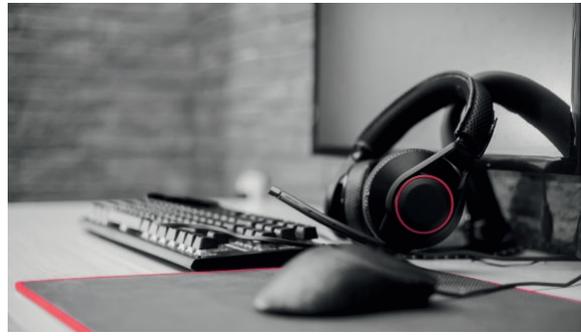


# Privacy Ticker

February 2024



**+++ ECJ: NO COMPENSATION FOR NON-MATERIAL DAMAGE IF RISK OF DATA MISUSE IS ONLY HYPOTHETICAL +++ LABOUR COURT OF HAMBURG: USE OF CHATGPT IN COMPANY NOT SUBJECT TO CO-DETERMINATION +++ BANK FINED EUR 5 MILLION FOR SENDING RECEIPT TO WRONG PERSON +++ BAVARIAN DATA PROTECTION AUTHORITY PUBLISHES CHECKLIST FOR USE OF AI +++**

## 1. Case Law

**+++ ECJ: NO COMPENSATION FOR NON-MATERIAL DAMAGE IF RISK OF DATA MISUSE IS ONLY HYPOTHETICAL +++**

The ECJ has ruled that a merely hypothetical risk of misuse of personal data by a third party does not automatically lead to compensation. In the main proceedings, the plaintiff purchased a household appliance from an electronics retailer. A sales contract and a credit agreement were drawn up to that effect, containing personal data of the plaintiff, namely his surname and first name, address, place of residence, name of his employer, income and bank details. These documents were, by error, handed out to another customer. The error was quickly discovered and the plaintiff received his documents back after half an hour. The plaintiff demanded compensation for the breach of data protection, although it was not obvious that the other customer was even aware of the plaintiff's personal data. The ECJ finds the existence of non-material damage may not be established from the mere fact that the data subject fears that, by the unauthorised communication of his data, a dissemination, even abuse, of his data may occur in the future. The person seeking compensation would have to establish the existence of a concrete damage.

[To the judgment of the ECJ \(dated 25 January 2024, C 687/21\)](#)

### **+++ HIGHER REGIONAL COURT OF HAMBURG: EVALUATION PORTAL KUNUNU MUST DISCLOSE EVALUATORS' IDENTITIES +++**

The Hanseatic Higher Regional Court has ruled that an employer rated on the Kununu platform may demand the deletion of an evaluation if the portal operator does not individualise the evaluator in such a way that the employer can verify the existence of a business contact. The plaintiff company received two negative evaluations from two alleged former employees on the Kununu rating platform. The company claimed that the evaluations were not from former employees and asked Kununu to disclose their identities. The court ruled in favour of the company and ordered Kununu to delete these two evaluations. The portal could not refuse to disclose the identities of the evaluators based on data protection regulations. If a platform wants to keep comments of a third party public, it must allow the person being rated to individualise the rating.

[To the decision of the Higher Regional Court of Hamburg \(dated 8 February 2024, 7 W 11/24, in German\)](#)

### **+++ LABOUR COURT OF HAMBURG: USE OF CHATGPT IN COMPANY NOT SUBJECT TO CO-DETERMINATION +++**

The Labour Court of Hamburg has ruled in expedited proceedings that the use of ChatGPT and the employer's guidelines on handling AI do not require the consent of the works council. The company's works council objected to the introduction of guidelines on the use of ChatGPT in which it had not been involved. The company allows employees to use ChatGPT through their own accounts and at their own expense. It also stipulates certain rules of conduct for the company's use of ChatGPT. According to the court, neither the introduction of the AI tool itself nor the establishment of rules for the use of the software require the consent of the works council. The AI guideline merely sets out instructions concerning the manner in which work is performed, which is why there is no right of co-determination. Furthermore, here ChatGPT was not intended to monitor the conduct or performance of employees, which, in the court's opinion, was supported by the fact that the tool was not installed on the company's IT systems. Instead, the employees were able to voluntarily create their own account and access it via their browser.

