



1. Changes in Legislation

+++ EU PARLIAMENT POSITIONS ITSELF WITH REGARD TO THE DIGITAL MARKETS ACT +++

The Internal Market Committee of the EU Parliament has adopted the negotiating position of the EU Parliament regarding the Digital Markets Act (DMA). The DMA is a new law to regulate particularly large platforms, so-called "gatekeepers" (e.g. Google, Apple, Facebook, Amazon, Microsoft and Airbnb) to which new competition rules are to apply in future. The EU Parliament's proposal also stipulates that messenger services (such as WhatsApp, Signal or Facebook Messenger) must be interoperable, so that users of different messenger services can exchange messages and simple posts with each other. A ban on personalised advertising was also discussed; however, this is to remain admissible in principle with the consent of the user. The EU Parliament still has to formally confirm the negotiating position before the DMA draft can be agreed with the Council of Ministers. It is expected that the DMA can enter into force at the end of 2022.

[To the report on Heise Online \(dated 23 November 2011, German\)](#)

2. Case Law

+++ ECJ REVIEWS SCHUFA SCORING +++

The Administrative Court of Wiesbaden has referred to the European Court of Justice, among other things, the question of whether the creation and transmission of consumer score values (also known as "scoring") are subject to the prohibition of automated individual decision-making. The Wiesbaden Administrative Court argued that scoring is so decisive for banks' decisions on granting credit that it could already be regarded as an independent "decision" under Article 22 (1) GDPR. Should the ECJ share this view, scoring by Schufa would only be permissible in exceptional cases, for instance if a law authorises it (such as Section 31 German Federal Data Protection Act (BDSG)), or if the data subject has given prior consent. However, the Wiesbaden Administrative Court expressed "far-reaching concerns" about the compatibility of Section 31 BDSG with the GDPR. As a result, Schufa scoring in its current form could be classified as unlawful.

[To the decision of the Wiesbaden Administrative Court \(dated 1 October 2021, 6 K 788/20.WI, German\)](#)

+++ REGIONAL COURT OF FRANKFURT: TECHNICALLY DEFECTIVE COOKIE BANNERS ARE A BREACH OF COMPETITION LAW +++

The Regional Court of Frankfurt has ruled that a technically incorrectly implemented cookie banner constitutes a breach of competition law under Section 3a German Act against Unfair Competition (UWG) in conjunction with Section 15 (3) German Telemedia Act (TMG). The defendant company used tracking cookies (from Criteo, Facebook, Google Analytics, Hotjar and Microsoft Ads, among others) on its website. Although the website had a cookie banner (with the categories "Statistics", "Marketing", "Third-party services"), the tracking cookies, which were actually optional, were already set immediately when the page was first accessed - and thus before the user could make his selection in the cookie banner. The Court found this to be misleading, for which the website operator was liable as the perpetrator. The complaint was filed by a competition office. The defendant company tried to defend itself (unsuccessfully) with the objection that the technical cookie banner service provider had changed processes on its own authority and thereby caused the faulty implementation.

[To the Notification of Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main e. V. \(dated 5 November 2021, German\)](#)

+++ REGIONAL COURT OF KREFELD: NO GDPR CLAIM IN THE EVENT OF LEGAL ABUSE +++

The Regional Court of Krefeld 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 (Section 242 German Civil Code (BGB)), as the plaintiff exclusively wanted to check whether a contribution increase was lawful and whether he was entitled to monetary reimbursement claims on the basis of the information. "Not even as a reflex" did this correspond to the interests protected by Article 15 GDPR, in particular the verification of the lawfulness of data processing. The reasoning for the dismissal of the action is almost identical to a ruling by the Wuppertal Regional Court ([see BB Privacy Ticker September 2021](#)). The Wuppertal Regional Court had also dismissed a data subject's claim for information in a comparable case for abuse of rights.

