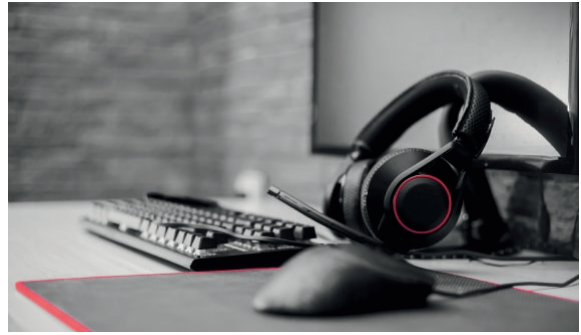


# Privacy Ticker

July 2023



**+++ EU COMMISSION PUBLISHES ADEQUACY DECISION FOR DATA TRANSFER TO THE US +++ ELECTRONIC MEDICAL FILE IS COMING +++ ECJ: FEDERAL CARTEL OFFICE MAY CONSIDER GDPR-COMPLIANCE +++ EUR 1 MILLION FINE FOR USE OF GOOGLE ANALYTICS +++**

## 1. Changes in Legislation

### **+++ EU COMMISSION PUBLISHES ADEQUACY DECISION FOR DATA TRANSFER TO THE USA +++**

With the "EU-US Data Privacy Framework", the EU Commission has issued a new adequacy decision for transatlantic data transfers between the EU and the US. The predecessor, the so-called "Privacy Shield" was declared null and void by the European Court of Justice (ECJ) in 2020 in the so-called "Schrems II" ruling (see [BB Privacy Ticker July 2020](#)). The "Data Privacy Framework" is intended to dispel the ECJ's concerns at the time regarding data protection standards in the US and the legal protection options of EU citizens affected. The prerequisite is that US companies commit to comply with the principles of the "Data Privacy Framework" and are then entered in a publicly accessible list of the US Department of Commerce ("Data Privacy Framework List"). Only then can data from the EU be transferred to these companies in a legally secure manner on the basis of the adequacy decision.

[To the adequacy decision Data Privacy Framework \(dated 10 July 2023\)](#)

[To our Blog post \(dated 12 July 2023\)](#)

### **+++ EU INTENDS TO IMPROVE ENFORCEMENT OF THE GDPR +++**

The EU Commission plans to improve cooperation between data protection authorities in enforcing the GDPR in cross-border matters (see

[AB Privacy Ticker March 2023](#)). To this end, specific procedural rules will be laid down in a new regulation. The objective is faster and more determined enforcement of data protection rules, especially in serious cases with an impact on many data subjects across the EU. The regulation includes measures to empower complainants as well as those affected by an investigation, for instance by giving them more extensive rights to be heard. Data protection authorities will be able to comment at an early stage of investigations and request and grant joint investigations and mutual assistance. The measures should then also lead to the timely conclusion of investigations and enable the rapid provision of legal remedies for data subjects.

[To the European Commission press release \(dated 4 July 2023\)](#)

[To the draft regulation of the European Commission \(dated 4 July 2023\)](#)

### **+++ EU AGREES ON DATA ACT +++**

On 27 June 2023, the EU institutions reached an agreement on the Data Act, a regulation aimed at harmonising fair access to and use of data. Unlike the GDPR, the Data Act is not limited to personal data but also covers non-personal data. The focus is on making non-personal data economically exploitable. In addition to the "Internet of Things", the law regulates almost all connected products and cloud services. Data holders are subject to extensive obligations, such as providing and granting access to user data. Moreover, the Data Act stipulates that data holders may not share non-personal data at will, but only within the framework of the user contract. Furthermore, the Data Act is intended to facilitate switching between similar "data processing services", i.e. cloud services. These provisions are intended to break up the EU cloud market and facilitate the portability of data between cloud providers.

[To the European Commission press release \(dated 28 June 2023\)](#)

[To our Blog post \(dated 5 July 2023\)](#)

### **+++ ELECTRONIC MEDICAL FILE IS COMING +++**

According to the draft of the "Act to Accelerate the Digitisation of the Health Care System" ("Digital Act") presented by the Federal Ministry of Health, those insured under the statutory health insurance system are to automatically receive an electronic medical file ("*elektronische Patientenakte – ePA*") as of 15 January 2025. An opt-out procedure is to allow insured persons not to use the ePA. The ePA is intended to enable the central storage of health data, such as findings or laboratory values, to simplify the treatment of patients. In addition, the data is to be made

usable for research purposes. The health insurance institutions are to fill the ePA, but are also allowed to use the health data of their insured persons for the management of care, e.g., to identify rare diseases or cancer risks at an early stage. In the event of concrete dangers, the health insurance institutions must inform the insured persons immediately. The draft must now be coordinated with the other ministries of the federal government.

