

# Privacy Ticker

September 2023



**+++ HIGHER REGIONAL COURT OF HAMM: ADVERTISING MESSAGES VIA SOCIAL MEDIA PORTAL ILLEGAL WITHOUT CONSENT +++ TIKTOK FINED EUR 345 MILLION +++ GERMAN DATA PROTECTION CONFERENCE PUBLISHES APPLICATION GUIDANCE TO EU-US DATA PRIVACY FRAMEWORK +++ HANDOUT OF DATA PROTECTION AUTHORITIES ON THE USE OF MICROSOFT 365 +++**

## 1. Case Law

**+++ REGIONAL LABOR COURT OF SAXONY: DEPUTY DATA PROTECTION OFFICERS ALSO BENEFIT FROM SPECIAL PROTECTION AGAINST DISMISSAL +++**

The Regional Labor Court of Saxony has ruled that deputy data protection officers also benefit from the special protection against dismissal under Section 6 (4) BDSG. In the case at issue the employer had issued one extraordinary and one ordinary notice of termination to the deputy data protection officer. The extraordinary termination was invalid because it had not been given in due time. The ordinary termination, in turn, was not sufficient, as Section 6 (4) sentence 2 of the Federal Data Protection Act (BDSG) only permits termination of the data protection officer for good cause. To satisfy this requirement, it is not sufficient, in the opinion of the court, if there is objectively good cause for an extraordinary termination. Rather, an extraordinary termination must be expressly declared. The termination of the deputy data protection officer was therefore invalid.

[To the Regional Labor Court of Saxony judgment \(dated 17 March 2023, 4 Sa 133/22, in German\)](#)

### **+++ HIGHER REGIONAL COURT OF HAMM: ADVERTISING MESSAGES VIA SOCIAL MEDIA PORTAL ILLEGAL WITHOUT CONSENT +++**

The Higher Regional Court of Hamm has ruled in an advisory decision that advertising messages sent without consent via social networks such as Xing, Facebook, LinkedIn or WhatsApp, as well as via other online portals, are to be classified as impermissible advertising. The plaintiff company offered services for real estate agents and sued for payment of the outstanding remuneration. Part of the service was also the provision of contact data of potential customers via online and social media portals. However, since the plaintiff was unable to provide evidence of consent to receive advertising for these potential customers, the defendant refused payment on the grounds that the services had not been properly provided. The court shared this view and declared the contract void as it was aimed at anti-competitive acts. In addition to emails and text messages, in the court's opinion all messages via social media services or other portals also fall under the term "electronic mail" within the meaning of Section 7 (2) No. 3 of the German Unfair Competition Act (UWG) and therefore constitute an unreasonable harassment unless consent was given.

[To the Higher Regional Court of Hamm decision \(dated 3 May 2023, 18 U 154/22, in German\)](#)

### **+++ REGIONAL COURT OF BIELEFELD: COPYING A PERSONAL IDENTITY CARD DOES NOT JUSTIFY NON-MATERIAL DAMAGES+++**

The Regional Court of Bielefeld has ruled that a data subject is not entitled to non-material damages under Article 82 (1) of the GDPR due to the copying of her ID card in a doctor's office. The plaintiff made a claim against the operator of a fertility clinic for payment of damages and compensation for pain and suffering. As part of the attachment of the patient file, the plaintiff's ID card had also been copied and added to the documents. The plaintiff claimed that she felt psychologically burdened by the unauthorized data processing, was worried and unsettled. The court rejected a claim for damages because there was no immaterial damage. Although the GDPR does not specify a materiality threshold, a concrete non-material damage must actually have occurred. The plaintiff was unable to prove in the trial that the copying of the ID card had caused her discomfort and uncertainty.

[To the Regional Court of Bielefeld judgment \(dated 7 July 2023, 4 O 275/22, in German\)](#)

### **+++ REGIONAL COURT OF KLEVE: EXTRANEOUS MOTIVES LEAD TO ABUSE OF RIGHTS IN THE CASE OF RIGHT OF ACCESS +++**

The Regional Court of Kleve has ruled that extraneous motives can lead to an abuse of rights in the case of a claim for access pursuant to Article 15 of the GDPR. In the underlying case, the plaintiff was involved in a legal dispute against his private health insurance company on the issue of the effectiveness of premium increases. To substantiate his claims, he demanded that the insurance company hand over a large number of documents, namely the addenda to the insurance policy, and also relied on the right of access pursuant to Art. 15 GDPR. The Regional Court denied such a claim since the plaintiff was not interested in reviewing the lawfulness of the data processing. Rather, the purpose of the disclosure requested by the plaintiff was exclusively to review any premium adjustments made by the insurance company. Such a procedure is not covered by the protective purpose of the GDPR.

