

Privacy Ticker

June 2023



+++ ALTERNATIVE TO COOKIE-BANNERS: DRAFT REGULATION ON CONSENT MANAGEMENT +++ FEDERAL LABOUR COURT: CHAIR OF THE WORKS COUNCIL CANNOT BE DATA PROTECTION OFFICER +++ EUR 40 MILLION FINE IMPOSED ON ONLINE ADVERTISING SERVICE PROVIDER CRITEO +++ SPOTIFY FINED EUR 4.9 MILLION +++ CHAT GPT OPERATOR MUST ANSWER TO LIST OF QUESTIONS BY DATA PROTECTION AUTHORITIES +++

1. Changes in Legislation

+++ ALTERNATIVE TO COOKIE BANNERS: DRAFT REGULATION ON CONSENT MANAGEMENT +++

The Federal Ministry for Digital and Transport has presented a draft regulation on consent management. According to Section 26 of the German Telecommunication Telemedia Data Protection Act (TTDSG), the German government may establish an independent body recognising user-friendly and non-competitive proceedings to obtain and manage consents in compliance with Section 25 TTDSG. Recognised services may be commercial and can be offered by the same providers which also provide cookie banners or consent management tools for websites. The draft specifies the requirements for a recognition of the consent management services and for the technical and organisational measures to be adhered to. The new services are supposed to offer an alternative to the commonly used cookie banners and to facilitate consent management of non-essential cookies. With the services, users should be able to manage their cookie settings centrally and transparently. It will then no longer be necessary to set individual preferences at cookie banners at individual websites. Those involved may comment on the draft until mid-July 2023.

[To the press release by the Federal Ministry for Digital and Transport \(dated 01 June 2023, in German\)](#)

[To the draft regulation by the Federal Ministry for Digital and Transport \(dated 01 June 2023, in German\)](#)

2. Case Law

+++ ECJ: IN THE CASE OF DATA DISCLOSURE PURSUANT TO ART. 15 GDPR DATA PROTECTION RIGHTS OF EMPLOYEES MUST BE RESPECTED +++

The European Court of Justice (ECJ) has again ruled on the scope of the right to information. The plaintiff was both a customer and an employee of a bank. He had noticed that other employees of the company had requested data about him. As a result, he wanted to know, among other things, who had accessed his personal data. The ECJ ruled that the plaintiff indeed had a right to information against the bank which was not limited by the fact that the bank was carrying out its business in the context of a regulated activity. However, no information could be provided about the identity of the retrieving employees of the bank, in order to ensure their data protection. The situation would have been different if these employees had not carried out the queries in accordance with the bank's instructions. Even in such a case, however, the rights and freedoms of the querying employees would have had to be taken into account. Furthermore, the court stated that a request for information pursuant to Article 15 GDPR can also be used to request information that was already processed before the GDPR came into force.

[To the ECJ ruling \(dated 22 June 2023, C-579/21\)](#)

+++ FEDERAL COURT OF JUSTICE ON THE RIGHT TO BE FORGOTTEN BY GOOGLE +++

The Federal Court of Justice has decided on delisting requests brought to Google. The case dealt with which requirements data subjects must present in order to be able to demand that Google delete search results if these results allegedly contain misrepresentations. The action had been filed by a couple from the financial sector who objected to the publication of negative information linked in Google searches. Google had refused to delete the search results as the correctness of the information could not be assessed, and the data subjects would first have to take legal action against the authors. The Federal Court of Justice now clarified that data subjects will have to present relevant and sufficient proof that the information shown in Google hits is obviously incorrect. Google, as operator of the search engine, is not obliged to initiate investigations itself. It is however not required that data subjects first take legal action against the website operators for removal of the information.

[To the press release of the Federal Court of Justice \(dated 23 May 2023, VI ZR 476/18, in German\)](#)

+++ REGIONAL COURT OF COLOGNE: UNLAWFUL DATA TRANSFER TO GOOGLE ON TELEKOM WEBSITE +++

The consumer advice centre of North Rhine-Westphalia successfully brought action against Telekom Deutschland GmbH for an injunction. Their website had, among others, the analysis and marketing tool Google Ads Services implemented. The Regional Court of Cologne ruled that the transfer of personal data to the Google group in the USA is unlawful and therefore prohibited Telekom from further use. In this context, the court finds that IP addresses are personal data and that there is currently no adequate level of data protection in the USA. Standard contractual clauses, if any, would not prevent access by US authorities. Further, no effective consent to data transfers on the basis of Article 49 GDPR had been given. Although Telekom did use a cookie banner, website visitors were not sufficiently informed about the data transfer. However, the court did not decide whether consent for permanent data transfer to third countries is permissible at all. The judgment has not become final yet.

