

Privacy Ticker

March 2023



+++ DATA PROTECTION REFORM IN UK +++ FEDERAL DATA PROTECTION COMMISSIONER PROHIBITS FACEBOOK FANPAGE OF THE GOVERNMENT +++ OLDENBURG LABOUR COURT: EUR 10,000 IN DAMAGES DUE TO DELAYED GDPR INFORMATION +++ WARNING NOTICES FOR USING US-NEWSLETTERS SERVICE PROVIDERS +++

1. Changes in Legislation

+++ DATA PROTECTION REFORM IN UK +++

The United Kingdom (UK) government has introduced the second draft of a "Data Protection and Digital Information (No. 2) Bill" in the House of Commons after the first attempt failed. The new law is intended to comprehensively revise the regulations on data protection in the UK after Brexit. It is intended to minimise obligations for data controllers but also to limit the rights of data subjects. In addition, the British Information Commissioner's Office (ICO) is to be restructured and reduced in size. With the law, the government primarily seeks to free British companies from "unnecessary bureaucracy". The question of how the new data protection regulations will affect the existing adequacy decision of the EU Commission remains to be answered. Currently, the UK is classified as a safe third country. Should the level of data protection drop due to the new regulations, the admissibility of data transfers to the UK could be assessed more critically.

[To the article on iapp.org \(dated 8 March 2023\)](#)

[To the draft bill of the Federal Government \(dated 8 March 2023\)](#)

+++ EU COMMISSION PLANS NEW REGULATIONS REGARDING GDPR IMPLEMENTATION +++

The EU Commission plans to harmonise various aspects of the administrative procedure for the cooperation between data protection authorities in cross-border matters. This is intended to strengthen cooperation between national data protection authorities and simplify the enforcement of the GDPR in cases with international implications. Details of the legislative initiative planned for the second quarter 2023 are not yet known. The objective is, however, to prevent different treatments of companies throughout the EU. In particular, the measures taken by the Irish Data Protection Commissioner (DPC) have often been criticised in the past as being too lenient and the procedures too lengthy. As the supervisory authority, the DPC is responsible, among other things, for the European subsidiaries of Meta (Facebook, Instagram), Google, Apple and Twitter.

[To the announcement of the EU Commission \(dated February 2023\)](#)

[To the report on heise.de \(dated 21 February 2023, in German\)](#)

+++ EU COMMISSION SPECIFIES FEES FOR DSA CONTROL +++

The EU Commission has adopted a subordinate legal act to the Digital Services Act (DSA), which specifies how the fees to be paid by platforms and search engine providers will be calculated. The DSA (see [AB Privacy Ticker November 2022](#)) stipulates that very large platforms (e.g. YouTube, Facebook, Instagram and TikTok) and search engine providers must pay fees for the Commission inspections that become necessary, whereas these fees may not exceed 0.05 % of the worldwide annual net revenue in the previous business year. The new legal act now discloses the details of the calculation. The supervision fee is primarily determined by the number of monthly active users of the service, which the online platforms must make available on their website anyway. Based on these figures, the EU Commission will set the annual supervision fees according to the formula specified in the legal act.

[To the Legal Act of the EU Commission \(dated 2 March 2023\)](#)

[To the report on heise.de \(dated 4 March 2023, in German\)](#)

2. Case Law

+++ LOCAL COURT MUNICH AFFIRMS EXPIRY DATE FOR DECLARATIONS OF CONSENT FOR E-MAIL ADVERTISING +++

The Local Court of Munich has ruled that consent to e-mail advertising pursuant to Section 7 (2) No. 3 German Unfair Competition Act (UWG) loses its effectiveness after the expiry of 4 years. Although consent is in principle valid for an unlimited period of time, it can expire after a certain period of time depending on the circumstances of the individual case. In the specific case, the plaintiff had subscribed to a golf newsletter of the defendant in 2015 and 2017 and had received corresponding advertising from the defendant. After the plaintiff had left the golf club in 2017, he no longer used his account on the defendant's website and also no longer received any newsletters. It was not until December 2021 that the plaintiff received another advertising e-mail from the company. The court is of the opinion that in light of the fact that the plaintiff had left the golf club in 2017, had not used his account for 4 years and had not received any newsletters from the defendant for 4 years, the defendant could no longer assume that the plaintiff's consent still existed. Rather, the defendant was obliged to ask the plaintiff whether his consent was still valid.

[To the ruling of the Munich Local Court \(dated 14 February 2023, 161 C 12736/22, in German\)](#)

+++ OLDENBURG LABOUR COURT: EUR 10,000 IN DAMAGES DUE TO DELAYED GDPR INFORMATION +++

The Oldenburg Labour Court awarded damages of EUR 10,000 for late provision of information. The employee who brought the action had demanded information from his employer before court in accordance with Art. 15 GDPR. However, the employer did not respond until the court proceedings and thus almost 2 years after the request for information. The plaintiff thus demanded non-material damages of EUR 500 for each month of non-compliance, without further substantiating the damages. Following the case law of the Federal Labour Court, the court affirmed non-material damages already in the event of a violation of the GDPR. It was not necessary for the data subject to demonstrate further damage because Art. 82 GDPR has a preventive character and a deterrent function. The court justified the high damages with the enormous delay in providing the information.

[To the judgement of the Oldenburg Labour Court \(dated 9 February 2023, 3 Ca 150/21, in German\)](#)

[To the article on beck-aktuell \(dated 14 March 2023, in German\)](#)

3. Regulatory Investigations and Enforcement Actions

+++ FEDERAL DATA PROTECTION COMMISSIONER PROHIBITS FACEBOOK FAN PAGE OF THE GOVERNMENT +++

The Federal Commissioner for Data Protection and Freedom of Information (BfDI) has ordered the Federal Press Office (BPA), as the operator of the Facebook fan page of the Federal Government, to shut down the facebook page. In this context, the BfDI also relies on a short expert opinion of the Data Protection Conference (DSK) on the permissibility of Facebook fan pages (see [AB Privacy Ticker April 2022](#)). It criticises in particular the unproven legality of joint responsibility between the BPA and Facebook. There is also a lack of effective consent for cookies that are not absolutely necessary under the German Telecommunication Telemedia Data Protection Act (TTDSG). In the notice, the BPA is obliged to refrain from operating the fan page within four weeks, against which the BPA has filed a complaint. According to its own statements, the BPA thus wants to create "legal clarity for the operation of Facebook pages in a kind of model case". The outcome of the proceedings is also likely to be relevant for companies.

[To the BfDI press release \(dated 22 February 2023, in German\)](#)

[To the notice of the BfDI \(dated 17 February 2023, in German\)](#)

+++ FINE OF EUR 2.45 MILLION FOR UNLAWFUL ADVERTISING MEASURES +++

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has imposed a fine of EUR 2.45 million on the company Edison Energia S.p.A., responding to complaints from many concerned citizens. The energy supply company based in Milan had repeatedly contacted private individuals for advertising purposes without their consent. In addition, the company had continued telephone advertising despite the explicit objection of the data subjects. Furthermore, the GPDP complained that it was not possible for customers on the website and in the app to differentiate between different purposes of consent (advertising, profiling, passing on data to third parties). The fine was originally as high as EUR 4.9 million but was reduced by half because the company exercised its right to dispute resolution and paid half of the fine.

