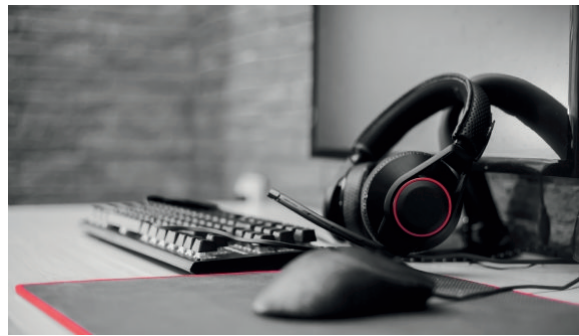


Privacy Ticker

November 2023



+++ EU ADOPTS DATA ACT: NEW RULES FOR DATA ACCESS AND USE +++ EU PARLIAMENT: NO MASS SURVEILLANCE OF CHATS +++ ECJ: VEHICLE IDENTIFICATION NUMBER IS NOT BY ITSELF PERSONAL DATA +++ REGIONAL COURT OF BERLIN: LINKEDIN MUST ACCEPT DO-NOT-TRACK FUNCTION IN BROWSER +++ EDPB PROHIBITS PERSONALIZED ADVERTISING ON INSTAGRAM AND FACEBOOK +++ FINE OF EUR 600.000 AGAINST GROUPE CANAL+ +++ HAMBURG DATA PROTECTION AUTHORITY PUBLISHES CHECKLIST FOR THE USE OF AI CHATBOTS +++

1. Changes in Legislation



+++ EU ADOPTS DATA ACT: NEW RULES FOR DATA ACCESS AND USE +++

The EU institutions adopted the Data Act on November 27, 2023. The Data Act - an EU regulation and as such directly applicable in all EU member states - provides for harmonized rules for "fair access to and use of data". Unlike the GDPR, it is not limited to personal data. The aim is to make this data commercially usable. It is already clear that the law will go far beyond the regulation of the "Internet of Things" (IoT). In particular, it affects so-called "connected products" and cloud services.

On December 6, 2023 at 4 p.m., we will be holding a webinar in English, further information can also be found in our [blog_post](#).

Register
Webinar

+++ EU PARLIAMENT: NO MASS SURVEILLANCE OF CHATS +++

In the legislative procedure for a regulation on online surveillance to combat child abuse, the EU Parliament has spoken out against the EU Commission's draft. There should be no mass monitoring of electronic communication and chats without cause. The planned disclosure orders, which would be linked to comprehensive chat monitoring, should only be possible as a last resort and be approved by a judicial body. End-to-end encrypted communication services such as WhatsApp, Signal or Threema are not covered by the disclosure orders. The EU Parliament's proposal only provides for mandatory age verification for online platforms that are used to distribute pornographic content. Such websites would also have to take numerous other technical and organizational measures to protect children. In principle, internet services and apps should be designed and preset to be safe in order to protect children and young people from sexual harassment and exploitation.

[To the report on heise.de \(dated 26 October 2023, in German\)](#)

2. Case Law

+++ ECJ: VEHICLE IDENTIFICATION NUMBER IS NOT BY ITSELF PERSONAL DATA +++

The ECJ has ruled that the vehicle identification number (VIN) by itself is not personal data. However, it becomes personal data if the person who has access to it has the means to identify the owner of the vehicle, provided that the owner is a natural person. A German industry association had sued the truck manufacturer Scania and demanded that it provide its members with the VIN. The ECJ found that vehicle manufacturers are obliged to grant independent economic operators, including repairers, spare parts dealers and publishers of technical information, access to all vehicle repair and maintenance information. The format must be suitable for direct electronic processing. Vehicle manufacturers are also obliged to create a database of interchangeable spare parts. This must also contain the VIN. The GDPR does not preclude this obligation to provide the VIN and other information.