[To the judgement of the Krefeld Regional Court \(dated 6 October 2021, 2 O 448/20, German\)](#)

+++ REGIONAL COURT OF MUNICH ON THE OBLIGATION TO PROVIDE INFORMATION UNDER THE GDPR: ELECTRONIC INFORMATION VIA A LINK IS SUFFICIENT +++

The Regional Court of Munich has ruled that the provision of information under the GDPR by means of an electronic information system, in which data subjects are provided with a permanently available link under which the data to be provided can be accessed, complies with the GDPR. The court pointed out that "the electronic provision of personal data out of the account" is expressly permitted in Recital 63 of the GDPR. The plaintiff had argued that the link provided could not be opened and only led to an error report ("page not found"). However, the court was able to access the link and considered the information to have been properly provided with the provision of the link.

[To the judgement of the Munich Regional Court \(dated 2 September 2021, 23 O 10931/20, German\)](#)

+++ ADMINISTRATIVE COURT OF HANOVER: QUERY OF DATE OF BIRTH IN ORDER PROCESS UNLAWFUL +++

The Administrative Court of Hanover ruled that an online pharmacy may not request the date of birth of the person placing the order in an order form, insofar as (also) non-prescription products can be purchased. There is no legal basis for this data collection under the GDPR, as age-specific

advice is not required for over-the-counter products and the mere verification of the age of majority can be carried out in a more data-saving manner, i.e. without specifying the exact date of birth. The proceedings were preceded by a cease-and-desist order issued by the Data Protection Commissioner of Lower Saxony. In this order, the pharmacy was also forbidden to include a mandatory form of address (Mr/Mrs) in the order form, insofar as medication does not have to be dosed according to gender. As a consequence, the pharmacy introduced the selection option "without indication".

[To the judgement of the Hanover Administrative Court \(dated 9 November 2021, 10 A 502/19, German\)](#)

[To the press release of the Administrative Court of Lower Saxony \(dated 10 November 2021, German\)](#)

+++ ADMINISTRATIVE COURT OF WIESBADEN: DATA SUBJECT HAS RIGHT TO INTERVENE AGAINST DATA PROTECTION AUTHORITY +++

The Administrative Court of Wiesbaden obliged the Hessian Commissioner for Data Protection and Freedom of Information (HBDI) to intervene against a credit agency. The plaintiff was a customer of a bank that had reported a payment default to the credit agency. Subsequently, the bank and the plaintiff reached a court settlement which, among other things, provided for the deletion of the negative entry. The credit agency, however, refused to delete the negative entry. The plaintiff sought help from the HBDI who refused to intervene against the credit agency. The Wiesbaden Administrative Court now obliged the HBDI to issue a deletion order against the credit agency. No later than after the presentation of the court settlement, it had to be assumed that the storage of the negative entry was unlawful. Accordingly, the authority's discretion had been reduced to zero so that the plaintiff concerned was entitled to official intervention. However, assuming such a "failure of discretion" is the exception in case law. Most claims for official intervention by data protection authorities are dismissed with reference to the discretionary powers of the authorities (as was also the case a few days earlier in another case by the Wiesbaden Administrative Court, see [BB Privacy Ticker October 2021](#)).

[To the judgement of the Wiesbaden Administrative Court \(dated 27 September 2021, 6 K 549/21.WI, German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ ITALIAN DATA PROTECTION AUTHORITY LAUNCHES INVESTIGATION AFTER HACKER ATTACK +++

The Italian data protection authority Garante per la Protezione dei Dati Personali (GDPD) has launched an investigation into an Italian collecting society, Società Italiana degli Autori ed Editori (SIAE). SIAE reported a massive ransomware attack to the authority, in which the attackers captured more than 60 giga-bytes of data, including a large amount of personal data of artists. The attackers are demanding a ransom and have already published some of the data on the internet. SIAE reported the incident already one day after the attack and thus within the deadline of Article 33 GDPR.

