



1. Changes in Legislation

+++ EU PARLIAMENT PASSES DIGITAL SERVICES ACT +++

With the Digital Services Act (DSA), the EU Parliament has passed a new law for the general regulation of online platforms, marketplaces and hosting services. The law contains new regulations in the areas of e-commerce, consumer protection and data protection. Among other things, consumers are to be better protected from illegal or dangerous content and misinformation. To this end, operators of large platforms such as Meta (formerly Facebook) must disclose their recommendation algorithms in the future. In addition, there will be a right to anonymous use of the services. DSA violations are to lead to severe fines (up to 6 percent of the annual turnover). As part of a larger legislative package, the DSA is flanked by the Digital Markets Act ([see AB Privacy Ticker November 2021](#)) which, however, will only apply to particularly large platform providers (so-called "gatekeepers"). The DSA now enters the trilogue negotiations and is expected to come into force in 2023.

[To the article on Zeit.de \(dated 20 January 2022, German\)](#)

[More information on the DSA](#)

+++ SOUTH KOREA CLASSIFIED AS A SAFE THIRD COUNTRY +++

The EU Commission has adopted an adequacy decision for data transfers from the EU to South Korea. With this decision, the third country is certified as having an adequate level of data protection according to Article 45 GDPR. On this basis, personal data can be transferred to South Korea without the need for additional safeguards to secure this data transfer (such as the conclusion of standard contractual clauses).

[On the EU Commission's adequacy decision \(dated 17 December 2021\)](#)

[To the Q&A of the EU Commission \(dated 17 December 2021\)](#)

2. Case Law

+++ GERMAN FEDERAL SUPREME COURT: OPERATION OF PHYSICIANS' RATING PORTAL LAWFUL +++

The Federal Supreme Court has ruled that the doctor rating portal "Jameda" may publish profiles of doctors who can be rated by users of the portal on the basis of publicly available data (name, academic degree, specialisation, practice address, other contact details and consultation hours). Two physicians had demanded that Jameda delete their profile (Article 17 GDPR). As can be gathered from the reasons for the judgement, which have now been published, the Federal Supreme Court did not consider the conditions for a claim for deletion to be met, as the data processing was justified on the basis of legitimate interests (Article 6 (1) lit. f) GDPR). The portal only processed the data to the extent necessary and as a "neutral information provider". The interests pursued here were protected by the freedom of expression and information as well as the freedom to conduct a business.

[On the ruling of the Federal Supreme Court \(dated 12 October 2021, VI ZR 488/19 and VI ZR 489/19; German\)](#)

+++ GERMAN RECORD FINE AT THE EUROPEAN COURT OF JUSTICE +++

The dispute over the EUR 14.5 million fine imposed by the Berlin data protection authority on Deutsche Wohnen (see [BB Privacy Ticker November 2019](#) and [March 2021](#)) has now reached the European Court of

Justice (ECJ). In a preliminary ruling, the European court must examine, among other things, whether it is possible to impose a GDPR fine on a company even though no misconduct has been proven against the management staff (e.g. a board member). Under German law, this would be principally required. This is because only administrative offences committed by the management level can be attributed to a company (so-called legal entity principle). According to the European GDPR, however, the imposition of a fine should also be possible directly against the company - without proven misconduct of the management level (so-called function holder principle), at least according to some data protection authorities. The relationship between these principles must now be determined by the ECJ. The issue is thus of fundamental importance for the imposition of GDPR fines within Germany and the EU.