[To the press release of the ECJ \(dated 9 November 2023\)](#)

[To the ECJ ruling \(dated 9. November 2023, C-319/22\)](#)

+++ REGIONAL COURT OF BERLIN: LINKEDIN MUST ACCEPT DO-NOT-TRACK FUNCTION IN BROWSER +++

The Regional Court of Berlin has prohibited LinkedIn from describing the

"Do-Not-Track (DNT)" browser function as legally irrelevant in its terms of use. A German consumer association had sued LinkedIn for this and other data protection violations. The DNT function allows users to set their browsers so that they automatically send the websites they visit an objection to their data being evaluated for analysis and marketing purposes. LinkedIn, on the other hand, stated on its website that it would not respond to such DNT signals. In the opinion of the court, an automatically sent DNT signal also constitutes an effective objection and must be respected by the website operator. In addition, the court prohibited LinkedIn from using a default setting according to which the user's profile is also visible on other websites outside of LinkedIn applications. In a partial verdict, the court had previously prohibited the unsolicited sending of emails to non-members.

[To the judgment of the Regional Court of Berlin \(dated 24 August 2023, 16 O 420/19, in German\)](#)

[To the press release of the consumer association \(dated 30 October 2023, in German\)](#)

+++ ADMINISTRATIVE COURT OF HANOVER: VIDEO SURVEILLANCE IN BETTING OFFICE INADMISSIBLE +++

The Administrative Court of Hanover has ruled that monitoring the seating area of a betting office where guests are present violates the GDPR. The operator of the betting office took legal action against the data protection authority's request to refrain from video surveillance. The video surveillance served preventive purposes and the detection of criminal offenses that had occurred in the past. The court, however, confirmed the opinion of the data protection authority and classified the video surveillance as unlawful. The surveillance of the seating areas was not justified because it was not suitable for preventing or solving the alleged crimes. There was also a lack of necessity, as the monitoring of the seating areas by existing staff was a less severe measure than permanent video surveillance.

[To the judgment of the Administrative Court of Hanover \(dated 10 October 2023, 10 A 3472/20, in German\)](#)

+++ ADMINISTRATIVE COURT OF BERLIN: NO RIGHT OF ACCESS DUE TO VIDEO SURVEILLANCE IN BERLIN SUBURBAN TRAIN +++

The Administrative Court of Berlin has ruled that a claim for access regarding video recordings in the Berlin suburban train is not justified. A passenger had demanded that the operator hand over a copy of the video recordings that allegedly showed him. The transport company refused

and deleted the recordings after 48 hours, whereupon the competent data protection authority issued a warning against the operator. The operator then filed a lawsuit against the data protection authority. The court ruled in favor of the operator and denied the passenger's claim to a copy. The court left open the question of whether the specific recordings were even personal data for the operator. In any case, the provision of information was not reasonable due to the disproportionate effort involved. There was a gross disproportion between the effort involved and the interest of the person concerned. The authority's warning was therefore revoked.

[To the judgment of the Administrative Court of Berlin \(dated 12 October 2023, VG 1 K 561/21, in German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ EDPB PROHIBITS PERSONALIZED ADVERTISING ON INSTAGRAM AND FACEBOOK +++

The European Data Protection Board (EDPB) has issued a binding urgency decision instructing the Irish Data Protection Commission (DPC) to take final action in relation to Meta Ireland Limited within two weeks and to impose a ban on the processing of personal data for behavioral advertising on the legal basis of contracts and legitimate interests throughout the European Economic Area (EEA). The binding urgency decision followed a request from the Norwegian data protection authority Datatilsynet. According to the authority, Meta's advertising practices cannot be based on the contract concluded with the user for the use of its services. In the meantime, Meta has introduced a paid subscription for Instagram and Facebook. Users now have to decide whether they want to use the social networks free of charge with advertising or free of advertising against payment of a monthly fee.

[To the press release of the EDPB \(dated 1 November 2023\)](#)

[To the press release of Meta \(dated 30 October 2023\)](#)

+++ FINE OF EUR 600.000 AGAINST GROUPE CANAL+ +++

The French data protection authority Commission Nationale de l'Informatique et des Libertés (CNIL) has imposed a fine of EUR 600,000 on the pay-TV provider GROUPE CANAL+ for several data protection violations. After receiving complaints from data subjects, the authority found that CANAL+ was sending email advertising without being able to

prove that the recipients had given sufficient consent. Furthermore, the privacy policy provided when opening a user-account was incomplete with regard to retention periods. The privacy policy of a third-party company used for telephone acquisition was also incorrect. The CNIL also found that a data processing agreement did not contain all the information required by the GDPR and that the company responded late or not at all to complaints and requests for access. The authority saw a lack of data security in the fact that the storage of the company's employees' passwords was not sufficiently secure. Most recently, CANAL+ had also failed to report a data breach to the authority.

