



**+++ ADMIN COURT OF HANOVER: AMAZON DATA COLLECTION IN LOWER SAXONY LEGAL +++ USE OF DATA ANALYSIS SOFTWARE BY POLICE UNCONSTITUTIONAL +++ WHATSAPP FINED EUR 5.5M +++ EUROPEAN DATA PROTECTION BOARD PUBLISHES REPORT ON COOKIE BANNERS +++**

## 1. Changes in Legislation

### **+++ EU-U.S. COLLABORATION FOR DEVELOPMENT OF AI +++**

The U.S. and the EU strengthen their collaboration for the development of artificial intelligence (AI), having signed an administrative arrangement to this end. The cooperation is supposed to optimise processes and merge data. The goal is an improved forecasting and assessment of health care, extreme weather situations and energy supply. It is planned to store U.S. data separately from EU data, while the data still may be analysed as a whole. Particularly, authors and creators criticise the plan, as they fear that their rights will be exploited. AI systems such as ChatGPT are already accessing copyrighted works on a massive scale without any remuneration. The legal situation here is still unclear.

[To the U.S. Authorities' Statement \(dated 27 January 2023\)](#)

[To the report on heise.de \(dated 28 January 2023, in German\)](#)

## 2. Case Law

### **+++ FEDERAL CONSTITUTIONAL COURT: POLICE ACT OF MECKLENBURG-WESTERN POMERANIA IN PART UNCONSTITUTIONAL +++**

The Constitutional Court has decided that a number of regulations stipulated in the Act on Public Safety and Order in Mecklenburg-Western Pomerania (*SOG MV*) are in conflict with the German Constitution. Several citizens had filed action as they felt that their fundamental rights had been

In particular, the regulations on online searches and on the surveillance of residential space and telecommunications are affected. The Court confirmed the violation of rights in most points, especially because the secret surveillance measures did not comply with the principle of proportionality. The state must now revise some of the regulations. The data protection officer of Mecklenburg-Western Pomerania has already offered his help with the revisions.

[To the Constitutional Court decision \(dated 9 December 2022, 1 BvR 1345/21, in German\)](#)

[To the Court's press release \(dated 1 February 2023\)](#)

### **+++ ADMIN COURT OF HANOVER: AMAZON DATA COLLECTION IN LOWER SAXONY LEGAL +++**

In its ruling of 9 February 2023 (10 A 6199/20), the Hanover Administrative Court upheld an action brought by Amazon seeking to lift the ban imposed on it from using hand-held scanners on its employees in the logistics warehouse. By means of the hand scanners, movement data of the employees is recorded and then evaluated with a software application. The State Commissioner for Data Protection of Lower Saxony had prohibited Amazon from collecting the data with a decision of October 2020, as the continuous collection of the respective performance data of the employees violated data protection regulations. The Administrative Court of Hanover considers the use of the hand-held scanners and the associated data processing to be justified by section 26 (1) sentence 1 of the Federal Data Protection Act (BDSG) because it is necessary for the control of logistics processes, the control of qualification and the creation of assessment bases for individual feedback and personnel decisions and thus to carry out the employment relationship. In the opinion of the Administrative Court, the interference in the right to informational self-determination of the employees caused by the monitoring of the employees was not disproportionate to Amazon's legitimate interests.

[To the press release of the Administrative Court of Hanover \(dated 14 February 2022, in German\)](#)

### **+++ ECJ: ACTIVITY AS WORKS COUNCIL MEMBER AND DATA PROTECTION OFFICER NOT GENERALLY IMPOSSIBLE +++**

The Court of Justice of the European Union has ruled that it is for a national court to decide whether a works council member may perform his or her duties as Data Protection Officer simultaneously, or whether a conflict of interests exists. The basis of the proceedings was the action

brought by a works council member who had been dismissed from his duties as DPO. Both the state officer for data protection and freedom of information of Thuringia and the company where the plaintiff was employed had assumed a conflict of interests. The Federal Labour Court of Germany generally did not consider the two positions to be incompatible but referred the question to the ECJ. The ECJ in turn offered a very vague perspective and left the examination of individual cases to national courts. It remains to be seen how the Federal Labour Court will decide on the case and whether such situations constitute a conflict of interests.

[To the ECJ judgment \(dated 9 February 2023, C 453/21\)](#)

### **+++ FEDERAL ADMINISTRATIVE COURT: ANALYSIS OF DIGITAL DATA CARRIERS INADMISSIBLE IN ASYLUM PROCEEDINGS +++**

The Federal Administrative Court has ruled that the Federal Office for Migration and Refugees (*BAMF*) is only allowed to analyse digital data carriers (e.g. mobile phones) in the absence of passports or passport replacement papers under certain conditions. The Court thus upheld the action of an Afghan national whose mobile phone had been analysed by BAMF, although the applicant had presented an identity document issued by Afghan authorities. The analysis of digital data carriers to determine the identity and nationality of a foreigner was only permissible if the purpose of the measure could not be achieved by more lenient means at the time it was ordered. As other, preferable means could have been used here, the BAMF's request to the applicant to hand over her mobile phone and her access data was unlawful.

