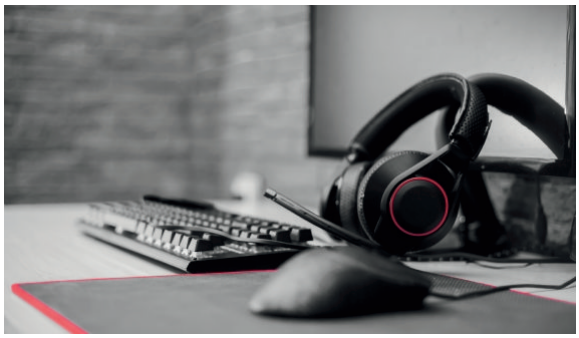
ADVANT Beiten

Privacy Ticker

May 2024



+++ AI ACT ADOPTED +++ NEW DIGITAL LAWS (DDG AND TDDDG) IN FORCE +++ ADMINISTRATIVE COURT OF BERLIN: GDPR INFORMATION DOES NOT HAVE TO BE PROVIDED IN THE SIMPLEST POSSIBLE FORM +++ FINE OF EUR 14 MILLION AGAINST AVAST FOR UNAUTHORISED DATA DISCLOSURE +++ GUIDELINES BY GERMAN DATA PROTECTION CONFERENCE ON ARTIFICIAL INTELLIGENCE +++

1. Changes in Legislation

+++ AI ACT ADOPTED +++

After the European Parliament passed the Artificial Intelligence Act (AI Act) in March (see AB Privacy Ticker March 2024), the EU Council has now also approved the regulation. It will enter into force 20 days after publication in the Official Journal of the EU and will then apply for most of its provisions two years later. The AI Act follows a risk-based approach in which certain AI systems are banned, such as emotion recognition systems in the workplace and the assessment of social behaviour. The aim is to ensure that only AI systems that are both safe and respect the fundamental rights and values of the EU are allowed to enter and be used on the European market. So-called high-risk AI systems are only permitted if they fulfil certain requirements. These systems include those that are used in areas such as critical infrastructure, migration, border controls, education or employment. In addition, information and transparency obligations apply to all systems. The fines for violations are up to 7 percent of the previous year's global turnover or EUR 35 million, depending on the type of violation.

To the press release of the EU Council (dated 21 May 2024)

To the text of the AI Act (dated 14 May 2024)

+++ NEW DIGITAL LAWS (DDG AND TDDDG) IN FORCE +++

The German Bundestag has transposed the EU Commission's Digital Services Act (DSA), which has been in force since February 2024, into national law. On 14 May, the two national implementation laws "Digitale-Dienste-Gesetz" (DDG) and "Gesetz über den Datenschutz und den Schutz der Privatsphäre in der Telekommunikation und bei digitalen Diensten" (TDDDG) came into force. The DDG replaces the previous Telemedia Act (TMG), which, for example, regulated the obligation to provide an imprint. Liability for user-generated content, e.g., comments, reviews or posts on social media platforms, is now fully regulated by the DSA. The new TDDDG replaces the Telecommunications and Telemedia Data Protection Act (TTDSG), which in particular contained regulations on telecommunications secrecy and the cookie consent requirement. In this respect, no changes have been made in terms of content, but the legal information in privacy policies must be adapted.

To the text of the DDG (dated 6 May 2024, in German)

To the text of the TDDDG (dated 6 May 2024, in German)

2. Case Law

+++ ECJ AUTHORISES THE INTERNATIONAL TRANSFER OF EVIDENCE FROM ENCROCHAT +++

The European Court of Justice (ECJ) has ruled that a public prosecutor can in principle authorise the transfer of evidence from one EU member state to another. The French police had infiltrated the messenger service EncroChat, which was used by criminal organisations for encrypted telecommunications. The evidence obtained in this way was also transferred to German investigating and prosecuting authorities and used for investigations and arrests. In a case before the Berlin Regional Court, the question arose as to whether the information had been obtained lawfully, as it had only been requested by the public prosecutor's office and had not been authorised by a judge. The ECJ is of the opinion that an investigation order aimed at the transfer of evidence that is already in the possession of the competent authorities of the executing state does not necessarily have to be issued by a judge. It can be issued by a public prosecutor if he is competent to authorise the transfer of evidence already collected in purely domestic proceedings. However, a court

dealing with an appeal against this decision must be able to review compliance with the fundamental rights of the data subjects.

To the press release of the ECJ (dated 30 April 2024)

To the ECJ ruling (dated 30 April 2024, C-670/22)

+++ ADMINISTRATIVE COURT OF BERLIN: GDPR INFORMATION DOES NOT HAVE TO BE PROVIDED IN THE SIMPLEST POSSIBLE FORM +++

The Administrative Court of Berlin has ruled that access to information pursuant to Art. 15 GDPR does not have to be provided in the simplest possible form. Rather, it is sufficient if the information is generally understandable, provided that it is reasonable for the data subject to take note of it. The plaintiff requested information about his personal data from the defendant authority. The defendant repeatedly provided information and sent the plaintiff the complete administrative process as a PDF file. The plaintiff considered the information to be incomplete and incomprehensible, so he filed a lawsuit. The court largely dismissed the action, pointing out that the PDF file contained the entire administrative file and therefore also all of the plaintiff's personal data. It was also possible and reasonable for the plaintiff to search for his data from the document, for example by using the search function of the PDF reader. According to the court, there is no entitlement to receive the information in a form that is as easy to understand as possible. Furthermore, the information was also complete, although the defendant had not named the recipients of the processed data and had also not specifically stated the purpose of processing and storage duration. In the opinion of the court, it was reasonable for the plaintiff to find out this information himself from the information provided and it was not possible to specifically state the retention periods.

