

# Privacy Ticker

April 2023



**+++ GERMAN GOVERNMENT PLANS ACT AGAINST DIGITAL VIOLENCE +++ ECJ DECIDES ON GERMAN PROVISIONS REGARDING EMPLOYEE DATA PROTECTION +++ TIKTOK UK FINED EUR 14.4 MILLION +++ ITALIAN DATA PROTECTION AUTHORITY IMPOSES REQUIREMENTS FOR OPERATION OF CHATGPT +++ DSK CONSIDERS "PURE SUBSCRIPTION MODELS" PERMISSIBLE +++**

## 1. Changes in Legislation

### **+++ GERMAN GOVERNMENT PLANS ACT AGAINST DIGITAL VIOLENCE +++**

In order to strengthen the enforcement of law by individuals in the future, the Federal Ministry of Justice is planning an Act Against Digital Violence. As a preparation of the draft bill, the Federal Ministry has written a key issues paper and an explanatory paper. According to these papers, digital violence covers not only criminal offences but also violations of the general right of personality and untruthful user comments and ratings. The aim is in particular to strengthen the rights of access of data subjects. In the case of serious violations of rights of personality in social media, it should also be possible to temporarily block accounts. Online platforms will have to disclose the e-mail and IP addresses of potential offenders. According to the key issues paper, messenger services are also to be obliged to disclose such data. A first draft bill is to be presented in the second half of 2023.

[To the Key Issues Paper by the Federal Ministry of Justice \(as of April 2023, in German\)](#)

[To the Explanatory Paper of the Federal Ministry of Justice \(dated April 2023, in German\)](#)

## 2. Case Law

### **+++ ECJ DECIDES ON GERMAN PROVISIONS REGARDING EMPLOYEE DATA PROTECTION +++**

The European Court of Justice (ECJ) has ruled on the effectiveness of national employee data protection law. The Administrative Court of Wiesbaden had submitted the question to the ECJ whether or when a national regulation is compatible with the opening clause in Article 88 (1) of the GDPR. Specifically, the question concerned Section 23 (1) of the Hessian Data Protection and Freedom of Information Act (HDSIG). According to this, personal data of employees may be processed if this is necessary for the employment. The ECJ found that the German provision very likely does not meet the requirements of Article 88 GDPR and is thus invalid because it merely repeats the wording of the GDPR instead of specifying it. Since Section 23 (1) HDSIG matches Section 26 (1) of the Federal Data Protection Act in content, the decision is likely to have significance not only for the Hessian Data Protection Act but also for the Federal Data Protection Act. It is very likely that the processing of employee data will have to be backed by other legal bases. Further developments in this regard remain to be seen.

[To the judgment of the ECJ \(dated 30 March 2023, C 34/21\)](#)

### **+++ HIGHER REGIONAL COURT OF DRESDEN: NO RIGHT OF PROHIBITORY INJUNCTION UNDER GDPR FOR LEGAL ENTITIES+++**

The Higher Regional Court of Dresden has ruled that a legal entity is not entitled to injunctive relief and right to removal under data protection law. In the underlying case, a company demanded injunction and handing over of various documents from a former employee. The defendant had disclosed internal e-mails from the employment relationship as evidence in a procedure. The Court dismissed the action, clarifying that legal entities may not invoke rights arising from the GDPR. The GDPR only covers data relating to an identified or identifiable natural person. Although legal persons are in fact addressees of the GDPR and the Federal Data Protection Act (BDSG) - e.g. employers vis-à-vis their employees - no own rights arise from it.

[To the Court's decision \(dated 14 March 2023, 4 U 1377/22, in German\)](#)

## **+++ LOCAL COURT OF LUDWIGSBURG CONFIRMS ABUSE OF RIGHTS IN GOOGLE FONTS CEASE-AND-DESIST LETTERS +++**

After the wave of Google Fonts cease-and-desist letters (see [AB Privacy Tickers of October](#) and [November 2022](#)) has come to an end and criminal investigations have been initiated against a warning lawyer and his client (see [AB Privacy Ticker of January 2023](#)), the Local Court of Ludwigsburg has once again dealt with the issue. In the proceedings, a person affected by the cease-and-desist letters sued for a declaration that there was no claim for injunctive relief and damages for pain and suffering. The warning lawyer in turn sued for payment of his legal fees. The Local Court considered the cease-and-desist letter to be an abuse of rights and dismissed the lawyer's action. The lawyer's sole purpose had been to generate income, not to pursue an unlawful act. The lawyer had sent at least 217,540 warning letters in the period from mid-September to mid-October 2022 alone.