[To the decision of the Labour Court of Hamburg \(dated 16 January 2024, 24 BVGa 1/24, in German\)](#)

### **+++ HIGHER REGIONAL COURT OF NUREMBERG: EMPLOYEE'S REQUEST FOR GDPR INFORMATION PERMISSIBLE EVEN FOR EXTRANEIOUS PURPOSES +++**

The Higher Regional Court of Nuremberg has ruled that the right of access to personal data under Article 15 GDPR is not a misuse of rights if the applicant is pursuing extraneous purposes and the employer incurs considerable expense as a result. A former employee requested information about all personal data stored about him by the employer as well as a copy of this data. The employer only provided information about the master data which the plaintiff did not accept. Instead, he demanded all information stored at the company, e.g. also minutes of board meetings and e-mail correspondence. The Higher Court of Nuremberg ruled that it did not matter that such a claim constituted considerable effort. In no case did it lead to an excessive request. Nor does it constitute misuse if a data subject (also) uses the right of access to personal data for reasons unrelated to data protection, for example to obtain information for settlement negotiations or to obtain contractual information that the data subject no longer has.

[To the judgment of the Higher Regional Court of Nuremberg \(dated 29 November 2023, 4 U 347/21, in German\)](#)

### **+++ HIGHER REGIONAL COURT OF HAMBURG: EUR 4,000 IN DAMAGES FOR UNJUSTIFIED REPORTS TO CREDIT RATING AGENCY SCHUFA +++**

The Hanseatic Higher Regional Court has ordered Barclays Bank to pay compensation for non-material damage in an amount of EUR 4,000 because it had unduly reported two claims to Schufa. Although the plaintiff in the underlying case had disputed the claims, the bank reported the two alleged claims to the German credit rating agency Schufa. As the legal requirements had not been met, the court found the reports to Schufa to be a breach of data protection committed by the bank. In addition, the court considered it proven that the plaintiff had to suffer damage to his social reputation by being portrayed as an unreliable debtor as a result of the two unjustified reports to Schufa. The plaintiff was further able to prove that the Schufa report and the down-graded assessment of his credit risk had concrete negative consequences for the granting of a loan and the blocking of his credit card. When assessing the amount of damages, the court took into account the aggravating factor that the bank had acted with conditional intent when making the reports.

[To the ruling of the Higher Regional Court of Hamburg \(dated 10 January 2024, 13 U 70/23, in German\)](#)

## 2. Regulatory Investigations and Enforcement Actions

### **WRONG PERSON +++**

The Spanish data protection authority Agencia Española de Protección de Datos (AEPD) imposed a fine in the amount of EUR 5 million on the Spanish bank CAIXABANK S.A. The bank had inadvertently sent a customer the payment receipt of another bank customer. As a result, the recipient had access to the names of the sender and recipient of the payment. The customer was also able to see the residential address, the IBAN of the accounts and the origin and destination of the transfer. The customer informed the bank of this error. Due to the bank's inadequate response, the customer reported the incident to the data protection authority. The AEPD found that the bank had not implemented sufficient technical and organisational security measures to prevent such data breaches. It also discovered that data protection complaints could only be reported to general customer service, and no separate unit had been set up for this purpose. This was also why the bank had not appropriately handled the complaint. The authority further criticised the fact that the bank did not respond promptly despite being notified and the recipient therefore had access to the unauthorised data for an extended period of time. Finally, the bank tried to play down the incident, which also played into the amount of the fine.

