BEITEN BURKHARDT

Privacy Ticker

April 2021

1. Legislative Changes

+++ REGISTER MODERNISATION ACT PROMULGATED: TAX ID TO BE THE CENTRAL PERSONAL INDENTIFIER FOR ADMINISTRATIVE DATA +++

The Act on the Introduction and Use of an Identification Number in Public Administration (Register Modernisation Act) now promulgated introduces an individual, comprehensive identification number for citizens (so-called "Bürger-ID") on the basis of the tax ID. In future, all administrative data of citizens (e.g. administrative services, information and evidence vis-à-vis certain authorities) will be assigned to the Bürger-ID in order to enable a simplified exchange of data between the authorities. Public authorities can then access the data stored there with the help of the individual Bürger-ID. The introduction of the Bürger-ID as a central personal identifier was previously heavily criticised by data protection authorities and data privacy specialists.

To the press release of the Federal Ministry of the Interior, for Building and Home Affairs (BMI)

+++ REFORM REGARDING ACCESS TO SUBSCRIBER DATA ADOPTED +++

After the German Federal Council initially refused its approval for the new regulation of the access to subscriber data (see BB Privacy Ticker February 2021), the law could now be passed with amended regulations on the disclosure of passwords. The law

enables security authorities under certain circumstances to obtain subscriber data or usage data from telecommunications companies. Password disclosure can also be considered in the case of particularly serious offences. At the same time, amendments were made to the Law to Fight Right-Wing Extremism and Hate Crime, which subsequently came into force on 3 April 2021.

Further information on the new regulation of the access to subscriber data

Information on the Law Fight Right-Wing Extremsism and Hate Crime

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2. Case Law

+++ STUTTGART HIGHER REGIONAL COURT: NO REVERSAL/ EASEMENT OF THE BURDEN OF PROOF FOR CLAIMS FOR DAMAGES UNDER ARTICLE 82 GDPR; SUBMISSION OF THE ORIGINAL POWER OF ATTORNEY FOR REQUEST FOR INFORMATION +++

The Higher Regional Court Stuttgart has ruled that the general rules of evidence in civil proceedings also apply to claims for damages under Art. 82 GDPR. Accordingly, the plaintiff in court proceedings must present and prove the breach of a GDPR obligation that gives rise to liability. In contrast, the accountability obligations of the defendant controller (Art. 5 (2) GDPR) did not lead to a procedural reversal or an easing of the burden of proof in favour of the plaintiff. In the case at hand, the plaintiff could not prove that the defendant had violated its obligations under Art. 32 GDPR by failing to comply with security standards.

In the same ruling, the Court also clarified that a request for information under Art. 15 GDPR asserted by an authorised representative (e.g. a lawyer) may be rejected by the controller until the authorised representative submits an original power of attorney issued by the data subject. The Court declared the corresponding norm of the German Civil Code (Section 174 BGB) applicable to GDPR requests for information.

To the judgment of the OLG Stuttgart (dated 31 March 2021, file ref. 9 U 34/21)

+++ REGIONAL LABOUR COURT BADEN-WUERTTEMBERG: PROCESSING OF EMPLOYEE DATA BY US PARENT COMPANY CAN TRIGGER EMPLOYER'S OBLIGATION TO PAY DAMAGES UNDER GDPR +++

The Regional Labour Court Baden-Wuerttemberg has found that the "risk of misuse of data by investigating authorities in the US or other group companies" or the "loss of

being able to control the personal data" is capable of giving rise to non-material damage under Art. 82 GDPR for the affected employees. The plaintiff was employed by the defendant company, a German subsidiary of the group of companies. The defendant company transferred employee data to a sharepoint site of the parent company located in the USA within the framework of the "Workday" system used throughout the group. The court found this to be a "loss of control" with regard to the transmitted data, which could in principle lead to compensable damage. The court nevertheless dismissed the claim, as the damage in the specific case was not (causally) attributable to a GDPR violation.

To the judgment of the LArbG (dated 25 February 2021, file ref. 17 Sa 37/20

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3. Regulatory Investigations and Enforcement Actions

+++ BAVARIAN DATA PROTECTION AUTHORITY: UNVERIFIED USE OF NEWSLETTER TOOL MAILCHIMP ILLEGAL +++

The Bavarian Data Protection Authority considers the use of the newsletter sending tool Mailchimp to be illegal if it has not been verified in advance whether the transmission of e-mail addresses to the USA is to be secured by "additional measures". In its so-called "Schrems II" decision (ECJ, judgment of 16 July 2020, C-311/18, see BB Privacy Ticker July 2020), the ECJ found that data controllers may have to take additional measures to protect personal data before the data is transferred to the USA. The Bavarian authority states that Mailchimp, as a provider of electronic communications services, could be subject to the US law "FISA702", which is particularly critical from a European perspective and allows US intelligence services to access the transmitted data.