[To the Court's decision \(dated 28 February 2023, 8 C 1361/22, in German\)](#)

## **+++ CONSTITUTIONAL COMPLAINTS AGAINST DATA RETENTION UNSUCCESSFUL +++**

With two decisions from February 2023, the Federal Constitutional Court has ruled that three constitutional complaints against data retention without grounds are inadmissible. The Constitutional Court referred to a ruling of the European Court of Justice (ECJ) of 20 September 2022, confirming its judgment. In its judgment, the ECJ had declared the legal obligation of telecommunication service providers in Germany to retain data without grounds to be contrary to EU law. Data retention may therefore no longer be applied in Germany. In the opinion of the German Constitutional Court, there is therefore no need for legal protection for constitutional complaints in this regard, as the invalidity of the national provisions has already been established.

[To the press release of the Federal Constitutional Court \(dated 30 March 2023, in German\)](#)

# 3. Regulatory Investigations and Enforcement Actions

## +++ TIKTOK UK FINED EUR 14.4 MILLION +++

The British data protection authority, Information Commissioner's Office (ICO), has issued TikTok Information Technologies UK Limited with a penalty notice imposing a fine of GBP 12.7 million or EUR 14.4 million. According to the ICO, TikTok breached data protection regulations several times between May 2018 and July 2020. TikTok is in particular accused of providing its app and platform also to children under the age of 13 without consent from their parents. British data protection law sets out that personal data of children under the age of 13 may only be processed with consent from their parents. Breaching its own terms of use, TikTok allowed up to 1.4 million UK children to create an account. The authority further claimed that TikTok failed to provide sufficient and clear information about the processing of data on the platform.

[To the press release of the ICO \(dated 4 April 2023\)](#)

## +++ ITALIAN DATA PROTECTION AUTHORITY IMPOSES REQUIREMENTS FOR OPERATION OF CHATGPT +++

The Italian data protection authority, Garante per la Protezione dei Dati Personali (GPDP), has temporarily blocked access to ChatGPT by the company OpenAI nationwide on 31 March 2023 due to data protection concerns. The authority now introduced conditions for the block to be lifted. Only if ChatGPT fulfils these measures by 30 April 2023 will the access be reactivated. The operator must provide details on data processing and the rights of data subjects. OpenAI may not invoke "contract performance" as legal ground for its processing. Further, users must be able to erase their personal data and to object to data processing. The use of the chatbot may only be permitted from the age of 13 and a system for age verification must be introduced. Finally, OpenAI must conduct an information campaign on radio, television, newspapers and the internet to inform users about the use of their data.

[To the GPDP press release \(dated 12 April 2023, in Italian and English\)](#)

# 4. Opinions

## **+++ DSK CONSIDERS "PURE SUBSCRIPTION MODELS" PERMISSIBLE +++**

The Conference of the Independent Data Protection Authorities of the German Federal and State Governments (DSK) has declared so-called "pure subscription models" on websites to be permissible. In the case of pure subscription models, visitors to the website must decide whether they consent to tracking by analysis services and individualised advertising, or choose a tracking-free model instead, which is, however, subject to a charge. Especially media sites and press publishers use this model, making a visit of their website dependent on such a selection. Consents are usually obtained in a kind of cookie banner. The DSK has assessed this model to be generally permissible. However, website operators must ensure that both offers are equal options and that consent for tracking is obtained in accordance with the requirements of the GDPR. The DSK's decision creates clarity to some degree for website operators and users.

[To the resolution of the DSK \(dated 22 March 2023, in German\)](#)

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### **EDITOR IN CHARGE**

Dr Andreas Lober | Rechtsanwalt

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[BB-Datenschutz-Ticker@advant-beiten.com](mailto:BB-Datenschutz-Ticker@advant-beiten.com)

[www.advant-beiten.com](http://www.advant-beiten.com)

# 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 69 756095-582

[vCard](#)



### Susanne Klein, LL.M.

+49 69 756095-582

[vCard](#)



### Lennart Kriebel

+49 69 756095-582

[vCard](#)



### Fabian Eckstein, LL.M.

+49 69 756095-582

[vCard](#)



### Jason Komninos, LL.M.

+49 69 756095-582

[vCard](#)



## Office Berlin

Luetzowplatz 10 | 10785 Berlin

### Dr Ariane Loof

+49 30 26471-282

[vCard](#)



## Office Dusseldorf

Cecilienallee 7 | 40474 Dusseldorf

### Mathias Zimmer-Goertz

+49 211 518989-144

[vCard](#)



### Christian Frederik Döpke, LL.M.

+49 211 518989-144

[vCard](#)



## Office Freiburg

Heinrich-von-Stephan-Straße 25 | 79100 Freiburg

### Dr Birgit Münchbach

+49 761 150984-22

[vCard](#)



## Office Munich

Ganghoferstrasse 33 | 80339 Munich

### Katharina Mayerbacher

+89 35065-1363

[vCard](#)





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