[To the judgment of the Regional Court of Cologne \(dated 23 March 2023, 33 O 376/22, in German\)](#)

[To the press release of the consumer advice centre \(dated 10 May 2023, in German\)](#)

+++ FEDERAL LABOUR COURT: CHAIR OF THE WORKS COUNCIL CANNOT BE DATA PROTECTION OFFICER +++

The Federal Labour Court has decided that the chair of a works council cannot be company data protection officer. The defendant company had appointed the plaintiff, who is the chair of the works council, as data protection officer, but revoked this appointment at the instigation of the Thuringian data protection authority. The plaintiff objected to this revocation. The Federal Labour Court found that the chairmanship of the works council typically conflicts with the performance of duties of a data protection officer, thus entitling the employer to revoke the appointment. The tasks of a works council chair and a data protection officer typically could not be performed by the same person without a conflict of interest. The chair of the works council thus lacked the reliability required to perform the duties of a data protection officer.

[To the press release of the Federal Labour Court \(dated 06 June 2023, 9 AZR 383/19, in German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ EUR 40 MILLION FINE IN FRANCE IMPOSED ON ONLINE ADVERTISING SERVICE PROVIDER CRITEO +++

The French supervisory authority, Commission Nationale de l'Informatique et des Libertés (CNIL), imposed a EUR 40 million fine on Criteo, an online advertising company. The company uses behavioural targeting, a strategy which tracks the surfing behaviour of users with the help of cookies. Following complaints from data protection organisations, the CNIL investigated into the company. CNIL found a number of data protection violations, especially in connection with the consent of the data subjects. Some of the cookies were placed without the consent of the data subjects, or consent was not obtained effectively. Also the withdrawal of consent was not sufficiently observed. Furthermore, in the opinion of the CNIL, Criteo's privacy policy was worded too vaguely and requests for information from data subjects were only answered inadequately. Finally, agreements with partners (joint controllers) were incomplete.

[To the EDPB press release \(dated 15 June 2023\)](#)

[To the decision of the authority \(dated 15 June 2023, in French\)](#)

+++ SPOTIFY FINED EUR 4.9 MILLION +++

The Swedish Authority for Privacy Protection (IMY) has issued a fine in the equivalent of EUR 4.9 million on Spotify AB. The authority found that Spotify had not properly complied with requests for information from data subjects under Article 15 GDPR. Several private individuals had complained to the authority. The information provided by Spotify did neither specify the categories of personal data to which the processing relates nor the categories of data recipients. Further, the purposes of processing were not indicated and there was no information on guarantees for the transfer of data to third countries. The authority also clarified that providing the information in English was not sufficient to provide the data subjects with comprehensible information. Rather, the information must also be provided in the national language of the data subjects.

[To the IMY press release \(dated 13 June 2023\)](#)

[To the administrative fine notice by IMY \(dated 12 June 2023, in Swedish\)](#)

+++ USD 20 MILLION FINE IMPOSED ON MICROSOFT FOR XBOX ACCOUNTS +++

The US supervisory authority Federal Trade Commission (FTC) has issued a USD 20 million (equivalent to approx. EUR 18.7 million) fine on Microsoft Corporation. When setting up Xbox accounts, huge amounts of data of minors were processed without their parents' consent. For example, the children were asked to provide their name, email address, telephone number and their date of birth. The data was retained, sometimes for years, and also passed on for advertising purposes. In addition, Microsoft retained the children's data even when a parent failed to complete the account registration process. The FTC relies on the Children's Online Privacy Protection Act (COPPA) which, among other things, protects the personal data of children under 13. Microsoft was ordered to inform parents and obtain their consent for accounts created before May 2021. In addition, a new system to delete must be established for cases where parental consent has not been obtained.