[To the Regional Court of Kleve judgment \(dated 10 August 2023, 6 O 143/22, in German\)](#)

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

### **+++ TIKTOK FINED EUR 345 MILLION +++**

The Irish Data Protection Commission (DPC) has imposed a fine of EUR 345 million on TikTok Technology Limited. The authority conducted investigations between July and December 2020 and found numerous violations on the social media platform in connection with the handling of minors' data. For example, the profiles of underage users were set to public by default, so that anyone could access the posted content. Through a so-called "family pairing," it was possible for adult users to pair their accounts with those of minors and allow direct messages. It was discovered that this function was also being exploited by non-parents. In addition, the privacy notices for underage users were inadequate and TikTok used "dark patterns" to get users to share as much data as possible in the sign-up process. In addition to the fine, TikTok was ordered to remedy the data protection violations within three months.

[To the press release of the DPC \(dated 15 September 2023\)](#)

[To the DPC decision \(dated 1 September 2023\).](#)

## **+++ GOOGLE PAYS USD 93 MILLION REGARDING LOCATION DATA IN CALIFORNIA +++**

In a settlement with the state of California, Google LLC has agreed to pay a fine of USD 93 million. After many years of investigation, the California Attorney General considers it proven that Google recorded the location of users even if they had deactivated location tracking. This meant that personal data was processed without the users' consent. In addition, location tracking was enabled by default when using Google services until 2019. Google used the location data for personalized advertising. While Google did not admit any wrongdoing, it assured more transparency and extended information for users regarding location tracking in the future. Already in November 2022, Google had agreed to pay a penalty of USD 391.5 million to 40 other US states due to the same allegations.

[To the press release of the Attorney General \(dated 14 September 2023\)](#)

## **+++ FINE OF EUR 100,000 FOR ADVERTISING TEXT MESSAGES WITHOUT CONSENT +++**

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has imposed a fine of EUR 100,000 on the company Tiscali Italia SpA. During routine checks, the authority found that the telecommunications company had carried out so-called soft spam activities. Over a period of four months, advertising messages were sent to more than 160,000 customers via text message, even though they had not given their consent. Furthermore, the company's data privacy information was incomplete, as it did not provide sufficient information about the storage periods, especially for marketing and profiling purposes.

[To the GPDP press release \(dated 11 September 2023, in Italian\)](#)

[To the GPDP fine notice \(dated 18 July 2023, in Italian\)](#)

## **3. Opinions**

### **+++ GERMAN DATA PROTECTION CONFERENCE PUBLISHES APPLICATION GUIDANCE TO EU-US DATA PRIVACY FRAMEWORK +++**

The Conference of the Independent Data Protection Authorities of the German Federal and State Governments (DSK) has published application guidance on the Adequacy Decision on the "EU-US Data Privacy Framework" (EU-US DPF, see [AB blog post of 12 July 2023](#)). In this

document, the DSK provides detailed information on the background to the adequacy decision and the legal basis for data transfers to the US. It also describes the certification procedure for US companies. In addition, the various legal remedies available to data subjects to assert claims for access or deletion are explained. In conclusion, the DSK appreciates the EU-US DPF as an effective tool for data transfers to the US. It should be noted, however, that the application guidelines were adopted against the vote of the State Data Protection Commissioner of Thuringia. In his own press release on the paper, he makes it clear that he does not share the DSK's opinion and criticizes the EU-US DPF in clear terms.

[To the application guidelines of the DSK \(dated 4 September 2023, in German\)](#)

[To the press release of the State Data Protection Commissioner of Thuringia \(dated 4 September 2023, in German\)](#)

### **+++ HANDOUT OF DATA PROTECTION AUTHORITIES ON THE USE OF MICROSOFT 365 +++**

The State Commissioner for Data Protection of Lower Saxony, together with six other German data protection authorities, has published a handout on the use of Microsoft 365. Most recently, the German data protection authorities had classified the use of Microsoft 365 as impermissible in November 2022 ([see AB Data Protection Ticker November 2022](#)). In the new handout, the data protection authorities now provide tips on how to use the software in a permissible manner and in a manner that is as compliant with data protection as possible. This requires implementing own measures and modifying the data processing agreement with Microsoft. The document provides, for example, for the adjustment of deletion deadlines as well as information obligations regarding the use of sub-processors. In addition, the controller must review and, if possible, prevent the processing of data by Microsoft for its own business purposes. Another important point concerns the implementation of technical and organizational measures. All in all, the handout provides data controllers with a comprehensive to-do list for using Microsoft in a legally compliant manner.

[To the press release of the State Data Protection Commissioner of Lower Saxony \(dated 22 September 2023, in German\)](#)

[To the handout of the data protection authorities \(dated 22 September 2023, in German\)](#)

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