[To the press release of the CNIL \(dated 19 October 2023, in French\)](#)

[To the decision of the CNIL \(dated 12 October 2023, in French\)](#)

4. Opinions

+++ HAMBURG DATA PROTECTION AUTHORITY PUBLISHES CHECKLIST FOR THE USE OF AI CHATBOTS +++

The State Commissioner for Data Protection and Freedom of Information of Hamburg has published a checklist for AI chatbots based on large language models such as ChatGPT. The checklist is intended to serve companies and authorities as a guideline for the data protection-compliant use of chatbots and contains regulations for data protection and compliance. The list contains 15 aspects for the controlled use of the technology. Binding internal guidelines and instructions for employees are required. Personal data must not be transferred to the AI. In addition, the results of the AI must be critically reviewed and evaluated for accuracy and discrimination. Decisions with legal effect may only be made by humans and not automatically. Finally, further developments must be monitored and, in particular, the future AI Act must be observed.

[To the checklist of the authority \(dated 13 November 2023\)](#)

+++ POSITION PAPER OF THE GERMAN DATA PROTECTION CONFERENCE ON CLOUD-BASED DIGITAL HEALTH APPLICATIONS +++

The German Conference of Independent Federal and State Data Protection Supervisory Authorities ("Datenschutzkonferenz" - DSK) has taken a position on the requirements for the use of cloud functions in healthcare applications and has issued strict guidelines. From August 2024, digital health applications must implement the data protection requirements defined by the German Federal Institute for Drugs and Medical Devices. From January 2025, the data security requirements

specified by the German Federal Office for Information Security must also be met. The DSK also addresses the use of personal data for research purposes and quality assurance and requires explicit consent for this. In addition, the resolution lists various examples of technical and organizational measures that providers of cloud-based healthcare applications must observe.

[To the decision of the DSK \(dated 6 November 2023, in German\)](#)

+++ BERLIN GROUP PUBLISHES WORKING PAPER ON TELEMETRY AND DIAGNOSTIC DATA +++

Under the chairmanship of the Federal Commissioner for Data Protection and Freedom of Information, the International Working Group on Data Protection in Technology, the so-called "Berlin Group", has published a working paper on telemetry and diagnostic data. The working paper is intended to provide software manufacturers and users with recommendations on how telemetry and diagnostic data can be processed in compliance with data protection regulations. Telemetry and diagnostic data is data that is collected by devices and applications around usage, e.g. how often users use certain functions of an app or at what times this happens. According to the Berlin Group, such information often constitutes personal data. Pursuant to the working paper, data subjects must be fully informed about data processing. In addition, the data collected may only be used for the intended purpose and must then be deleted. Users must also have the opportunity to implement their rights under the GDPR simply and effectively.

[To the press release of the authority \(dated 16 October 2023, in German\)](#)

[To the working paper of the Berlin Group \(dated 11 October 2023\)](#)

+++ GERMAN DATA PROTECTION CONFERENCE SPEAKS OUT AGAINST MASS SURVEILLANCE IN CHATS WITHOUT CAUSE +++

The German Conference of Independent Federal and State Data Protection Authorities ("Datenschutzkonferenz" - DSK) has taken a very critical stance on the EU Commission's planned monitoring of electronic communications as part of the regulation on online monitoring to combat child abuse (see also the second message in this Privacy Ticker). The DSK does not dispute the need to protect children from sexual abuse and to uncover criminal acts. However, the state-ordered control and monitoring of communication in the planned comprehensive form in the draft regulation is considered disproportionate. This is because it would affect masses of sometimes very sensitive information of all users indiscriminately and regardless of suspicion. Mass surveillance without

cause would fundamentally interfere with the fundamental rights to respect for private and family life, the confidentiality of communications and the protection of personal data. The DSK therefore calls on the EU legislator to respect the limits of the constitutionality and, in particular, to ensure necessity and proportionality.

[To the decision of the DSK \(dated 17 October 2023, in German\)](#)

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Imprint

This publication is issued by BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33, 80339 Munich, Germany

Registered under HR B 155350 at the Regional Court Munich / VAT Reg. No.: DE811218811

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