[To the FTC press release \(dated 05 June 2023\)](#)

+++ EUR 300,000 FINE AGAINST BANK FOR LACK OF TRANSPARENCY OVER AUTOMATED REJECTION OF A CREDIT CARD APPLICATION +++

The Berlin Commissioner for Data Protection and Freedom of Information has imposed a fine of EUR 300,000 on a German direct bank, Deutsche Kreditbank (DKB). The bank had refused to provide a customer with comprehensible information about the reasons for the automated rejection of a credit card application. The customer had applied for a credit card using an online form where the customer had to provide various data, including work, income and personal details. Based on this and data from other sources, the bank's algorithm rejected the application without giving any particular reason. When asked by the customer, the bank only provided general information about the scoring procedure and refused to tell him why it assumed a poor creditworthiness in his case. The customer therefore complained to the data protection authority which found a violation of Article 22 and Article 15 GDPR. When companies make automated decisions, they are obliged to substantiate them in a valid and comprehensible manner. A bank is obliged to inform customers of the reasons for a rejection when making an automated decision on a credit card application.

[To the press release of the Berlin authority \(dated 31 May 2023, in German\)](#)

[To the EDPB press release \(dated 31 May 2023\)](#)

+++ EUR 7.6 MILLION FINE ON ITALIAN TELECOMMUNICATIONS COMPANY +++

The Italian data protection authority, Garante per la Protezione dei Dati Personali (GPDP), has imposed a fine of EUR 7.6 million on Tim S.p.A., an energy and telecommunications company. The subject of the repeated complaints from data subjects was, in particular, unsolicited advertising calls without effective consent. In other cases, the calls were made despite entries in opt-out lists or issued objections to advertising. Data subjects' rights were not observed or were observed late. Another violation by the company was that a personal data incident had not been reported to the authorities. In addition, telephone numbers of data subjects were published in a publicly accessible list without their consent. In particular, the authority ordered the company to better monitor its call centres to prevent unauthorised telemarketing.

[To the GPDP press release \(dated 09 June 2023, in Italian\)](#)

[To the administrative fine notice of GPDP \(dated 13 April 2023, in Italian\)](#)

4. Opinions

+++ CHAT GPT OPERATOR MUST ANSWER TO LIST OF QUESTIONS BY DATA PROTECTION AUTHORITIES +++

In April, several German data protection authorities (including Hesse, Rhineland-Palatinate, Baden-Württemberg, Schleswig-Holstein) sent an extensive list of questions to OpenAI, the operator of the chatbot ChatGPT. The Independent Centre for Data Protection of the German state of Schleswig-Holstein has now published its consultation letter along with the list of questions. The questions relate in particular to whether its data processing complies with the basic principles of data protection law, whether it is based on a valid legal basis and whether it is sufficiently transparent for the data subjects. For the protection of children and teenagers, questions are asked about what age limit has been defined for the use of ChatGPT, how compliance with the age limit is checked, and whether the consent of the legal guardian is obtained for all users under 16 years of age. OpenAI must also disclose from which sources the training data originates and for which purposes (e.g. profiling and advertising) the usage data is stored. Further questions are asked about data security and compliance with data subjects' rights. OpenAI is further requested to submit a data protection impact assessment.

[To the letter from ULD \(dated 19 April 2023, in German\)](#)

+++ EUROPEAN DATA PROTECTION BOARD PUBLISHES GUIDELINES ON THE CALCULATION OF GDPR FINES +++

During its plenary on 24 May 2023, the European Data Protection Board (EDPB) adopted a final version of the guidelines on the calculation of administrative fines. The guidelines aim to facilitate the authorities' approaches for sanctioning data protection infringements. The methodology data protection authorities use to calculate fines will be harmonised throughout Europe. Hereby, three elements are considered: the categorisation of infringements by nature, the seriousness of the infringement and the turnover of a business. The guidelines set out a 5-step methodology, taking into account the number of instances of sanctionable conduct; the starting point for the calculation of the fine; aggravating or mitigating factors; legal maximums of fines; and the requirements of effectiveness, dissuasiveness and proportionality.

[To the EDPB press release \(dated 07 June 2023\).](#)

[To the EDPB guidelines \(dated 24 May 2023\).](#)

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