[To the article on Handelsblatt.com \(dated 19 June 2023, in German\)](#)

[To the report on Heise.de \(dated 15 July 2023, in German\)](#)

## 2. Case Law

### **+++ ECJ: FEDERAL CARTEL OFFICE MAY CONSIDER GDPR-COMPLIANCE +++**

The European Court of Justice (ECJ) has ruled that national competition authorities are entitled to include compliance with the GDPR when assessing whether a company is abusing its dominant position. The German Federal Cartel Office had prohibited the Meta Group from making the use of the social network Facebook dependent on the processing of so-called off-Facebook data without obtaining separate consent. Off-Facebook data is data that shows the activities of users outside of Facebook by viewing third-party websites or apps. The ECJ emphasises that companies with a dominant position must carefully consider users' consent for data processing, as the dominant position may influence users' freedom of choice. This applies in particular to special categories of data, such as ethnic origin, political opinions or religious beliefs. However, the competition authority does not replace the supervisory authorities of the GDPR. Close cooperation between the authorities is necessary to ensure a uniform application of the GDPR. If the competition authority finds a violation of the GDPR, it cannot impose sanctions under the GDPR, but can only take competition law measures to stop the abuse of a dominant position.

[To the ECJ ruling \(dated 4 July 2023, C-252/21\)](#)

### **+++ EGC ON PSEUDONYMISED DATA WITH RELATIVE REFERENCE TO A PERSON +++**

The European General Court (EGC) has ruled that pseudonymised data with a relative personal reference are not personal data within the meaning of the GDPR if the data recipient has no means of re-identification. The case focused on a decision of the European Data

Protection Supervisor in relation to the transfer of data to the auditing company Deloitte. The personal data had been replaced by an alphanumeric code and thus pseudonymised. However, Deloitte had not received a tool for decryption. The court ruled that without access to additional information, Deloitte could not re-identify the data and, in particular, there was no claim to the surrender of information that would have enabled re-identification. As the GDPR requires that there must be reasonably available means of re-identification to establish a personal reference, the court held that Deloitte was not dealing with personal data. The decision is not final.

[On the ruling of the European General Court \(dated 26 April 2023, T-557/20\)](#)

### **+++ FEDERAL LABOUR COURT: NO BAN ON THE USE OF EVIDENCE IN CASE OF OPEN VIDEO SURVEILLANCE +++**

The Federal Labour Court ruled on the use of video footage in a dismissal protection case. The plaintiff was employed in a foundry and was dismissed because he had deliberately not worked a so-called overtime shift although he had been remunerated for it. Based on an anonymous tip, the video surveillance was analysed, which had filmed the plaintiff initially entering the factory premises, but later leaving again before the start of the shift. The video surveillance had been marked by a pictogram and was thus openly visible. The court found that such a recording, which can prove that the employee's conduct is intentionally in breach of the contract, is not subject to a ban on the use of evidence. This also applies if the employer's surveillance measure is not fully in line with the requirements of data protection law. The court did not see a serious violation of fundamental rights in this case.

[To the press release of the Federal Labour Court \(dated 29 June 2023, 2 AZR 296/22, in German\)](#)

## **3. Regulatory Investigations and Enforcement Actions**

### **+++ EUR 1 MILLION FINE FOR USE OF GOOGLE ANALYTICS +++**

The Swedish data protection authority (IMY) has imposed a fine of about EUR 1 million on a telecommunications company. Following a complaint by the organisation None of Your Business (noyb), the authority investigated the use of the analysis tool Google Analytics and the related data transfer to the US. The company had based this data processing on the conclusion of so-called standard contractual clauses (SCC), but had

not taken any further protective measures. In setting the fine, the authority referred to the so-called "Schrems II" ruling of the ECJ and considered the data of the data subjects to be insufficiently protected from access by the US security authorities.

[To the press release of IMY \(dated 3 July 2023\)](#)

[To the administrative fine notice of IMY \(dated 30 June 2023, in Swedish\)](#)

### **+++ FINE OF EUR 1.1 MILLION AGAINST SWEDISH MEDIA GROUP FOR PROFILING +++**

The Swedish data protection authority (IMY) has issued a fine of approx. EUR 1.1 million on Bonnier News AB. The authority had received several complaints against the company for collecting data on its customers' surfing behaviour and purchases made on its subsidiaries' websites over a period of several months. This information was sometimes supplemented with additionally acquired personal data, such as gender, purchasing power or life stage, based on the individuals' place of residence. The extensive profiling served marketing purposes, including commercial phone calls and personalised internet advertising. The company assumed that there was a legitimate interest for the procedure. The authority, on its part, takes the view that such extensive profiling is only lawful with explicit consent.

[To the IMY press release \(dated 27 June 2023, in Swedish\)](#)

[To the administrative fine notice of IMY \(dated 26 June 2023, in Swedish\)](#)

### **+++ EUR 240,000 FINE AGAINST BENETTON +++**

The Italian data protection authority Garante per la Protezione dei Dati Personali (GPDP) has imposed a fine of EUR 240,000 on Benetton Group. The fashion company operates an online shop with an integrated loyalty programme and newsletter. Numerous customer data were collected and stored indefinitely and used for profiling. Furthermore, all these customer data were accessible to all employees of the branches via a single account, for which they all used the same password. The authority criticised that profiling took place without consent, that the data was kept for too long and that there was no conclusive deletion concept, and that the data was not sufficiently secured because all employees could access the data via one account with one password, whereas it was not traceable who had access to which data and when.

[To the newsletter of GPDP \(dated 28 June 2023, in Italian\)](#)

[To the administrative fine notice of GPDP \(dated 27 April 2023, in Italian\)](#)

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