[To the GPDP press release \(dated 21 February 2023, in Italian\)](#)

[To the administrative fine notice of GPDP \(dated 15 December 2022, in Italian\)](#)

+++ AUSTRIAN DATA PROTECTION AUTHORITY CONSIDERS FACEBOOK BUSINESS TOOLS TO BE ILLEGAL +++

The Austrian Data Protection Authority has ruled that the use of the Facebook business tools "Facebook Login" and "Facebook Pixel" on websites violates the provisions of the GDPR. The decision was based on a complaint filed by the NOYB organisation of activist Max Schrems in 2020. The authority concludes that the use of the tools in August 2020 was unlawful due to the transfer of personal data of website visitors to the USA. Shortly before, the Privacy Shield agreement between the EU and the USA had been declared illegal by the ECJ (see [BB Privacy Ticker July 2020](#)). There were also no other guarantees or user consents as justification for the data transfer. It should be noted that the decision of the authority specifically only refers to the time at that point. The current legal situation was thus not examined.

[To the notice of the DSB \(dated 6 March 2023, in German\)](#)

+++ EU COMMISSION BANS TIKTOK ON BUSINESS MOBILE PHONES +++

In an internal decision, the EU Commission has banned the use of the Chinese social media app TikTok on official devices (mobile phones, laptops, etc.) as well as on personal devices on which official Commission apps are running or which are registered with the Commission. Employees had to delete the app from all devices by 15 March at the latest. The measure is intended to strengthen cybersecurity. The Commission is concerned about the Chinese state's access to Bytedance, the Chinese parent company of TikTok. In February 2023, the US government had also banned the use of TikTok on business mobile phones because of espionage concerns. Numerous other countries have also banned the app in the meantime or are planning such a ban. In addition, the app has been under observation by the European data protection authorities for some time. The Irish supervisory authority has announced investigations against Bytedance. In December 2022, the French data protection authority CNIL had already imposed a fine of EUR 5 million on TikTok (see [AB Privacy Ticker January 2023](#)).

[To the European Commission press release \(dated 23 February 2023\)](#)

[To the article on dw.com \(dated 23 February 2023, in German\)](#)

4. Opinions

+++ EDPB EXPRESSES POSITIVE VIEWS ON EU-US DATA PRIVACY FRAMEWORK +++

The European Data Protection Board (EDPB) has taken a generally positive position on the EU Commission's planned successor to the Privacy Shield, the EU-US Data Privacy Framework (DPF, see [AB Privacy Ticker December 2022](#)), but has also expressed some concerns. Although this opinion is not legally binding, it is an important basis for the Commission's decision.

The EDPB welcomes substantial improvements such as the introduction of necessity and proportionality requirements for intelligence collection in the US and the new appeal mechanism for EU data subjects. The EDPB expresses concerns about, for instance, the onward transfer of personal data and the temporary bulk collection of data. Since the EDPB has thus not fundamentally opposed the adequacy decision by the EU Commission, the enactment is to be expected. However, the EDPB also emphasises that the practical application of the newly introduced principles on data processing in the US must be closely monitored.

[To the statement of the EDPB \(dated 28 February 2023\)](#)

[To the EDPB press release \(dated 28 February 2023\)](#)

+++ WARNING NOTICES FOR USING US-NEWSLETTER SERVICE PROVIDERS +++

Recently, warnings from a Berlin law firm have been piling up because of alleged data protection violations due to inadmissible data transfers to the USA through the use of various newsletter tools such as Mailchimp or Klaviyo. The procedure is identical in all cases: The allegedly aggrieved party signs up for newsletters and shortly thereafter files a claim for information under Art. 15 GDPR against the company in question. If this is answered and the data transfer to the USA is pointed out, the next step is a warning notice. The demand is for a cease-and-desist declaration with a penalty clause, the deletion of the data, non-material damages of EUR 5,000 and legal fees of EUR 1,728.48. If the very short deadline is not met, legal action and a report to the data protection authority are threatened. Since the warning consists of sweeping legal assertions and text modules, deliberately builds up a threatening scenario and a large number of similar letters have been sent in the meantime, the accusation of abuse of rights is obvious. A comparison with the wave of Google Fonts warning letters comes to mind (see [AB Privacy Ticker October 2022](#) and [November 2022](#) as well as [January 2023](#)). The further development of this warning series remains to be seen.

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