[To the decision of the Higher Regional Court Berlin \(dated 6 December 2021, 3 Ws 250/21, German\)](#)

+++ REGIONAL LABOUR COURT OF COLOGNE: TERMINATION WITHOUT NOTICE DUE TO UNAUTHORISED ACCESS TO AND DISCLOSURE OF THIRD-PARTY DATA +++

The Cologne Regional Labour Court ruled that unauthorised access to and forwarding of an obviously private e-mail addressed to a superior to a third party can justify termination without notice. The (former) employee filing the action was employed in the bookkeeping department of the Protestant parish and had access to the pastor's office computer to the extent necessary for bookkeeping tasks. There, she took note of an e-mail in which the pastor was informed of a preliminary investigation against him on suspicion of sexual assault against a woman. The plaintiff anonymously forwarded the attached chat between the pastor and the woman to an employee of the church to "secure evidence". The court saw this as a serious violation of personal rights and a breach of the duty of consideration under the employment contract. The mutual trust with the plaintiff had been irreparably destroyed and the dismissal was effective.

[To the press release of the Cologne Regional Labour Court \(dated 3 January 2022, German\)](#)

+++ REGIONAL COURT FRANKENTHAL: GDPR INFORMATION IS NOT A PRE-TRIAL DISCOVERY +++

The Regional Court of Frankenthal has ruled that the assertion of the right to information under Article 15 GDPR is an abuse of rights if the notice merely serves to obtain information that is intended to help the data subject prepare for a lawsuit against the controller. In the proceedings, a public limited company sued a former member of the board of directors. The defendant requested a GDPR information pursuant to Article 15 (3) GDPR (inter alia, for the disclosure of e-mails) in the form of a counterclaim. The court was convinced that the defendant did not want to review the data processing of the complaining public limited company, but to prepare his own defence against the public limited company's action. However, the GDPR does not protect such a purpose (comparable to the so-called "pre-trial discovery" under US law). Moreover, the request for information was intended to delay the proceedings. The counterclaim was dismissed.

[To the ruling of the Frankenthal Regional Court \(dated 12 January 2021, File ref. HK O 4/19, beck-online, German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ FINES OF EUR 210 MILLION IMPOSED FOR DEFICIENCIES IN COOKIE SETTINGS +++

The French Data Protection Authority Commission Nationale de l'Informatique et des Libertés (CNIL) has imposed fines on Google (totalling EUR 150 million) and Facebook (EUR 60 million) for deficient cookie settings. On the websites "facebook.com", "google.fr" and "youtube.com" it was possible to accept cookies with one click, but only to reject them with several clicks. The consents to the storage of cookies had therefore not been given voluntarily and were invalid. This violated French data protection law which implements the so-called e-privacy directive on this issue. Hence, the fine is not based on any violations of the GDPR. In Germany, the rules of the e-privacy Directive also apply: They were only recently implemented with the new Telecommunications Telemedia Data Protection Act (TTDSG) (see below for the new guidance of the DSK).

[To the CNIL press release \(of 6 January 2022\)](#)

+++ USING GOOGLE ANALYTICS UNLAWFUL? +++

The Austrian Data Protection Authority (DPA) has issued a decision stating that the use of Google Analytics on a website in 2020 (at that time operated by the US company Google LLC) was illegal. This was due to the transfer of data to the USA, which could not be secured solely by concluding standard data protection clauses (Article 46 (2) lit. c) GDPR). The Dutch Data Protection Authority Autoriteit Persoonsgegevens (AP) is also currently investigating Google Analytics and, according to press reports, is already warning: "Please note: The use of Google Analytics may soon no longer be allowed." In the meantime, however, GoogleAnalytics is offered within the EU by a European Google subsidiary (Google Ireland Limited). Thus, the issue of data transfers to the USA has to be re-evaluated.

[To the notice of the DPO \(dated 22 December 2021, German\)](#)

[To the report on Heise.de \(dated 14 January 2022, German\)](#)

+++ ITALIAN DATA PROTECTION AUTHORITY IMPOSES MILLION-EURO FINE ON ENERGY GROUP +++

The Italian Data Protection Authority Garante per la Protezione dei Dati Personali (GPDP) has imposed a fine of around EUR 26.5 million on the energy group Enel Energia S.p.a. Among other things, the group is accused of unlawfully processing personal data of millions of users for advertising purposes (such as for advertising calls which were sometimes recorded). In addition, asserted rights of access and objection of data subjects were not processed in a timely manner. The fine proceedings were preceded by hundreds of complaints from data subjects. In the investigation proceedings initiated as a result, the group had not cooperated sufficiently with the GPDP and had, among other things, missed hearing deadlines. This probably had a negative impact on the amount of the fine.

[To the administrative fine notice of GPDP \(dated 16 December 2021, Italian\)](#)

4. Opinions

+++ DATA PROTECTION CONFERENCE: GUIDANCE FOR TTDSG AND COOKIES +++

In a new orientation guide, the Data Protection Conference gives advice on the implementation of the new Section 25 of the German Telecommunications Telemedia Data Protection Act (TTDSG), which is particularly relevant for the use of cookies on websites. The supervisory authorities reaffirm and supplement the already strict requirements for optional cookies. Accordingly, data processing under the GDPR and the German TTDSG may require separate consents, which can, however, also be obtained in bundled form (e.g. in the cookie banner). In future, a distinction is to be made in the privacy policy between GDPR and TTDSG processing. Also, a visible direct link to the cookie settings shall be implemented on the website (e.g. in the footer). It remains to be seen which of the requirements will also be confirmed by courts. At least for the time being, however, the guidance is extremely relevant for operators of websites or apps.

[To the DSK's orientation guide \(dated 20 December 2021, German\).](#)

+++ EDPB PUBLISHES STUDY ON THE LEVEL OF DATA PROTECTION IN RUSSIA, CHINA AND INDIA +++

As a result of the so-called Schrems II ruling of the European Court of Justice (see [BB Privacy Ticker July 2020](#)), the European Data Protection Board has commissioned an investigation into the access of state authorities to personal data in the third countries China, Russia and India. The study concludes that the level of data protection in all three countries lags behind the European level of protection or at least has deficiencies. The report is intended to help data protection authorities assess the legal situation and practices prevailing in these third countries. The legal situation and practices in the third country determine whether the European standard data protection clauses (Article 46 (2) lit. c) GDPR) can provide an adequate level of protection - i.e. whether they can safeguard data transfers to these countries - or not. The study casts doubt on this. It is to be expected that data transfers to these third countries will increasingly become the focus of the data protection authorities in the future.

[To the EDPB study \(dated 8 November 2021\).](#)

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions. This data protection ticker was created in cooperation with the ADVANT partner law firms Nctm and Altana.

EDITOR IN CHARGE

Dr Andreas Lober | Rechtsanwalt

©Beiten Burkhardt

Rechtsanwaltsgesellschaft mbH

BB-Datenschutz-Ticker@advant-beiten.com

www.advant-beiten.com



[Update Preferences](#) | [Forward](#)

Please note

This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive information, you can [unsubscribe](#) at any time.

© Beiten Burkhardt

Rechtsanwaltsgesellschaft mbH

All rights reserved 2022

Imprint

This publication is issued by Beiten Burkhardt Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33, 80339 Munich, Germany

Registered under HR B 155350 at the Regional Court Munich / VAT Reg. No.: DE811218811

For more information see:

www.advant-beiten.com/en/imprint

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions.

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 96 756095-582

[E-Mail](#)



Susanne Klein, LL.M.

+49 69 756095-582

[E-Mail](#)



Lennart Kriebel

+49 69 756095-582

[E-Mail](#)



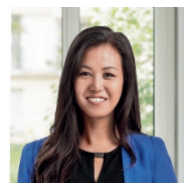
Office Munich

Ganghoferstrasse 33 | 80339 Munich

Lauren Lee, LL.M.

+49 89 35065-1380

[E-Mail](#)



Katharina Mayerbacher

+89 35065-1363

[E-Mail](#)



Office Dusseldorf

Cecilienallee 7 | 40474 Dusseldorf

Mathias Zimmer-Goertz

+49 211 518989-144

[E-Mail](#)



Christian Frederik Döpke, LL.M.

+49 211 518989-144

[E-Mail](#)