To the decision of the BayLDA in the context of appeal proceedings

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+++ SPANISH DATA PROTECTION AUTHORITY: EUR 8,15 MILLION FINE AGAINST MOBILE PHONE COMPANY +++

The Spanish data protection authority Agencia Española Protección Datos (AEPD) has imposed fines totalling EUR 8.15 million on Vodafone Espana S.A.U. for various data protection violations. Of this amount, EUR 2 million was imposed for the use of a data processor who transferred the customer data to be processed to a sub-processor based in a third country (Peru) without sufficient safeguarding. The authority's further accusations related, among other things, to the sending of advertising e-mails for which the group had not obtained the customers' consent.

To the administrative fine notice of the AEPD (spanish)

+++ ITALIAN DATA PROTECTION AUTHORITY: EUR 4,5 MILLION FINE AGAINST TELECOMMUNICATIONS COMPANY +++

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has imposed a fine of approximately EUR 4.5 million on the telecommunications company Fastweb S.p.A. The authority received hundreds of complaints about unauthorised advertising calls from the company. In a comprehensive investigation, the authority uncovered systematic violations at Fastweb and its call centres. Among other things, the companies had misused customer lists and contact data originating from third parties for advertising calls, had not taken sufficient measures to protect the data and had only insufficiently complied with data subjects' rights. In total, contact data of more than 7.5 million data subjects was allegedly processed without their consent.

To the press release of GPDP (italian)

+++ DUTCH DATA PROTECTION AUTHORITY: FINES FOR DATA LEAKS REPORTED TOO LATE +++

The Dutch data protection authority Autoriteit Persoonsgegevens (AP) has imposed a fine of EUR 475,000 on Booking.com. The travel accommodation booking platform became aware of a data protection incident at the beginning of 2019 in which attackers had gained access to data (including names, addresses, telephone numbers and booking details) of 4109 customers. Booking.com only reported this incident to the authority after 25 days. The GDPR provides for a maximum notification period of 72 hours for such data protection incidents.

To the press release of AP (English)

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4. Opinions

+++ BERLIN DATA PROTECTION AUTHORITY: ON THE ADMISSIBILITY OF 360-DEGREE EMPLOYEE FEEDBACK AT THE WORKPLACE +++

In its activity report for 2020, the Berlin Commissioner for Data Protection and Freedom of Information set out specific requirements for the design of so-called "360-degree feedback" procedures at the workplace. In these procedures, employees' work performance is assessed by their own colleagues (e.g. by grading). The implementation of such concepts should not lead to permanent monitoring pressure on those concerned. The process and content of the evaluation procedures must be

disclosed transparently. In the specific procedure reviewed, the company had to limit the number of evaluating employees to three. The employees concerned were also given the right to veto individual evaluations.

To the Annual Report 2020 of BlnDSB

+++ TOLERATION OF WIDESPREAD VIDEO CONFERENCING SYSTEMS BY SCHOOLS EXPIRES +++

The Hessian Commissioner for Data Protection and Freedom of Information has announced that the use of non-privacy-compliant video conferencing systems by schools will only be tolerated until 31 July 2021. In view of the pandemic in April 2020, the authority had advocated a temporary toleration of widespread video conferencing solutions. A (further) extension of this tolerance is now ruled out, as alternatives that comply with privacy regulations will be available by the beginning of the new school year. In particular, the use of US video conferencing systems, such as Microsoft Teams, would then be "neither necessary nor permissible under data protection law".

To the statement of HBDI

To the informative notes on data protection-compliant video conferencing services of BlnBDI

+++ BITKOM: GUIDELINE ON DATA PROTECTION VIOLATIONS AND NOTIFICATIONS IN THE CONTEXT OF THE "HAFNIUM HACK" +++

The industry association Bitkom has published a guide for controllers affected by the so-called "Hafnium Hack". This hack exploited security vulnerabilities in Microsoft Exchange servers (see BB Privacy Ticker March 2021). The guide contains information on any existing reporting obligations and the effects of the hack, for instance in connection with commissioned processing.

To the guide of Bitkom

Your contacts

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