To the judgement of the Administrative Court of Berlin (dated 10 January 2024, 1 K 73/22, in German)

+++ REGIONAL LABOUR COURT OF MAINZ: NO GDPR COMPENSATION FOR DELAYED INFORMATION PURSUANT TO ART. 15 GDPR +++

The Regional Labour Court of Mainz has ruled that a data subject is not entitled to compensation in the event of delayed GDPR information if there is no specific damage. The plaintiff was employed by the defendant and requested information about her personal data in accordance with

Art. 15 GDPR. The defendant provided the information only after 1.5 months and thus with a delay. The plaintiff then claimed damages of at least EUR 3,000 and justified this with a loss of control and annoyance due to the delayed information. The court dismissed the claim, as the failure to provide information on time alone did not lead to an immaterial claim for damages. The loss of control over her data alleged by the plaintiff did not constitute non-material damage that could be compensated. It was already not recognisable what the plaintiff's loss of control was supposed to have consisted of. Also, the mere annoyance of the data subject and the wait for the information were not sufficient to assume non-material damage, according to the court.

To the judgement of the Regional Labour Court of Mainz (dated 8 February 2024, 5 Sa 154/23, in German)

3. Regulatory Investigations and Enforcement Actions

+++ FINE OF EUR 14 MILLION AGAINST AVAST FOR UNAUTHORISED DATA DISCLOSURE +++

The Czech data protection authority Úřad Pro Ochranu Osobních Údajů has imposed a fine of the equivalent of EUR 14 million on the cybersecurity company Avast Software s.r.o.. The authority found that the company, which distributes a well-known antivirus software, had transferred the personal data of around 100 million users to its sister company without a legal basis. In particular, pseudonymised Internet browser history of customers, which was linked to a unique customer ID, was affected. The authority assumed that browser history also constitutes personal data, as it can lead to the identification of users. In addition, Avast had not correctly fulfilled its duty to inform users, as the data passed on was not anonymised, contrary to the statement in the privacy policy. The authority pointed out that the offence was all the more serious as Avast is one of the leading cyber security companies and therefore the trust of users was particularly violated. The US Federal Trade Commission had already imposed a fine of around EUR 15 million on Avast for similar practices in January 2024 (see AB Privacy Ticker March 2024).

To the press release of the Czech authority (dated 15 April 2024)

To the administrative fine notice of the Czech authority (dated 10 April 2024)

4. Opinions

+++ GUIDELINES BY GERMAN DATA PROTECTION CONFERENCE ON ARTIFICIAL INTELLIGENCE +++

The Conference of the Independent Data Protection Authorities of the German Federal and State Governments has published guidelines on the selection and data protection-compliant use of AI applications. The guidance is primarily aimed at those controllers who wish to use AI applications, i.e. companies, authorities and other organisations. However, it is also indirectly aimed at developers, manufacturers and providers of AI systems. It provides an overview of the criteria that must be taken into account for the data protection-compliant use of AI applications and is intended to serve as a guide for selecting, implementing and using AI applications. The focus of the guide is on Large Language Models (LLM), which are often offered as chatbots, such as ChatGPT. Using examples, important criteria are discussed in line with the requirements of the GDPR and guidelines for corresponding decisions are provided. For example, the issuance of internal service and handling policies for dealing with AI applications is recommended.

To the press release of the Rhineland-Palatinate data protection authority (dated 6 May 2024, in German)

To the authorities' guidelines (dated 6 May 2024, in German)

+++ STATE OF LOWER SAXONY USES MICROSOFT TEAMS AFTER COORDINATION WITH DATA PROTECTION AUTHORITY +++

The Ministry of the Interior and Sport of Lower Saxony has announced the successful conclusion of a data protection agreement with Microsoft on the use of Microsoft Teams. The federal state sees itself as a pioneer in the use of Microsoft Teams in the state administration. The focus was on revising the data protection regulations of the standard data processing agreement for Microsoft Online Services. The Data Protection Authority of Lower Saxony assisted the Ministry in terms of data protection law and considers the outcome of the negotiations to be acceptable with regard to the structure of the data processing agreement. However, even after this negotiation result, the authority believes that there is clear potential for more data protection-friendly regulations. The authority points out that

the measures resulting from the contractual provisions, which are to be taken by the federal state, must be consistently implemented before the start of operation of Microsoft Teams and regularly reviewed for their effectiveness. This applies in particular to the fulfilment of transparency and documentation obligations. Finally, the data protection authority encourages controllers to continue to examine alternatives and, in particular, to actively approach digitally sovereign solutions.

To the Ministry’s press release (dated 26 April 2024, in German)

To the press release of the Data Protection Authority of Lower Saxony (dated 3 May 2024, in German)

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