

Privacy Ticker

November 2022



+++ DIGITAL SERVICES ACT IN FORCE +++ EUR 5M FINE IN THE UK +++ MICROSOFT 365 STILL IN CONFLICT WITH DATA PROTECTION LAW +++ PRIVACY FAQ ON GOOGLE FONTS +++

1. Changes in Legislation

+++ PROPOSAL FOR A REGULATION ON DATA COLLECTION AND SHARING RELATING TO SHORT-TERM ACCOMODATION RENTALS+++

In November, the European Commission presented a draft bill according to which cities and municipalities are to obtain data on short-term rentals from rental platforms (such as Airbnb or booking.com) in the future. The goals of the law include the EU-wide standardisation of registration systems, improved data sharing and the protection of personal data. According to the current draft, however, hosts are only to transmit the number and length of stay of guests. On the other hand, hosts will be obliged to register with the competent authority, providing their personal data. The national authorities would then also be entitled to enforce sanctions and fines for any violations.

[To the EU Commission Fact Sheet](#) (dated November 2022)

[To the EU Commission Executive Summary](#) (dated 7 November 2022)

+++ DIGITAL SERVICES ACT ENTERED INTO FORCE +++

The Digital Services Act (DSA) has entered into force. The Act establishes binding rules of conduct for online platform providers (see [AB Privacy Ticker January 2022](#) and [October 2022](#)). The aim is to curb incitement, hate and political extremism on the internet and in social networks. Authorities will be entitled to issue Europe-wide orders against platform operators because of illegal content. Online advertising to minors will also be restricted. The DSA replaces large parts of the Network Enforcement

Act (NetzDG) applicable in Germany to combat hate crime on the internet. Operators of online platforms must now publish the number of active end users on their websites within three months. Based on this notification, the EU Commission will carry out a classification of the respective platform. Afterwards, the platform operator has four months to comply with the respective obligations under the DSA.

[To the European Commission press release](#) (dated 16 November 2022)

[To the DSA text](#)

[To the AB Tech Law Briefing, July 2022](#)

2. Case Law

+++ CJEU MUST DECIDE AGAIN ON CONSUMER PROTECTION ASSOCIATIONS' RIGHT OF ACTION +++

The German Federal Court of Justice has again referred a question to the European Court of Justice on the right of action of consumer protection associations to sue for data protection violations by Facebook. In the same proceedings, the CJEU already ruled in April of this year that, under the GDPR, the consumer protection association bringing the action may in principle bring the action itself, even without being mandated and irrespective of the violation of specific rights (see [AB Privacy Ticker May 2022](#)). The ruling had been considered to be strengthening consumer protection bodies. According to press reports, however, the Federal Court of Justice was surprised by this ruling and now digs deeper. In the question now referred, the Federal Court of Justice would like to know whether the requirements of the here relevant Article 80 of the GDPR are actually fulfilled in the specific case.

[To the press release of the Federal Court of Justice](#) (dated 10 November 2022, in German)

[To the article in the LTO](#) (dated 10 November 2022, in German)

+++ ADMINISTRATIVE COURT OF ANSBACH: FORWARDING PICTURES OF ILLEGALLY PARKED CARS TO POLICE IS NOT A GDPR VIOLATION +++

The Administrative Court of Ansbach has ruled in two cases that the sending of photographs of illegally parked vehicles together with reports to the police can constitute lawful data processing. Forwarding the pictures was necessary to protect legitimate interests according to Article 6 (1) lit. f) GDPR. In the proceedings, the two plaintiffs defended themselves against warnings issued by the Data Protection Authority of the German state of Bavaria (Bayerisches Landesamt für Datenschutzaufsicht).

The authority was of the opinion that it was not necessary to send the photos because a description of the parking offences by telephone, including the vehicle registration number, would have been sufficient for a report. Beyond that, the photos also contained images of other vehicles and passers-by. However, the plaintiffs successfully argued that the photographs served to document the violations of the law and facilitated the prosecution of the offences.

[To the press release of the Administrative Court of Ansbach](#) (dated 3 November 2022, in German)

+++ ADVOCATE-GENERAL ON THE REQUIREMENT OF DAMAGE FOR NON-MATERIAL COMPENSATION +++

More and more frequently, private individuals are taking action against companies for an alleged breach of data protection, claiming compensation for non-material damage. A dispute had been going on until now whether a so-called materiality threshold must be reached or exceeded or whether the mere violation of the GDPR or an "uneasy feeling" is sufficient damage. The Austrian Supreme Court referred these questions to the CJEU for a preliminary ruling in 2021. Recently, the Advocate-General now argued that there would be no right to compensation without damage. According to this view, a feeling of annoyance and exposure alone is not sufficient for a right to compensation for non-material damage. The CJEU's decision on this practice-relevant question is eagerly awaited, as it is likely to result in more clarity for all parties, and potential actions for damages might even be avoided from the outset.