[To the GDPD press release \(dated 21 October 2021, Italian\)](#)

+++ FINE IMPOSED BY THE DUTCH DATA PROTECTION AUTHORITY FOR INSUFFICIENT DATA SECURITY AT AIRLINE +++

The Dutch data protection authority Autoriteit Persoonsgegevens (AP) has imposed a fine of EUR 400,000 on the airline Transavia. The company reported a hacking attack in 2019 in which attackers potentially gained access to 25 million customer data (including name, dates of birth, gender, e-mail addresses, phone numbers, booking numbers, etc.). According to the authority, poor IT security made the attack possible. The attackers gained access via accounts of the IT department, which were only protected with easy-to-guess passwords and without multi-factor authentication. Also, the access rights to the accounts were not limited to the necessary Transavia systems. Here, the AP saw a violation of Article 32 GDPR.

[To the AP press release \(dated 12 November 2021\)](#)

[To the press release of the European Data Protection Board \(dated 12 November 2021\)](#)

+++ FINE IMPOSED BY THE POLISH DATA PROTECTION AUTHORITY DUE TO INADEQUATE REPORTING OF A DATA BREACH +++

The Polish Data Protection Authority Prezes Urzędu Ochrony Danych Osobowych (UODO) has issued a fine of EUR 79,625 against a bank for failing to notify a data breach to the authority (Article 33 GDPR) and for insufficient notification to data subjects (Article 34 GDPR). The bank had lost documents sent by courier, including names, addresses, account numbers and Polish personal identification numbers.

Although the bank informed the data subjects affected, it did not do so to the extent provided for in Article 34 GDPR. In addition, the data protection authority was not informed at all, as the bank had assessed the risk from the incident as too low - and the data breach as not reportable.

[To the press release of the European Data Protection Board \(dated 22 November 2021\)](#)

4. Opinions

+++ FEDERAL COMMISSIONER FOR DATA PROTECTION AND FREEDOM OF INFORMATION: IMPLEMENTATION OF 3G AT THE WORKPLACE "DEFECTIVE" +++

The German Federal Commissioner for Data Protection and Freedom of Information (BfDI) Ulrich Kelber welcomes a 3G rule in the workplace but criticises the legislative implementation. According to Kelber, the law does not include protective measures for data subjects, such as a duty of confidentiality for the persons monitoring the data vis-à-vis the employer or measures to pseudonymise the data. Moreover, personal 3G data would not have to be stored for a long period of time in order to enable access control. Accordingly, Kelber fears that errors in data protection law "could lead to delays in lawsuits before courts".

[To the press release of the BfDI \(dated 19 November 2021, German\)](#)

+++ BAVARIAN DATA PROTECTION AUTHORITY: COLLECTION OF FAQs ON THE PROCESSING OF 3G/2G DATA AT THE WORKPLACE +++

In an FAQ published on the authority's website, the Bavarian Data Protection Authority (Bay LDA) provides guidance on the processing of the vaccination status of employees by employers on the basis of the Bavarian Infection Control Regulation. The authority answers practical questions there, including to what extent (only the 3G status, not the verification document), for how long (only within the scope of necessity) and in what form (storage in the personnel file is not permitted) data on 3G status may be stored. The FAQ is tailored to the legal situation in Bavaria but may also contain useful information for companies outside Bavaria.

[To the FAQ of Bay LDA \(dated 11 November 2021, German\)](#)

+++ DATA PROTECTION CONFERENCE: RESOLUTION ON THE PROCESSING OF THE "VACCINATION STATUS" DATE AT THE WORKPLACE +++

The Data Protection Conference (DSK) has issued a resolution on the processing of the vaccination status. Among other things, it points out that the principles of data minimisation (Article 5 (1) (c) GDPR), storage limitation (Article 5 (1) (e) GDPR) and accountability (Article 5 (2) GDPR) must be observed when requesting the vaccination status. When reading, it should be noted, however, that the DSK issued the decision before the last amendment of the Infection Protection Act, which is why these last amendments (in particular the extension of the 3G rules) have not yet been taken into account.

[To the resolution of the DSK \(dated 19 October 2021, German\)](#)

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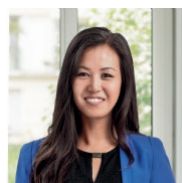
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