[To the press release of the Federal Administrative Court \(dated 16 February 2023, 1 C 19.21, in German\)](#)

### **+++ FEDERAL CONSTITUTIONAL COURT: USE OF DATA ANALYSIS SOFTWARE BY POLICE UNCONSTITUTIONAL +++**

The Federal Constitutional Court has ruled that certain provisions of the Police Acts of the German states of Hesse and Hamburg are unconstitutional. Specifically, the investigating authorities are authorised to link personal data stored on different platforms by means of software and to further analyse it within the framework of an automated data analysis, if this is necessary to prevent certain criminal offences. Journalists and defence attorneys, among others, had brought action against the use of such software, fearing that they would be targeted by the investigating authorities. The Court finds that the regulations violate the general right of personality (Article 2 (1) in conjunction with Article 1

(1) of the Basic Law (GG)), as the regulations do not contain a sufficient threshold for intervention. However, the Court thereby also clarified that an automated analysis of data by the software is not per se inadmissible.

[To the judgment of the Federal Constitutional Court \(dated 16 February 2023, 1 BvR 1547/19 and 1 BvR 2634/20, in German\)](#)

[To the press release of the Federal Constitutional Court \(dated 16 February 2022\)](#)

## 3. Regulatory Investigations and Enforcement Actions

### **+++ FRENCH DATA PROTECTION AUTHORITY IMPOSES EUR 3 MILLION FINE ON VOODOO +++**

The French Supervisory Authority, Commission Nationale de l'Informatique et des Libertés (CNIL), imposed a EUR 3 million fine on Voodoo SAS, a developer and publisher of video games, on 29 December 2022. The authority found that Voodoo read the technical identifier allocated to users when they downloaded or operated games in Apple's App Store, and processed data on their users' browsing habits for advertising purposes although users had rejected that. Voodoo was thereby able to play personalised ads to their users without their consent. The CNIL justified the fine by the high number of people concerned and the financial benefits obtained as a result of the data protection violation.

[To the press release of the authority \(dated 17 January 2023, in French\)](#)

### **+++ IRISH DATA PROTECTION AUTHORITY: WHATSAPP FINED EUR 5.5 MILLION FOR INCORRECT LEGAL BASIS +++**

The Irish Data Protection Commission (DPC) has imposed a fine of EUR 5.5 million on WhatsApp. The fine goes back to the complaint of a user who had been asked in May 2018 by WhatsApp to agree to the updated Terms of Service. Without the consent, the services of WhatsApp would no longer be accessible to the user. WhatsApp considered that, on accepting the updated Terms of Service, a contract was entered into, based on which the user's data could be processed. The DPC on the other hand found that the extent of the data processing was unclear, and that WhatsApp could not rely on the contract legal basis to use the data. The processing of the user data was thus unlawful.

[To the DPC press release \(dated 19 January 2023\)](#)

### **+++ ITALIAN DATA PROTECTION AUTHORITY PROHIBITS USE OF CHATBOT REPLIKA +++**

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has banned the US provider of the chatbot Replika from using personal data in Italy. The chatbot is AI-based and generates a "virtual friend" using text and video interfaces. The authority criticised the lack of age verification and insufficient protection for minors. The app sometimes provided minors with "answers that were absolutely unsuitable for their level of development" and sexually inappropriate content. Especially for mentally unstable minors, the application poses considerable risks. In addition, the data processing was unlawful and did not comply with transparency requirements. The provider must now present the authority with measures to implement the order within 20 days.

[To the GPDP press release \(dated 3 February 2023, in Italian and English\)](#)

## **4. Opinions**

### **+++ EUROPEAN DATA PROTECTION BOARD PUBLISHES REPORT ON COOKIE BANNERS +++**

The European Data Protection Board (EDPD) has published a position paper on cookie banners. EU data protection commissioners analyse the most commonly used cookie banner techniques in practice and elaborate on possible violations. The position paper corresponds in large parts to the Telemedia Guidance of the German Data Protection Conference, which was already published in December 2021 and updated in December 2022. According to the EDPD, it is inadmissible if there is a consent button on the first layer of the cookie banner, but no reject button. Pre-ticked boxes are just as unlawful as deceptive colour schemes and contrasts. The practice of classifying technically unnecessary cookies as "essential" was also criticised. In addition, withdrawal of consent must be as easy as to give consent. For this purpose, an icon should be embedded on the website, for example, to call up the cookie banner again at any time.

[To the EDPD position paper \(dated 17 January 2023\)](#)

### **+++ DSK EVALUATES POSSIBILITIES OF ACCESS BY THIRD COUNTRY PUBLIC BODIES +++**

The German Data Protection Conference (DSK) has assessed the access possibilities of public authorities of third countries to personal data processed in the EU by processors, and any associated consequences.

This concerns the practically relevant case where a controller concludes a processing agreement with a company based in the EU which in turn has a parent company in a third country (for example the U.S.). The DSK finds that the mere possibility that the parent company or a state authority (e.g. authorised by the US Cloud Act) could request the European company to disclose the data does not automatically lead to a third-country transfer. However, the processor may then lack reliability as required by Article 28 (1) of the GDPR. With this resolution, the German Data Protection Conference once again tightens the contractual requirements for potential data transfers to third countries. The controller is obliged to regularly check whether the processor provides suitable guarantees to prevent processing that is not permitted under EU law, even if this is only theoretically imminent. The mere conclusion of EU standard contractual clauses by the processor is not sufficient. Rather, a case-by-case assessment of all guarantees and safeguards of the processor is required.

[To the resolution of the DSK \(dated 31 January 2023, in German\)](#)

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