[To the opinion delivered by the Advocate-General](#) (dated 6 October 2022)

3. Regulatory Investigations and Enforcement Actions

+++ FRENCH DATA PROTECTION AUTHORITY IMPOSES FINE AGAINST DISCORD +++

The French Supervisory Authority, Commission Nationale de l'Informatique et des Libertés (CNIL), fined Discord, the operator of the voice over IP service, EUR 800,000. Among other breaches, the US company was accused to not have defined and respected data retention periods, so that more than two million French user accounts were stored in the database, although they had been inactive for over three years. Moreover, the company had failed to carry out a data protection impact

assessment which would have been necessary, given the data volume and use of the services by minors.

[To the CNIL press release](#) (dated 17 November 2022, in French)

[To the administrative fine notice of CNIL](#) (dated 17 November 2022, in French)

+++ EUR 5 million FINE IN THE UK FOR EMPLOYEE DATA DISCLOSURE BY CYBER ATTACK +++

The British data protection authority, Information Commissioner's Office (ICO), has issued Interserve Group Limited with a penalty notice imposing a fine of over EUR 5 million. The background to the incident was a ZIP file with malware attached to an email. An employee of the company opened the email which the attackers used to infiltrate the IT systems. In the process, personal data of more than 100,000 employees of the company was exposed. While the personal data breach in accordance with Article 33 of the GDPR was reported, the authority found that the company had failed to implement sufficient technical and organisational measures. In particular, the operating system used was outdated and the employee involved had not been trained in data protection law. The decision shows how important the implementation and updating of data protection requirements in the company is and remains.

[To the press release of the ICO](#) (dated 20 October 2022)

4. Opinions

+++ GOOGLE PUBLISHES PRIVACY FAQ ON GOOGLE FONTS +++

The wave of cease-and-desist letters under the GDPR for the use of Google Fonts continues (see [AB Privacy Ticker October 2022](#)). Although Google has not yet commented on the cease-and-desist letters, it has now provided an FAQ on the processing of user data in connection with obtaining fonts from Google's servers. In the Privacy FAQ, Google explains that the data is processed without the use of cookies and not for analysis or advertising purposes, but exclusively for the provision of the fonts. Furthermore, obtaining the fonts from Google's servers would be more efficient than using them locally on their own servers. Google's statement has an impact on the assessment of the legal situation and can help in the defence against cease-and-desist letters. However, since the legality of the use of Google Fonts is still unclear and there is no

established case law, we recommend implementing the fonts exclusively locally on one's own servers.

[To the Google Privacy FAQ](#) (dated 17 November 2022)

+++ DSK IN FAVOUR OF DATA PROTECTION COMPLIANT PROCESSING OF HEALTH DATA IN SCIENTIFIC RESEARCH +++

Recently, the Conference of the Independent Data Protection Authorities of the German Federal and State Governments (DSK) has been held for the 104th time. The highest data protection authorities dealt intensively with the processing of health data in the context of the envisaged Act on the Use of Health Data. The Act is supposed to facilitate the processing of health data in research. In its so-called Petersberg Declaration, which has now been adopted, the DSK recommends, among other things, "to determine by law who is responsible under data protection law for individual processing steps. Responsibility under data protection law must be regulated without gaps, especially in the case of transfers between research institutions, in order to ensure that data subjects can exercise their data protection rights. Legally clear regulations on the retention period and deletion of research data must be established, which take into account both the right to informational self-determination of the data subjects and the interest of scientific research in the subsequent verifiability of the research results. The instruments of encryption, pseudonymisation and anonymisation, which are particularly relevant from the point of view of data protection, should be specified by the legislator."

[To the DSK resolution](#) (as of 24 November 2022, in German)

+++ DSK: MICROSOFT 365 STILL IN BREACH OF DATA PROTECTION LAW +++

Also at the 104th conference, the DSK stated that a data protection-compliant use of Microsoft Office 365 was not possible, although certain progress by Microsoft in data protection had to be acknowledged. The DSK stands by its decision of September 2020 (see [BB Privacy Ticker October 2020](#)), even though Microsoft published a new version of its order processing agreement in September and also implemented the new standard contractual clauses of the EU Commission (see [AB Privacy Ticker October 2022](#)). Even the specification regarding the data collected by Microsoft to create the necessary transparency is not sufficient for the DSK. For companies, the use of Microsoft products therefore remains associated with uncertainty, as the DSK opposes the use of the software.

[To the report on heise.de](#) (dated 25 November 2022, in German)

+++ DATA PROTECTION AUTHORITY OF BADEN-WUERTTEMBERG

APPROVES RULES OF CONDUCT FOR DATA PROCESSORS +++

DSZ Datenschutzzertifizierungsgesellschaft mbH has published binding rules of conduct for processors ("Trusted Data Processor"). The State Commissioner for Data Protection of the German state of Baden-Wuerttemberg has now approved these rules of conduct. Data processing companies may use the document to gain more legal certainty in the implementation of a data processing contract and compliance with the legal requirements. The "Trusted Data Processor" code of conduct represents a self-commitment in terms of Article 40 of the GDPR with which companies can submit to monitoring by a supervisory authority accredited by the data protection authority. DSZ processes the applications for self-commitment and undertakes the monitoring and processing of complaints. Thereby, compliance with data protection can be highlighted and compliance with data protection standards can be facilitated.

[To the LfDI's press release](#) (dated 18 November 2022, in German)

[To the Rules of Conduct "Requirements for Processors under Article 28 of the GDPR"](#) (in German)

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