mildest disciplinary measure in view of the viral dissemination of the photos in the school.

[To the press release of the Berlin Administrative Court \(dated 11 August 2023, VG 3 K 211/22, in German\)](#)

### **+++ HIGHER REGIONAL COURT OF KARLSRUHE: E-MAILS IN BUSINESS DEALINGS DO NOT HAVE TO BE PARTICULARLY ENCRYPTED +++**

The Karlsruhe Higher Regional Court has ruled that business emails do not require special encryption. In the case at hand, the purchaser of a used car received two e-mails, each with an attached invoice in pdf format. While the first e-mail actually came from the seller, the second e-mail had been sent by an unknown hacker. The fake invoice provided an account number of the offender, to which the unsuspecting purchaser made the payment of the purchase price. While the actual seller demanded payment from the purchaser, the latter defended himself by saying that he had already paid, with discharging effect. The Higher Regional Court confirmed the seller's opinion. In normal business transactions, it is not necessary to use end-to-end encryption, transport encryption or password protection of the pdf file for e-mails. The seller had also not violated any IT security obligations that could give rise to a claim for damages by the purchaser. The purchaser was therefore ordered to pay the purchase price to the seller.

[To the judgment of the Karlsruhe Higher Regional Court \(dated 27 July 2023, 19 U 83/22, in German\)](#)

## **3. Regulatory Investigations and Enforcement Actions**

### **+++ FINES OF EUR 215,000 FOR PROCESSING SENSITIVE EMPLOYEE DATA +++**

The Berlin Commissioner for Data Protection has imposed a number of fines in a total amount of EUR 215,000 on a service company, Humboldt Forum Service GmbH. The company kept a table overview of all employees on probation over several months, listing personal remarks and sensitive information. This included health data, participation in psychotherapy or interest in forming a works council. The company used this data as criteria for possible continued employment beyond the probationary period. In the process, eleven employees were classified as "critical" or "very critical" based on the collected information. The BlnBDI considered this data processing to be inadmissible. In addition, further fines were imposed because the company had not involved the company data protection officer in compiling the table, had reported a data breach late and had not included the list in the processing directory.

[To the press release of the Berlin Commissioner for Data Protection \(dated 02 August 2023, in German\)](#)

## 4. Opinions

### **+++ DATA PROTECTION AUTHORITY OF MECKLENBURG-WESTERN POMERANIA CONSIDERS TESLA DASH CAM AND SENTRY MODE INADMISSIBLE +++**

The State Data Protection Commissioner of Mecklenburg-Western Pomerania has examined the permissibility of dash cams and sentry mode in Tesla vehicles under data protection laws. Tesla cars have cameras that permanently record the vehicle's surroundings and store the data. The Data Protection Commissioner considers such permanent video recording to be inadmissible and refers to a ruling by the Federal Court of Justice from 2018, according to which at most short-term and incident-related recordings are permitted. According to the data protection authority, dash cams may only be used if the data is stored for a maximum of two minutes and then deleted immediately. Since this is not currently the case at Tesla, the use constitutes a breach of data protection. Also video recording in sentry mode, in which the Tesla cameras film and monitor the surroundings to protect the car, is inadmissible in the authority's view. In the opinion of the Data Protection Commissioner, Tesla drivers must therefore turn off both camera functions.

[To the opinion of the Data Protection Commissioner \(dated July 2023, in German\)](#)

### **+++ SHORT NEWS ON WINDOWS 10 AND 11, ISSUED BY THE BAVARIAN DATA PROTECTION AUTHORITY +++**

The State Data Protection Commissioner of Bavaria has published short news for Bavarian public authorities regarding the configuration of Windows 10 and 11. Windows operating systems generally transmit telemetry or diagnostic data to Microsoft, which may possibly also be to servers in the USA. Since this may include personal data, the process is critical from a data protection perspective. The short news issued by the authority describe various options for preventing such a transmission of telemetry data. In addition to other technical and organisational measures, this is intended to facilitate the use of Windows in a data protection compliant manner. The news is open to be used by private companies as a helpful resource.

[To the short news by the State Data Protection Commissioner of Bavaria \(dated 01 August 2023, in German\)](#)

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