[To the administrative fine notice by AEPD \(dated 15 February 2024, in Spanish\)](#)

## 3. Opinions

### **+++ BAVARIAN DATA PROTECTION AUTHORITY PUBLISHES CHECKLIST FOR USE OF AI +++**

The Bavarian Data Protection Authority (BayLDA) has created a checklist and defined data protection requirements for the development and use of artificial intelligence. The authority does not regard the document itself as conclusive but rather as a good practice approach that can be used in the sense of a target-actual comparison. The checklist contains items that must be adhered to both during training and when introducing an AI model. These include an entry in the record of processing activities, the question of responsibility, determination of a legal basis, fulfilment of information obligations, the implementation of data subject rights and the implementation of a data protection impact assessment. The list then

points out particularities of training and the use of training data and comments on the use of input and output data when introducing a finished AI model. The Bavarian Data Protection Authority recommends defining and documenting protection goals as part of a risk model.

[To the checklist of the Bavarian Data Protection Authority \(dated 24 January 2024, in German\)](#)

### **+++ GUIDELINES BY GERMAN DATA PROTECTION CONFERENCE ON QUESTIONNAIRES FOR PROSPECTIVE TENANTS +++**

The Conference of the Independent Data Protection Authorities of the German Federal and State Governments has published guidelines on obtaining personal details from prospective tenants with the help of questionnaires. At least in urban areas, it is quite common for people who are interested in a flat to have to provide extensive information about their personal data even for viewing a flat for the first time. The guidelines deal with the question of whether and what data landlords are allowed to collect from potential tenants, depending on the stages, namely the viewing, the pre-contractual phase and the decision-making phase. The paper also contains information on the permitted retention period and, in the appendix, provides templates with questions that landlords are allowed to ask. These guidelines thus offer helpful, practical support.

[To the authorities' guidelines \(dated 24 January 2024, in German\)](#)

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions. This data protection ticker was created in cooperation with the ADVANT partner law firms Nctm and Altana.

#### **EDITOR IN CHARGE**

Dr Andreas Lober | Rechtsanwalt  
©Beiten Burkhardt  
Rechtsanwaltsgesellschaft mbH

[BB-Datenschutz-Ticker@advant-beiten.com](mailto:BB-Datenschutz-Ticker@advant-beiten.com)  
[www.advant-beiten.com](http://www.advant-beiten.com)

# Your Contacts

If you have any questions, please address the ADVANT Beiten lawyer of your choice or contact the ADVANT Beiten Privacy Team directly:

## Office Frankfurt

Mainzer Landstrasse 36 | 60325 Frankfurt am Main

### Dr Andreas Lober

+49 69 756095-582

[vCard](#)



### Susanne Klein, LL.M.

+49 69 756095-582

[vCard](#)



### Lennart Kriebel

+49 69 756095-582

[vCard](#)



### Fabian Eckstein, LL.M.

+49 69 756095-582

[vCard](#)



### Jason Komninos, LL.M.

+49 69 756095-582

[vCard](#)



## Office Dusseldorf

Cecilienallee 7 | 40474 Dusseldorf

### Mathias Zimmer-Goertz

+49 211 518989-144

[vCard](#)



### Christian Frederik Döpke, LL.M.

+49 211 518989-144

[vCard](#)



## Office Freiburg

Heinrich-von-Stephan-Straße 25 | 79100 Freiburg

### Dr Birgit Münchbach

+49 761 150984-22

[vCard](#)



## Office Munich

Ganghoferstrasse 33 | 80339 Munich

### Katharina Mayerbacher

+89 35065-1363

[vCard](#)





## Update Preferences | Forward

### **Please note**

This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive information, you can [unsubscribe](#) at any time.

© Beiten Burkhardt

Rechtsanwaltsgesellschaft mbH

All rights reserved 2024

### **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

For more information see:

[www.advant-beiten.com/en/imprint](http://www.advant-beiten.com/en/imprint)

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions.